



The State Bar of California

OPEN SESSION

AGENDA ITEM

50-2 FEBRUARY 2024

DATE: February 26, 2024

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Clarifying and Corrective Amendments to Rules of the State Bar 5.4(29) (Electronic Service Address), 5.226 (Application for Involuntary Enrollment), 5.441 (Filing Requirements), 5.445 (Burden of Proof), 5.461 (Beginning Moral Character Proceedings), 2302 (Disclosure of Information), and 2502 (Investigation Depositions): Return from Public Comment and Request for Adoption

EXECUTIVE SUMMARY

At its November 2023 meeting, the Board authorized circulation for public comment of proposed amendments to clarify and correct the following State Bar rules:

- Rule 5.4, subsection (29) to clarify that petitioners or reinstatement and applicants for admission requesting a moral character proceeding are required to provide an email address for service of documents with their initial pleading;
- Rule 5.226 to correct the standard for applications for involuntary enrollment to accord with statutory amendments to Business and Professions Code section 6007(c)(2);
- Rules 5.441 and 5.445 to clarify the application of prefiling requirements to petitioners for reinstatement in light of the State Bar Court's opinion in *In the Matter of Sanjay Bhardwaj*, Case No. SBC-22-R-30503;
- Rule 5.461 to specify that service on the Office of Chief Trial Counsel and Committee of Bar Examiners of applications for review of adverse moral character determinations may be by email;
- Rule 2302 to correct its provisions for disclosure of confidential information regarding disciplinary investigations to accord with statutory amendments to Business and Professions Code section 6086,1; and
- Rule 2502 to correct statutory references and clarify that both the Office of Chief Trial

Counsel and attorneys have the right to seek protective orders in connection with investigation depositions.

During a 45-day public comment period, we received one comment, which agreed with the proposed rule 2502 amendments. This item seeks adoption of all the proposed amendments.

BACKGROUND

The background of the proposed amendments is set out in the November 2023 agenda item that sought authorization to circulate for public comment (Attachment E).

DISCUSSION

A. Rule 5.4, subsection (29)

Rule 5.4, subsection (29), defines the term “electronic service address.” As part of this definition, subsection (29)(c) specifies that for parties and persons other than OCTC employees and State Bar licensees, this address is the email address that they provide to the court and all parties for service of documents. Subsection (29)(c) specifically references only Special Deputy Trial Counsel as being among those required to provide an email address for service. The proposed amendments to subsection (29)(c): (1) clarify that petitioners for reinstatement and applicants for admission requesting a moral character proceeding are among those required to provide an email address for service; (2) clarify that provision of an email address for service is required; and (3) clarify that this email address must be provided with the initial pleading. The proposed amendments, in both clean version and redline to current rule 5.4, subsection (29), are set forth in Attachment A.

B. Rule 5.226

Rule 5.226, subsection (C) specifies the facts that must be set forth to support an application for involuntary enrollment pursuant to Business and Professions Code section 6007(c)(2). In 2019, section 6007(c)(2) was amended to modify its requirements for involuntary enrollment. Current rule 5.226, subsection (C), continues to reference the requirements of section 6007(c)(2) prior to its 2019 amendment. The proposed amendments, set forth in both clean version and redline to current rule 5.226 in Attachment B, revise the rule to accord with the current statute.

C. Rules 5.441 and 5.445

Rules 5.441 and 5.445 address filing requirements and the burden of proof for reinstatement proceedings. In particular, rule 5.441, subsection (B) specifies prefiling requirements that must be satisfied by the petitioner prior to filing the petition, with proof of compliance attached to the petition, while rule 5.445 specifies the requirements as to which the petitioner bears the burden of proof in the reinstatement proceeding. In *In the Matter of Sanjay Bhardwaj*, Case No. SBC-22-R-30503 (Aug. 8, 2023), the Review Department addressed whether passage of a Professional Responsibility Examination (PRE) within one year prior to filing a petition of reinstatement and payment of all discipline costs and sanctions are prefiling requirements or requirements that the petitioner may establish after filing, in the course of the reinstatement

proceeding. The review department held that, consistent with Business and Professions Code section 6140.7, paying discipline costs is a prefiling requirement, that is, a “condition of applying for reinstatement” pursuant to rule 5.441(B)(2). Interpreting rule 5.441(B)(2) to favor the petitioner, the review department further held that the current rule permits an exception to this prefiling requirement if the petitioner simultaneously files, in the underlying disciplinary case, a motion to extend time for payment of discipline costs, even if that motion has not yet been, and may not be, granted. On the other hand, relying on California Rule of Court 9.10(f), the review department held that passage of a PRE within the one year prior to filing the petition is not a prefiling requirement, but instead “may be proven during the reinstatement process.”

In light of *Bhardwaj*, the proposed amendments to rule 5.441:

- Provide that the exception to the payment of disciplinary costs as a prefiling requirement applies only where the court in the underlying disciplinary matter has already granted an extension of time for payment that has not expired at the time of filing—this will ensure that time is not wasted on reinstatement proceedings where the court ultimately denies a motion for extension of time for payment that was filed with or remained pending at the time of the reinstatement petition;
- Clarify that proof of payment of discipline costs or a copy of the court order extending the time for payment must be attached to the petition;¹
- Remove the payment of monetary sanctions as a prefiling requirement (while leaving it a requirement that must be established in the reinstatement proceeding); and
- Provide that if a petition is dismissed for failure to comply with the prefiling requirements, no additional filing fee will be required if a new petition is submitted within 30 days.

In light of *Bhardwaj*, the proposed amendments to rule 5.445:

- Clarify that petitioner bears the burden of proving passage of a PRE within one year prior to filing the petition;
- Clarify that petitioner bears the burden of proving payment of all monetary sanctions.

The proposed amendments to rules 5.441 and 5.445 are set forth, in both clean version and redline from the current rules, in, respectively, Attachments C and D.

D. Rule 5.461

Rule 5.461 specifies the time for filing and the filing and service requirements for applications seeking review of adverse moral character determinations. The rule currently requires service on the Committee of Bar Examiners and the Office of Chief Trial Counsel in accordance with rule 5.25, which requires service by certified mail. The State Bar Court recently put on its website a fillable pdf form that can be used to appeal an adverse determination of moral character. As part of a general move to allowing service by email where possible, it makes sense

¹ Representatives of the ADDC have indicated that the ADDC may oppose the first two proposed amendments described above.

to permit service on the Committee of Bar Examiners and the Office of Chief Trial Counsel to also be by email. This is also consistent with procedures for submitting requests to the Committee of Bar Examiners for preliminary administrative review of adverse moral character determinations; these procedures permit these requests to be submitted by email. The proposed amendment to rule 5.461, which is set forth in both a clean version and redline from the current rule in Attachment E, authorizes service by email on the Committee of Bar Examiners and the Office of Chief Trial Counsel, at email addresses to be specified on the State Bar's website. If the proposed amendments are adopted, implementing changes will be made to the instructions on the State Bar Court's website to provide the necessary service email addresses.

E. Rule 2302

Disciplinary investigations are confidential pursuant to Business and Professions Code section 6086.1(b), which defines limited situations in which confidentiality may be waived. Rule 2302 specifies criteria and procedures for disclosures of otherwise confidential information, in accordance with the statutory limits of section 6086.1(b). SB 40, signed by the governor on October 10, 2023, substantially amended section 6086.1, redefining the criteria and procedures for waiving confidentiality. The proposed amendments to rule 2302, which are set forth in both clean version and redline from the current rule in Attachment F, are intended to align the rule with the new statutory requirements. Specifically, the proposed amendments:

- Clarify that both the fact of an investigation and information concerning the investigation are confidential.
- Provide, consistent with new section 6086.1(b)(2), that the Chief Trial Counsel, with written concurrence from the Board Chair, may waive confidentiality, but only if disclosure is warranted for protection of the public, it is determined that disclosure is necessary to prevent an immediate harm to the public, and the alternative disclosure provisions of new section 6086.1(c) are inadequate for the protection of the public;
- Provide, consistent with new section 6086.1(c)(1)(A), that subject to specified procedures, the Board, in closed session, may waive confidentiality, but only when warranted for protection of the public;
- Consistent with new section 6086.1(c)(3), establish procedures for the attorney to contest a Board decision to waive confidentiality in State Bar Court;
- Consistent with new section 6086(c)(1)(B), require the consideration of specified factors before a decision is made to waive confidentiality;
- Consistent with new sections 6086.1(b)(2)(B) and (c)(2), specify the limited information that may be disclosed to the public or to specified individuals or entities once a decision to waive confidentiality becomes final waive; and
- Clarify, consistent with the position taken by the State Bar in litigation before the Supreme Court, that confidentiality may be waived with respect to both pending and closed investigations.

