

AGENDA ITEM

123 JULY 2016

DATE: July 5, 2016

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

FROM: Gregory Dresser, Interim Chief Trial Counsel

SUBJECT: Proposed Amendment to Rule 5.441(A) of the Rules of Procedure of the State Bar of California Relating to the Filing Requirements for Reinstatement Proceedings. Request for Adoption Following Public Comment.

EXECUTIVE SUMMARY

At its November 19, 2015, meeting, the Regulation and Discipline Committee approved circulating for public comment a proposal to amend rule 5.441(A) of the Rules of Procedure of the State Bar, and to adopt an authorization and release to facilitate the investigation of a petitioner seeking reinstatement to the Bar after disbarment or resignation. The Office of Chief Trial Counsel (OCTC) received four public comments during the 75-day public comment period. Based on a review of the comments, OCTC does not recommend changes to the rule or authorization and release as circulated, and is recommending the Regulation and Discipline Committee and the Board of Trustees adopt the rule and the authorization and release.

BACKGROUND

A party seeking reinstatement to membership in the State Bar after disbarment or resignation ("reinstatement petitioner" or "petitioner") must, among other things, establish present moral qualifications for reinstatement, pursuant to rule 5.445 of the Rules of Procedure. If the petitioner seeks reinstatement after disbarment or resignation with charges pending, the petitioner must also establish rehabilitation from prior misconduct.

A petitioner initiates reinstatement proceedings by filing a verified petition with the Clerk of the State Bar Court and complying with service and pre-filing requirements set forth in rule 5.441. Along with the petition, the petitioner must serve OCTC with a Disclosure Statement Supporting Petition for Reinstatement. This form requires the reinstatement petitioner to disclose information about: (a) other jurisdictions in which the petitioner has been admitted to practice law, including any discipline recommended in such other jurisdictions; (b) medical, dental, real estate, stock brokerage, securities, and similar professional licenses; (c) financial obligations, including all restitution ordered or recommended by any court, and debts owed by petitioner; and (d) activities since disbarment or resignation, including employment history, sources of

income, civil cases or bankruptcies, criminal charges, or fraud charges levied in any legal proceedings. The information disclosed is only a starting point for the investigation.

OCTC has 120 days from the filing of the petition to complete an investigation to determine whether to oppose the petition for reinstatement. As provided in rule 5.443, the 120-day investigation period may not be extended without a finding of good cause by the State Bar Court.

Unlike applicants seeking first-time admission to the Bar, reinstatement petitioners are not required to sign a broad authorization and release that permits the Bar to obtain information about the petitioner. For applicants for admission, the authorization and release assists the Committee of Bar Examiners, and its agents, in conducting a thorough investigation to appropriately evaluate an applicant's moral character.

The proposed amendment to rule 5.441(A) would require reinstatement petitioners – that is, individuals who have been previously disbarred or resigned from the practice law – to sign an authorization and release similar to that required of applicants seeking first-time admission. Such an authorization and release will better enable OCTC to conduct a thorough investigation to appropriately evaluate the petitioner's moral qualifications for reinstatement and, where applicable, evaluate the petitioner's rehabilitation from prior misconduct.

DISCUSSION

Rule 5.441(A) of the State Bar Rules of Procedure currently provides:

Filing Petition and Disclosure Statement. 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 the Chief Trial Counsel.

The proposed amendment to rule 5.441(A) would also require the reinstatement petitioner to complete an authorization and release:

Filing Petition, and 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 the 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 the Chief Trial Counsel.

The proposed amendment is also attached as Attachment A.

The proposed authorization and release is virtually identical to the one currently required of first-time applicants for admission to the Bar. The differences between the two are entirely technical in nature. (See Attachment B for the proposed Reinstatement Authorization and Release, and

Attachment C for a red-line comparison between the Reinstatement Authorization and Release and the Moral Character Authorization and Release for applicants for admission.)

The burden of proving good moral character is substantially more rigorous for a petitioner seeking reinstatement than for a first-time applicant for admission to practice law.¹ The reinstatement petitioner must present stronger proof of present honesty and integrity than a person seeking admission for the first time, whose character has never been called into question. The reinstatement petitioner's proof must be sufficient to overcome the prior adverse judgment of his character.² In order to obtain information to help the State Bar Court determine whether those difficult burdens have been met, OCTC must have the ability to access the necessary information. The proposed authorization and release will provide that ability.

