



The State Bar of California

OPEN SESSION AGENDA ITEM 6.3 MAY 2025 BOARD OF TRUSTEES

DATE: May 22, 2025

TO: Members, Board of Trustees Sitting as the Regulation and Discipline Committee

FROM: Kathy Sher, Clerk of the State Bar Court

SUBJECT: Proposed Amendments to the Rules of Procedure of the State Bar Regarding the Alternative Discipline Program (Rules 5.381, 5.382, 5.384, 5.386, and 5.389.1): Request to Circulate for Public Comment

EXECUTIVE SUMMARY

At its November 2024 meeting, the Board of Trustees heard recommendations from the Lawyer Assistance Program Oversight Committee regarding changes to the rules for the Alternative Discipline Program (ADP). The Board referred the drafting of proposed rules revisions to the State Bar Court's Bench-Bar Committee (BBC), directing specifically that moral turpitude be eliminated as grounds for ineligibility for the ADP and that a minimum disciplinary sanction be set for ADP participants whose offenses involved moral turpitude. The Board further directed that the BBC also advance any additional amendments that the committee believed would improve the ADP process. The Board of Trustees, sitting as the Regulation and Discipline Committee is asked that the proposed amendments be presented to the Board at its May 2025 meeting with a request that they be circulated for public comment. This item seeks authorization to circulate for public comment the proposed ADP rules revisions developed by the BBC consistent with the referral from the Board.

RECOMMENDED ACTION

The Board of Trustees, sitting as the Regulation and Discipline Committee is asked to authorize the release for public comment for a period of 45 days of proposed changes to rules 5.381, 5.382, 5.384, 5.386, and adoption of new rule 5.389.1 of the State Bar Rules of Procedure relating to the ADP.

DISCUSSION

The proposed changes to the State Bar Rules of Procedure for the ADP are the product of a long process of discussion regarding how best to ensure that the rules for the ADP do not create unnecessary barriers to participation in the program and support the success of program participants. The rule revisions eliminate the bar on participation for attorneys whose misconduct involved moral turpitude, set minimum disciplinary sanctions for ADP participants in those cases, and make other changes to clarify the rules and give the court greater flexibility to control the timing of the evaluation process. The proposal was developed by the State Bar Court's Bench-Bar Committee (BBC), as requested by the Board at its November 2024, meeting, and reflects input from the State Bar Court (SBC), the Office of Chief Trial Counsel (OCTC), and the Association of Discipline Defense Counsel (ADDC).

BACKGROUND

The ADP is an SBC program for attorneys whose misconduct is linked to substance abuse or mental health problems. When an attorney is accepted into the program, the court issues two alternative discipline recommendations: one to be recommended to the Supreme Court as discipline if the attorney successfully completes all program requirements, including participation in treatment through the Lawyer Assistance Program (the low); and another to be recommended to the Supreme Court if the attorney fails to complete the program (the high). The ADP has long been a valued tool to fulfill the State Bar's mission of protecting the public while supporting attorneys in their recovery so that they can continue their legal careers.

The Ad Hoc Commission on the Discipline System, as part of its consideration of issues regarding the experience of respondents charged with moral turpitude, explored whether the rules for the ADP unfairly barred respondents whose misconduct involved moral turpitude from participating without giving them an opportunity to litigate the moral turpitude issue. [The Ad Hoc Commission recommended](#) that the Board "direct staff to work with stakeholders to study and clarify all applicable rules involving referrals to the Alternative Discipline Program (ADP), specifically concerning whether or not moral turpitude has resulted in significant harm to a client(s) or the administration of justice." Pursuant to that recommendation, the Board at its September 21, 2023, meeting [tasked the Lawyer Assistance Program Oversight Committee](#) (LAP Oversight Committee) with undertaking a comprehensive review of the rules for the ADP.

The LAP Oversight Committee [brought the results of its work to the Board](#) at the Board's November 14, 2024, meeting. The LAP Oversight Committee presented a history of the ADP to the Board; provided statistics on the numbers of attorneys participating, completion rates, and recidivism rates; and offered information on the demographics of ADP participants. The report included staff recommendations for the Board to (1) direct staff to collect and analyze specified data on ADP participation; (2) adopt the proposal for changes to rule 5.382(C)(3) of the Rules of Procedure to eliminate moral turpitude as grounds for ineligibility for the ADP while retaining the remainder of the ineligibility criteria in that rule; (3) adopt the OCTC proposal that in ADP cases where the misconduct involved moral turpitude, there be minimum disciplinary sanctions set; (4) retain the current process for stipulations to facts and conclusions of law; and (5) refer

the drafting of proposed rules, consistent with these recommendations, and any additional amendments that stakeholders believed would improve the ADP process, to the BBC. The proposed rules amendments presented to you today are the result of the BBC's work pursuant to that referral.