F. Rule 2502

Rule 2502 sets out procedures for investigation depositions compelled by the Office of Chief Trial Counsel by cross reference to sections of the Code of Civil Procedure. Similarly, the rule specifies procedures for seeking relief in connection with investigation depositions by cross reference to sections of the Code of Civil Procedure that specify the conditions under which protective orders may issue. The cross references to the Code of Civil Procedure in the current rule are out of date given the renumbering of the Code of Civil Procedure. The proposed amendments to rule 2502, which are set out in both a clean version and redline to the current rule in Attachment G, correct the cross references, clarify that the relief that may be sought is protective orders pursuant to the cited Code of Civil Procedure sections, and provide that both the attorney whose conduct is being investigated and the Office of Chief Trial Counsel may seek protective orders in connection with investigation depositions.

G. Public Comment

During the public comment period, we received one public comment on the proposed amendments from James Ham, whose practice includes representation of attorneys in disciplinary matters. Mr. Ham commented on the proposed amendment to Rule 2502, agreeing with the proposed amendment and stating: “I agree with the proposed recommendation. Both OCTC and attorneys ought to have the right to seek protective orders in connection with investigation depositions. That seems essential to an attorney's due process rights.”

H. Recommended Adoption of All Proposed Amendments

Staff now recommends adoption of all the proposed amendments. Because they are clarifying and correcting, including corrections to comply with current statutes, staff recommends that the amendments be adopted with an effective date of April 1, 2024, the first day of the month immediately following the Board’s March 2024 meeting.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 5, Division 1, Rule 5.4, subsection (29)

Title 5, Division 4, Chapter 6, Rule 5.226

Title 5, Division 7, Chapter 3, Rules 5.441 and 5.445

Title 5, Division 7, Chapter 4, Rule 5.461

Title III, Division II, Chapter 3, Rule 2302

Title III, Division II, Chapter 5, Rule 2502

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

Goal 3. Protect the Public by Regulating the Legal Profession

RECOMMENDATIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees sitting as the Regulation and Discipline Committee hereby approves and adopts amendments to rule 5.4, subsection (29) of the Rules of the State Bar of California, as set forth in Attachment A; rule 5.226 of the Rules of the State Bar of California, as set forth in Attachment B; rule 5.441 of the Rules of the State Bar of California, as set forth in Attachment C; rule 5.445 of the Rules of the State Bar of California, as set forth in Attachment D; rule 5.461 of the Rules of the State Bar of California, as set forth in Attachment E; rule 2302 of the Rules of the State Bar of California, as set forth in Attachment F; and rule 2502 of the Rules of the State Bar of California, as set forth in Attachment G; and it is

FURTHER RESOLVED, that the effective date of the adopted amendments to the specified sections of the Rules of the State Bar of California shall be April 1, 2024.

ATTACHMENTS LIST

- A.** Proposed Amendments to Rule 5.4, subsection (29)
- B.** Proposed Amendments to Rule 5.226
- C.** Proposed Amendments to Rule 5.441
- D.** Proposed Amendments to Rule 5.445
- E.** Proposed Amendments to Rule 5.461
- F.** Proposed Amendments to Rule 2302
- G.** Proposed Amendments to Rule 2502
- H.** Board Agenda Item 60-6, November 2023 Meeting (without attachments)

Proposed Amendments to Rule 5.4, subsection (29)

Clean Version

Rule 5.4 Definitions

(29) “Electronic service address” means an email address at or through which the party or other person is deemed to have authorized electronic service. The initial electronic service address, as set forth below, is deemed valid for a party or other person if the party or other person has not filed and served notice of a change of electronic service address pursuant to subdivision (E) of rule 5.26.1:

- (a) For employees of the Office of Chief Trial Counsel, the State Bar email address,
- (b) For State Bar licensees, the email address provided to the State Bar to facilitate communications by the State Bar with its licensees pursuant to rule 9.9(a)(2) of the California Rules of Court, and
- (c) For other parties and persons, including Special Deputy Trial Counsel handling matters pursuant to rule 2201, petitioners for reinstatement, and applicants for admission requesting a moral character proceeding, the email address that they must provide to the court and all parties for service of documents with their initial pleading.

Redline to Current Rule 5.4, subsection (29)

Rule 5.4 Definitions

(29) “Electronic service address” means an email address at or through which the party or other person is deemed to have authorized electronic service. The initial electronic service address, as set forth below, is deemed valid for a party or other person if the party or other person has not filed and served notice of a change of electronic service address pursuant to subdivision (E) of rule 5.26.1:

- (a) For employees of the Office of Chief Trial Counsel, the State Bar email address,
- (b) For State Bar licensees, the email address provided to the State Bar to facilitate communications by the State Bar with its licensees pursuant to rule 9.9(a)(2) of the California Rules of Court, and
- (c) For other parties and persons, including Special Deputy Trial Counsel handling matters pursuant to rule 2201, petitioners for reinstatement, and applicants for admission requesting a moral character proceeding, the email address that they

must provide ~~provided~~ to the court and all parties for service of documents with
their initial pleading.

Proposed Amendments to Rule 5.226

Clean Version

Rule 5.226 Application for Involuntary Enrollment

- (A) **Beginning Proceeding.** The Office of Chief Trial Counsel must file with the Clerk a verified application with supporting documents. A request for a hearing must be stated in the application or it will be waived.
- (B) **Service.** The application must be served on the attorney under rule 5.25.
- (C) **Stating Facts.** The application must state with particularity facts showing that (1) the attorney has caused or is causing substantial harm to the attorney's clients or the public and (2) there is a reasonable probability that the chief trial counsel will prevail on the merits of the underlying disciplinary matter, and that the attorney will be disbarred, as required under Business and Professions Code § 6007(c)(2)(A)-(B). It must be supported by declarations, transcripts, or requests for judicial notice.
- (D) **Alleging Violations.** If the application relates to pending or concurrently filed notices of disciplinary charges, then those must be identified by case number and copies of all notices must be attached to the application. If there is no pending disciplinary proceeding, the application itself must: (1) cite the statutes, rules, or court orders allegedly violated, or that warrant involuntary inactive enrollment, and (2) state the particular acts or omissions that constitute the alleged violation or violations, or that form the basis for warranting involuntary inactive enrollment.
- (E) **Notice to Attorney; Attorney's Response and Request for Hearing.** The application must contain a notice to the attorney, in prominent type, stating that the attorney must file a verified response to the application and request a hearing as provided in rule 5.227; otherwise, the right to a hearing will be waived.

Redline to Current Rule 5.226

Rule 5.226 Application for Involuntary Enrollment

- (A) **Beginning Proceeding.** The Office of Chief Trial Counsel must file with the Clerk a verified application with supporting documents. A request for a hearing must be stated in the application or it will be waived.
- (B) **Service.** The application must be served on the attorney under rule 5.25.

