



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: November 5, 2008

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Addition of Rule 2.40 to the Rules of the State Bar of California
Re Voluntary Resignations and Proposed Approval of Voluntary Resignation
Form – Request for Release for Further Public Comment

ISSUE

Since June 2007, there have been at least five members of the State Bar who have tendered voluntary resignations from the State Bar of California without disciplinary charges pending when, in reality, at the time they tendered those resignations, they had already been charged with or convicted of serious felony offenses or the plea for such offenses was imminent. In each case, the State Bar was compelled to ask the Supreme Court to vacate its order accepting the member's resignation without charges pending. The Supreme Court has expressed its concern about these improper resignations and has asked the State Bar to consider the adoption of a rule that would require members who wish to tender a voluntary resignation to declare, under penalty of perjury, that there are no criminal investigations or charges pending against them and that they have not been convicted of any crime that is required to be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5).

At your July 2008 meeting, the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") authorized the release of proposed new rule 2.40 of the Rules of the State Bar of California and a proposed Voluntary Resignation form, for a 45-day public comment period. Only one public comment was received either during the public comment period, which ended on August 25, 2008, or thereafter.

However, during the public comment period, we concluded that rule 2.40 and the Voluntary Resignation form, as proposed, would not entirely address and correct the problem identified by the Supreme Court. Therefore, the issue presented by this agenda item is whether the RAD Committee should authorize the release of amended versions of rule 2.40 of the Rules of the State Bar of California and of the Voluntary Resignation form for an additional 45-day public comment period.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that the RAD Committee authorize the release of amended versions of proposed rule 2.40 of the Rules of the State Bar of California and of the proposed Voluntary Resignation form, in the form attached hereto as Appendix A and Appendix B respectively, for an additional 45-day public comment period.

DISCUSSION

An attorney is not entitled to voluntarily resign from the State Bar of California without disciplinary charges pending if he or she is currently (1) suspended from the practice of law as a result of the imposition of discipline; (2) on disciplinary probation; (3) criminally charged with or convicted of a crime that must be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5)¹; or (4) has a disciplinary complaint, investigation or proceeding pending against him or her. If one or more of these circumstances exist, the attorney who desires to resign from the State Bar of California must tender his or her resignation in accordance with the requirements of rule 9.20 of the California Rules of Court.

As mentioned above, since approximately June 2007, there have been at least five attorneys who have tendered voluntary resignations without charges pending to the State Bar of California but who were not eligible to resign without charges pending because they had either been charged with or convicted of one or more felonies that were required to be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5).

As a result of the failure of these members to report to the State Bar their convictions and/or the filing of the felony charges against them as required by section 6068, subdivisions (o)(4)² and (o)(5), the State Bar's Office of Member Services erroneously processed their respective resignations as voluntary resignations without disciplinary charges pending. However, when the Office of the Chief Trial Counsel and the Office of General Counsel subsequently learned of these members' criminal convictions, a request was filed in each instance asking the Supreme Court to vacate its earlier orders accepting their respective resignations without charges pending.

¹ Section 6068, subdivision (o)(5) requires a member to report to the State Bar in writing, within 30 days, of the member's knowledge of "[t]he conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of laws; or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type."

² Section 6068, subdivision (o)(4) requires a member to report to the State Bar in writing, within 30 days, of the member's knowledge of "[t]he bringing of an indictment or information charging a felony against the attorney."

The Supreme Court has expressed its concern about these improper resignations without charges pending and has asked the State Bar to consider both a modification of the State Bar's voluntary resignation form as well as the adoption of a rule that would require members tendering a resignation from the State Bar without charges pending to declare, under penalty of perjury, that there are no criminal charges pending against them and that they have not been convicted of a crime that is required to be reported to the State Bar.

Currently, there is no rule that addresses the eligibility of a member to voluntarily resign from the State Bar without disciplinary charges pending. At its July 2008 meeting, the RAD Committee authorized the release of proposed new rule 2.40 of the Rules of the State Bar of California which, if adopted, would establish both the eligibility requirements for resigning without disciplinary charges pending and a process for handling those resignations.

Only one comment was received during the public comment period.³ However, during the comment period, as a result of discussions between representatives of the Office of General Counsel and the Office of the Chief Trial Counsel, State Bar staff concluded that the version of rule 2.40 that was released for public comment did not fully address or resolve the problems that have been encountered with respect to members who tender voluntary resignations that are, purportedly at least, without charges pending.

Proposed rule 2.40, as previously released for public comment, would preclude a member from tendering his or her voluntary resignation if:

1. The member is currently suspended or subject to disciplinary probation or an agreement in lieu of discipline;
2. The member currently has a disciplinary complaint, investigation or proceeding against him or her;
3. The member is currently charged with the commission of a crime described in Business and Professions Code section 6068, subdivision (o)(5); or
4. The member has been convicted of a crime described in Business and Professions Code section 6068, subdivision (o)(5) for which discipline has previously been imposed by the State Bar Court or the Supreme Court.

However, there have been two recent resignation cases that are not specifically covered by the above-referenced eligibility requirements. In each case, although no criminal charges had been filed, the member was aware of the pendency of a criminal investigation against him and, in fact, was actively

³ By e-mail on August 8, 2008, State Bar member Peter Corcoran objected to the proposed rule. Mr. Corcoran stated that, in his opinion, an attorney should be able to resign from the State Bar without any questions and that any acts of misconduct or questions about the attorney's conduct can be addressed at such time, if ever, that he or she seeks reinstatement. However, that is neither the current law nor practice. (See, e.g., rule 9.21, Calif. Rules Ct.)

engaged in plea negotiations with the prosecutor at the time he tendered his resignation from the practice of law. In both cases, no criminal charges had yet been filed on the date the member tendered his resignation but, a few days later, the indictment or criminal complaint was filed and the member entered a negotiated guilty plea to one or more of the charged offenses. Because no charges had been filed as of the date the resignations were received, the Office of Member Services processed the tendered resignations as being without charges pending and it was transmitted to the Supreme Court, who subsequently accepted the resignations. When the subsequent conviction information was received by the Office of the Chief Trial Counsel, however, it became necessary to request the Supreme Court to vacate the resignations.

In order to address this additional circumstance, the amended version of proposed rule 2.40 would provide that a member is not eligible to tender a voluntary resignation if, to his or her knowledge, the member is the subject of a current criminal investigation or grand jury proceeding regarding the member's alleged commission of a felony or of a misdemeanor described in Business and Professions Code section 6068, subdivision (o)(5). A similar change has been made to the proposed Voluntary Resignation form.

In addition, the amended version of rule 2.40 and of the Voluntary Resignation form adds a specific warning that the member's false statement in the submission of his or her resignation can result in the denial or vacating of the resignation and that it can constitute a cause for disbarment or for punishment as a contempt or a crime.

PROPOSED RESOLUTIONS

If you agree that the amended versions of proposed rule 2.40 of the Rules of the State Bar of California and of the proposed Voluntary Resignation form should be released for a further 45-day public comment period, your approval of the following resolutions would be appropriate:

“RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the amended version of proposed rule 2.40 of the Rules of the State Bar of California and of the proposed Voluntary Resignation form, in the form attached hereto as Appendix A and Appendix B, respectively, for a further 45-day public comment period; and it is

FURTHER RESOLVED that the release of the aforementioned proposed rule and proposed Voluntary Resignation form does not constitute, and shall not be considered, as approval by the Board of Governors of the State Bar of California of the matters published.”