



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: April 11, 2006
TO: Interested Members of the Public
FROM: Scott J. Drexel, Chief Trial Counsel
SUBJECT: Proposed Amendments to the California Rules of Court
Regarding Permanent Disbarment, the Minimum Waiting Period
For Reinstatement and Passage of the Attorney Bar Examination

At its meeting on March 16, 2006, the State Bar Board of Governors' Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") voted 3-2 to recommend to the Board of Governors at its August 2006 meeting that the Board of Governors, in turn, recommend to the California Supreme Court that it adopt proposed amendments to the California Rules of Court. If adopted, the proposed amendments would:

- (a) authorize the State Bar Court, in any recommendation involving the disbarment of an attorney, to recommend that the attorney be *permanently* disbarred consistent with guidelines identifying the specific types of misconduct that might warrant permanent disbarment;
- (b) increase the minimum waiting period for seeking reinstatement to the practice of law following non-permanent disbarment or resignation from the practice of law with disciplinary charges pending from five (5) years to seven (7) years; and
- (c) require individuals seeking reinstatement to the practice of law following non-permanent disbarment or resignation to take and pass the Attorney Bar Examination in order to demonstrate their present learning and ability in the general law.

Thereafter, on March 28, 2006, the RAD Committee voted to release the above-referenced recommendations for a second 90-day public comment period.

The following information may be helpful in considering the RAD Committee's recommendations and in formulating any public comment that a member of the public may wish to submit regarding these recommendations

Permanent Disbarment

The primary goals of the attorney discipline system are protection of the public, the courts and the legal profession and the maintenance of the integrity of the legal profession and the administration of justice. Although the individual rehabilitation of the disciplined attorney is also a goal, it is not the

exclusive goal of the discipline system. (*In re Stevens* (1925) 197 Cal. 408, 424; *In re Andreani* (1939) 14 Cal.2d 736, 748-749.)

Under current law, disbarments are not permanent. An attorney who has been disbarred by the California Supreme Court may seek reinstatement to the practice of law after a minimum waiting period of five years. (Rule 662(b), Rules Proc. of State Bar; *In re Treadwell* (1896) 114 Cal. 24, 26; *Maggart v. State Bar* (1946) 29 Cal.2d 439, 442-443.) However, in order to be reinstated, a former attorney who has been disbarred or has resigned from the State Bar with disciplinary charges pending against him/her must demonstrate to the satisfaction of the State Bar Court and the Supreme Court that he/she has been rehabilitated from the past acts of misconduct, that he/she is presently fit to practice law and that he/she has present learning and ability in the general law. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1091-1092; *Calaway v. State Bar* (1986) 41 Cal.3d 743, 745.)

The proposed amendments to the California Rules of Court recommended by the RAD Committee, if adopted by the Supreme Court, would provide for *permanent* disbarment in some cases. An attorney who is *permanently* disbarred would not be allowed to seek reinstatement to the practice of law, whether or not he or she could demonstrate personal rehabilitation, on the grounds that the misconduct for which the attorney was disbarred was so serious or heinous that his or her reinstatement would damage the legal profession in the perception of the public and harm the integrity of the system.

The proposed amendments to the California Rules of Court recommended by the RAD Committee establish guidelines to be applied by the State Bar Court in determining whether, in any recommendation for disbarment, the State Bar Court should recommend that the attorney be permanently disbarred. The proposed guidelines identify the following types of misconduct that would potentially warrant permanent disbarment:

- (1) conviction of a crime involving malfeasance in public office which involved fraud or the embezzlement or intentional misuse of public funds;
- (2) engaging in multiple instances of the intentional theft or conversion of client funds, resulting in substantial harm to one or more victims;
- (3) engaging in the intentional corruption of the judicial process, including but not limited to, bribery, forgery, perjury or subornation of perjury;
- (4) engaging in multiple instances of insurance fraud committed in the course of the practice of law, including but not limited to, staged accidents, the submission of false or fraudulent claims for the payment of a loss or injury or repeated instances of runner-based solicitation;
- (5) engaging in the unauthorized practice of law when the member knew of his or her disbarment, resignation or suspension from practice;
- (6) the member was previously disbarred or resigned with disciplinary charges pending; and

- (7) engaging in conduct, involving fraud, moral turpitude or a pattern of serious misconduct that is so egregious that the member should be permanently disbarred.

Minimum Waiting Period for Seeking Reinstatement

The minimum waiting period for seeking reinstatement to the practice of law following disbarment or resignation with disciplinary charges pending is five (5) years. (Rule 662(b), Rules Proc. of State Bar.)