- (C) **Stating Facts.** The application must state with particularity facts showing that (1) the attorney has caused or is causing substantial harm to the attorney's clients or the public and (2) there is a reasonable probability that the chief trial counsel will prevail on the merits of the underlying disciplinary matter, and that the attorney will be disbarred, the attorney's conduct poses a substantial threat of harm to the attorney's clients or to the public as required under Business and Professions Code § 6007(c)(2)(A)-(B). It must be supported by declarations, transcripts, or requests for judicial notice.
- (D) **Alleging Violations.** If the application relates to pending or concurrently filed notices of disciplinary charges, then those must be identified by case number and copies of all notices must be attached to the application. If there is no pending disciplinary proceeding, the application itself must: (1) cite the statutes, rules, or court orders allegedly violated, or that warrant involuntary inactive enrollment, and (2) state the particular acts or omissions that constitute the alleged violation or violations, or that form the basis for warranting involuntary inactive enrollment.
- (E) **Notice to Attorney; Attorney's Response and Request for Hearing.** The application must contain a notice to the attorney, in prominent type, stating that the attorney must file a verified response to the application and request a hearing as provided in rule 5.227; otherwise, the right to a hearing will be waived.

Proposed Amendments to Rule 5.441*Clean Version***Rule 5.441 Filing Requirements**

- (A) **Filing Petition, Disclosure Statement, and Authorization and Release.** A petitioner must complete and verify a petition and disclosure statement on the forms approved by the court and in compliance with the instructions therein. The original and three copies of the petition must be filed with the Clerk of the State Bar Court. The disclosure statement is not filed with the court but must be served on the Office of Chief Trial Counsel. In addition, a petitioner must complete an authorization and release approved by the State Bar. The authorization and release is not filed with the court but must be served on the Office of Chief Trial Counsel.
- (B) **Pre-Filing Requirements and Proof.** Prior to filing the petition, the petitioner must satisfy the following requirements and must attach proof of compliance to the petition:
- (1) **Fingerprints Submitted.** Under Business and Professions Code section 6054, the petitioner must have submitted fingerprints to the California Department of Justice via Live Scan technology, or if the petitioner resides outside the state, two sets of original fingerprints on record cards furnished by the State Bar must have been submitted to the Office of Chief Trial Counsel;
 - (2) **Discipline Costs Paid and Monetary Sanctions Paid.** Unless the petitioner has been granted an extension of time for payment under these rules which has not expired at the time of the filing of the petition, petitioner must have paid all discipline costs imposed under Business and Professions Code section 6086.10, subdivision (a). Proof of payment of costs or a copy of the court order extending the time to pay costs must be attached to the petition.
 - (3) **Client Security Fund Payments Reimbursed.** Petitioner must have reimbursed all payments made by the Client Security Fund as a result of the petitioner's conduct, plus applicable interest and costs, under Business and Professions Code section 6140.5, subdivision (c).
 - (4) **Passage of the Attorneys' Examination.**
 - (a) **Resigned with Charges Pending or Disbarred.** Petitioners who resigned with charges pending or who were disbarred must establish that they have taken and passed the Attorneys' Examination by the Committee of

Bar Examiners within three years prior to the filing of the petition for reinstatement.

- (b) Resigned without Charges Pending. Petitioners who resigned without charges pending more than five years before filing the petition for reinstatement must establish that they have taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the application for readmission or reinstatement.
- (C) Filing Fee. The petition must include a filing fee of \$1,600, which will be given to the Office of Chief Trial Counsel to defray incurred costs. The Clerk will reject the petition for filing if the fee is not included.
- (D) Service. The petition and disclosure statement must be served on the Office of Chief Trial Counsel under rule 5.25.
- (E) Dismissal. Failure to comply with any of the requirements of this rule will be grounds to dismiss the petition. If a petitioner submits a new petition within 30 days of a dismissal under this rule, the petitioner will not have to pay the filing fee again. The new petition must otherwise meet all of the requirements of this rule.

Redline to Current Rule 5.441

Rule 5.441 Filing Requirements

- (A) **Filing Petition, Disclosure Statement, and Authorization and Release.** A petitioner must complete and verify a petition and disclosure statement on the forms approved by the court and in compliance with the instructions therein. The original and three copies of the petition must be filed with the Clerk of the State Bar Court. The disclosure statement is not filed with the court but must be served on the Office of Chief Trial Counsel. In addition, a petitioner must complete an authorization and release approved by the State Bar. The authorization and release is not filed with the court but must be served on the Office of Chief Trial Counsel.
- (B) **Pre-Filing Requirements and Proof.** Prior to filing the petition, the petitioner must satisfy the following requirements and must attach proof of compliance to the petition:
 - (1) Fingerprints Submitted. Under Business and Professions Code section 6054, the petitioner must have submitted fingerprints to the California Department of Justice via Live Scan technology, or if the petitioner resides outside the state,

two sets of original fingerprints on record cards furnished by the State Bar must have been submitted to the Office of Chief Trial Counsel;

- (2) Discipline Costs Paid and Monetary Sanctions Paid. Unless the petitioner ~~files a motion for extension of time for payment under these rules, or has already been~~ granted an extension of time for payment under these rules which has not expired at the time of the filing of the petition, petitioner must have paid ~~provide proof of payment of~~ all discipline costs imposed under Business and Professions Code section 6086.10, subdivision (a) ~~and monetary sanctions imposed under Business and Professions Code section 6086.13, subdivision (a).~~ Proof of payment of costs or a copy of the court order extending the time to pay costs must be attached to the petition.
- (3) Client Security Fund Payments Reimbursed. Petitioner must have reimbursed all payments made by the Client Security Fund as a result of the petitioner's conduct, plus applicable interest and costs, under Business and Professions Code section 6140.5, subdivision (c).
- (4) Passage of the Attorneys' Examination.
 - (a) Resigned with Charges Pending or Disbarred. Petitioners who resigned with charges pending or who were disbarred must establish that they have taken and passed the Attorneys' Examination by the Committee of Bar Examiners within three years prior to the filing of the petition for reinstatement.
 - (b) Resigned without Charges Pending. Petitioners who resigned without charges pending more than five years before filing the petition for reinstatement must establish that they have taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the application for readmission or reinstatement.
- (C) Filing Fee. The petition must include a filing fee of \$1,600, which will be given to the Office of Chief Trial Counsel to defray incurred costs. The Clerk will reject the petition for filing if the fee is not included.
- (D) Service. The petition and disclosure statement must be served on the Office of Chief Trial Counsel under rule 5.25.
- (E) Dismissal. Failure to comply with any of the requirements of this rule will be grounds to dismiss the petition. If a petitioner submits a new petition within 30 days of a dismissal

under this rule, the petitioner will not have to pay the filing fee again. The new petition must otherwise meet all of the requirements of this rule.

Proposed Amendments to Rule 5.445

Clean Version

Rule 5.445 Burden of Proof

- (A) Reinstatement after Resignation with Charges Pending or Disbarment. Petitioners for reinstatement must:
- (1) provide proof of passage of a professional responsibility examination within one year prior to filing the petition;
 - (2) establish their rehabilitation;
 - (3) establish present moral qualifications for reinstatement;
 - (4) establish present ability and learning in the general law by providing proof that they have taken and passed the Attorneys' Examination by the Committee of Bar Examiners within three years prior to the filing of the petition; and
 - (5) provide proof of payment of all monetary sanctions imposed under Business and Professions Code section 6086.13, subdivision (a).
- (B) Reinstatement after Resignation without Charges Pending. Petitioners for reinstatement must:
- (1) provide proof of passage of a professional responsibility examination within one year prior to filing the petition;
 - (2) establish their present moral qualifications for reinstatement; and
 - (3) establish present ability and learning in the general law. If the petitioner resigned without charges pending more than five years before filing the petition, the petitioner must establish present ability and learning in the general law by providing proof that he or she has taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the petition.

Redline to Current Rule 5.445

Rule 5.445 Burden of Proof

- (A) Reinstatement after Resignation with Charges Pending or Disbarment. Petitioners for reinstatement must:

- (1) provide proof of passage of a professional responsibility examination within one year prior to filing the petition;
- (2) establish their rehabilitation;
- (3) establish present moral qualifications for reinstatement; ~~and~~
- (4) establish present ability and learning in the general law by providing proof that they have taken and passed the Attorneys' Examination by the Committee of Bar Examiners within three years prior to the filing of the petition; and
- (5) provide proof of payment of all monetary sanctions imposed under Business and Professions Code section 6086.13, subdivision (a).

