



The State Bar of California

OPEN SESSION

AGENDA ITEM

54-122 MARCH 2022

REGULATION AND DISCIPLINE COMMITTEE III.C

DATE: March 24, 2022

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Amendments to Rule 5.21 of the Rules of Procedure (Limitations Period): Return from Public Comment and Request for Approval

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.” At its January 20, 2022, meeting, the State Bar Regulation and Discipline Committee (RAD) authorized a 45-day public comment period on proposed amendments to rule 5.21 that 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, the 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.

One public comment was submitted, from the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (LAC-PREC). The comment requests that the Board refrain from adopting the proposed amendments to rule 5.21, or any other revisions to or new regulations relating to the disciplinary system until the Ad Hoc Commission on the Discipline System has completed its work. For reasons discussed below and in the January 2022 agenda item proposing these amendments, the OCTC continues to believe that the proposed amendments to rule 5.21 appropriately balance the State Bar’s public protection mission with the purposes served by a rule of limitations, and therefore recommends their adoption. The OCTC does not believe it is necessary to wait for the completion of the work of the Ad Hoc Commission, which to the OCTC’s knowledge has to date neither considered nor proposed modifications to the rule of limitations. If the Ad Hoc Commission’s work will soon be complete such that waiting on it will not unnecessarily delay final consideration of the proposed amendments, however, the OCTC would not object to a short postponement of final action on the proposed amendments.

BACKGROUND

Rule 5.21 of the Rules of the Procedure of the State Bar 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 complainant’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).

The proposed amendments would modify rule 5.21 as set forth in the Executive Summary above.

DISCUSSION

The specific amendments proposed are shown in redline in Attachment B and were discussed at the January 20, 2022, meeting, as reflected in January 2022 RAD Agenda Item III.C (Attachment C).

During the 45-day public comment period, the State Bar received one public comment, a March 9, 2022, letter from LAC-PREC (Attachment D). The comment appears to state a specific objection only to the proposed amendment to rule 5.21(A) that would provide OCTC with up to two years to investigate and initiate disciplinary proceedings based on complaints submitted at or near the five-year time limit, contending that in proposing this amendment, the OCTC “seeks to greatly expand their authority to pursue State Bar complaints up to at least 7 years from the date the violation occurred.” The comment argues that “such an amendment will be prejudicial to the fairness of the disciplinary proceedings because it promotes the investigation of complaints about events that have long since passed.” The comment requests not that the Board reject this, or any of the other proposed amendments, but rather that the Board “table its consideration of the proposed revisions to rule 5.21” and any “other changes to the rules and regulations of the State Bar Court and the Office of the Chief Trial Counsel, while the Ad Hoc Commission on the Discipline System is engaged in its pending comprehensive review of the State Bar Disciplinary system.” The comment contends that absent such a stay of adoption of proposed amendments, “these piecemeal changes to the rules governing disciplinary proceedings pending before the State Bar of California undermine the ongoing work of the Ad Hoc Commission and may directly adversely affect the fairness of State Bar disciplinary proceedings.”

The comment relies on civil cases setting out the balancing of policy interests that underlie the establishment of statutes of limitations for civil actions. While these same policy interests underlie the rule of limitations for disciplinary proceedings, the balancing of those interests, and the resulting rule of limitations, are not the same as for civil proceedings. Indeed, the American Bar Association (ABA) Model Rules for Lawyer Disciplinary Enforcement, in recognition of the underlying public protection mission of disciplinary proceedings, recommend against application of any statute of limitations for those 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). The OCTC is not recommending an

elimination of the rule of limitations established by rule 5.21. The OCTC believes, however, that the proposed amendments it recommends appropriate balance the State Bar's public protection mission with the interest in limiting untimely claims.

The proposed amendment to rule 5.21(A) with which the comment takes specific issue does not generally expand the time for filing from 5 to 7 years. To the contrary, for complaints submitted to the OCTC within 3 years after the events complained of, the limitations period will remain 5 years. For complaints submitted more than 3 years after the events complained of, the proposed amendment adopts a sliding two-year window from the date of the complaint to provide the OCTC with the opportunity to investigate. This addresses a concern with the current rule, under which, whether a complaint is submitted three years after a violation or four years and 360 days after a violation, the result is the same, the OCTC must file a Notice of Disciplinary Charges (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 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 after the date of the violation. The two-year period from the date the complaint is submitted provides necessary investigation time and is consistent with 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).

Like the other proposed amendments, with which the comment does not take particular issue, this proposed modification to rule 5.21(A) reflects a balancing between the State Bar's public protection mission and the interest in limiting untimely complaints. For the reasons discussed above, and in the January 2022 agenda item (Attachment C), the OCTC continues to believe that this balancing favors adoption of the proposed amendments.

