



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: May 23, 2006

TO: Members of the Board Committee on Regulation, Admissions
and Discipline Oversight

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Addition of Rule 562.5, Rules of Procedure Re:
Prohibition Upon Consolidation of Probation Revocation Proceedings
With Other Proceedings -- Request for Release for 90-Day Public Comment

ISSUE

The issue presented by this agenda item is whether the Board Committee on Regulation, Admissions and Discipline Oversight (“RAD Committee”) should authorize the release, for a 90-day public comment period, of the proposed addition of rule 562.5 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”). If ultimately adopted, proposed rule 562.5 would prohibit the consolidation of a probation revocation proceeding with any other disciplinary proceeding, including another probation revocation matter.

RECOMMENDATION

The Office of the Chief Trial Counsel and the Office of Probation recommend that the RAD Committee approve the release of proposed rule 562.5 of the Rules of Procedure, in the form attached hereto as Attachment A, for a 90-day public comment period.

DISCUSSION

Rule 108 of the Rules of Procedure allows the State Bar Court to order the consolidation of multiple pending proceedings against either (a) a single respondent; or (b) multiple respondents where the proceedings involve common questions of fact. However, proceedings may not be consolidated if it would result in prejudice to the substantial rights of any party or if the consolidation would unduly delay either proceeding.

In virtually all cases in which the final discipline imposed by the California Supreme Court exceeds a public or private reproof, the Supreme Court imposes a period of stayed suspension, places the respondent on probation for a specified period of time and requires him or her to comply with various probation conditions. The probation conditions must be reasonably related to the misconduct for which the respondent is being disciplined and can include such conditions as (a) restitution to clients of

unearned fees or misappropriated funds; (b) payment of court-ordered monetary sanctions; (c) abstinence from the use of alcohol and non-prescription drugs; (d) submission to random blood or urine testing; (e) periodic review of the respondent's client trust account by a certified public accountant; (f) development and approval of a law office management plan; and (g) attendance at specified continuing legal education courses.¹

The State Bar's Office of Probation monitors the respondent's compliance with the terms and conditions of his or her probation. If the respondent violates the conditions of probation, the Office of Probation may file a motion in the State Bar Court to revoke the respondent's probation. Significantly, the discipline that may be imposed in a probation revocation proceeding is limited by the terms of the Supreme Court's final disciplinary order in the underlying proceeding in which the probation was originally imposed. The period of actual suspension recommended in a probation revocation proceeding may not exceed the entire period of stayed suspension in the underlying proceeding. The State Bar Court's ruling on the revocation motion may also recommend that all or part of the actual suspension imposed as a result of the probation revocation be stayed and that a new period of probation be imposed. (Rule 562, Rules Proc. of State Bar.)

Probation revocation proceedings differ markedly from other disciplinary proceedings. Probation revocation proceedings are expedited and the applicable standard of proof is preponderance of the evidence, rather than the clear and convincing evidence standard applicable in other disciplinary proceedings. (See Bus. & Prof. Code, § 6093, subd. (c); rule 561, Rules Proc. of State Bar; *cf.*, rule 213, Rules Proc. of State Bar.) Additionally, no discovery is permitted in a probation revocation proceeding except by leave of the Court for good cause shown (rule 563(c), Rules Proc. of State Bar) and a hearing is held only if the Court determines that it will materially contribute to the consideration of the revocation motion (rule 563(d), Rules Proc. of State Bar).²

Furthermore, while the State Bar Court has 90 days within which to file its decision in other disciplinary proceedings (rule 220, Rules Proc. of State Bar), the Court must file its order determining the probation revocation motion within 30 days. Moreover, any appeal of the Hearing Department's ruling on a probation revocation motion must also be considered on an expedited basis. (Rule 565, Rules Proc. of State Bar.)

Finally, whereas the respondent attorney and the Office of the Chief Trial Counsel have 60 days within which to file a petition for review with the California Supreme Court in normal disciplinary proceedings (rules 952(b) and 952.5(a), Calif. Rules of Ct.), the parties have only 15 days within which

¹ In virtually every case, the respondent is also ordered to (a) comply with the State Bar Act and Rules of Professional Conduct; (b) file written quarterly reports with the Office of Probation; (c) notify the State Bar of all changes of address; (d) attend State Bar Ethics School; and (e) respond promptly and truthfully to all inquiries from the Office of Probation.

² The Office of Probation is required to include evidence of the probation violation(s) as attachments to its motion to revoke the respondent's probation. All facts relied upon by the respondent in opposition to the revocation motion must be set forth in one or more declarations that are submitted along with the respondent's response to the revocation motion. The respondent's failure to request a hearing constitutes a waiver of the waiver and his/her failure to file a response to the revocation motion constitutes an admission of the factual allegations contained in the revocation motion and supporting documents. (Rule 563(b), Rules Proc. of State Bar.)

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to file a petition for review of an adverse decision in a probation revocation proceeding (rules 952(a) and 952.5(a), Calif. Rules of Court).

In light of the significant differences between probation revocation proceedings and other types of disciplinary proceedings in terms of (1) the time within which the matters must be processed; (2) the applicable standard of proof; (3) the availability of discovery; (4) the time within which the decision must be filed; and (5) the applicable appellate processes, it is clear that probation revocation proceedings should not be consolidated with other disciplinary proceedings. Additionally, because the discipline that can be imposed in a probation revocation proceeding is dependent upon the discipline imposed by the Supreme Court in the respondent's underlying disciplinary proceeding, the consolidation of two probation revocation proceedings against the same respondent creates nearly insoluble problems in issuing a disciplinary recommendation that is consistent with the Supreme Court's original disciplinary orders. Each probation revocation proceeding should be prosecuted and adjudicated separately.

The proposed addition of rule 562.5 of the Rules of Procedure would clarify that a probation revocation proceeding may not be consolidated with any other State Bar Court proceeding, including another probation revocation proceeding.

PROPOSED RESOLUTION

If you agree that the proposed addition of rule 562.5 of the Rules of Procedure should be released for a 90-day public comment period, your adoption of the following resolutions would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of proposed rule 562.5 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Attachment A, for a 90-day public comment period;

FURTHER RESOLVED, that authorization for release of a matter for public comment is not, and shall not be construed as, a recommendation or approval by the Board of Governors of the materials published.”

SJD:dim
Attachment

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***PROPOSED ADDITION OF RULE 562.5
RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA***

RULE 562.5 NO CONSOLIDATION OF PROBATION REVOCATION PROCEEDINGS.

A probation revocation proceeding may not be consolidated for decision with any other proceeding, except another probation revocation proceeding alleging a separate violation or violations of the same Supreme Court order.

ATTACHMENT A