(B) Reinstatement after Resignation without Charges Pending. Petitioners for reinstatement must:

- (1) provide proof of passage of a professional responsibility examination within one year prior to filing the petition;
- (2) establish their present moral qualifications for reinstatement; and
- (3) establish present ability and learning in the general law. If the petitioner resigned without charges pending more than five years before filing the petition, the petitioner must establish present ability and learning in the general law by providing proof that he or she has taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the petition.

Proposed Amendments to Rule 5.461

Clean Version

Rule 5.461 Beginning Proceeding; Time for Filing

If the Committee of Bar Examiners makes an adverse moral character determination, the applicant may file an application for a moral character proceeding and hearing. Within 60 days after the notice of adverse moral character determination is served, the application and supporting documents must be served under rule 5.25 and filed, accompanied by a copy of the notice of adverse moral character determination, the applicable filing fee, and proof of service upon the Committee of Bar Examiners and the Office of Chief Trial Counsel. As an alternative to service via certified mail as otherwise required by rule 5.25(E), the application and supporting documents may be electronically served upon the Committee of Bar Examiners and the Office of Chief Trial Counsel to the email addresses specified for service on these entities on the State Bar's website.

Redline to Current Rule 5.461

Rule 5.461 Beginning Proceeding; Time for Filing

If the Committee of Bar Examiners makes an adverse moral character determination, the applicant may file an application for a moral character proceeding and hearing. Within 60 days after the notice of adverse moral character determination is served, the application and supporting documents must be served under rule 5.25 and filed, accompanied by a copy of the notice of adverse moral character determination, the applicable filing fee, and proof of service upon the Committee of Bar Examiners and the Office of Chief Trial Counsel. As an alternative to service via certified mail as otherwise required by rule 5.25(E), the application and supporting documents may be electronically served upon the Committee of Bar Examiners and the Office of Chief Trial Counsel to the email addresses specified for service on these entities on the State Bar's website.

Proposed Amendments to Rule 2302

Clean Version

Rule 2302. DISCLOSURE OF INFORMATION

- (a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations of licensees and other attorneys subject to the disciplinary jurisdiction of the State Bar (collectively, licensees) is confidential, and shall not be shared outside of the State Bar Office of Chief Trial Counsel. The information that is confidential includes the existence and contents of an inquiry, complaint, or investigation, until the filing of a notice of disciplinary charges or the institution of a formal proceeding identified in paragraph (2) of subdivision (a) of Business and Professions Code section 6086.1.
- (b) A licensee whose conduct is or has been the subject of an inquiry, complaint or investigation may consent to a public announcement or disclosure. Notwithstanding such consent, the Chief Trial Counsel or designee may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an inquiry, complaint, or investigation may be substantially prejudiced by a public disclosure of some or all of the information authorized by subdivision (c)(6) of this rule before the filing of a notice of disciplinary charges or the institution of a formal proceeding identified in paragraph (2) of subdivision (a) of Business and Professions Code section 6086.1.
- (c) (1) Notwithstanding the confidentiality requirement of subdivision (a) and without waiving confidentiality for other purposes, the Chief Trial Counsel or designee, with the written concurrence of the Chair of the Board of Trustees or designee, after private notice to the licensee, may waive confidentiality and disclose some or all of the information authorized by subdivision (c)(6) of this Rule, but only if all of the following are met:
 - (A) Disclosure is warranted for protection of the public;
 - (B) Disclosure is necessary to prevent an immediate harm to the public, including, but not limited to, ongoing fraud, theft, or embezzlement; and
 - (C) Disclosure under the provisions of subdivision (c)(2) below is inadequate for the protection of the public.
- (2) Notwithstanding the confidentiality requirements of subdivision (a) and without waiving confidentiality for other purposes, the Board of Trustees may vote to waive confidentiality, and disclose some or all of the information authorized by subdivision (c)(6) of this Rule, but only if the Board determines by majority vote that disclosure is warranted for protection of the public, and only after compliance with the following procedures:

- (A) The Board shall set for closed session, at either a regular or special meeting, an agenda item for determination whether disclosure is warranted for protection of the public;
- (B) The Board or its designee shall provide the licensee who is the subject of the complaint(s), inquiry(ies), or investigation(s) for which disclosure is being considered at least five days' notice of the fact that the Board will be meeting to consider disclosure -- the notice provided to the licensee shall advise the licensee that the licensee will not be permitted to attend the closed session meeting of the Board but may, in advance of the Board meeting, submit a written statement to the Board for its consideration at the meeting;
- (C) If the Board votes to waive confidentiality and disclose information, the State Bar shall provide notice to the licensee both via email at the email address shown on the licensee's State Bar registration records and via United States mail to the physical address shown on the licensee's State Bar registration records of all of the following (i) the fact that the Board voted to waive confidentiality; (ii) a description of the information that may be disclosed to the public; and (iii) that the licensee has five business days from the date of the notice to notify the State Bar that the licensee is contesting the release of the information; and
- (D) If the licensee elects to contest the Board's determination to disclose information after providing the State Bar notice as required by subdivision (c)(2)(C) above and Business and Professions Code section 6086.1, subdivision (c)(3)(C), the licensee may do so by filing, within seven court days from the date of the notice provided to the licensee under subdivision (c)(2)(C) above, a motion with the State Bar Court to prevent the State Bar from disclosing information, which motion shall be filed, served, and resolved using the following procedures, which implement the provisions of Business and Professions Code section 6086.1, subdivision (d):
 - (i) The licensee shall electronically serve the motion on the Office of Chief Trial Counsel at CTC@calbar.ca.gov and on the Office of General Counsel at GC@calbar.ca.gov;
 - (ii) The State Bar shall file a response to the motion within three court days of the motion's filing and service and shall electronically serve this response on the licensee;
 - (iii) No reply or additional briefing may be filed unless ordered by the court;
 - (iv) The State Bar Court may, but is not required to, conduct a hearing on the motion;
 - (v) The State Bar Court will issue a ruling based on the pleadings and any hearing within 10 court days from the filing of the motion;

- (vi) The ruling of the State Bar Court is final and not subject to review; and
 - (vii) The motion, the State Bar's response, any hearing, and the State Bar Court's ruling, shall all be confidential.
- (3) In assessing whether and to what extent to waive confidentiality pursuant to subdivision (c)(1) or (c)(2) above, the Chief Trial Counsel or designee, the Chair of the Board or designee, and the Board shall, at a minimum:
- (A) Apply a presumption in favor of maintaining confidentiality of the complaint(s), inquiry(ies), and investigation(s);
 - (B) Consider the extent to which the allegations or issues involved in the complaint(s), inquiry(ies), and investigation(s) are already generally known to the public;
 - (C) Consider the gravity of the underlying allegations and the potential for continued harm to the public in the absence of disclosure; and
 - (D) Consider the potential for harm to the reputation of the licensee from any disclosure.
- (4) In assessing whether and to what extent a waiver of confidentiality pursuant to subdivision (c)(1) or (c)(2) above is warranted for the protection of the public, the Chief Trial Counsel or designee, the Chair of the Board or designee, and the Board may also consider any other information relating to the licensee and the relevant complaint(s), inquiry(ies), and investigation(s), including but not limited to the following:
- (A) Whether the licensee's conduct has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice;
 - (B) The need to maintain public confidence in the discipline system's exercise of self-regulation;
 - (C) The licensee's current license status;
 - (D) The record of prior complaints against and prior discipline of the licensee;
 - (E) The potential for the imposition of a substantial disciplinary sanction;
 - (F) The existence of any other public matters;
 - (G) The status of the complaint(s), inquiry(ies), or investigation(s);
 - (H) Any consent to disclosure by the licensee;

