

# AGENDA ITEM

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**Proposed Amendment to Rules of Procedure of the State Bar, rule 5.41,  
Authorizing “Notice Pleading” in Notice of Disciplinary Charges**

**DATE:** February 20, 2013

**TO:** Members, Regulation, Admissions and Discipline Oversight

**FROM:** Jayne Kim, Chief Trial Counsel

**SUBJECT:** Proposed Amendment to Rules of Procedure of the State Bar,  
rule 5.41, Authorizing “Notice Pleading” in Notice of  
Disciplinary Charges

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## EXECUTIVE SUMMARY

The Office of Chief Trial Counsel (OCTC) seeks the Committee on Regulation, Admissions and Discipline Oversight’s approval to circulate, for a 45 day period of public comment, the proposed amendment to Rules of Procedure of the State Bar, rule 5.41, in the form attached hereto as Attachment A, which clarifies that notice pleading shall suffice in the Notice of Disciplinary Charges (“NDC”).

Rule 5.41 governs the contents and manner in which misconduct must be alleged in the NDC, which is the formal charging document in State Bar disciplinary proceedings. Subsections (B)(1-3) of rule 5.41 reflect the minimum requirements expected in an NDC and are not inconsistent with notice pleading. OCTC does not seek to revise the minimum requirements or to make substantial revision to the rule. The proposed amendment to rule 5.41 merely clarifies that the NDC need not contain technical averments or any allegations of matters not essential to be proved and that the statement of facts shall be written in concise and ordinary language.

More specifically, the proposed amendment is limited to subsection (B)(2) and is as follows:

[Proposed] Rule 5.41:

(A) Initial Pleading. A notice of disciplinary charges is the initial pleading in a disciplinary proceeding, unless specified otherwise in the rules.

(B) Contents. The notice of disciplinary charges must:

(1) cite the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action;

(2) contain ~~a statement of facts~~, in concise and ordinary language, comprising the violations in sufficient detail to permit the preparation of a defense; no technical averments or any allegations of matters not essential to be proved are required;

(3) relate the stated facts to the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action;

(4) contain a notice that the member may be ordered to pay costs; and

(5) contain the following language in capital letters at or near the beginning of the notice:

“IF YOU FAIL TO FILE A WRITTEN ANSWER OT THIS NOTICE  
WITHIN 20 DAYS AFTER SERVICE, OR IF YOU FAIL TO APPEAR  
AT THE STATE BAR COURT TRIAL:...”

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## **BACKGROUND**

Beginning in 2011, the Board Committee on Regulation, Admissions and Discipline Oversight tasked OCTC with identifying areas in the State Bar Rules of Procedure that create delay or slow down in its processing of complaints to closure, settlement or the filing of disciplinary charges.

OCTC believes that a move to true notice pleading will result in disciplinary cases being processed more expeditiously, consistent with the instructions by the Board Committee on Regulation, Admissions and Discipline Oversight and with the State Bar’s mission to protect the public.

Over the years, OCTC’s NDCs have become unduly long, fact-intensive documents that go well beyond that which is required by the fundamental principles of due process and current rule 5.41. The NDCs include virtually every fact that will be presented at trial. The practice of using these long narratives which plead non-essential facts has not benefited OCTC, respondents, the State Bar Court, or the mission of the disciplinary process. Instead, OCTC long history of using an exaggerated form of “fact pleading” for its NDCs has resulted in a delay in the processing of disciplinary matters, which adversely affects all concerned.

Moreover, OCTC believes that its practice of extensive fact pleading has become so embedded and expected that it has essentially superseded the rule to become a *de facto* requirement. As a result, if OCTC were to unilaterally move to the practice of

short-form notice pleading, it may be viewed, especially by the defense bar, as a radical attempt by OCTC to circumvent the Rules of Procedure. Therefore, OCTC believes that it is prudent and necessary to amend rule 5.41 for the sake of transparency and to make explicit that true notice-pleading is authorized and approved of by the Board of Trustees.

