



The State Bar Court *of California*

OPEN SESSION

AGENDA ITEM

MARCH 2022

REGULATION AND DISCIPLINE COMMITTEE III.A

DATE: March 24, 2022

TO: Members, Regulation and Discipline Committee

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

SUBJECT: Proposed Amendments to Rules 5.127 and 5.155 of the Rules of Procedure:
Request for Public Comment

EXECUTIVE SUMMARY

Rule 5.127 of the Rules of Procedure of the State Bar of California addresses an order of public or private reproof by the State Bar Court. This item proposes amendments to rule 5.127(A) to clarify when a reproof takes effect.

Rule 5.155 describes certain actions that may be taken by the Review Department. Rule 5.155(F) specifically provides that a presiding judge or the acting presiding judge may designate a hearing judge appointed by the Supreme Court to act in a Review Department judge's place if one or more Review Department judges are disqualified or unavailable to serve. This item proposes amendments to rule 5.155(F) to permit any hearing judge, including those appointed by the Supreme Court, the Governor, the Senate Committee on Rules, or the Speaker of the Assembly, to act in a Review Department judge's place.

This item requests that the Regulation and Discipline Committee approve these amendments for a 45-day public comment period.

BACKGROUND

Rule 5.127 Public and Private Reprovals

In the instances in which an appeal is filed after the State Bar Court orders a reproof, there have been requests for clarification regarding when that reproof becomes final. Currently, rule 5.127(A) states that a reproof takes effect when the decision or order is final. The proposed amendment to rule 5.127(A) provides for sufficient time for a party to request reconsideration in the Hearing Department, and clarity as to when a reproof takes effect if request for review is sought in the Review Department or at the California Supreme Court.

Rule 5.155 Actions by Review Department

Current rule 5.155(F) permits the presiding judge or acting presiding judge to designate a hearing judge only appointed by the Supreme Court to act in a disqualified or unavailable Review Department judge's place. Recently, the State Bar Court sought authorization from the California Supreme Court to designate a hearing judge appointed by the Governor to serve on the Review Department in a case that necessitated two hearing judge appointments and where one of the two Supreme Court appointed hearing judges was disqualified in the case.

In response to the State Bar Court's request, the Supreme Court issued Administrative Order 2022-01-18, included as Attachment C, a standing order that permits the presiding judge or acting presiding judge to assign as pro tempore any hearing judge of the State Bar Court. The Order remains in effect until either the Supreme Court fills all vacancies in the Review Department or the Board of Trustees amends rule 5.155(F) to permit any hearing judge to be assigned to the Review Department on a temporary basis. The proposed amendments to rule 5.155(F) will make the changes as described in the Administrative Order, permanently permitting any hearing judge, including a judge appointed by the Supreme Court, the Governor, the Senate Committee on Rules, or the Speaker of the Assembly, to be temporarily elevated to the Review Department when necessitated due to one or more review judges being disqualified or unavailable to serve.

DISCUSSION

Rule 5.127 Public and Private Reprovals

The proposed amendments to rule 5.127(A) will clarify that a reproof takes effect 60 days after the filing of a decision, opinion, or order, allowing sufficient time for a party to file an appeal. If a request for review is filed in the Review Department and the Review Department orders a reproof, it will take effect 60 days after it is filed. If a request for review is filed in the California Supreme Court, the reproof will take effect 30 days after the filing of an opinion or order by the California Supreme Court, as set forth in rule 9.18(a) of the California Rules of Court.

Rule 5.155 Actions by Review Department

The proposed amendments to rule 5.155(F) permit a presiding judge to designate any hearing judge to act in a Review Department judge's place when a Review Department judge is

disqualified or unavailable to serve and so long as the hearing judge took no part in considering or deciding the matter in the Hearing Department.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

Title 5, Division 2, Chapter 6; Title 5, Division 3

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 authorizes staff to make available for a 45-day public comment period, proposed amendments to rules 5.127 and 5.155 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.