- (I) The gravity of the underlying allegations;
 - (J) The licensee's cooperation with the State Bar;
 - (K) Whether the licensee has committed criminal acts or is under investigation by law enforcement authorities; and
 - (L) Whether the licensee is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency.
- (5) If the Chief Trial Counsel or Chair of the Board, for any reason, self-disqualifies, is otherwise disqualified, declines, or is otherwise unavailable to exercise the authority provided by subdivision (c)(1) above, the Chief Trial Counsel or Chair of the Board shall appoint a designee to act in their place.
- (6) Once a decision to waive confidentiality and disclose information pursuant to subdivision (c)(1) or (c)(2) above becomes final, the Chief Trial Counsel or designee or the Chair of the Board or designee may issue, if appropriate, one or more public announcements or make information public generally or to specified individuals or entities. Any public announcement or any disclosure of information to the public generally or to specified individuals or entities shall include a statement defending the right of the licensee to a fair hearing and shall be limited to doing some or all of the following:
- (A) Confirming the fact of a complaint, inquiry, investigation, or proceeding, whether pending or previously closed;
 - (B) Providing a brief factual summary to identify the subject matter of the complaint, inquiry, investigation, or proceeding; and
 - (C) Providing the status of the complaint, inquiry, investigation, or proceeding.
- (7) The discretionary authority to waive confidentiality as authorized by Business and Professions Code section 6086.1, subdivisions (b)(2) and (c), and this Rule extends to both pending and previously closed complaints, inquiries, investigations, or proceedings.
- (d) The provisions of subdivisions (a) through (c) above do not apply to inquiries, complaints, or investigations regarding nonlicensees. The Chief Trial Counsel or designee may assert confidentiality with respect to inquiries, complaints, or investigations regarding nonlicensees if, in the discretion of the Chief Trial Counsel or designee, that is necessary to protect members of the public. The Chief Trial Counsel or designee may, in their discretion, issue one or more public announcements and may disclose information, not subject to the limitations in subdivision (c)(6) above, concerning a complaint(s), inquiry(ies), or investigation(s) involving a nonlicensee, including, but not limited to, when such disclosure would serve to protect the public from an individual(s) who has engaged in the unauthorized practice of law.

- (e) Notwithstanding the confidentiality requirements of subdivision (a) and without waiving confidentiality for other purposes, the Chief Trial Counsel or designee, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:
- (1) Any Special Deputy Trial Counsel or any employee of the State Bar. Any Special Deputy Trial Counsel or State Bar employee receiving confidential documents or information pursuant to this subdivision (e)(1) shall not disclose such documents or information to any other person or entity without the authorization of the Chief Trial Counsel or designee;
 - (2) Any person or entity providing services to the State Bar. Prior to receiving such confidential information or documents, any such person or entity must execute a confidentiality agreement or non-disclosure agreement with the State Bar, or a contract containing a confidentiality or non-disclosure clause;
 - (3) Members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction (see Business and Professions Code section 6044.5(b)(2));
 - (4) Witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding (see Business and Professions Code section 6049(b));
 - (5) Other governmental agencies responsible for the enforcement of civil or criminal laws (see Business and Professions Code sections 6043.5 and 6044.5(b)(1));
 - (6) Agencies and other jurisdictions responsible for professional licensing and disciplinary enforcement (see Business and Professions Code section 6044.5(a), (b)(1));
 - (7) The complainant or lawful designee (see Business and Professions Code sections 6092.5(a) and 6093.5);
 - (8) The licensee(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any (see State Bar Rule of Procedure 2409);
 - (9) Judges of the State Bar Court (see Business and Professions Code sections 6049(a) and 6051.1);
 - (10) Any person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14, or other statutory provision or any other law; or
 - (11) Third-party recipients of subpoenas duces tecum in a State Bar Court proceeding, when service of a narrowly tailored supporting declaration is necessary to inform the

subpoenaed party why their private information is being subpoenaed (see Business and Professions Code section 6049(a)).

- (f) In exercising their discretion pursuant to subdivision (e), the Chief Trial Counsel or designee shall consider the purposes for which disclosure is sought, the State Bar's policy of promoting information sharing within the State Bar where necessary to advance the State Bar's goals and objectives, the need to maintain the confidentiality of the documents or information at issue, and the risk that the disclosure sought would lead to an improper or unlawful disclosure beyond the intended recipient(s) of the documents or information at issue. To protect the confidentiality of particular documents or information, to prevent the disclosure of information or documents beyond the intended recipient(s), or to prevent the use of disclosed information for improper purposes, the Chief Trial Counsel or designee may impose limitations or conditions on any disclosure pursuant to subdivision (e), including but not limited to: redaction; anonymization; limits on further disclosure to other persons or entities; confidentiality or non-disclosure agreements; and limits on the use of disclosed documents or information.
- (g) This rule is not intended to conflict with and shall not be construed as conflicting with Business and Professions Code section 6079.5(a), which provides that the Chief Trial Counsel "shall report to and serve under the Regulation, Admissions, and Discipline Oversight Committee of the Board of Trustees of the State Bar or its successor committee on attorney discipline, and shall not serve under the direction of the chief executive officer."

Redline Version

Rule 2302. DISCLOSURE OF INFORMATION

- (a) Except as otherwise provided by law or these rules, information concerning inquiries, complaints or investigations of licensees and other attorneys subject to the disciplinary jurisdiction of the State Bar (collectively, licensees) is confidential, and shall not be shared outside of the State Bar Office of Chief Trial Counsel. ~~There is no duty of confidentiality with respect to nonattorneys; however, the Chief Trial Counsel or designee may assert confidentiality with respect to inquiries, complaints, or investigations regarding nonattorneys, if, in the discretion of the Chief Trial Counsel or designee, that is necessary to protect members of the public.~~ The information that is confidential includes the existence and contents of an inquiry, complaint, or investigation, until the filing of a notice of disciplinary charges or the institution of a formal proceeding identified in paragraph (2) of subdivision (a) of Business and Professions Code section 6086.1.
- (b) ~~An attorney~~ A licensee whose conduct is or has been the subject of an inquiry, complaint or investigation may ~~waive confidentiality~~ consent to a public announcement or disclosure.
- (c) ~~Notwithstanding the provisions of paragraph (b),~~ such consent, the Chief Trial Counsel or designee may decline to waive confidentiality regarding an inquiry, complaint or investigation, if it is determined that an ~~ongoing inquiry, complaint, or~~ investigation may be substantially prejudiced by a public disclosure of some or all of the information authorized by subdivision (c)(6) of this rule before the filing of a notice of disciplinary charges or the institution of a

formal proceeding identified in paragraph (2) of subdivision (a) of Business and Professions Code section 6086.1.

(~~dc~~) (1) ~~Notwithstanding paragraph the confidentiality requirement of subdivision (a) and without violating the duty of confidentiality or~~ Notwithstanding the confidentiality requirement of subdivision (a) and without waiving confidentiality for other purposes, the Chief Trial Counsel or designee, with the written concurrence of the Chair of the Board of Trustees or designee, after private notice to the attorney licensee, may waive confidentiality and disclose documents or information concerning a complaint(s) or investigation(s) for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality, including but not limited to the following circumstances some or all of the information authorized by subdivision (c)(6) of this Rule, but only if all of the following are met:

- (A) Disclosure is warranted for protection of the public;
- (B) Disclosure is necessary to prevent an immediate harm to the public, including, but not limited to, ongoing fraud, theft, or embezzlement; and
- (C) Disclosure under the provisions of subdivision (c)(2) below is inadequate for the protection of the public.

