



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: May 1, 2009

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Amendments to Rule 105, Rules of Procedure –
Request for Release for 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 of the proposed amendments to rule 105 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.

Currently, the Rules of Procedure neither expressly permit nor expressly prohibit a moving party from filing a written reply to the opposition filed by a party opposing the motion. In practice, some State Bar Court Hearing Judges refuse to accept reply memoranda or briefs while other Hearing Judges accept written replies for filing if they are submitted promptly after the filing and service of the opposition.

If ultimately adopted, the amendments to rule 105 would expressly permit a moving party who has filed a motion in the State Bar Court Hearing Department to file a written reply within three days following service of any opposition to the motion. The amendments to rule 105 would also shorten the time for filing an opposition to a motion from ten (10) days to seven (7) days.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends to the RAD Committee that it authorize the release of the proposed amendments to rule 105 of the Rules of Procedure for a 75-day public comment period.

DISCUSSION

During the course of the regular quarterly meeting between representatives of the Office of the Chief Trial Counsel, the State Bar Court and members of the Association of Discipline Defense Counsel (“ADDC”) in February 2009, the latter requested that the State Bar consider an amendment to rule 105 that would expressly permit a moving party to file a reply to any opposition to the moving party’s motion. Members of the ADDC having noted that, since the Rules of Procedure do not expressly permit the moving party to file a reply to the opposing party’s opposition, there is not a consistent practice among the State Bar Court Hearing Judges as to whether such written replies will be accepted. The ADDC supports clarification of this ambiguity by expressly permitting the filing of a written reply. The ADDC proposed allowing five (5) days after filing and service of the opposition for the filing of the written reply.

After discussion with representatives of the ADDC and with State Bar Court staff, the Office of the Chief Trial Counsel supports the proposed amendments to rule 105 of the Rules of Procedure in the form attached hereto as Attachment A.

The primary concern with permitting the filing of a written reply is the extent to which the filing of multiple pleadings with respect to each motion will tend to slow down the timely and efficient adjudication and disposition of proceedings. Both the State Bar Court and the Office of the Chief Trial Counsel are committed to streamlining the attorney discipline process and reducing the pendency of proceedings in the State Bar Court without impairing the essential due process rights of respondent attorneys.

The proposed amendments to rule 105 would shorten the time for filing an opposition to a motion from ten (10) days to seven (7) days after filing and service of the motion and would grant the moving party three (3) days within which to file a reply following the filing of any opposition to the motion. Since the service of pleadings by first-class mail extends the time within which to file a response by five days (see rule 63, Rules Proc. of State Bar), the elapsed time from the filing of a motion in the State Bar Court Hearing Department to the date the motion is taken under submission for decision could be as long as 21 days, or even longer if the court determines that a hearing on the motion is either necessary or appropriate.

However, if ultimately adopted, the proposed amendments to rule 105 of the Rules of Procedure will specifically permit the filing of a reply and, by shortening the time for filing the opposition to seven (7) days and the reply to three (3) days, it will not drastically extend the pendency of these matters.

PROPOSED RESOLUTION

If you agree that the proposed amendments to rule 105 of the Rules of Procedure should be released for a 75-day public comment period, your adoption of the following resolutions would be appropriate:

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“RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed amendments to rule 105 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;

FURTHER RESOLVED, that the release of the aforementioned proposed rule 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.”

SJD:dim
Attachment