In a reinstatement proceeding, the petitioner must be able to show, *by sustained exemplary conduct over an extended period of time*, that he or she has re-attained the moral fitness to practice law. (*In re Giddens* (1981) 30 Cal.3d 110, 116; *In re Petty* (1981) 29 Cal.3d 356, 362.)

Since January 1, 1990, the vast majority of petitioners seeking reinstatement at or shortly after the expiration of the minimum five-year waiting period are unable to make the required showing of rehabilitation, present fitness to practice and present learning and ability in the general law. The statistics regarding the success or failure of reinstatement petitions since January 1, 1990 are as follows:

<u>Time Since Disbarment/Resignation</u>	<u>Reinstatement Granted</u>	<u>Reinstatement Denied</u>
Less than 7 years	30 (33.3%)	60 (66.7%)
7 Years or More	42 (50.1%)	41 (49.9%)

The above-referenced statistics graphically demonstrate that two-thirds of the petitioners who have seek reinstatement within five to seven years following the effective date of their disbarment or resignation are unable to demonstrate the sustained exemplary conduct over an extended period of time required for reinstatement. On the other hand, approximately one-half of the petitioners who seek reinstatement following the passage of at least seven years following their disbarment or resignation are successful in demonstrating their rehabilitation and present fitness to practice.

Extending the minimum waiting period for seeking reinstatement from five years to seven years will provide petitioners with additional time within which to establish and demonstrate adequate rehabilitation from their prior acts of misconduct. The extended waiting period may also reduce the number of cases in which a petitioner is initially denied reinstatement and, as a result, must file and adjudicate a second reinstatement proceeding.

Requiring Passage of the Attorney Bar Examination

In order to be reinstated to the practice of law, a disbarred or resigned attorney must demonstrate, among other things, that he or she possesses present learning and ability in the general law. However, the Supreme Court has never specified how much current knowledge of the law is required for reinstatement. (See *Calaway v. State Bar*, *supra*, 41 Cal.3d at p. 756 (dis. Opn. of Bird, C.J.)

The showing required to demonstrate present learning and ability in the general law has varied considerably. In *Calaway*, for instance, it was found sufficient that one of the petitioner's attorney

acquaintances had consulted the petitioner in matters arising in his practice, that a second attorney believed that the petitioner had maintained a “dedicated interest in the law and the study thereof” and that a third attorney stated that the petitioner frequently spent time in his office library, reading and acquainting himself with the current trends in the law and discussing cases with attorneys in the office. (*Calaway, supra*, 41 Cal.3d at p. 756.)

By contrast, in *In the Matter of Ainsworth* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 900-901, the State Bar Court Review Department recognized that the petitioner had taken many bar review and continuing legal education courses over a period of several years and that he had increased his knowledge of the law. Nevertheless, the Review Department concluded that the petitioner did not understand the nature of proper litigation. In addition, in *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373, 385, the Review Department concluded that the petitioner had failed to show sufficient proof of his learning and ability in the general law because he failed to submit documentary evidence in support of his claim that he had written legal memoranda and that he had engaged in other activities to maintain knowledge of the law. The Review Department also found that the petitioner had demonstrated only the most rudimentary knowledge of case presentation.

The Legislature has determined that an applicant’s learning and ability in the law is sufficient to warrant his or her admission to the practice of law if, among other things, the applicant has “passed the general bar examination given by the examining committee.” (Bus. & Prof. Code, § 6060, subd. (g).) However, the conclusion that an applicant has present learning and ability in the law lasts for only five years. Rule IX of the Rules Regulating Admission to the Practice of Law in California provides that, if an applicant who has passed the general bar examination fails to take the attorney’s oath within five years of the last day of the administration of the bar examination that he or she passed, the applicant must take and pass the bar examination a second time.

Moreover, upon seeking admission to practice law in California, attorneys licensed in other states who have no existing disciplinary record, are required to demonstrate appropriate learning and ability in the law by taking and passing the Attorney Bar Examination, regardless of their actual professional knowledge of the law.

The requirement that a petitioner for reinstatement take and pass the Attorney Bar Examination is intended to bring objectivity, predictability and consistency to the requirement of proposed rule 951.2(a) [current rule 951(f)] of the California Rules of Court that applicants for reinstatement establish “present ability and learning in the general law.” In light of the lengthy passage of time which may pass between an attorney’s disbarment or resignation and reinstatement under the current system (currently averaging approximately ten years), this requirement serves a number of legitimate interests: (1) it establishes a uniform means of measuring current learning and ability in the law; (2) it provides an objective standard by which present ability and learning may be measured; (3) it promotes judicial economy by prohibiting reinstatement applications where this showing is not made; and (4) it ensures that the best possible evidence on the issue is presented to the Court.