

OPEN SESSION AGENDA ITEM

REGULATION AND DISCIPLINE COMMITTEE – B.3

DATE: May 17, 2018

TO: **Members, Regulation and Discipline Committee**

FROM: Antonia G. Darling, Chief Court Counsel, State Bar Court

SUBJECT: Request to Circulate for Public Comment Changes to the Rules regarding Disqualification of a Judge (Proposal to Amend Rule 5.46, Rules Proc. of State Bar)

EXECUTIVE SUMMARY

This proposal would make a clarifying amendment to the wording of the rule regarding the appointment of a judge to hear a motion to disqualify another judge.

This item requests that the Board circulate, for a 45-day public comment period, proposed amendments to State Bar Rules of Procedure.

BACKGROUND

Rule 5.46, subsection (k) of the Rules of Procedure of the State Bar of California currently states that when a disqualification motion is filed against a particular judge, the presiding or supervising judge must appoint “another” judge to hear the motion. This has led to occasional contentions that the presiding or supervising judge may not appoint himself/herself to hear the motion, which is the usual practice in situations where the original disqualification motion is not directed at the presiding or supervising judge. The proposed change is to replace the word “another judge” with the phrase “a judge other than the challenged judge”.

DISCUSSION

The language in the rule requiring a disqualification motion to be assigned to “another judge” is intended to mean that the motion must be assigned for decision to a judge other than the challenged judge. Unfortunately, the language is arguably ambiguous, leading to an occasional challenge to the presiding or supervising judge actually deciding the disqualification motion. The proposed language will eliminate any ambiguity and make clear that the appointing judge may assign the motion to himself/herself for decision if he/she is not the judge being challenged in the original disqualification motion.

OCTC staff has reviewed this proposal and raised no objection.

FISCAL/PERSONNEL IMPACT

Minor savings of time for the court to rule on challenges if the presiding or supervisory judge appoints himself/herself to decide the disqualification challenge of another judge.

RULE AMENDMENTS

Title 5, Division 2, Chapter 5, Rules 5.46, Rules of Procedure of the State Bar.

BOARD BOOK AMENDMENTS

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.

RECOMMENDATION

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to:

Title 5, Division 2, Chapter 5, Rule 5.46 of the Rules of Procedure of the State Bar;

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 or Board policy.

ATTACHMENT(S) LIST

- A.** Proposed language of Rule 5.46 (Clean version).
- B.** Proposed language of Rule 5.46 (Redline version).

ATTACHMENT A

Proposed Revised Rule of Procedure 5.46

Clean version

Rule 5.46 Disqualifying a Judge

- (A) **Disqualification under Code of Civil Procedure § 170.1.** When Code of Civil Procedure § 170.1 applies, the judge must be disqualified.
- (B) **Judge Pro Tempore.** A judge pro tempore must be disqualified if the judge pro tempore or the judge pro tempore's office is affiliated with or represents:
 - (1) A party to pending litigation that involves any party, counsel, or law office affiliated with any party or counsel; or
 - (2) A party represented by any party, counsel, or law office affiliated with any party or counsel.
- (C) **Applicable Provisions; Recusal.** Only the provisions of Code of Civil Procedure §§ 170.1, 170.2, 170.3(b), 170.4, and 170.5(b)–(g) apply to judicial disqualification in State Bar Court proceedings.
- (D) **Notice of Recusal.** Judges who recuse themselves must promptly give notice of the recusal to the judge who has authority to assign the matter to another judge.
- (E) **Review of Stipulation.** An assigned judge's consideration or rejection of a stipulation in a proceeding is not a basis to disqualify the judge from the proceeding.
- (F) **Settlement Judge.** Unless the parties stipulate otherwise, a settlement judge is disqualified from presiding over the trial of the matter.
- (G) **Proceeding Involving Relief from Default.** When a party seeks relief from default, the judge may not be disqualified on the basis that the judge heard evidence or filed a decision before the party filed the motion for relief.
- (H) **Motion to Disqualify.** If a judge refuses or fails to disqualify himself or herself, any party may file a motion to disqualify. The motion must contain a verified statement setting forth the facts constituting the grounds for disqualification. Copies of the motion must be served on the opposing party and must be personally served upon the judge the party seeks to disqualify or upon his or her case administrator if the judge is present in the State Bar's office or in chambers.