PROPOSED CHANGES DIRECTED BY THE BOARD TO IMPLEMENT THE AD HOC COMMISSION RECOMMENDATIONS

As discussed above, the Ad Hoc Commission recommended that staff be directed to study and clarify all of the rules governing the ADP, and specifically to look at the rule prohibiting eligibility for respondents charged with misconduct involving moral turpitude that has resulted in significant harm to one or more clients or the administration of justice, rule 5.382(C)(3). Subsequently, the Board directed the LAP Oversight Committee to undertake this review of the ADP rules.

As reflected in the [report to the Board](#) regarding the LAP Oversight Committee's work, the LAP Oversight Committee solicited input from the SBC, OCTC, and ADDC regarding the effect of the bar on eligibility for attorneys whose misconduct involved moral turpitude. The LAP Oversight Committee determined that the bar on eligibility creates a significant barrier to participation and lengthens the evaluation process. The LAP Oversight Committee heard from stakeholders that, because there is variability as to how the term moral turpitude is applied in different cases, disputes over allegations of moral turpitude often make it difficult for the parties to reach the required stipulation of facts and conclusions of law. By contrast, dishonesty or corruption, also grounds for ineligibility under rule 5.382 (C)(3), are more clearly defined and disputes over these types of allegations are more easily resolved. The staff recommendation to the Board was therefore to eliminate moral turpitude as grounds for ineligibility, while keeping the rule's language regarding dishonesty or corruption.

OCTC did not oppose the proposal to eliminate moral turpitude as grounds for ineligibility, but suggested that because of the seriousness of cases involving moral turpitude, a minimum sanction should be set for any attorney charged with misconduct involving moral turpitude. Staff recommended that this change also be made.

After reviewing the LAP Oversight Committee's work and report regarding the ADP rules, at its November 14, 2024, meeting, the Board referred to the BBC the work of drafting rules revisions in accordance with these recommendations. As proposed, the amendments to the rules do the following:

- Removes the words "moral turpitude" from rule 5.382(C)(3) (proposed to be renumbered as 5.382(C)(4)); and
- Adds provisions to rule 5.384(B) to set a minimum sanction that must be imposed if the misconduct involved moral turpitude. In the absence of compelling mitigating circumstances, the disposition must be no lower than a recommendation that includes an actual suspension; if there are compelling mitigating circumstances, the disposition must be no lower than a recommendation that includes a suspension, actual or stayed.

OTHER PROPOSED CHANGES

In addition to making the changes specifically directed by the Board, and in accordance with the Ad Hoc Commission's recommendation for clarification of the ADP rules, the BBC drafted further amendments intended to clarify the rules for acceptance into the ADP and to give the court better tools for managing that process. The proposed amendments are attached in clean text (Attachment A) and as a redline showing the changes from the current rules (Attachment B).

The proposed changes, with a brief description of the reasons for each change, are as follows:

Rule 5.381: Eligibility to Apply for Participation in Program

- Rule 5.381 (A): Language is added to clarify that an attorney cannot be accepted into the ADP until an SBC proceeding has been initiated. The existing rule notes that the judge in a Prefiling Settlement Conference (formerly called an Early Neutral Evaluation Conference) may discuss the attorney's eligibility to participate in the ADP. The BBC proposes the additional language to give clear notice to attorneys that participation in the ADP is only possible after a formal proceeding has been initiated.
- Rule 5.381(B): The rule is redrafted to provide that the appointment of the Program Judge is made by the court, rather than the Presiding Judge; to remove the deadline requiring that the referral be made at least 45 days before the first scheduled trial date; and to provide that the Program Judge will preside over the ADP proceedings from determination of whether the attorney will be accepted through disposition or termination. Elimination of the deadline is proposed to give the court greater flexibility to refer an attorney for the ADP when the court becomes aware that the attorney may benefit from participation. Stakeholders noted that the initial trial date may later be changed, so that using this to set the deadline often does not make sense in a particular case. The court believes that it has the necessary tools without this deadline to prevent requests for referrals from being used for purposes of gamesmanship and delay. The other changes in this rule are made to align the rule with the court's current practices as to the appointment of the Program Judge and having that judge assigned to preside over all ADP proceedings.

Rule 5.382: Acceptance for Participation in Program

- Rule 5.382(A): The provisions of 5.382(A) are recast for clarity without substantive change. A provision is added to require that the attorney be found eligible for participation under rule 5.382(C), which sets out grounds for ineligibility, to be accepted into the program. This is required for acceptance under the existing rules and is proposed to be brought into the list of conditions that must be met for acceptance so that the list reflects all requirements.
- Rule 5.382(B): Language is added to 5.382(B) to state that a stipulation of facts and conclusions of law must resolve all relevant facts and conclusions of law. This is intended to clarify that not only must the parties reach agreement on a stipulation, but

the stipulation must be complete, or the Program Judge may choose to return the proceeding to be handled as a standard disciplinary proceeding.