This authorization and release will assist OCTC in carrying out the Bar's public protection mission by ensuring OCTC has sufficient time and ability to get records from third parties, necessary to facilitate the thorough and prompt investigation into the reinstatement petitioner's present moral qualifications and, where applicable, rehabilitation from prior misconduct. It will protect the public and promote confidence in the profession and administration of justice by allowing OCTC investigators to complete more thorough reinstatement investigations within the short time permitted. Moreover, it will help to ensure that all relevant evidence is available for presentation in a reinstatement proceeding and will, consequently, aid the State Bar Court in its determination as to whether the petitioner is, in fact, rehabilitated and morally fit to practice law. Although there are benefits in utilizing the authorization and release in lieu of a subpoena in a time-limited period for investigation, the authorization and release will be most helpful in cases where the third parties in possession of the records are beyond the reach of the Bar's subpoena power, or where a third party prefers to have an indication of the reinstatement petitioner's agreement to the release of such records.

Public Comment and OCTC Response

OCTC received four public comments during the public comment period, from Mr. Jerry Miller, Mr. Jerome Fishkin, Ms. Chauné Williams, and the Legal Ethics Committee of the Bar Association of San Francisco. (See Attachments D – G.)

Comment from Jerry Miller

The comment from Mr. Jerry Miller was beyond the scope of this amendment, relating to reinstatement generally, but not to the specific issue at hand. Thus, Mr. Miller's comment is not addressed herein.³

Comment from Jerome Fishkin

Mr. Jerome Fishkin opposed the proposal, arguing that the Bar failed to "identify any pattern of problems in reinstatement cases. It does not even purport to identify one problem." In support of his assertion that current law is sufficient, Mr. Fishkin notes that reinstatement petitioners are required to disclose various types of information, including financial and employment

¹ *In re Menna* (1995) 11 Cal.4th 975, 986.

² *Id.*; *Calaway v. State Bar* (1986) 41 Cal.3d 743, 745-746; *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.

³ Mr. Miller's comment relates to adding a requirement of monitoring reinstatement petitioners for some length of time prior to reinstatement.

information, tax returns, and an accounting of their activities after disbarment. “They are expected to answer **relevant** requests for follow up information posed by OCTC.” Mr. Fishkin appears to suggest that independent investigations are unnecessary, and that OCTC simply needs to ask reinstatement petitioners for the information it seeks, and proceed only on that basis. Although petitioners are required to provide information and “a court evaluating a petition for reinstatement should be able to rely on it as candid and complete,”⁴ reinstatement petitioners are not always forthcoming. Investigation is necessary for OCTC to vet the information provided by a reinstatement petitioner and gather all the information the State Bar Court requires to determine the petitioner’s qualifications for reinstatement and, where applicable, evaluate the petitioner’s rehabilitation.

OCTC strongly disagrees with Mr. Fishkin’s assertion that there is no problem acquiring the necessary information under the rules, and that this is a mere fishing expedition for sensitive and private information. The Bar’s subpoena authority is not absolute, and the limited time frame can constrain the Bar from obtaining all relevant information. Although, in most instances, the 120-day investigation period is sufficient to subpoena records from those subject to the Bar’s subpoena powers, sometimes information uncovered in the review of subpoenaed records gives rise to the need to secure additional records. Additionally records from federal government entities, such as the Federal Bureau of Prison Records, the Social Security Administration, federal law enforcement, or the military, are not subject to the Bar’s subpoena power. Similarly when seeking information from other jurisdictions, including information from another state’s Department of Motor Vehicles, Department of Real Estate, Department of Insurance, state or county probation, or law enforcement, an authorization and release is necessary. Such out-of-state entities are also outside of the Bar’s subpoena power.

Even where a subpoena is required (and effective), the authorization and release demonstrates the agreement of the reinstatement petitioner to provide access to information, and, thus, can assist in securing the documents, or expediting the process. Currently reinstatement petitioners are not required to sign an authorization and release, and OCTC has encountered situations where the petitioner delays providing a release, hampering OCTC’s ability to secure necessary information. Public protection warrants that OCTC be able to obtain the records necessary to determine the moral qualifications to practice law and, where applicable, the petitioner’s rehabilitation from past misconduct.

Finally, Mr. Fishkin raises concerns that confidential information and documents sought through this broad authority could identify third parties and describe unfounded allegations against them. He objects to the language in the release that “release[s], discharge[s], and exonerate[s] the State Bar of California, including its Board of Trustees and the Chief Trial Counsel, and all officers, employees, agents and representatives (as the same may be constituted from time to time) and any Third Party from and against any and all claims, demands, causes of action, damages, judgments, debts, obligations, or liabilities of every nature and kind arising out of or in connection with any information furnished to the Chief Trial Counsel or used by the Chief Trial Counsel pursuant to this authorization and release.” Except for changing references from the Committee of Bar Examiners to the Chief Trial Counsel, this language is identical to the language in the authorization and release required to be signed by all first-time applicants for admission to the State Bar of California. Although Mr. Fishkin points to examples where information was inadvertently disclosed by OCTC, he does not articulate any reason why the same authority provided to investigate applicants for admission to the Bar should not extend to

⁴ *In re Matter of Giddens* (Review Dept. 1990)1 Cal. State Bar Ct. Rptr. 25, 34.

investigations of those who have been disbarred or resigned, and are now seeking reinstatement.

