



# The State Bar *of California*

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## **OPEN SESSION AGENDA ITEM JANUARY 2019 REGULATION AND DISCIPLINE COMMITTEE III. E**

**DATE:** January 25, 2019

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

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

**SUBJECT:** State Bar Court Proposed Changes to Rules of Procedure 5.4, 5.9, 5.10 and 5.40 (Confidentiality): Request to Circulate for Public Comment

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### **EXECUTIVE SUMMARY**

The State Bar currently has no Rules of Procedure that require parties to protect confidential information in documents filed with the State Bar Court. In order to balance the State Bar's desire for transparency with the proper protection of confidential information, the proposed rule additions and changes were drafted. The rule changes state that confidential information that is not necessary should be omitted, and that such information that is necessary shall be redacted or the document filed under seal.

This item requests that the Committee direct that these proposed amendments be circulated for public comment, for a period of 45 days.

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### **BACKGROUND**

As the administrative arm of the California Supreme Court in matters relating to the admission, discipline and regulation of attorneys, the State Bar's duty to assist the Supreme Court and to protect the public includes the duty, among other things, to inform the public about the work of the State Bar, about the right of all persons to make complaints against attorneys and about the nature and procedures of the discipline system. Further, Business & Professions Code §6086.1, states that all disciplinary proceeding hearings and records shall be public, unless otherwise designated.

The records and court hearings relating to proceedings before the State Bar Court against California attorneys generally become public upon the filing of the notice of disciplinary charges (“NDC”) or other initial pleading. Some proceedings or information obtained in the disciplinary process are deemed confidential by rule, and so those records are not available to non-parties. However specific types of private or confidential information (such as financial information, personally identifying information of non-parties and medical information (including mental health and substance abuse) also needs to be protected from public disclosure.

State and federal privacy laws restrict the dissemination of personally identifiable information, such as social security numbers, dates of birth, minor children’s names and protected private financial and medical information. The Board of Trustees and the Executive Director have received regular complaints from people that their confidential information (such as non-parties’ names and home location, minor children’s information, financial and medical information) is posted on the bar’s website. Some of these people are respondents, but others are complaining witnesses, attorneys, family members or victims. This information is generally contained in Notice of Disciplinary Charges, stipulations or mitigation evidence offered by respondents. These complaints are based upon the relatively limited number of documents that the court currently posts on the attorney’s profile page.

Shortly after the State Bar’s new Case Management System (CMS) goes live, the State Bar Court portal will be made available to the public. All documents filed in a case (except sealed documents), will be available for viewing via the internet. CMS does have the ability to allow the court to restrict access to confidential documents or proceedings so the public cannot see them. But unless the proceeding or document is not already designated as confidential in the rules, the court cannot redact information or conceal it even if private information is included. The proposed new rules will alert parties to the need to protect certain information, and provide a method for protecting it if the information is necessary to the matter before the court. It also provides transparency as the rules clearly define what matters and documents will not be available to non-parties. The changes are summarized below.

#### **Rule 5.4 (Definitions)**

Rule 5.4 was amended to add two new subsections. New Rule 5.4 (57) defines “Confidential Information” as both sensitive personally identifiable information and personal financial information. It specifies that such information should be redacted in any document meant to become part of the court record, unless accompanied by a motion to seal or is filed in a confidential proceeding.

New Rule 5.4 (58) defines “Confidential Proceeding” as any proceeding so defined by rule or statute as being confidential, and states clearly that such proceedings will not appear on the State Bar Court’s publicly accessible portal or docket.

**Rule 5.40 (General Rules of Pleadings)**

Rule 5.40 was amended to add subsections (B), (C) (D) and (E). (B) states that documents should not include Confidential Information unless that information is relevant and necessary. (C) states that if Confidential Information is included it must be redacted or the document must be accompanied with a motion to seal. In order to ensure that parties are given full information (D) requires that unredacted copies of the document be provided to all other parties and the court. New (E) places the responsibility for excluding or redacting Confidential Information on the party filing the document. This has become standard practice in most courts as the court should not be the party identifying and protecting information.