## **ISSUE**

Whether the proposed amendment to rule 5.41 should be circulated for a 45 day period of public comment.

## **CONCLUSION**

The Committee on Regulation, Admissions and Discipline Oversight should authorize staff to circulate the proposed amendment to rule 5.41 for a 45 day period of public comment.

## **DISCUSSION**

To begin the discussion, it is helpful to clarify what is meant by “fact pleading” and “notice pleading,” and where and how both are used.

“Fact pleading” is the form of pleading that we associate with the civil complaint. Fact pleading has its roots in English Common Law and the “primary right theory” which requires that every cause of action set forth facts sufficient to establish a primary right possessed by the plaintiff, a corresponding duty owed by the defendant to plaintiff, and a wrong committed by the defendant which constituted a breach of the duty owed, and damages caused thereby. (4 Witkin, *California Procedure* (5<sup>th</sup> ed. 2012) Pleading, section 34; see also *Cal Jur.* 3d, Pleading, section 77.)

To a large extent, California follows the traditional practice of requiring fact pleading in civil litigation. *California Code of Civil Procedure*, section 425.10(a)(1) states that a complaint must contain “a statement of facts constituting the cause of action, in ordinary and concise language.” In drafting the complaint, the plaintiff must set forth sufficient facts that justify the particular remedy or relief demanded. (See 3 *Cal. Proc.* (5<sup>th</sup>), *Actions*, section 118 et seq.) However, even the rules for civil fact pleading in California arguably provide for less certainty than that which we currently present in OCTC’s NDCs. (See, *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876, the particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information. Less particularity is required where defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff).

“Notice pleading” is the form of pleading that is typically used in the criminal arena and is embodied by the accusatory pleadings used in California criminal procedure. Traditionally, a “notice pleading” consists of a brief general statement of the matter involved, sufficient merely to give the opposing party reasonable notice of the claim, and

omitting any detailed statement of the ultimate facts. (4 Witkin, *California Procedure* (5<sup>th</sup> ed. 2012) Pleading, section 379.)

Presumably, this short form of pleading, as opposed to fact pleading, is sufficient in criminal cases, as opposed to a civil dispute between private parties, because the duty of all citizens to refrain from the commission of criminal acts is universal and need not be factually established in a criminal accusation to satisfy due process notice concerns. Similarly, a member's duties and oaths vis a vis the Rules of Professional Conduct and the State Bar Act are also presumed, such that facts which provide the member notice of the essential elements of the State Bar's case should be sufficient.

Thus, although State Bar disciplinary matters are not subject to the rules governing criminal proceedings, the statutory language contained in the Penal Code is nonetheless useful by analogy. Pleading in criminal actions in California are governed by *Penal Code* section 948, et seq. The pertinent sections for purposes of this memorandum are sections 950-952. Section 952 codifies notice pleading in criminal actions in California. Section 951 provides an example of the brevity of pleading that is sufficient to satisfy the requirements of section 952.

Section 950 provides:

The accusatory pleading must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties;
2. A statement of the public offense or offenses charged therein.

Section 951 provides:

An indictment or information may be in substantially the following form:

The people of the State of California against A. B.

In the superior court of the State of California, in and for the county of \_\_\_\_\_.

The grand jury (or the district attorney) of the county of \_\_\_\_\_

hereby accuses A. B. of a felony (or misdemeanor), to wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the \_\_\_\_

day of \_\_, 20\_\_, in the county of \_\_\_\_\_, State of California, he (insert statement of act or omission, as for example "murdered C.D.").

Section 952 provides:

In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

In charging theft it shall be sufficient to allege the defendant unlawfully took the labor or property of another.

It is OCTC's recommendation that the Rules of Procedures concerning the contents of the NDC be amended to clarify that notice pleading, consistent with that used in criminal procedure, shall suffice.

### **A History of OCTC's Current Fact-Pleading Practice**

A review of select Supreme Court and Review Department cases helps to explain how OCTC's NDCs become so fact-intensive.