- (I) **When to File Motion.** If the party seeking disqualification did not know the matter was assigned to the judge or the ground for disqualification in time to file the motion under the other provisions of this rule, the party must file the motion promptly and make an oral motion when the next hearing, trial, conference, or argument begins. Otherwise, a party must move to disqualify within the earliest of:
- (1) 10 days after the party or the party's counsel learns of the ground for disqualification;
 - (2) Before the trial begins; or
 - (3) 20 days before oral argument is held before the Review Department.
- (J) **Consent or Answer to Motion.** After a motion to disqualify is filed, the judge may:
- (1) Consent to disqualification within 10 days after the motion is served and promptly notify the judge who has authority to assign the matter to another judge;
 - (2) File a verified answer within 10 days after the motion is served, admitting or denying any or all of the allegations in the motion and setting forth any additional facts material or relevant to the question of disqualification, and the Clerk must transmit a copy of the judge's answer to each party; or
 - (3) Fail to expressly consent or timely answer, in which case the judge's consent to disqualification is presumed, and the Clerk must promptly notify the judge who has authority to assign the matter to another judge.
- (K) **Ruling on Disqualification.** A judge who refuses to recuse himself or herself may not rule on his or her own disqualification. The presiding or supervising judge must assign a judge other than the challenged judge to decide the motion. If the judge hearing the motion decides that the judge is disqualified, the judge must promptly notify the judge who has authority to assign the matter to another judge.
- (L) **Petition for Review.** A ruling on a motion for disqualification is reviewable under rule 5.150. The party must file the petition within 10 days of service of the ruling. The Review Department must expedite action on the petition.

ATTACHMENT B

Proposed Revised Rule of Procedure 5.46

Redline version

Rule 5.46 Disqualifying a Judge

- (A) **Disqualification under Code of Civil Procedure § 170.1.** When Code of Civil Procedure § 170.1 applies, the judge must be disqualified.
- (B) **Judge Pro Tempore.** A judge pro tempore must be disqualified if the judge pro tempore or the judge pro tempore's office is affiliated with or represents:
 - (1) A party to pending litigation that involves any party, counsel, or law office affiliated with any party or counsel; or
 - (2) A party represented by any party, counsel, or law office affiliated with any party or counsel.
- (C) **Applicable Provisions; Recusal.** Only the provisions of Code of Civil Procedure §§ 170.1, 170.2, 170.3(b), 170.4, and 170.5(b)–(g) apply to judicial disqualification in State Bar Court proceedings.
- (D) **Notice of Recusal.** Judges who recuse themselves must promptly give notice of the recusal to the judge who has authority to assign the matter to another judge.
- (E) **Review of Stipulation.** An assigned judge's consideration or rejection of a stipulation in a proceeding is not a basis to disqualify the judge from the proceeding.
- (F) **Settlement Judge.** Unless the parties stipulate otherwise, a settlement judge is disqualified from presiding over the trial of the matter.
- (G) **Proceeding Involving Relief from Default.** When a party seeks relief from default, the judge may not be disqualified on the basis that the judge heard evidence or filed a decision before the party filed the motion for relief.
- (H) **Motion to Disqualify.** If a judge refuses or fails to disqualify himself or herself, any party may file a motion to disqualify. The motion must contain a verified statement setting forth the facts constituting the grounds for disqualification. Copies of the motion must be served on the opposing party and must be personally served upon the judge the party seeks to disqualify or upon his or her case administrator if the judge is present in the State Bar's office or in chambers.

- (I) **When to File Motion.** If the party seeking disqualification did not know the matter was assigned to the judge or the ground for disqualification in time to file the motion under the other provisions of this rule, the party must file the motion promptly and make an oral motion when the next hearing, trial, conference, or argument begins. Otherwise, a party must move to disqualify within the earliest of:
- (1) 10 days after the party or the party's counsel learns of the ground for disqualification;
 - (2) Before the trial begins; or
 - (3) 20 days before oral argument is held before the Review Department.
- (J) **Consent or Answer to Motion.** After a motion to disqualify is filed, the judge may:
- (1) Consent to disqualification within 10 days after the motion is served and promptly notify the judge who has authority to assign the matter to another judge;
 - (2) File a verified answer within 10 days after the motion is served, admitting or denying any or all of the allegations in the motion and setting forth any additional facts material or relevant to the question of disqualification, and the Clerk must transmit a copy of the judge's answer to each party; or
 - (3) Fail to expressly consent or timely answer, in which case the judge's consent to disqualification is presumed, and the Clerk must promptly notify the judge who has authority to assign the matter to another judge.
- (K) **Ruling on Disqualification.** A judge who refuses to recuse himself or herself may not rule on his or her own disqualification. The presiding or supervising judge must assign **a judge other than the challenged judge** to decide the motion. If the judge hearing the motion decides that the judge is disqualified, the judge must promptly notify the judge who has authority to assign the matter to another judge.
- (L) **Petition for Review.** A ruling on a motion for disqualification is reviewable under rule 5.150. The party must file the petition within 10 days of service of the ruling. The Review Department must expedite action on the petition.