(2) Notwithstanding the confidentiality requirements of subdivision (a) and without waiving confidentiality for other purposes, the Board of Trustees may vote to waive confidentiality, and disclose some or all of the information authorized by subdivision (c)(6) of this Rule, but only if the Board determines by majority vote that disclosure is warranted for protection of the public, and only after compliance with the following procedures:

- (A) The Board shall set for closed session, at either a regular or special meeting, an agenda item for determination whether disclosure is warranted for protection of the public;
- (B) The Board or its designee shall provide the licensee who is the subject of the complaint(s), inquiry(ies), or investigation(s) for which disclosure is being considered at least five days' notice of the fact that the Board will be meeting to consider disclosure -- the notice provided to the licensee shall advise the licensee that the licensee will not be permitted to attend the closed session meeting of the Board but may, in advance of the Board meeting, submit a written statement to the Board for its consideration at the meeting;
- (C) If the Board votes to waive confidentiality and disclose information, the State Bar shall provide notice to the licensee both via email at the email address shown on the licensee's State Bar registration records and via United States mail to the physical address shown on the licensee's State Bar registration records of all of the following (i) the fact that the Board voted to waive confidentiality; (ii) a description of the information that may be disclosed to the public; and (iii) that the licensee has five

business days from the date of the notice to notify the State Bar that the licensee is contesting the release of the information; and

(D) If the licensee elects to contest the Board's determination to disclose information after providing the State Bar notice as required by subdivision (c)(2)(C) above and Business and Professions Code section 6086.1, subdivision (c)(3)(C), the licensee may do so by filing, within seven court days from the date of the notice provided to the licensee under subdivision (c)(2)(C) above, a motion with the State Bar Court to prevent the State Bar from disclosing information, which motion shall be filed, served, and resolved using the following procedures, which implement the provisions of Business and Professions Code section 6086.1, subdivision (d):

- (i) The licensee shall serve the motion by email on the Office of Chief Trial Counsel at CTC@calbar.ca.gov and on the Office of General Counsel at GC@calbar.ca.gov;
- (ii) The State Bar shall file a response to the motion within three court days of the motion's filing and service and shall serve this response on the licensee by email;
- (iii) No reply or additional briefing may be filed unless ordered by the court;
- (iv) The State Bar Court may, but is not required to, conduct a hearing on the motion;
- (v) The State Bar Court will issue a ruling based on the pleadings and any hearing within 10 court days from the filing of the motion;
- (vi) The ruling of the State Bar Court is final and not subject to review; and
- (vii) The motion, the State Bar's response, any hearing, and the State Bar Court's ruling, shall all be confidential.

(3) In assessing whether and to what extent to waive confidentiality pursuant to subdivision (c)(1) or (c)(2) above, the Chief Trial Counsel or designee, the Chair of the Board or designee, and the Board shall, at a minimum:

- (A) Apply a presumption in favor of maintaining confidentiality of the complaint(s), inquiry(ies), and investigation(s);
- (B) Consider the extent to which the allegations or issues involved in the complaint(s), inquiry(ies), and investigation(s) are already generally known to the public;
- (C) Consider the gravity of the underlying allegations and the potential for continued harm to the public in the absence of disclosure; and

(D) Consider the potential for harm to the reputation of the licensee from any disclosure.

(4) In assessing whether and to what extent a waiver of confidentiality pursuant to subdivision (c)(1) or (c)(2) above is warranted for the protection of the public, the Chief Trial Counsel or designee, the Chair of the Board or designee, and the Board may also consider any other information relating to the licensee and the relevant complaint(s), inquiry(ies), and investigation(s), including but not limited to the following:

(A) ~~An attorney has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice, such that the public or specific individuals should be advised of the nature of the allegations. The following additional factors shall be considered in making this determination:~~ Whether the licensee's conduct has caused, or is likely to cause, harm to client(s), the public, or to the administration of justice;

(iB) The ~~maintenance of~~ need to maintain public confidence in the discipline system's exercise of self-regulation;

(iiC) The ~~attorney's~~ licensee's current license status;

(iiiD) The record of prior complaints against and prior discipline of the ~~attorney~~ licensee;

(ivE) The potential for the imposition of a substantial disciplinary sanction;

(vF) The existence of any other public matters;

(viG) The status of the complaint(s), inquiry(ies), or investigation(s);

(viiH) ~~The waiver of confidentiality~~ Any consent to disclosure by the attorney licensee;

(viiiI) The gravity of the underlying allegations; ~~and~~

(ixJ) The ~~attorney's~~ licensee's cooperation with the State Bar;

(BK) ~~An attorney~~ Whether the licensee has committed criminal acts or is under investigation by law enforcement authorities; and

(CL) ~~An attorney~~ Whether the licensee is under investigation by a regulatory or licensing agency, or has committed acts or made omissions which may reasonably result in investigation by a regulatory or licensing agency. ~~;~~ ~~or~~

~~(D) The attorney is the subject of multiple complaints and the Office of Chief Trial Counsel has determined not to pursue all of the complaints. The Office of Chief Trial Counsel may inform complainants whose allegations have not been pursued of the status of the other investigations or the manner in which the other complaint(s) against the attorney~~

~~have been resolved, e. g., by directional letter, warning letter, admonition, agreement in lieu of discipline, or private reproof.~~

- (25) ~~If the Chief Trial Counsel or Chair of the Board, for any reason, declines to exercise the authority provided by paragraph (d)(1), or disqualifies himself or herself from acting under paragraph (d)(1), self-disqualifies, is otherwise disqualified, declines, or is otherwise unavailable to exercise the authority provided by subdivision (c)(1) above, he or she the Chief Trial Counsel or Chair of the Board shall appoint a designee to act in their place.~~
- ~~(3) The Chief Trial Counsel or designee, may define the scope of information disclosed and may limit the dissemination of information pursuant to paragraph (d)(1), above, to specified individuals or entities.~~
- (46) ~~Except as otherwise provided by law or these rules, if the Chief Trial Counsel or designee discloses documents or information pursuant to paragraph (d)(1) through (d)(3), the Chief Trial Counsel or designee~~ Once a decision to waive confidentiality and disclose information pursuant to subdivision (c)(1) or (c)(2) above becomes final, the Chief Trial Counsel or designee or the Chair of the Board or designee may issue, if appropriate, one or more public announcements ~~and may disclose information concerning a complaint(s) or investigation(s) involving an attorney(s), which includes a statement of the status or disposition of the complaint(s) or investigation(s); clarifying the procedures involved; and or make information public generally or to specified individuals or entities. Any public announcement or any disclosure of information to the public generally or to specified individuals or entities shall include a statement defending the right of the attorney(s) licensee to a fair hearing on the allegations of misconduct. and shall be limited to doing some or all of the following:~~
- (A) Confirming the fact of a complaint, inquiry, investigation, or proceeding, whether pending or previously closed;
 - (B) Providing a brief factual summary to identify the subject matter of the complaint, inquiry, investigation, or proceeding; and
 - (C) Providing the status of the complaint, inquiry, investigation, or proceeding.
- ~~(7) The discretionary authority to waive confidentiality as authorized by Business and Professions Code section 6086.1, subdivisions (b)(2) and (c), and this Rule extends to both pending and previously closed complaints, inquiries, investigations, or proceedings.~~
- (5d) The provisions of subdivisions (a) through (c) above do not apply to inquiries, complaints, or investigations regarding nonlicensees. The Chief Trial Counsel or designee may assert confidentiality with respect to inquiries, complaints, or investigations regarding nonlicensees if, in the discretion of the Chief Trial Counsel or designee, that is necessary to protect members of the public. The Chief Trial Counsel or designee may, in their discretion, issue, if appropriate, one or more public announcements and may disclose information, not subject to the limitations in

~~subdivision (c)(6) above, concerning a complaint(s), inquiry(ies), or investigation(s) involving a nonattorney(s) nonlicensee, including, but not limited to, when such disclosure would serve to protect the public, including, but not limited to, protecting the public~~ from an individual(s) who has engaged in the unauthorized practice of law.