The seminal case on the topic of adequacy of notice is *Woodard v. State Bar* (1940) 16 Cal.2d 755. In that case, the Supreme Court emphasized that "[t]he right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and to which full notice and opportunity to defend have been accorded." (*Id.* at 757.) *Woodard* disapproved of a disciplinary culpability finding of a violation for which the Respondent was not charged in the initial notice to show cause. The court in *Woodard* affirmed the need to, at the very least, file a formal amendment to the notice citing the particular regulation alleged to have been violated and provide the respondent with a reasonable opportunity to formally answer those amended charges and procure evidence in his or her defense. Since then, the Supreme Court held fast to this requirement in numerous published cases. (e.g., *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420.)

In 1987, a pair of Supreme Court cases criticized the State Bar for deficiencies in its Notices to Show Cause (renamed Notice of Disciplinary Charges, effective January 1, 1995). In *Maltaman v. State Bar* (1987) 43 Cal.3d 924, the Supreme Court disapproved of "material gaps in the analytical path from charges to proof to findings and conclusions to recommendations" (*Id.* at 931) as well as "mismatched" charges. (*Id.* at 932.) In *Guzetta v. State Bar* (1987) 43 Cal.3d 962, the court criticized the notice's failure to relate the conduct charged to the statute or rule alleged to have been violated. In *Baker v. State Bar* (1989) 49 Cal.3d 804, the court once again highlighted these two basic requirements. (*Id.* at 816.) Subsequent to *Maltaman*, *Guzetta* and *Baker*, the State Bar codified these requirements into the Rules of Procedure. These attempts are reflected in the current rule 5.41(B)(3).

The Supreme Court has rarely spoken to what constitutes too few facts in an NDC. However, in the few instances in which it has, the Court cited to *Sullins v. State Bar* (1975) 15 Cal. 3d 609, suggesting that, at its most basic level, due process concerns may be met and no miscarriage of justice will occur where the notice is such that the attorney has "sufficient notice to eliminate unfair surprise in preparation of the defense." (*Id.* at 618.) For example, in *Hartford v. State Bar* (1990) 50 Cal. 3d 1139, the petitioner was charged with violating Bus. & Prof. Code sections 6068(a) [oath and duties as an attorney], 6103 [failure to comply with court order], 6106 [moral turpitude], former rules 6-101(A)(2) and 6-101(B)(1) [incompetence], and former rule 8-101(A) [failing to

maintain client funds in trust]. The charging document was found to provide sufficient notice by stating that the alleged violations were based upon the sale of stock without authority or notice (*Id.* at 1153-1154.)

The State Bar Court Review Department has also sought to clarify what constitutes an insufficient level of factual specificity in a Notice of Disciplinary Charges. In *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, the Review Department found that a broad reference to a series of loans over an unspecified period of time regarding 12 unnamed family trusts and one or more of three limited partnerships, without reference to lender, borrower, amount or date, was insufficiently precise to sustain a disciplinary violation of Bus. & Prof. Code, sections 6068(a) [oath and duties], 6103 [failure to comply with court order] or 6106 [moral turpitude], among others. (*Id.* at 169-171). The Review Department also refused to find a violation of the obligation to account based on charges of making loans that were “frequently undocumented” and where “many” of the loans were undisclosed. (*Id.*) Finally, the Review Department refused to find culpability for misappropriation where the charging language failed to allege that the Respondent possessed any particularly identified client funds, that the client was entitled to receive the funds or that the client demanded them. (*Id.*) Perhaps most important, the Review Department held that the NDC failed to satisfy the notice required of a civil *and criminal* pleading. (*Id.* at 171, emphasis added.)