ATTACHMENTS LIST

- A. Proposed Rules 5.127 and 5.155 (Clean Version)
- B. Proposed Rules 5.127 and 5.155 (Redline Version)
- C. Supreme Court Administrative Order 2022-01-18

Rule 5.127 Public and Private Reprovals

- (A) **Decisions, Opinions, or Orders Imposing a Reproval.** The State Bar Court's decision, opinion, or order approving a stipulation may include a reproof. The decision, opinion, or order must specify whether the reproof is public or private. In the absence of a request for review, the reproof will take effect 60 days after the filing of a decision, opinion, or order. If review of the hearing department decision or order is requested pursuant to rule 5.151, the reproof will, in the absence of a request for review by the California Supreme Court, take effect 60 days after the filing of an opinion or order by the Review Department. If review by the California Supreme Court is sought pursuant to California Rule of Court 9.13, the reproof will take effect 30 days after the filing of an opinion or order by the California Supreme Court.
- (B) **Public Reproval.** A public reproof is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries, and is reported as a record of public discipline on the State Bar's web page. The record of the proceeding in which the public reproof was imposed is also public.
- (C) **Private Reproval Before Notice of Disciplinary Charges.** A private reproof imposed before a State Bar Court proceeding begins is part of the attorney's official State Bar attorney records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding is not available to the public unless it becomes part of the record of any later proceeding in which it is introduced as evidence of a prior record of discipline. The attorney is not obligated to pay discipline costs.
- (D) **Private Reproval After Notice of Disciplinary Charges.** A private reproof imposed on an attorney after the initiation of a State Bar Court proceeding is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page. The complainant is informed of the imposition of the private reproof. The attorney is not obligated to pay discipline costs.

Rule 5.155 Actions by Review Department

- (A) **Standard of Review under Rule 5.151.** The Review Department will independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the hearing judge. The findings of fact of the hearing judge are entitled to great weight.
- (B) **Remand.** The Review Department may remand a proceeding to the Hearing Department for a new trial on specified issues, for a trial de novo, or for other

proceedings. If a proceeding is remanded, the same hearing judge will preside unless that judge is unavailable or the Review Department orders otherwise.

- (C) Issues Not Raised for Review.** The Review Department may take action on an issue that was not raised in the request for review or briefs of any party. Before it does so, the Review Department will notify the parties in writing of the issue before oral argument, and any party may file a supplemental brief about that issue. If the parties are not notified before oral argument, they may make a motion to file supplemental briefs or for reconsideration under rule 5.158.
- (D) En Banc Review.** The Review Department will decide matters before it en banc. Two judges constitute a quorum. A majority vote of the judges present and voting are sufficient to take any action or arrive at any decision.
- (E) Time for Opinion.** The Review Department will file its opinion within 90 days after the matter is submitted, unless the proceeding is expedited and a procedural rule, a statute, or a Supreme Court rule requires a shorter period for filing the opinion.
- (F) Disqualified Judge.** If one or more Review Department judges are disqualified or unavailable to serve, the Presiding Judge may designate a hearing judge appointed under Business and Professions Code § 6079.1 to act in the Review Department judge's place, if the designated hearing judge took no part in considering or deciding the matter in the Hearing Department. If the Presiding Judge is disqualified or unavailable to act and has not designated another judge to act in his or her place, the Acting Presiding Judge may act in place of the Presiding Judge.
- (G) Disbarment Recommendation.** If the Review Department recommends disbarment, it must include in its opinion an order that the attorney be enrolled as an inactive attorney under Business and Professions Code § 6007(c)(4). Unless otherwise ordered by the Court, the order takes effect on personal service or three days after service by mail, whichever is earlier.
- (H) State Bar Court's Annual Report.** By March 1 of each year, the State Bar Court must prepare and submit to the Chief Justice of the Supreme Court an annual report describing how the Review Department complied with the requirements of subsection (E) during the preceding calendar year.