The comment's primary argument is that these proposed amendments, and any other amendments or additions to the rules, should be tabled pending the work of the Ad Hoc Commission on the Discipline System. To the OCTC's knowledge, the Ad Hoc Commission has neither considered nor proposed any modifications to the rule of limitations. Moreover, delaying any modifications or any additions to the rules pending the Ad Hoc Commission's work seems unwarranted if proposed modifications or additions are independently determined by the Board to be appropriate. Should the Ad Hoc Commission's work subsequently lead the Board to conclude that earlier adopted modifications or additions should be reversed, the Board retains the ability to do so. That said, if the Ad Hoc Commission's work will soon be

complete such that waiting on it will not unnecessarily delay final consideration of the proposed amendments, the OCTC would not object to a short postponement of final action on the proposed amendments.

For the reasons set forth above, and in the January 2022 agenda item, this item requests adoption of the proposed amendments, effective as of April 4, 2022 (to align with the effective date of other proposed amendments). The amendments include a provision 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, that is, as of the proposed April 4, 2022, effective date.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF PROCEDURE

Title 5, Division 2, Chapter 4, Rule 5.21

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 recommends that the Board of Trustees approve and adopt proposed rule 5.21 of the Rules of Procedure of the State Bar of California, attached hereto as Attachment A, effective as of April 4, 2022.

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

RESOLVED, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee, hereby approves and adopts rule 5.21 of the Rules of Procedure of the State Bar of California, attached hereto as Attachment A, effective as of April 4, 2022.

ATTACHMENTS LIST

- A.** Proposed Rule 5.21 (Clean Version)
- B.** Proposed Rule 5.21 (Redline Version)
- C.** January 2022 Regulation and Discipline Committee Agenda Item III.C (without attachments)
- D.** March 9, 2022, public comment letter from Los Angeles County Bar Association Professional Responsibility and Ethics Committee

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.

(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.



**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)



LOS ANGELES COUNTY BAR ASSOCIATION

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March 9, 2022

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Public Comment RE Proposed Amendment to Rule 5.21 of
the Rules of Procedure

Dear Trustees,

We write on behalf of the Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (PREC), which, among other duties, is charged with consideration and analysis of legal ethics, professional responsibility issues and State Bar regulatory matters. Two of the primary objectives of our Committee are the issuance of legal ethics opinions to assist California lawyers in compliance with their ethical and professional duties, and also the monitoring of and participation in ensuring that the attorney disciplinary system and other regulatory actions taken by the State Bar of California are fair, equitable and reasonable.

We urge the Board of Trustees to table its consideration of the proposed revisions to rule 5.21 of the Rules of Procedure of the State Bar of California ("Rules of Procedure"), and other changes to the rules and regulations of the State Bar Court and the Office of the Chief Trial Counsel, while the Ad Hoc Commission on Discipline is engaged in its pending comprehensive review of the State Bar Disciplinary system.¹ Our Committee is of the view that these piecemeal changes to the rules governing disciplinary proceedings pending before the State Bar of California undermine the ongoing work of the Ad Hoc Commission and may directly adversely affect the fairness of State Bar disciplinary proceedings.

¹ We note that in the recent past since the Ad Hoc Commission was constituted, various changes have been adopted by the BOT that directly relate to the very systems and procedures being studied by the Ad Hoc Commission. These include, among other things, revisions to the discovery rules in disciplinary proceedings.

Initially enacted in 1850 and codified in the Code of Civil Procedure in 1872,² the statutory framework of California's limitation system has deep roots in California law. The Supreme Court of California has stated that the fundamental purpose of limitation of actions "...is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims."³ Further, the rationale underlying the existence of statutes of limitation reflects an interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely on their substantive merits. These same policies serve as the rationale for rule 5.21 in the State Bar disciplinary system.

The above authorities affirm that there is a delicate balance between the competing policy interests afforded opposing parties which must not be disturbed without careful and diligent examination of the merits of the proposed amendment. Otherwise, such a change could result in a situation where one side is unfairly advantaged over the other. This is a significant risk posed by the Office of Chief Trial Counsel's proposal to amend rule 5.21.

The Office of Chief Trial Counsel's proposal to amend rule 5.21, among other things, seeks to greatly expand their authority to pursue State Bar complaints up to at least 7 years from the date the violation occurred. Rule 5.21(A) of the Rules of Procedure currently provides: "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 within five years from the date of the violation." A statute or rule 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."⁴ The proposed amendment to rule 5.21 will permit the bringing of disciplinary cases instituted more than 5 years from the date the violation occurred. In the opinion of PREC, such an amendment will be prejudicial to the fairness of the disciplinary proceedings because it promotes the investigation of complaints about events that have long since passed.

