



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: May 4, 2009

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Addition of Rule 216.5 and Proposed Amendment to
Rule 803, Rules of Procedure -- Request for Authority to Release
for 75-Day Public Comment Period

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 of proposed new rule 216.5 and proposed amendments to rule 803 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”) for a 75-day public comment period.

If ultimately adopted, proposed new rule 216.5 would permit a person who was harmed by conduct of the respondent that is the subject of a pending disciplinary proceeding to submit a written statement, after culpability has been found, for the State Bar Court’s consideration during the mitigation/aggravation phase of the disciplinary proceeding. If adopted, the proposed amendment to rule 803 of the Rules of Procedure would permit a victim’s written statement to be submitted and considered by the State Bar Court in connection with proceedings under the Court’s Alternative Discipline Program.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that the RAD Committee authorize the release of proposed new rule 216.5 and the proposed amendments to rule 803 of the Rules of Procedure, in the form attached hereto as Attachment A, for a 75-day public comment period.

DISCUSSION

At the March 2009 RAD Committee meeting, a RAD Subcommittee composed of Rex Heinke, Bill Hebert and Angela Davis, which had been formed to review specific recommendations relating to the State Bar Court’s Alternative Discipline Program, recommended that the Rules of Procedure be amended to permit a victim of a respondent’s misconduct to submit a victim’s statement for

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consideration by the State Bar Court in determining the appropriate degree of discipline to be imposed upon the respondent or recommended for imposition to the Supreme Court.¹ The RAD Committee requested that I draft a proposed Rule of Procedure granting to the victims of attorney misconduct the right to submit a written statement concerning the harm caused to the victim as a result of the respondent's misconduct.

Although the Subcommittee's recommendation and request for directed primarily at proceedings in the State Bar Court's Alternative Discipline Program ("ADP"), the right of a victim of attorney misconduct to submit a written victim's statement to extend to standard disciplinary proceedings as well as to ADP cases.

If adopted, proposed new rule 216.5(a) would authorize any person who has been harmed by conduct of the respondent to submit a written statement setting forth the nature and extent of the harm and the manner in which the respondent's conduct caused the harm. The term "written statement," rather than declaration, has been used to make clear that the victim's statement can be in the form of a letter or statement, rather than a detailed declaration under penalty of perjury.

Rule 216.5(b) provides that the victim's statement must be admitted into evidence, but only after a finding of culpability has been made. If the respondent demonstrates good cause, the State Bar Court may order the Office of the Chief Trial Counsel to produce the victim for cross-examination during the mitigation/aggravation phase of the disciplinary proceeding. However, the requirement of good cause has been included to preclude a respondent from simply demanding the production of all victims of his or her misconduct without demonstrating that there is a legitimate basis for challenging the accuracy or extent of the harm claimed by the victim.

The proposed amendment to rule 803 of the Rules of Procedure, if adopted, would likewise permit the victim of a respondent's misconduct to submit a written statement regarding the harm caused by such misconduct. However, unlike standard disciplinary proceedings, there are no evidentiary hearings in the State Bar Court. The respondent attorney must stipulate to facts and conclusions of law relating to his or her misconduct and, typically, the respondent and the Office of the Chief Trial Counsel stipulate to factors in mitigation or aggravation of the respondent's misconduct. The nature and extent of harm suffered by the victim of the respondent's misconduct is one of the recognized aggravating factors to be considered in determining the appropriate degree of discipline to be imposed. (See, e.g., rule 803(b), Rules Proc. of State Bar; see also, Std. 1.2(b)(iv), Stds. for Atty. Sanctions for Prof. Misconduct.)

If adopted, rule 803(c) would require the ADP Judge to consider the victim's statement in determining the degree of discipline to be imposed or recommended to the Supreme Court in connection with the ADP proceeding.

¹ The Subcommittee's concept was analogous to the right of a victim of criminal conduct under Penal Code section 1191.1 to appear at the defendant's sentencing hearing and to express his or her views concerning the crime, the person responsible and the need for restitution.

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PROPOSED RESOLUTION

If you agree that proposed new rule 216.5 and the proposed amendments to rule 803 of the Rules of Procedure should be released for a 75-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 216.5 and the proposed amendments to rule 803 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Attachment A, for a 75-day public comment period; and it is

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

SJD:dim
Attachment