

AGENDA ITEM

MARCH 123

Proposed Amendments to the California Rules of Court and Rules of Procedure of the State Bar re Resignations with Disciplinary Charges Pending

DATE: February 15, 2008

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Amendments to California Rules of Court and to the Rules of Procedure of the State Bar of California re Resignations With Disciplinary Charges Pending -- Request for Approval and Recommendation to Supreme Court Following Public Comment

EXECUTIVE SUMMARY

By letter dated May 17, 2007, the Supreme Court asked the State Bar, among other things, to consider appropriate changes to be recommended to the Court concerning the procedure for handling the resignations of State Bar members against whom disciplinary proceedings or investigations are pending.

At its November 8, 2007 meeting, the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") authorized the release for a 90-day public comment period of a proposed resignation procedure developed by a staff working group consisting of representatives of the Office of General Counsel, the State Bar Court and the Office of the Chief Trial Counsel. The new procedure includes proposed amendments to both the California Rules of Court and to the Rules of Procedure of the State Bar. A copy of the proposal that was released for public comment is attached as Appendix A.

The proposed resignation process, if adopted, would (a) refer to resignations with disciplinary charges pending as "disciplinary resignations;" (b) delegate to the State Bar Court the obligation to make recommendations to the Supreme Court regarding the acceptance of resignations; (c) deem the member's submission as an admission or no contest plea to the allegations of any pending notice of disciplinary charges or statement of undisputed facts filed by the Office of the Chief Trial Counsel; (d) add two additional grounds for the potential rejection of a member's resignation; and (e) potentially permanently prohibit a member who willfully fails to comply with rule 9.20 of the California Rules of Court from being reinstated the practice of law.

The 90-day public comment period expired on February 8, 2008. Three comments were received during the public comment period, all of which opposed the proposed change in the resignation process. Despite these comments (which are summarized below), State Bar staff recommends adoption of the proposed amendments to the Rules of Procedure and requests the RAD Committee and the Board of Governors to recommend to the Supreme Court its adoption of the proposed amendments to the California Rules of Court.

DISCUSSION

By letter dated May 17, 2007, the Supreme Court expressed concern that, in making recommendations regarding the acceptance of members' resignations with disciplinary charges pending, the Board of Governors was not applying and evaluating the factors enumerated in rule 9.21 (former rule 960) of the California Rules of Court ("Rules of Court") with respect to each resignation tendered by a member.¹ Among other things, the Supreme Court inquired about the resignation process in other states and asked the State Bar to consider appropriate changes to the resignation process for the Court's consideration.²

At your July 2007 meeting, a working group consisting of representatives of the State Bar Court, the Office of General Counsel and the Office of the Chief Trial Counsel requested the Board of Governors to adopt proposed rule 657 of the Rules of Procedure of the State Bar of California ("Rules of Procedure"), on an emergency basis, to address the Supreme Court's concern regarding application of the factors enumerated in rule 9.21 of the Rules of Court to each resignation received by the State Bar.

Effective July 20, 2007, the Board of Governors adopted rule 657 of the Rules of Procedure as an interim measure until a proposal for a more permanent resignation process could be developed, discussed, released for public comment and recommended to the Supreme Court. At your November 9, 2007 meeting, following completion of a 90-day public comment period and upon the recommendation of the RAD Committee, the Board of Governors ratified its earlier adoption of rule 657 as a transitional procedure to be followed until a more permanent resignation process was developed and adopted.

¹ 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:

- (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."

² In her response to the Supreme Court's letter, Executive Director Judy Johnson notified the Supreme Court that, in April 1986, the Board of Governors had 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 the procedure specified by the Board of Governors from April 1986 through July 2007, when the Board of Governors adopted interim rule 657 of the Rules of Procedure.

At its November 8, 2007 meeting, the RAD Committee authorized the release for public comment of the proposal of the above-referenced State Bar staff working group for a permanent process for the handling of resignations with disciplinary charges pending. The proposal included proposed amendments to both the California Rules of Court and to the Rules of Procedure of the State Bar. As discussed below, only three public comments were received during the 90-day public comment period.

The issue presented by this agenda item is whether the Board of Governors should adopt the proposed amendments to the Rules of Procedure of the State Bar of California and recommend to the Supreme Court that it adopt the proposed amendments to the California Rules of Court.

Interim Rule 657 of the Rules of Procedure

Effective July 20, 2007, the Board of Governors adopted rule 657 of the Rules of Procedure, on an emergency basis, pending the development, presentation and adoption of a more permanent procedure for the evaluation and consideration of resignations with disciplinary charges pending. The purpose of rule 657 was to provide an interim procedure for the consideration of resignations that would address the Supreme Court's concern regarding the adequacy of the State Bar's consideration of each individual resignation and its application of the factors enumerated in rule 9.21 of the California Rules of Court in determining whether the resignation should be accepted.

Under rule 657, upon receipt of a member's resignation with disciplinary charges pending, the State Bar Court makes an initial determination as to whether the resignation is in the appropriate form required by rule 9.21(b) of the California Rules of Court. If the resignation is in proper form, the Clerk serves a copy of the resignation upon the Office of the Chief Trial Counsel. The Office of the Chief Trial Counsel must determine whether any of the factors enumerated in rule 9.21(d) of the California Rules of Court or in rule 657(b) of the Rules of Procedure are present.³ If none of these factors are present, the Office of the Chief Trial Counsel files a report with the Clerk of the State Bar Court notifying the Clerk of that fact. The State Bar Court Clerk's Office then transmits the resignation to the Supreme Court with the State Bar's recommendation that the resignation be accepted.