Rule 5.127 Public and Private Reprovals

- (A) **Decisions, Opinions, or Orders Imposing a Stipulation and Reapproval.** The State Bar Court's decision, opinion, or order approving a stipulation may include a reapproval ~~that takes effect when the decision or order is final~~. The decision, opinion, or order must specify whether the reapproval is public or private. In the absence of a request for review, the reapproval will take effect 60 days after the filing of a decision, opinion, or order. If review of the hearing department decision or order is requested pursuant to rule 5.151, the reapproval will, in the absence of a request for review by the California Supreme Court, take effect 60 days after the filing of an opinion or order by the Review Department. If review by the California Supreme Court is sought pursuant to California Rule of Court 9.13, the reapproval will take effect 30 days after the filing of an opinion or order by the California Supreme Court.
- (B) **Public Reapproval.** A public reapproval is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries, and is reported as a record of public discipline on the State Bar's web page. The record of the proceeding in which the public reapproval was imposed is also public.
- (C) **Private Reapproval Before Notice of Disciplinary Charges.** A private reapproval imposed before a State Bar Court proceeding begins is part of the attorney's official State Bar attorney records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding is not available to the public unless it becomes part of the record of any later proceeding in which it is introduced as evidence of a prior record of discipline. The attorney is not obligated to pay discipline costs.
- (D) **Private Reapproval After Notice of Disciplinary Charges.** A private reapproval imposed on an attorney after the initiation of a State Bar Court proceeding is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page. The complainant is informed of the imposition of the private reapproval. The attorney is not obligated to pay discipline costs.

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- (B) **Remand.** The Review Department may remand a proceeding to the Hearing Department for a new trial on specified issues, for a trial de novo, or for other

proceedings. If a proceeding is remanded, the same hearing judge will preside unless that judge is unavailable or the Review Department orders otherwise.

- (C) **Issues Not Raised for Review.** The Review Department may take action on an issue that was not raised in the request for review or briefs of any party. Before it does so, the Review Department will notify the parties in writing of the issue before oral argument, and any party may file a supplemental brief about that issue. If the parties are not notified before oral argument, they may make a motion to file supplemental briefs or for reconsideration under rule 5.158.
- (D) **En Banc Review.** The Review Department will decide matters before it en banc. Two judges constitute a quorum. A majority vote of the judges present and voting are sufficient to take any action or arrive at any decision.
- (E) **Time for Opinion.** The Review Department will file its opinion within 90 days after the matter is submitted, unless the proceeding is expedited and a procedural rule, a statute, or a Supreme Court rule requires a shorter period for filing the opinion.
- (F) **Disqualified Judge.** If one or more Review Department judges are disqualified or unavailable to serve, the Presiding Judge may designate a hearing judge appointed ~~by the Supreme Court~~ under Business and Professions Code § 6079.1 to act in the Review Department judge's place, if the designated hearing judge took no part in considering or deciding the matter in the Hearing Department. If the Presiding Judge is disqualified or unavailable to act and has not designated another judge to act in his or her place, the Acting Presiding Judge may act in place of the Presiding Judge.
- (G) **Disbarment Recommendation.** If the Review Department recommends disbarment, it must include in its opinion an order that the attorney be enrolled as an inactive attorney under Business and Professions Code § 6007(c)(4). Unless otherwise ordered by the Court, the order takes effect on personal service or three days after service by mail, whichever is earlier.
- (H) **State Bar Court's Annual Report.** By March 1 of each year, the State Bar Court must prepare and submit to the Chief Justice of the Supreme Court an annual report describing how the Review Department complied with the requirements of subsection (E) during the preceding calendar year.

ADMINISTRATIVE ORDER 2022-01-18

SUPREME COURT
FILED

JAN 18 2022

IN THE SUPREME COURT OF CALIFORNIA

Jorge Navarrete Clerk

EN BANC

Deputy

 TEMPORARY STANDING ORDER CLARIFYING APPOINTMENT POWER OF
 THE PRESIDING JUDGE OF THE STATE BAR COURT REVIEW DEPARTMENT

Notwithstanding rule 5.155(F) of the State Bar Rules of Procedure, if one or more State Bar Court Review Department judges are disqualified or unavailable to serve, the Presiding Judge may assign as pro tempore any hearing judge of the State Bar Court, if the designated hearing judge took no part in considering or deciding the matter in the Hearing Department. If the Presiding Judge of the State Bar Court is disqualified or unavailable to act and has not designated another judge to act in his or her place, the Acting Presiding Judge may act in place of the Presiding Judge for purposes of this order.

This standing order shall remain in effect until this court fills all vacancies in the Review Department of the State Bar Court or until the State Bar Board of Trustees amends rule 5.155(F) of the State Bar Rules of Procedure to conform with the 1999 amendments to Business and Professions Code, section 6079.1, subdivision (a), whichever comes first.

It is so ordered.

CANTIL-SAKAUYE

Chief Justice

CORRIGAN

Associate Justice

LIU

Associate Justice

KRUGER

Associate Justice

GROBAN

Associate Justice

JENKINS

*Associate Justice**Associate Justice*