Comment from Chauné Williams

Ms. Chauné Williams opposes the proposal, arguing that it is seeking to “enable the OCTC to conduct clandestine discovery outside the boundaries of Rules 5.463 and 5.65,” relating to, respectively, the discovery in moral character proceedings for applicants for admission, and discovery procedures after the filing of a notice of disciplinary charges. Ms. Williams argues that OCTC has subpoena power to obtain documents from third parties, and has not demonstrated why that subpoena power is insufficient. OCTC notes that the discovery rules cited do not govern the 120-day *investigation period* for a petitioner seeking reinstatement. Nonetheless, the substance of Ms. Williams’s comment is addressed, above, in response to Mr. Fishkin’s comments.

Ms. Williams further argues, as does the Legal Ethics Committee for the Bar Association of San Francisco, that the authorization and release is inconsistent with the California Right to Financial Privacy Act, Gov. Code sec. 7460, et seq., which requires requests for financial records from a financial institution to be included in a subpoena that describes the records with particularity. The statute provides that a customer may sign an authorization permitting release, but the authorization must specify the period of time for which records are sought and the records that are authorized to be disclosed. That authorization must include notification that the customer has the right at any time to revoke such authorization. (Gov. Code sec. 7473(a), (c).)

The Reinstatement Authorization and Release cannot, and does not purport to, absolve OCTC from any obligations it has under Government Code sec. 7640, et seq., or any other law. Nor does it absolve a financial institution from its obligations to withhold records when statutory requirements have not been satisfied. Financial institutions require the issuance of subpoenas regardless of the existence of an authorization and release. OCTC currently provides a subpoena and complies with all relevant statutory requirements when it seeks financial records as part of a moral character investigation for applicants for admission even though the Moral Character Authorization and Release contains the same language as that proposed here regarding financial information. The same will be true with the adoption of a Reinstatement Authorization and Release.

Finally, Ms. Williams asserts that the authorization and release should terminate by operation of law upon the conclusion of the 120-day investigation period. Ms. Williams argues that in moral character cases OCTC improperly uses the authorization and release as a “discovery weapon” after the 120-day investigation period ends. Like the Moral Character Authorization and Release for applicants for admission, this release remains effective throughout the entire reinstatement process, which includes proceedings before the State Bar Court and the California Supreme Court. Until the final decision is rendered by the Supreme Court, a reinstatement petitioner has a continuing obligation to provide updated information that would bear on his or her rehabilitation or fitness for reinstatement. After the conclusion of the 120-day investigation period, any discovery is conducted under rules 5.65 and 5.443. However, the limits on the Bar’s subpoena authority remain, even though OCTC is operating under the provisions of these rules. The authorization and release is necessary during this period, as it is during the investigation period, to assist OCTC in collecting evidence from jurisdictions outside the Bar’s subpoena power.

Comment from the Legal Ethics Committee of the Bar Association of San Francisco

The Legal Ethics Committee of the Bar Association of San Francisco (BASF) raises several concerns:

- (1) The authorization for release of financial information.
- (2) The failure to limit the records subject to the authorization and release to the time after resignation or disbarment through the time of hearing on the reinstatement petition.
- (3) The failure to limit the third parties from whom records may be requested, resulting in receipt of records with no indicia of reliability.
- (4) The termination of the reinstatement process upon the petitioner's withdrawal of the authorization and release.

The memorandum addresses BASF's first concern, above, in response to Ms. Williams's comments.

As to the second issue raised, BASF may not have a complete understanding of the investigations that OCTC needs to conduct to determine whether to oppose a petition for reinstatement. OCTC may need to secure information from the time period prior to resignation or disbarment in order to assess the petitioner's rehabilitation or moral fitness. For example, when a petitioner resigns with charges pending, OCTC likely did not have the opportunity to investigate the full extent of his or her misconduct. Or if a petitioner is disbarred, OCTC may not have fully investigated other complaints against the petitioner, because it understood that the attorney was going to be disbarred based on other misconduct, making those other investigations unnecessary. It is impossible to assess whether petitioner has been rehabilitated from misconduct without knowing the full scope of all of the petitioner's prior misconduct.