(e) Notwithstanding ~~paragraph (a), the confidentiality requirements of subdivision (a) and without violating the duty of confidentiality or~~ waiving confidentiality for other purposes, the Chief Trial Counsel or designee, in the exercise of discretion, may disclose documents and information concerning disciplinary inquiries, complaints and investigations to the following individuals or entities:

- (1) Any Special Deputy Trial Counsel or any employee of the State Bar. Any Special Deputy Trial Counsel or State Bar employee receiving confidential documents or information pursuant to this ~~paragraph~~ subdivision (e)(1) shall not disclose such documents or information to any other person or entity without the authorization of the Chief Trial Counsel or designee;
- (2) Any person or entity providing services to the State Bar. Prior to receiving such confidential information or documents, any such person or entity must execute a confidentiality agreement or non-disclosure agreement with the State Bar, or a contract containing a confidentiality or non-disclosure clause;
- (3) Members of the Judicial Nominees Evaluation Commission or Review Committee as to matters concerning nominees in any jurisdiction (see Business and Professions Code section 6044.5(b)(2));
- (4) Witnesses or potential witnesses in conjunction with an inquiry, complaint, investigation, or proceeding (see Business and Professions Code section 6049(b));
- (5) Other governmental agencies responsible for the enforcement of civil or criminal laws, ~~including but not limited to information within the definitions set forth in~~ (see Business and Professions Code sections 6043.5 and 6044.5(b)(1));
- (6) Agencies and other jurisdictions responsible for professional licensing and disciplinary enforcement (see Business and Professions Code section 6044.5(a), (b)(1));
- (7) The complainant or lawful designee (see Business and Professions Code sections 6092.5(a) and 6093.5);
- (8) The ~~attorney~~ licensee(s) who is (are) the subject of the inquiry, complaint or investigation or their counsel of record, if any (see State Bar Rule of Procedure 2409);
- (9) Judges of the State Bar Court (see Business and Professions Code sections 6049(a) and 6051.1);

- (10) Any person or entity to the extent that such disclosure is authorized by Business and Professions Code sections 6094.5(b), 6086.14, or other statutory provision or any other law; or
 - (11) Third-party recipients of subpoenas duces tecum in a State Bar Court proceeding, when service of a narrowly tailored supporting declaration is necessary to inform the subpoenaed party why ~~his or her~~ their private information is being subpoenaed (see Business and Professions Code section 6049(a)).
- (f) In exercising ~~his or her~~ their discretion pursuant to ~~paragraph~~ subdivision (e), the Chief Trial Counsel or designee shall consider the purposes for which disclosure is sought, the State Bar's policy of promoting information sharing within the State Bar where necessary to advance the State Bar's goals and objectives, the need to maintain the confidentiality of the documents or information at issue, and the risk that the disclosure sought would lead to an improper or unlawful disclosure beyond the intended recipient(s) of the documents or information at issue. To protect the confidentiality of particular documents or information, to prevent the disclosure of information or documents beyond the intended recipient(s), or to prevent the use of disclosed information for improper purposes, the Chief Trial Counsel or designee may impose limitations or conditions on any disclosure pursuant to ~~paragraph~~ subdivision (e), including but not limited to: redaction; anonymization; limits on further disclosure to other persons or entities; confidentiality or non-disclosure agreements; and limits on the use of disclosed documents or information.
- (g) This rule is not intended to conflict with and shall not be construed as conflicting with Business and Professions Code section 6079.5(a), which provides that the Chief Trial Counsel "shall report to and serve under the Regulation, Admissions, and Discipline Oversight Committee of the Board of Trustees of the State Bar or its successor committee on attorney discipline, and shall not serve under the direction of the chief executive officer."

Proposed Amendments to Rule 2502*Clean Version***Rule 2502. INVESTIGATION DEPOSITIONS**

In the course of an investigation, pursuant to Business and Professions Code section 6049, subdivision (b), the Office of Chief Trial Counsel may compel by subpoena the appearance of a witness at a deposition. The deposition shall be conducted in accordance with Code of Civil Procedure sections 2025.220 through 2025.480, inclusive. The Office of Chief Trial Counsel shall serve a copy of the notice of deposition upon each attorney whose conduct is being investigated. Such attorneys shall have the right to appear and participate at the deposition and such attorneys and the Office of Chief Trial Counsel shall have the right to seek protective orders from the State Bar Court pursuant to Code of Civil Procedure section 2025.420, subdivision (b)(1) through subdivision (5), inclusive, and subdivision (b)(8) through (i)(14), inclusive.

*Redline to Current Rule 2502***Rule 2502. INVESTIGATION DEPOSITIONS**

In the course of an investigation, pursuant to Business and Professions Code section 6049, subdivision (b), the Office of Chief Trial Counsel may compel by subpoena the appearance of a witness at a deposition. The deposition shall be conducted in accordance with Code of Civil Procedure sections 2025.220, subdivision (c) through 2025.480, subdivision (u), inclusive. The Office of Chief Trial Counsel shall serve a copy of the notice of deposition upon each attorney whose conduct is being investigated. Such attorneys shall have the right to appear and participate at the deposition and such attorneys and the Office of Chief Trial Counsel shall have the right to seek protective orders ~~relief~~ from the State Bar Court pursuant to Code of Civil Procedure section 2025.420 subdivision ~~(b)~~(1) through subdivision ~~(b)~~(5), inclusive, and subdivision ~~(b)~~(8) through ~~(b)~~(14), inclusive.



The State Bar of California

ATTACHMENT H

OPEN SESSION AGENDA ITEM 60-6 NOVEMBER 2023

DATE: November 16, 2023

TO: Members, Board of Trustees
Sitting as the Regulation and Discipline Committee

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Clarifying and Corrective Amendments to State Bar Rules Regarding Electronic Service Address (Rule 5.4(29)), Application for Involuntary Enrollment (Rule 5.226), Filing Requirements (Rule 5.441), Burden of Proof (Rule 5.445), Beginning Moral Character Proceedings (Rule 5.461), Disclosure of Information (Rule 2302), and Investigation Depositions (Rule 2502): Request to Circulate for Public Comment

EXECUTIVE SUMMARY

This item seeks authorization to circulate for public comment proposed amendments to clarify and correct the following State Bar rules:

- rule 5.4, subsection (29) to clarify that petitioners or reinstatement and applicants for admission requesting a moral character proceeding are required to provide an email address for service of documents with their initial pleading;
- rule 5.226 to correct the standard for applications for involuntary enrollment to accord with statutory amendments to Business and Professions Code section 6007(c)(2);
- rules 5.441 and 5.445 to clarify the application of prefiling requirements to petitioners for reinstatement in light of the State Bar Court's opinion in *In the Matter of Sanjay Bhardwaj*, Case No. SBC-22-R-30503;
- rule 5.461 to specify that service on the Office of Chief Trial Counsel and Committee of Bar Examiners of applications for review of adverse moral character determinations may be by electronic service;
- rule 2302 to correct its provisions for disclosure of confidential information regarding disciplinary investigations to accord with statutory amendments to Business and Professions Code section 6086,1; and

- rule 2502 to correct statutory references and clarify that both the Office of Chief Trial Counsel and attorneys have the right to seek protective orders in connection with investigation depositions.
-

BACKGROUND

The proposed corrective and clarifying amendments to rules 5.4, subsection (29), 5.226, 5.441, 5.445, and 2502 were presented and discussed with representatives of the State Bar Court and the Association of Discipline Defense Counsel at a Bench Bar Committee meeting on September 13, 2023. The proposed amendment to rule 5.461 has been the subject of email discussion with representatives of the State Bar Court in light of the recent addition to the State Bar Court's website of a fillable electronic application for review of adverse moral character determinations. The proposed amendments to rule 2302 are occasioned by the October 10, 2023, enactment of SB 40, which substantially amended Business and Professions Code section 6086.1.

DISCUSSION

A. RULE 5.4, SUBSECTION (29)

Rule 5.4, subsection (29), defines the term "electronic service address." As part of this definition, subsection (29)(c) specifies that for parties and persons other than OCTC employees and State Bar licensees, this address is the email address that they provide to the court and all parties for service of documents. Subsection (29)(c) specifically references only Special Deputy Trial Counsel as being among those required to provide an email address for service. The proposed amendments to subsection (29)(c): (1) clarify that petitioners for reinstatement and applicants for admission requesting a moral character proceeding are among those required to provide an email address for service; (2) clarify that provision of an email address for service is required; and (3) clarify that this email address must be provided with the initial pleading. The proposed amendments, in both clean version and redline to current rule 5.4, subsection (29), are set forth in Attachment A.

B. RULE 5.226

Rule 5.226, subsection (C) specifies the facts that must be set forth to support an application for involuntary enrollment pursuant to Business and Professions Code section 6007(c)(2). In 2019, section 6007(c)(2) was amended to modify its requirements for involuntary enrollment. Current rule 5.226, subsection (C), continues to reference the requirements of section 6007(c)(2) prior to its 2019 amendment. The proposed amendments, set forth in both clean version and redline to current rule 5.226 in Attachment B, revise the rule to accord with the current statute.