Investigations of stale complaints obviously pose many challenges, some insurmountable, including but not limited to, the fading of memories, the loss of documents (both inculpatory and more importantly, exculpatory), and the unavailability of witnesses because their current whereabouts are unknown, or they have passed away. Thus, the avoidance of the deterioration of evidence is best achieved by promoting the timely bringing of complaints. On this point, the Supreme Court of California is explicitly clear:

² See generally William Wirt Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 Hastings Law Journal 701 (1966).

³ *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 (citing *Davies v. Krasna* (1975) 14 Cal.3d 502, 512).

⁴ Rule 5.21(B), Rules of Procedure.

It is fundamental that the principal purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available.... The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend.⁵

Moreover, the public protection concern where the underlying conduct occurred so many years earlier is dubious and may encourage the submission of strategic or frivolous claims that serve to mar the integrity of the State Bar's disciplinary system. For well over a century, the opinions of the Supreme Court of California and the Courts of Appeal have concluded that the deterioration of evidence or loss of evidence makes the accurate and just adjudication of claims less likely.⁶ Therefore, discouraging the lapse of time between the submission of a State Bar complaint and the investigation and filing of disciplinary charges is almost certainly a worthwhile means of ensuring that the State Bar's disciplinary system is not only effective, but reasonable and fair to all involved parties.⁷

A clear example of the problem created when stale events form the basis of disciplinary proceedings is amply demonstrated by the current backlog created by the institution of conviction referral proceedings under rules 5.340-5.347 of the Rules of Procedure. As the members of the Board of Trustees know, misdemeanor DUI convictions that occurred many years ago (and in some cases 10-17 years ago), are being regularly filed by the Office of Chief Trial Counsel irrespective of the attorney's interim rehabilitation and recovery from a prior substance abuse problem. Ultimately,

⁵ *Addison v. State of California* (1978) 21 Cal.3d 313, 317 (Emphasis added.); see *Barrington v. A.H. Robins Co* (1985) 39 Cal.3d 146, 152 (“[S]tatutes [of limitation] were enacted to promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim.”); *Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.* (1985) 39 Cal.3d 57, 61 (“The purpose of any limitation statute is to require ‘diligent prosecution of known claims thereby...ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh.’”); *Wood v. Elling Corp* (1977) 20 Cal.3d 353, 362 (“Statutes of limitations...are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”) (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.* (1944) 321 U.S. 342, 348).

⁶ See, e.g., *California Sav. & Loan Society v. Culver* (1899) 127 Cal. 107, 110 (“Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time...when loss of papers, deaths of witnesses, and worn-out recollections make the presentation of the actual facts in the case impossible or extremely difficult.”); *Los Angeles County v. Security First Nat'l Bank* (1948) 84 Cal.App.2d 575, 580 (“Statutes of limitation are designed to prevent the resurgence of stale claims after the lapse of long periods of time as a result of which loss of papers, disappearance of witnesses, [and] feeble recollections, make ineffectual or extremely difficult a fair presentation of the case.”).

⁷ Using a rule of limitation to avoid the deterioration of evidence also lessens the risk of two types of errors that inevitably reduce the accuracy of outcomes even when the admissible evidence is fresh. First, is the occurrence of significant errors of law, many of which will occur regardless of the quality of the evidence presented on factual issues. Second, is the issue of mistaken findings of fact that occur not because of the poor quality of evidence, but rather due to human fallibility. These two errors can never be entirely eliminated and thus it is critical that the deterioration of evidence be kept to a minimum. Using a rule of limitation in this matter will also improve the occurrence of just results in the State Bar's disciplinary system.

many of these cases are resolved at the lowest levels of resolution or dismissed outright, because they do not implicate a current public protection issue.

Accordingly, permitting old cases to proceed wastes prosecutorial and judicial resources and is inherently unfair to the lawyers who have lost the ability to present exculpatory evidence and/or who are demonstrably fit for legal practice. Expanding the prosecution of such outdated events is fundamentally unfair.

Finally, if anything, rule 5.21 should be amended to make the 5 year limitation period applicable to all State Bar investigations, in order to avoid the very harms that statutes of limitations are meant to protect against. It should not matter whether the investigation is triggered by an individual complainant. Unless one of the other (numerous) exceptions applies, there should be a 5 year limit on State Bar prosecutions, commencing from the date of the alleged wrongdoing.

We respectfully request that the Board of Trustees refrain from adopting revisions to or adopting new regulations relating to the disciplinary system while the Ad Hoc Commission on Discipline is actively engaged in its work.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kirsten Spira / rmc".

Kirsten H. Spira

Chair, Professional Responsibility and Ethics Committee
Los Angeles County Bar Association