**Rule 5.9 (Public Nature of State Bar Court Proceedings)**

Rule 5.9 is amended to add that matters determined by the court to be confidential will not be publically available to non-parties.

**Rule 5.10 (Confidential Proceedings)**

Rule 5.10 is amended to add requests under the Americans with Disabilities Act as confidential matters as required by federal law.

**DISCUSSION**

The State Bar is trying to strike the correct balance between the need for transparency, protection of the public, and the right to privacy for parties, witnesses and respondents. In order to encourage parties to be mindful about including unnecessary personal information, and to allow the Court to mask confidential proceedings and documents, the proposed rule changes set forth the duties of parties and the proper procedure for handling such information.

**FISCAL/PERSONNEL IMPACT**

None

**RULE AMENDMENTS**

Title 5, Division 6, Chapter 2, Rules 5.4, 5.40, 5.9 and 5.10, 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.

## **RECOMMENDATIONS**

**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, Rules 5.4, 5.9, 5.10 and 5.40 (Confidentiality) 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 Rules 5.4, 5.9, 5.10 and 5.40 (Confidentiality) of the Rules of Procedure of the State Bar (Clean version).
- B.** Proposed language of Rules 5.4, 5.9, 5.10 and 5.40 (Confidentiality) of the Rules of Procedure of the State Bar (Redline version).

## ATTACHMENT A

### Proposed Revised Rules of Procedure 5.4, 5.40, 5.9, 5.10

#### Clean version

##### Rule 5.4 Definitions

(57) “Confidential Information” means (a) sensitive personally identifiable information of any individual, including but not limited to social security numbers, dates of birth, home addresses, driver’s license numbers, names of minor children, and medical information (including information regarding mental health and substance abuse); and (b) personally identifiable financial information such as bank or other financial account numbers, including routing numbers. Such information should be redacted in any document, including but not limited to pleadings and exhibits, meant to become part of the court record, unless accompanied by a motion to seal or filed in a confidential proceeding. Social security numbers and account numbers can be redacted to show the last four digits.

(58) “Confidential Proceeding” means any proceeding so defined by rule or statute as being confidential. Confidential proceedings will not appear on the State Bar Court’s publicly accessible portal or docket.

##### Rule 5.40 General Rules of Pleadings

(A) Existing - Each assertion in a pleading must be simple, concise, and direct.

(B) Documents filed with the Court should not include Confidential Information unless that information is relevant and necessary.

(C) If Confidential Information is included in any document filed with the Court, then the Confidential Information must be redacted or the document must be accompanied with a motion to seal pursuant to Rule 5.12.

(D) If a party files a document with Confidential Information redacted, it must provide unredacted copies of the document to all other parties and the court in sealed envelopes marked “UNREDACTED DOCUMENT(S) CONTAINING CONFIDENTIAL INFORMATION”. Each unredacted document shall be clearly marked “UNREDACTED DOCUMENT CONTAINING CONFIDENTIAL INFORMATION.”

(E) The responsibility for excluding or redacting confidential information from all documents filed with the court rests solely with the party filing the document. The court will not review each pleading or perform any redactions for compliance with these rules.

### Rule 5.9 Public Nature of State Bar Court Proceedings

Except as otherwise provided by law or by these rules, all State Bar Court proceedings must be public except settlement conferences and portions of the record sealed by court order under rule 5.12 or determined by the court to be confidential.

### Rule 5.10 Confidential Proceedings

Unless the applicant or member waives confidentiality, proceedings under Business and Professions Code § 6007(b)(3), requests under the Americans with Disabilities Act and moral character proceedings are confidential.

## ATTACHMENT B

### Proposed Revised Rules of Procedure 5.4, 5.40, 5.9, 5.10

#### Redline version

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