Since and in response to these opinions, OCTC has overcompensated in its factual allegations in its NDCs. Although *Maltaman*, *Guzetta*, and *Glasser* involved criticisms of individual charging documents, not an indictment of OCTC’s broader charging practices, OCTC responded to these cases by informally adopting a custom and practice of pleading virtually every fact that it intended to present at trial, including those not material to proving the elements of the charged offense. While this custom and practice eliminated findings like those in *Maltaman*, *Guzetta*, and *Glasser*, it also resulted in a mutant form of exaggerated fact pleading that goes beyond that which is required under rule 5.41, the rules of civil procedure, and criminal procedure. Moreover, the defense bar has been able to use OCTC’s exaggerated form of fact pleading as a sword in challenging and excluding relevant factual evidence at trial if not specifically articulated in the NDC. OCTC recognizes that evidence supporting uncharged misconduct is not properly admissible, however, additional relevant facts supporting noticed charges should be part of the record.

The proposed rule will clarify that relevant but non-essential facts should not be excluded at trial, simply because they were not contained in the NDC.

### **The Proposed Language is Legally Permissible and Affords Due Process**

The proposed language and the manner of pleading is legally permissible under existing law, as described above. The State Bar disciplinary process is replete with procedural safeguards to ensure adequate notice and certainty to the member before formal charges are initiated.

For instance, Rules of Procedure, rule 2409 states in pertinent part:

Prior to the filing of a Notice of Disciplinary Charges, the Office of 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...

In practice, OCTC complies with rule 2409 through what is commonly known as the “TR” letter to the respondent and through its Notice of Intent to File Disciplinary Charges letter. The “TR” letter is typically sent by the assigned investigator near the outset of the investigation and satisfies the requirements of rule 2409. The Notice of Intent to File Disciplinary Charges letter is sent to the respondent once the investigation has been completed and forwarded for prosecution. This letter is sent by the assigned attorney and informs the respondent of OCTC’s intent to file formal disciplinary charges and the respondent’s right to Early Neutral Evaluation Conference (discussed below) prior to the filing of the NDC. Importantly, the Notice of Intent letter also notifies the respondent of the specific charges that will be filed if the case is not resolved prior to filing.

In addition, Rules of Procedure, rule 5.30 concerns Early Neutral Evaluation Conferences and provides the respondent with still more *pre-filing* notice and certainty of the charges. Rule 5.30 provides in pertinent part:

(A) Early Neutral Evaluation Conference. Prior to the filing of disciplinary charges, the Office of Chief Trial Counsel will notify the member in writing of the right to request an Early Neutral Evaluation Conference. Either party may request an Early Neutral Evaluation Conference. A party will have 10 days from the date of service of notice to request a conference.

(B) Judicial Evaluation. At the conference, the judge must give the parties an oral evaluation of the facts and the charges and the potential for imposing discipline....

(C) Evidence. The Office of Chief Trial Counsel must submit a draft copy of the notice of disciplinary charges, or other written summary to the judge prior to the conference. The documentation must include the rules and statutes alleged to have been violated by the member, a summary of the facts supporting each violation, and the Office of Trial Counsel’s settlement position. Each party may submit documents and information to support its position.

(D) Confidentiality. The conference is confidential. A party may designate any document it submits for in camera inspection only.

(E) Trial Judge. Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts.

The *pre*-filing notice requirements in State Bar proceedings are significant because *post*-filing discovery procedures in criminal cases have been held to be an insufficient substitute for the requirement of notice. (*Sallas v. Municipal Court* (1978) 86 Cal.App. 3d 737, 742); see also, *In the Matter of Glasser, supra*, 1 Cal. State Bar Ct. Rptr. at 171.)

**FISCAL / PERSONNEL IMPACT:**

None.

**RULE AMENDMENTS:**

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**BOARD BOOK IMPACT:**

None.

**RECOMMENDATION**

OCTC recommends that the Committee on Regulation, Admissions and Discipline Oversight authorize staff to circulate, for a 45 day period of public comment, the proposed amendment to rule 5.41, in the form attached hereto as Attachment A.

**PROPOSED BOARD COMMITTEE RESOLUTION:**

Should the Committee on Regulation, Admissions and Discipline Oversight agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that the Committee on Regulation, Admissions and Discipline Oversight authorize staff to make available, for public comment period of 45 days, the proposed amendment to rule 5.41 in the form attached; and it is

**FURTHER RESOLVED**, that this authorization for release from public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.