



The State Bar of California

OPEN SESSION AGENDA ITEM 3.6 FEBRUARY 2025 BOARD OF TRUSTEES

DATE: February 21, 2025

TO: Members, Board of Trustees

FROM: George Cardona, Chief Trial Counsel

SUBJECT: Proposed Amendments to Rules of Procedure of the State Bar of California, Rules 5.28 (Computing Time) and 5.127 (Public and Private Reprovals), and Standards for Attorney Sanctions for Professional Misconduct, Standard 1.2 (Definitions): Return from Public Comment and Request for Adoption

EXECUTIVE SUMMARY

After return from public comment, this staff report seeks adoption of proposed amendments to the State Bar Rules of Procedure and the Standards for Attorney Sanctions for Professional Misconduct. First, this item seeks adoption of an amendment to State Bar Rule of Procedure 5.28 to resolve confusion regarding the computation of time following differing interpretations of the current rule by the Review Department of the State Bar Court and the California Supreme Court. The amendment will make clear the computation of time when there is an extension of the prescribed period for action based on the manner of service. Second, this item seeks adoption of amendments to State Bar Rule of Procedure 5.127 and Standard for Attorney Sanctions for Professional Misconduct 1.2 to accord with new Business and Profession Code section 6086.20, which, effective January 1, 2025, precludes the Chief Trial Counsel from issuing a private reproof to any attorney accused of misconduct. The amendments will make clear that as of January 1, 2025, all reprovals, whether designated private or public, will be public discipline that will be disclosed in response to public inquiries and reported as a record of public discipline on the State Bar's webpage.

RECOMMENDED ACTION

Adopt the proposed amendments to State Bar Rule of Procedure 5.28 as set forth in Attachment B; adopt the proposed amendments to State Bar Rule of Procedure 5.127 and Standard for Attorney Sanctions for Professional Misconduct 1.2 as set forth in Attachment D.

DISCUSSION

A. Rule 5.28: Computation of Time

The proposed amendments to rule 5.28, which does not set prescribed periods for acting or responding but rather specifies the method of computing prescribed periods for acting or responding set by other rules, is intended to clarify the computation of time in light of prior conflicting interpretations of the rule by the Supreme Court and the Review Department. A redline of the proposed amendments to the current rule is Attachment A; a clean version of the amended rule is Attachment B.

Summary of Proposed Amendment to Rule 5.28: The amended rule would revise the extended period to act or respond to a filing served electronically, by overnight mail, or by fax from two court days to two calendar days. The amended rule would also clarify that if the end of the designated period to act or respond (even if extended) falls on a non-court day, the period to act or respond is extended to the next court day.

Public Comment: Three public comments were received that addressed this amendment, all from individual attorneys. (A compilation of the complete public comments is Attachment E.) One agreed with the proposed amendment, stating, “Extending the response time by 2 calendar days is completely reasonable.”

One agreed with the proposed amendment only if modified, stating: “I believe that the continued use of both court days and calendar days by the proposed amendment only adds to confusion and I would recommend either one or the other should be used in the calculation of time not both.” In fact, the proposed amendment shifts to using only calendar days to determine the period to act, but then makes clear that if the period to act ends on a non-court day, the period for filing is extended to the next court day. This is common in court rules to ensure that due dates do not fall on non-court days and should not cause confusion.

The third commenter disagreed with the proposed amendment, stating that the proposal is “terrible” and explaining: “One proposal would shorten the computation of time according to calendar days, rather than court days. That creates gross unfairness for the person subject to the time constraint. Suppose the person receives the notice on a Friday afternoon. In that case, the deadline to respond is Monday, assuming Monday is not a holiday? Terrible idea. Gross unfairness.” This appears to misunderstand the rule that is being amended, which does not establish the time periods for responses, but addresses only the computation and extension of time for prescribed periods to act set by other rules. To take the example used in the comment, under the existing rule, if a document were served by overnight mail on Thursday, January 23, 2025, with receipt on Friday, January 24, 2025, the due date for a response would be determined by the period prescribed by another applicable rule. If the other rule set a period for response of 30 days, then, under the amended rule, the actual due date would be calculated by adding 2 days to the 30 days, and then calculating this 32 days from the date of service (January 23, 2025), which would put the response due on Monday, February 24, 2025, a court day. This does not appear unfair.

In light of the above, no change to the proposed amendments is recommended based on the public comment, and it is requested that the proposed amendments be adopted with an effective date of April 1, 2025, to allow time for publication.

B. Private Reprovals

The proposed amendments to rule 5.127 and standard 1.2 are intended to comport with the addition of new Business and Professions Code Section 6086.20(a), which states that, effective January 1, 2025, “the Chief Trial Counsel shall not issue private reprovals to any attorney accused of misconduct.” As explained in the staff report that requested circulation for public comment, this appears to reflect a legislative intention to eliminate non-public private reprovals, that is, private reprovals issued at the request of the Office of Chief Trial Counsel prior to the public filing of a Notice of Disciplinary Charges. A redline of the proposed amendments to the current rule and standard is Attachment C; a clean version of the amended rule and standard is Attachment D.