C. RULES 5.441 AND 5.445

Rules 5.441 and 5.445 address filing requirements and the burden of proof for reinstatement proceedings. In particular, rule 5.441, subsection (B) specifies prefiling requirements that must be satisfied by the petitioner prior to filing the petition, with proof of compliance attached to the petition, while rule 5.445 specifies the requirements as to which the petitioner bears the

burden of proof in the reinstatement proceeding. In *In the Matter of Sanjay Bhardwaj*, Case No. SBC-22-R-30503 (Aug. 8, 2023), the Review Department addressed whether passage of a Professional Responsibility Examination (PRE) within one year prior to filing a petition for reinstatement and payment of all discipline costs and sanctions are prefiling requirements or requirements that the petitioner may establish after filing, in the course of the reinstatement proceeding. The review department held that, consistent with Business and Professions Code section 6140.7, paying discipline costs is a prefiling requirement, that is, a “condition of applying for reinstatement” pursuant to rule 5.441(B)(2). Interpreting rule 5.441(B)(2) to favor the petitioner, the review department further held that the current rule permits an exception to this prefiling requirement if the petitioner simultaneously files, in the underlying disciplinary case, a motion to extend time for payment of discipline costs, even if that motion has not yet been, and may not be, granted. On the other hand, relying on California Rule of Court 9.10(f), the review department held that passage of a PRE within the one year prior to filing the petition is not a prefiling requirement, but instead “may be proven during the reinstatement process.”

In light of *Bhardwaj*, the proposed amendments to rule 5.441:

- Provide that the exception to the payment of disciplinary costs as a prefiling requirement applies only where the court in the underlying disciplinary matter has already granted an extension of time for payment that has not expired at the time of filing – this will ensure that time is not wasted on reinstatement proceedings where the court ultimately denies a motion for extension of time for payment that was filed with or remained pending at the time of the reinstatement petition;
- Clarify that proof of payment of discipline costs or a copy of the court order extending the time for payment must be attached to the petition;¹
- Remove the payment of monetary sanctions as a prefiling requirement (while leaving it a requirement that must be established in the reinstatement proceeding); and
- Provide that if a petition is dismissed for failure to comply with the prefiling requirements, no additional filing fee will be required if a new petition is submitted within 30 days.

In light of *Bhardwaj*, the proposed amendments to rule 5.445:

- Clarify that petitioner bears the burden of proving passage of a PRE within one year prior to filing the petition;
- Clarify that petitioner bears the burden of proving payment of all monetary sanctions.

The proposed amendments to rules 5.441 and 5.445 are set forth, in both clean version and redline from the current rules, in, respectively, Attachments C and D.

D. RULE 5.461

Rule 5.461 specifies the time for filing and the filing and service requirements for applications seeking review of adverse moral character determinations. The rule currently requires service on the Committee of Bar Examiners and the Office of Chief Trial Counsel in accordance with

¹ Representatives of the ADDC have indicated that the ADDC may oppose the first two proposed amendments described above.

rule 5.25, which requires service by certified mail. The State Bar Court recently put on its website a fillable pdf form that can be used to appeal an adverse determination of moral character. As part of a general move to allow electronic service where possible, it makes sense to permit electronic service on the Committee of Bar Examiners and the Office of Chief Trial Counsel. This is also consistent with procedures for submitting requests to the Committee of Bar Examiners for preliminary administrative review of adverse moral character determinations; these procedures permit these requests to be submitted by email. The proposed amendment to rule 5.461, which is set forth in both a clean version and redline from the current rule in Attachment E, authorizes electronic service on the Committee of Bar Examiners and the Office of Chief Trial Counsel, at email addresses to be specified on the State Bar's website. If the proposed amendments are adopted, implementing changes will be made to the instructions on the State Bar Court's website to provide the necessary service email addresses.

E. RULE 2302

Disciplinary investigations are confidential pursuant to Business and Professions Code section 6086.1(b), which defines limited situations in which confidentiality may be waived. Rule 2302 specifies criteria and procedures for disclosures of otherwise confidential information, in accordance with the statutory limits of section 6086.1(b). SB 40, signed by the governor on October 10, 2023, substantially amended section 6086.1, redefining the criteria and procedures for waiving confidentiality. The proposed amendments to rule 2302, which are set forth in both clean version and redline from the current rule, are intended to align the rule with the new statutory requirements. Specifically, the proposed amendments:

- Clarify that both the fact of an investigation and information concerning the investigation are confidential.
- Provide, consistent with new section 6086.1(b)(2), that the Chief Trial Counsel, with written concurrence from the Board Chair, may waive confidentiality, but only if disclosure is warranted for protection of the public, it is determined that disclosure is necessary to prevent an immediate harm to the public, and the alternative disclosure provisions of new section 6086.1(c) are inadequate for the protection of the public;
- Provide, consistent with new section 6086.1(c)(1)(A), that subject to specified procedures, the Board, in closed session, may waive confidentiality, but only when warranted for protection of the public;
- Consistent with new section 6086.1(c)(3), establish procedures for the attorney to contest a Board decision to waive confidentiality in State Bar Court;
- Consistent with new section 6086(c)(1)(B), require the consideration of specified factors before a decision is made to waive confidentiality;
- Consistent with new sections 6086.1(b)(2)(B) and (c)(2), specify the limited information that may be disclosed to the public or to specified individuals or entities once a decision to waive confidentiality becomes final; and
- Clarify, consistent with the position taken by the State Bar in litigation before the Supreme Court, that confidentiality may be waived with respect to both pending and closed investigations.

F. RULE 2502

Rule 2502 sets out procedures for investigation depositions compelled by the Office of Chief Trial Counsel by cross reference to sections of the Code of Civil Procedure. Similarly, the rule specifies procedures for seeking relief in connection with investigation depositions by cross reference to sections of the Code of Civil Procedure that specify the conditions under which protective orders may issue. The cross references to the Code of Civil Procedure in the current rule are out of date given the renumbering of the Code of Civil Procedure. The proposed amendments to rule 2502, which are set out in both a clean version and redline to the current rule in Attachment G, correct the cross references, clarify that the relief that may be sought is protective orders pursuant to the cited Code of Civil Procedure sections, and provide that both the attorney whose conduct is being investigated and the Office of Chief Trial Counsel may seek protective orders in connection with investigation depositions.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 5, Division 1, Rule 5.4, subsection (29)

Title 5, Division 4, Chapter 6, Rule 5.226

Title 5, Division 7, Chapter 3, Rules 5.441 and 5.445

Title 5, Division 7, Chapter 4, Rule 5.461

Title III, Division II, Chapter 3, Rule 2302

Title III, Division II, Chapter 5, Rule 2502

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

Goal 3. Protect the Public by Regulating the Legal Profession

RECOMMENDATIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees sitting as the Regulation and Discipline Committee authorizes staff to make available for public comment, for a period of 45 days, proposed amendments to rule 5.4, subsection (29) of the Rules of the State Bar of California, as set forth in Attachment A; rule 5.226 of the Rules of the State Bar of California, as set forth in Attachment B; rule 5.441 of the Rules of the State Bar of California, as set forth in Attachment C; rule 5.445 of the Rules of the State Bar of California, as set forth in Attachment D; rule 5.461 of the Rules of the State Bar of California, as set forth in Attachment E; rule 2302 of the Rules of the State Bar of

California, as set forth in Attachment F; and rule 2502 of the Rules of the State Bar of California, as set forth in Attachment G; 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 amendments to the Rules of the State Bar of California.

ATTACHMENTS LIST

- A.** Proposed Amendments to Rule 5.4, subsection (29)
- B.** Proposed Amendments to Rule 5.226
- C.** Proposed Amendments to Rule 5.441
- D.** Proposed Amendments to Rule 5.445
- E.** Proposed Amendments to Rule 5.461
- F.** Proposed Amendments to Rule 2302
- G.** Proposed Amendments to Rule 2502