

ATTACHMENT C (Proposed Amendments to Rules 2409 and 5.104 – Redline Version)

Rule 2409, Rules of Procedure of the State Bar (Office of Chief Trial Counsel Rules).

- (a) Prior to the filing of a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel shall notify the member in writing of the allegations forming the basis for the complaint or investigation and shall provide the member with a period of not less than two weeks within which to submit a written explanation. The Office of Chief Trial Counsel may transmit the letter of inquiry by: (1) posting the letter of inquiry to the member's "My State Bar Profile" on the State Bar's website and (2) sending an e-mail notification to the address the member maintains pursuant to California Rule of Court rule 9.9(a)(2). The e-mail notification must state that a letter of inquiry from the Office of Chief Trial Counsel has been posted on the member's "My State Bar Profile" and remind the member of his or her duty to cooperate and participate in the State Bar's disciplinary investigation. If the member has not provided the State Bar with an e-mail address pursuant to rule 9.9(a)(2), the Office Chief Trial Counsel shall transmit the letter of inquiry by personal delivery or by regular mail.

An extension of time for submission of the member's written explanation shall be granted only upon written request to the Office of the Chief Trial Counsel and for good cause shown as to the specific constraints on the member's practice which are claimed to necessitate the additional time. This rule does not prohibit the Office of the Chief Trial Counsel from contacting a member by telephone for purposes of resolution of minor matters or investigation.

- (b) In response to the Office of the Chief Trial Counsel's written notification pursuant to paragraph (a), the member may provide a written response claiming any applicable constitutional or statutory privilege; however, the availability of an applicable constitutional or statutory privilege shall not excuse the member from submitting a written response to the Office of the Chief Trial Counsel to the extent necessary to identify and exercise the claimed privilege.

Rule 5.104 Evidence (Rules of Procedure of the State Bar)

- (A) Oral Evidence. Oral evidence must be taken only on oath or affirmation.
- (B) Rights of Parties. Each party will have these rights:
- (1) to call and examine witnesses;
 - (2) to introduce exhibits;
 - (3) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
 - (4) to impeach any witness regardless of which party first called him or her to testify;
 - (5) to rebut the evidence against him or her; and,
 - (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

(C) Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(D) Hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(E) Privileges. The rules of privilege will be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(F) Judicial Discretion. The hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(G) Letters of Inquiry.

(1) Proof that the Office of Chief Trial Counsel sent an e-mail notification to a member in compliance with rule 2409(a), Rules of Procedure of the State Bar, coupled with proof that the e-mail was not returned as undeliverable, creates a presumption affecting the burden of producing evidence that the member viewed the e-mail on or about the date it was sent.

(2) Proof that a letter of inquiry was remotely accessed on a member's "My State Bar Profile" on a given date creates a presumption affecting the burden of producing evidence that the member received the letter of inquiry on that date.

(3) The Office of Chief Trial Counsel may establish the proof necessary under paragraphs (i) and (ii) by submitting copies of State Bar records, supported by declaration(s) of State Bar staff attesting to the authenticity and nature of the records.