

AGENDA ITEM

JULY 127

**Emergency Adoption of
Interim Rule 657, Rules of
Procedure Re Resignations
With Disciplinary Charges
Pending**

DATE: June 29, 2007

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Request for Emergency Adoption of Proposed Rule 657, Rules
Of Procedure Regarding Resignations with Disciplinary Charges
And Request for Authority to Publish for 90-Day Public Comment Period

EXECUTIVE SUMMARY

The Supreme Court has expressed concern about the State Bar's handling of the resignations of members against whom disciplinary charges are pending. Among other things, the Court wants to ensure that the factors set forth in rule 9.21(d) of the California Rules of Court are considered and evaluated in deciding whether a member's resignation should be accepted. The Court has asked the State Bar to consider whether changes should be made to the current resignation process established by a Board of Governors' resolution that was adopted on April 5, 1986.

State Bar staff is investigating the Court's concerns and will develop an effective proposal to handle the resignation process, giving consideration to the factors set forth in rule 9.21(d) along with such additional factors that may the State Bar may wish to propose for the Court's consideration. It is our expectation that any proposed changes to the resignation process will be ready for consideration at the November 2007 meeting of the Board Committee on Regulation, Admissions and Discipline Oversight.

Pending development, consideration and adoption of a revised resignation procedure, the State Bar Court, Office of the Chief Trial Counsel and Office of General Counsel jointly recommend that the Board of Governors adopt proposed rule 657 of the Rules of Procedure, in the form attached as Appendix A, on an emergency basis, to ensure that the factors set forth in rule 9.21(d) are evaluated and applied to each proposed resignation with disciplinary charges pending.

DISCUSSION

Effective December 14, 1984, the California Supreme Court adopted rule 960 of the California Rules of Court.¹ Among other things, rule 960 formalized the procedure for the submission of resignations by members against whom disciplinary charges are pending, specified the form that the resignation must take and, as significant here, imposed a requirement upon the Board of Governors of the State Bar to consider each member's tendered resignation and to recommend to the Supreme Court whether the resignation should be accepted. Additionally, rule 960(c) specified the grounds upon which the Supreme Court might decline to accept a member's resignation.

In April 1986, the Board of Governors approved proposed amendments to rule 960 of the California Rules of Court for recommendation to the Supreme Court. The proposed amendments were aimed at providing a more expeditious process for the consideration of resignations with disciplinary charges pending. At the same meeting, the Board of Governors adopted a resolution authorizing and directing the State Bar Court Clerk's Office to transmit all resignations that are submitted in an appropriate form to the Supreme Court with the Board's recommendation that the resignation be accepted unless the Office of the Chief Trial Counsel has filed written notice indicating that perpetuation of testimony is required. The State Bar Court has consistently followed this procedure since the Board's adoption of this 1986 resolution.

In October 2006 and March 2007, the Board of Governors recommended rejection of the resignations of two members who had waited to submit their resignations until the State Bar Court had filed decisions recommending their disbarments. Additionally, the Supreme Court has delayed taking action on the tendered resignation of a member who had been previously disbarred and reinstated and who sought to resign only after his subsequent felony conviction was affirmed on appeal. Pursuant to the Board's 1986 resolution, this resignation was forwarded to the Supreme Court in December 2006 with a recommendation that the resignation be accepted.

By letter dated May 17, 2007, the Supreme Court expressed concern that, in making recommendations regarding the acceptance of member's resignations, the Board of Governors had apparently not been applying and evaluating the factors enumerated in rule 9.21 (former rule 960) with respect to each resignation tendered by a member.² The

¹ Effective January 1, 2007, former rule 960 of the California Rules of Court was re-numbered as rule 9.21.

² Rule 9.21(d) of the California Rules of Court provides as follows:

"The Supreme Court will make such orders concerning the member's resignation as it deems appropriate. The Supreme Court may decline to accept the resignation based on a report by the Board of Governors that:

Court requested the State Bar to provide specified information regarding the procedures used to comply with the requirements of rule 9.21. Additionally, the Court inquired about the information that the Board of Governors considers in making determinations regarding the acceptance or rejection of resignations and about the practice followed in other states. Finally, the Supreme Court asked the State Bar to consider appropriate changes in its procedures to ensure that the provisions of rule 9.21 are implemented and to make recommendations to the Court for its review.

A working group consisting of representatives of the State Bar Court, Office of Chief Trial Counsel and Office of General Counsel has been appointed to consider the current requirements of rule 9.21 of the California Rules of Court and the practice of other jurisdictions with respect to resignations with disciplinary charges pending and to develop a proposed procedure for the future evaluation of such resignations. The working group expects to bring a proposal to the Board Committee on Regulation, Admissions and Discipline Oversight for its November 2007 meeting. To the extent that such proposal involves the proposed adoption or amendment of either the Rules of Procedure of the State Bar or the California Rules of Court, it will be subject to a 90-day public comment period.

In the interim, however, in order to address the Supreme Court's concern that the factors set forth in rule 9.21 may not be adequately considered and applied to each resignation, the Office of the Chief Trial Counsel, State Bar Court and Office of General Counsel jointly recommend that the Board of Governors adopt proposed interim rule 657 of the Rules of Procedure on an emergency basis, with a concurrent 90-day public comment period. The proposed interim rule would remain in effect until any proposed additions or amendments to the Rules of Procedure and/or the California Rules of Court can be considered and, if appropriate, adopted and implemented.

Proposed interim rule 657 of the Rules of Procedure would, if adopted, require the Office of the Chief Trial Counsel to consider and apply the factors set forth in rule 9.21(d) of the California Rules of Court in determining whether a member's resignation with disciplinary charges pending should be approved. The interim rule would also require the Office of the Chief Trial Counsel to consider whether the member had tendered his or her resignation after a State Bar Court decision had been filed in which the Court had recommended that the member be disbarred. In any case in which the

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- (1) Preservation of necessary testimony is not complete;
 - (2) After transfer to inactive status, the member has practiced law or has advertised or held himself or herself out as entitled to practice law;
 - (3) The member has failed to perform the acts specified by rule 9.20(a)-(b);
 - (4) That the member has failed to provide proof of compliance as specified in rule 9.20(c);
 - (5) The Supreme Court has filed an order of disbarment as to the member; or
 - (6) On such other evidence as may show that acceptance of the resignation of the member will reasonably be inconsistent with the need to protect the public, the courts or the legal profession."

Office of the Chief Trial Counsel concludes that the member's resignation should not be accepted, interim rule 657 would require the Office of the Chief Trial Counsel to place the proposed resignation on the RAD Committee's agenda for its next meeting for its consideration. Finally, proposed rule 657 would delegate to the RAD Committee the authority to recommend, on behalf of the Board of Governors, that the resignation of an individual member with disciplinary charges pending should be rejected.

Following the concurrent 90-day public comment period, interim rule 657 can be amended as necessary or appropriate in light of the comment received and our experience in considering current and future resignations under the interim procedure.

If the Board of Governors agrees that the emergency adoption of interim rule 657 is appropriate, approval of the following resolutions would be appropriate:

Proposed Resolutions for the RAD Committee

“RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends to the Board of Governors the adoption, on an emergency basis, of proposed interim rule 657 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, and recommends that such rule, once adopted, should be immediately effective; and it is

FURTHER RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of proposed interim rule 657 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, for a concurrent 90-day public comment period.

Proposed Resolution for the Board of Governors

“RESOLVED, upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, that the Board of Governors hereby adopts, on an emergency basis, interim rule 657 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, effective immediately.