Summary of Proposed Amendment to Rule 5.127: To address revisions to OCTC’s authority under the recently added Business and Professions Code Section 6086.20(a), the amendment repeals sections of the current rule pertaining to private reprovals issued before a Notice of Disciplinary Charges. The amendment also revises the current “Public Reproval” subsection to include private reprovals, thus making all private reprovals disclosable in response to public inquiries and reported as part of an attorney’s public discipline record.

Summary of Proposed Amendment to Standard 1.2: The amended rule would repeal the definition of “Private Reproval” and revise the current definition of “Public Reproval” to include both public and private reprovals.

Public Comment: Four public comments were received that addressed these proposed amendments, three from individual attorneys, and one from a non-attorney. (A compilation of the complete public comments is Attachment E.)

The non-attorney agreed with the proposed amendments, stating, “I wholeheartedly endorse the proposed changes to Section 5.127 and Standard 1.2.” This commenter continued to explain their support: “Now, speaking generally, eliminating nonpublic private reprovals and thus allowing some additional light to be shed on past behavior of attorneys in all fields of practice is a helpful development for the people of California who might be impacted by such disclosures. Thus, I encourage the adoption of the proposed items without amendment.”

One attorney agreed with the proposed amendment only if modified, stating: “I am of the opinion that an attorney has a ‘private’ reapproval is self-contradictory and also would be confusing to the public. Instead, I would recommend the designation ‘private’ be eliminated from the proposed amendment and that if the intent is to impose a milder sanction than would have been meted out for a ‘public’ reapproval, the notice ought to reflect that fact.” There is logic to the commenter’s position, which would, for example, suggest a move to a “public reapproval 1” and “public reapproval 2” indicating different levels of seriousness. Given remaining sections of the Business and Professions Code that continue to recognize and authorize “private reprovals”

the elimination of private reprovals would appear to require a legislative change. In the absence of such a change, the proposed amendments appear to comport with legislative intent.

The two other attorneys disagreed with the proposed amendments. One described the proposed amendments as a “terrible idea” and explained: “The second proposal would make a private reproof public even where the reproof preceded any formal disciplinary charges. Again, gross unfairness. If there are no formal charges yet, there is no good way to evaluate the significance of the private reproof. Without formal charges, we cannot know what the person was accused of doing wrong and we cannot evaluate intelligently the significance of the private reproof.” This appears to misunderstand the amended rule, which would require the filing of a public Notice of Disciplinary Charges and/or a public stipulation prior to the entry of a private reproof; thus, there would always be a public document that could be used to evaluate the significance of the private reproof. The other commenting attorney stated: “As to making private reprovals public that defeats the purpose and doesn’t make the public safer. If an attorney violates a rule that does or could impact the public then the reproof or discipline should be public. Where a more minor issue arises, that does not significantly impact the public, a private reproof is appropriate.” The elimination of non-public private reprovals appears to comport with legislative intent. The Office of Chief Trial Counsel retains other mechanisms for dealing with minor issues that do not warrant public discipline, including the diversion program it has implemented in accordance with direction from the legislature.

In light of the above, no change to the proposed amendments is recommended based on the public comment, and it is requested that the proposed amendments be adopted with an effective date of April 1, 2025, to allow time for publication.

PREVIOUS ACTION

At its November 2024 meeting (Agenda Item 5.6), the Board approved the circulation for public comment of the proposed amendments.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

Title 5, Division 2, Chapter 1, Rule 5.28
Title 5, Division 2, Chapter 6, Rule 5.127
Title IV, Part A, Standard 1.2

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

RESOLUTIONS

Should the Board of Trustees concur, it is:

RESOLVED, that the Board of Trustees adopts the proposed amendments to Rule 5.28 of the Rules of Procedure of the State Bar of California as set forth in Attachment B, the amendment to this rule to be effective as of April 1, 2025; and it is

FURTHER RESOLVED, that the Board of Trustees adopts the proposed amendments to Rule 5.127 of the Rules of Procedure of the State Bar of California and Standard 1.2 of the Standards for Attorney Sanctions for Professional Misconduct of the Rules of Procedure of the State Bar of California, as set forth in Attachment D, the amendments to be effective as of April 1, 2025; and it is

FURTHER RESOLVED, that except as expressly modified by this resolution, all other sections, subsections, paragraphs, subparagraphs, terms, clauses, and phrases set forth in Standard 1.2 of the Standards for Attorney Sanctions for Professional Misconduct of the Rules of Procedure of the State Bar of California will remain unchanged and will be in full force and effect.

ATTACHMENTS LIST

- A.** Proposed Amendments to Rule of Procedure 5.28 (Redline Version)
- B.** Proposed Amendments to Rule of Procedure 5.28 (Clean Version)
- C.** Proposed Amendments to Rule of Procedure 5.127 and Standard 1.2 (Redline Version)
- D.** Proposed Amendments to Rule of Procedure 5.127 and Standard 1.2 (Clean Version)
- E.** Compilation of Public Comments