

AGENDA ITEM

NOV 124

Adoption of Rule 657, Rules
Of Procedure of State Bar
Re Interim Procedure for
Processing Resignations

DATE: October 19, 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: Rule 657 of the Rules of Procedure Relating to the Interim
Procedure for Processing Resignations with Disciplinary Charges
Pending -- Adoption Following Public Comment

EXECUTIVE SUMMARY

At its July 2007 meeting, the Board of Governors adopted rule 657 of the Rules of Procedure of the State Bar on an emergency basis, subject to reconsideration following the expiration of a 90-day public comment period. Rule 657 was adopted in response to concerns raised by the Supreme Court regarding the State Bar's handling of resignations of members against whom disciplinary charges are pending. Among other things, the Supreme 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 public comment period on rule 657 will expire on October 29, 2007. To date, no public comments have been received.

Pending the Board of Governors' consideration and the Supreme Court's ultimate adoption of a more permanent process for the consideration of resignations, the adoption of rule 657 of the Rules of Procedure, in the form attached hereto as Appendix A, will ensure that the factors set for 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 individually 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 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. From April 1986 through July 2007, the State Bar Court consistently followed this procedure.

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 after the State Bar Court had filed decisions recommending their respective disbarments. Additionally, the Supreme Court has delayed taking action on the tendered resignation of a third member who had been previously disbarred and reinstated and is now seeking to resign 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 members' resignations, the Board of Governors has not been applying and evaluating the factors enumerated in rule 9.21 (former rule 960) of the California Rules of Court with respect to each resignation tendered by a member.² The Court requested the State Bar to provide specified

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

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.

At its meeting in July 2007, the Board of Governors adopted rule 657 of the Rules of Procedure of the State Bar (“Rules of Procedure”) to provide an interim process for considering members’ resignations with disciplinary charges pending. Rule 657 was adopted on an emergency basis subject to further consideration in light of any public comment received during a 90-day comment period. Rule 657 was intended as an interim procedure for the processing of members’ resignations until a more permanent procedure could be developed and adopted.³

Rule 657 of the Rules of Procedure requires 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 also requires the Office of the Chief Trial Counsel to consider whether the member (1) has tendered his or her resignation after a State Bar Court decision has been filed in which the State Bar Court has recommended that the member be disbarred; or (2) has previously resigned or been disbarred and reinstated prior to submitting the current resignation. In any case in which the Office of the Chief Trial Counsel concludes that one or more of the factors set forth in rule 9.21(d) of the California Rules of Court or rule 657(b) appears to be present, the Office of the Chief Trial Counsel must place the proposed resignation on the RAD Committee’s agenda for

Board of Governors that:

- (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.”

³ A working group consisting of representatives of the State Bar Court, the Office of General Counsel and the Office of the Chief Trial Counsel has developed a more permanent procedure for handling members’ resignations. That proposal is on the agenda for the Board Committee on Regulation, Admissions and Discipline Oversight’s (“RAD Committee”) November 2007 meeting with a request that the proposal be published for a 90-day public comment period.

consideration and recommendation.⁴ The RAD Committee and the Board of Governors then determines whether acceptance of the member's resignation should be recommended to the Supreme Court. However, in none of the factors set forth in rule 9.21(d) of the Rules of Court or rule 657(b) of the Rules of Procedure are present, the resignation is transmitted to the Supreme Court with the Board's recommendation that the resignation be accepted. The majority of resignations are in this category.

As previously indicated, the 90-day public comment period with respect to rule 657 of the Rules of Procedure is scheduled to expire on October 29, 2007. To date, no public comments have been received. If any public comments are received prior to your respective meetings on November 8 and 9, 2007, those comments will be brought to your attention.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends, following expiration of the 90-day public comment period, that the RAD Committee and the Board of Governors adopt rule 657 of the Rules of Procedure. If you agree, adoption of the following resolution would be appropriate:

Proposed Resolution for the RAD Committee:

RESOLVED, following its emergency adoption in July 2007 and the expiration of a subsequent 90-day public comment period, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends to the Board of Governors the final adoption of rule 657 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A.

Proposed Resolution for the Board of Governors:

RESOLVED, upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight and following its emergency adoption in July 2007 and the expiration of a subsequent 90-day public comment period, that the Board of Governors hereby adopts rule 657 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A."

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⁴ Pursuant to rule 657, the Office of the Chief Trial Counsel has also placed the proposed resignations of 16 State Bar members on the November 2007 agenda of the RAD Committee and of the Board of Governors. In each of these cases, one or more of the factors for the Supreme Court's potential rejection of the resignation appear to be present.