- Rule 5.382(C): As discussed above, this section is revised to make the change directed by the Board, removing misconduct involving moral turpitude as grounds for ineligibility. Additional changes are proposed to clarify the rule and remove unneeded provisions. The entire section is recast to clarify that it is the Program Judge who will determine if the criteria for ineligibility are met, and to clearly state the standards by which those determinations will be made. The existing language of rule 5.382(C)(1) makes an attorney ineligible for participation if the stipulation shows that disbarment of the attorney is “warranted;” to give the court greater flexibility to allow participation, this is proposed to be changed to state that the attorney is ineligible if the stipulation shows that disbarment is “required,” even assuming successful completion of the program. Finally, subsection (C)(4) is deleted as unnecessary. This subsection makes an attorney ineligible if there is a finding that the attorney would not benefit from treatment or that the substance abuse or mental health issues cannot be overcome so as to prevent future misconduct. In practice, evidence that an attorney will not benefit from treatment or that treatment will not prevent future misconduct can be brought in by OCTC on the issue of whether there is a nexus between the substance abuse or mental health issue and the misconduct, as required under rule 5.382(A)(3).
- Rule 5.382(D): This section is added to make it clear that the Program Judge’s findings on the grounds of ineligibility set out in rule 5.382(C)(1), (3), and (4) are based on the stipulated facts and conclusions of law, not on other evidence. (A finding under 5.382(C)(2) that the attorney has been convicted of a criminal offense that requires summary disbarment need not be based on the stipulation.)
- Rule 5.382(E): This section is added to clarify that the Program Judge has authority to set a deadline for submission of the proposed stipulation or other materials required for the determination of whether the attorney will be accepted into the ADP. The LAP Oversight Committee proposed a 180-day deadline from the date of referral for the Program Judge to make a determination of eligibility. The BBC rejected this as needlessly restricting a judge’s discretion regardless of facts that might lead to a longer timeline in a particular case. The BBC instead added this provision to give the judge the tools needed ensure that the parties do not unduly delay the determination of eligibility.

Rule 5.386: Effect of Later Proceedings on Program Participation

- Rule 5.386(A): New section 5.386(A) is added to clearly state that for an additional inquiry, investigation or proceeding to be added to an existing ADP case, there must be a Notice of Disciplinary Charges (NDC) filed or a referral of a criminal conviction to the Hearing Department. The BBC discussed how additional matters could be more easily brought into an ADP proceeding, with one proposal to allow such additions by stipulation without the filing of an NDC. However, representatives of the court noted the considerable procedural difficulties that can arise when uncharged misconduct is

added to an ADP case, including issues around what happens if the matter is referred back to standard disciplinary proceedings with no charges having been brought for some of the misconduct.

- Rule 5.386(B): This section is revised to make it clear to litigants that if a new matter is incorporated into an ADP proceeding, this may result in changes to the levels of discipline set.

Rule 5.389.1: Use of Findings in Subsequent Proceedings

- The proposed new language of rule 5.382(D), states that the judge may base findings regarding the grounds of ineligibility under rule 5.382(C)(1), (3), and (4) on all stipulated facts and conclusions of law agreed to by the parties. New rule 5.389.1 is proposed to ensure that those findings will not be used in a subsequent hearing or trial if the matter is returned to standard disciplinary proceedings. This will allow the parties to reach agreement on a stipulation without being concerned about how findings based on the stipulation might be used in a later proceeding.

PREVIOUS ACTION

- [Board of Trustees, November 14, 2024, Approval of Recommendations from the Lawyer Assistance Oversight Committee Regarding Alternative Discipline Program](#)
- [Lawyer Assistance Program Oversight Committee, September 6, 2024, Recommendations for Board of Trustees Regarding Alternative Discipline Program](#)
- [Board of Trustees, September 21, 2023, Ad Hoc Commission on the Discipline System: Status Update Regarding Board Directed Follow Up Work](#)
- [Board of Trustees, January 19, 2023, Discussion and Approval of the Ad Hoc Commission on the Discipline System Report and Recommendations](#)

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

Title 5, Division 6, Chapter 5, Rules 5.381, 5.382, 5.384, 5.386, and 5.389.1

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

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

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

RESOLUTIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee concur, it is:

RESOLVED, that the Board of Trustees, sitting as the Regulation and Discipline Committee authorizes staff to make available for public comment for a period of 45 days proposed amendments to rules 5.381, 5.382, 5.384, 5.386, and proposed new rule 5.389.1 of the Rules of the State Bar of California, as set forth in Attachments A and B; 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 amendments to the Rules of the State Bar of California.

ATTACHMENTS LIST

- A.** Proposed Amendments to Rules 5.381, 5.382, 5.384, 5.386, and Proposed New Rule 5.389.1 of the Rules of the State Bar of California – Clean Version
- B.** Proposed Amendments to Rules 5.381, 5.382, 5.384, 5.386, and Proposed New Rule 5.389.1 of the Rules of the State Bar of California – Redline to Current Rules