Additionally, an investigation may reveal a long history of misconduct, requiring a showing of a longer period of rehabilitation. The evidence of petitioner's present character must be considered in light of all of his or her past moral shortcomings and measured against the gravity of his prior misconduct.⁵ This means that the amount of evidence of rehabilitation required to justify reinstatement will depend on the seriousness of the prior misconduct.⁶ Further, in considering whether a petitioner has shown good moral character, "[t]he State Bar Court may consider any act or conduct that is relevant to a petitioner's moral character regardless of when or where the act or conduct occurred."⁷ Therefore, a temporal limitation on the authorization and release is not appropriate.

As to BASF's third issue, there are a variety of third parties that may possess records or documents that weigh on a petitioner's moral character. "[G]ood moral character has traditionally been defined in terms of the absence of proven acts that have been historically considered manifestations of moral turpitude."⁸ It also includes "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process."⁹ "Thus, any act or conduct bearing on any of these qualities is relevant in a

⁵ *Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1092; *In re Menna, supra*, 11 Cal.4th at 987.

⁶ *In re Menna, supra*, 11 Cal.4th at 987.

⁷ *Id.* at 634.

⁸ *In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 634.

⁹ *Id.*

reinstatement proceeding.”¹⁰ Finally, with respect to BASF’s concern regarding receipt of records with no indicia of reliability, it should be noted that when presenting a reinstatement case in State Bar Court, OCTC must formally move documentary evidence into evidence, which includes demonstrating that the documentary evidence is relevant, laying the foundation for it, and authenticating it. The court determines whether to receive the documents into evidence and the weight to afford to evidence presented by OCTC or the reinstatement petitioner. These procedures guard against the admission of evidence that is not reliable. Accordingly, any limit on the third parties from whom records may be requested is not appropriate.

Finally, BASF objects to the provision that, if the petitioner withdraws the authorization and release, the reinstatement proceedings terminate. It argues that this precludes the possibility of a petitioner revoking the authorization and release if he or she believes OCTC has abused the process. However, the appropriate remedy for a perceived abuse of process is to seek relief from the State Bar Court, not a self-help remedy through revocation of the release. In addition to its responsibility to determine the weight to afford evidence, the State Bar Court also has the authority to exclude evidence it determines is not relevant or was obtained inappropriately. The authorization and release does not purport to limit the court’s authority in these matters. Moreover, this language is essentially identical to that included in the authorization and release for applicants for admission to the State Bar.

Based on the foregoing, OCTC recommends that the Regulation and Discipline Committee and the Board of Trustees adopt the amendment to rule 5.441(A) and the Reinstatement Authorization and Release as proposed. This will enable OCTC to perform the appropriate analysis to determine whether a reinstatement petitioner has met the burden of proving good moral character after having been disbarred or resigned from the practice of law.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

Rule 5.441(A), Rules of Procedure of the State Bar of California, Title 5, Division 7, Chapter 2.

BOARD BOOK IMPACT

None.

BOARD GOALS & OBJECTIVES

Adoption of this recommendation is consistent with mission of the State Bar, as set forth in Section 6001.1 of the Business and Professions Code, which places protection of the public as the highest priority for the Bar and the Board of Trustees “in exercising their licensing, regulatory, and disciplinary functions.” It carries out Goal and Objective number 1 of the 2012-2017 Five-Year Plan – “Ensure a timely, fair, and appropriately resourced discipline and regulatory system.”

¹⁰ *Id.* at 635.

BOARD COMMITTEE RECOMMENDATIONS

Should the Regulation and Discipline Committee agree with the proposed amendment to Rule 5.441(A), Rules of Procedure of the State Bar of California and the Reinstatement Authorization and Release attached hereto as Attachments A and B, the following resolution would be appropriate:

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, following publication for comment and notice and upon recommendation of the Regulation and Discipline Committee, that the Board of Trustees adopts the proposed amendment of Rule 5.441(A), Rules of Procedure of the State Bar of California, and the Reinstatement Authorization and Release, as set forth in attachments A and B, effective upon adoption.

ATTACHMENTS LIST

- A.** Proposed Amendment to Rule 5.441(A).
- B.** Proposed Reinstatement Authorization and Release.
- C.** Red-line Comparison of Reinstatement Authorization and Release and Moral Character Authorization and Release.
- D.** Public Comment Received, Jerome Fishkin.
- E.** Public Comment Received, Jerry Miller, Esq.
- F.** Public Comment Received, Chauné Williams.
- G.** Public Comment Received, Bar Association of San Francisco, Legal Ethics Committee.