However, if the Office of the Chief Trial Counsel concludes that one or more of the factors enumerated in rule 9.21(d) of the Rules of Court or rule 657(b) of the Rules of Procedure are present, the resignation is placed on the agenda of the RAD Committee for its consideration and recommendation to the Board of Governors as to whether the resignation should be accepted. Sixteen (16) such resignations are currently on the RAD Committee's closed agenda for its November 2007 meeting.

³ Rule 657(b) of the Rules of Procedure establishes two additional grounds for the potential rejection of the member's resignation, i.e., (a) the State Bar Court has filed a decision or opinion recommending the member's disbarment; and (b) the member has previously resigned or has been disbarred and subsequently reinstated to the practice of law.

The Supreme Court has approved the use of rule 657 of the Rules of Procedure on an interim basis pending the State Bar's submission of a proposal for another procedure. Following the expiration of a 90-day public comment period during which no comments were received, the Board ratified its adoption of rule 657 at its meeting on November 9, 2007.

The Practice in Other Jurisdictions

As reflected in the attachment (Appendix B), the general practice relating to resignations with disciplinary charges pending in other jurisdictions is considerably different from the practice in California.

Twenty-five (25) jurisdictions do not permit members to resign from the practice of law. Instead, the member must consent to his or her disbarment. In another thirteen (13) jurisdictions, the member is required, as a condition of his/her resignation, to admit to the pending allegations of misconduct or to acknowledge that he or she cannot successfully defend against those allegations.

There are only fifteen (15) jurisdictions (including California) that currently allow members to resign without admitting the charged misconduct or acknowledging that he or she cannot successfully defend against the charges.

The Proposed New Resignation Procedure

A staff working group, consisting of representatives of the State Bar Court⁴, the Office of General Counsel and the Office of the Chief Trial Counsel, met to discuss the Supreme Court's concerns, the current procedure and alternative methods for the handling of resignations of State Bar members against whom disciplinary charges are pending. The staff working group has developed a procedure that we believe addresses the concerns expressed by the Supreme Court and appropriately balances the need to protect the public, the courts and the legal profession with the need to conserve, when appropriate, the limited resources of the State Bar and the Supreme Court.

The plan developed by the staff working group has several important features that constitute a departure from the procedure currently reflected in rule 9.21 of the California Rules of Court. The new features include:

1. An express recognition that a resignation submitted following the State Bar's receipt of a disciplinary complaint, the initiation of a State Bar investigation or following the filing of formal disciplinary charges is a *disciplinary* resignation;

⁴ The State Bar Court representative did not purport to speak on behalf of the judges of the State Bar Court, who have taken no position with respect to this proposal.

2. Delegation to the State Bar Court Review Department the obligation to make recommendations to the Supreme Court regarding the acceptance or rejection of a member's resignation;
3. A requirement that the member's submission of his or her resignation be deemed an admission or no contest plea to the allegations of any pending notice of disciplinary charges filed in the State Bar Court and/or to any statement of undisputed facts filed by the Office of the Chief Trial Counsel as to any pending investigation or charges against the member as defined in rule 650 of the Rules of Procedure;
4. The proposed addition to rule 9.21(d) of the California Rules of Court of the two additional grounds for rejecting a member's resignation currently specified in rule 657 of the Rules of Procedure, i.e., that (a) the State Bar Court has issued a decision or opinion recommending the member's disbarment; and (b) the member previously resigned or was disbarred and subsequently reinstated; and
5. The potential permanent prohibition of a member's reinstatement following resignation if the member willfully failed to comply with rule 9.20 of the California Rules of Court at the time of his or her resignation.

Characterization of Resignation with Charges Pending as a "Disciplinary Resignation"

There is a significant difference between a voluntary resignation and a resignation with disciplinary charges pending. The voluntary resignation of a member can only be tendered and accepted if there are no pending disciplinary complaints, investigations, proceedings or charges within the meaning of rule 650 against the member and he or she is otherwise in "good standing" as an active or inactive member of the State Bar, i.e., the member has not been administratively suspended for non-compliance with MCLE requirements, failure to pay annual membership fees, failure to pay a final fee arbitration award or failure to pay court-ordered family or child support. Such a voluntary resignation does not carry with it any adverse implication or connotation.

On the other hand, a member who resigns with disciplinary charges pending typically does so because (a) he or she wishes to avoid the humiliation or notoriety of a disbarment or suspension order; (b) does not wish to contest the pending charges or allegations; and/or (c) wishes to avoid the potential adverse consequences of a finding of specific misconduct on his or her license in another jurisdiction or profession.

In light of our proposed requirement for resigning members to admit or plead no contest to the pending charges against him or her and because of the very different connotations applicable to a voluntary resignation as opposed to a resignation with disciplinary charges pending, we believe that it is appropriate to specifically designate the latter resignation as a "disciplinary resignation."

Delegation of Obligation to Evaluate Resignations to the State Bar Court Review Department

The State Bar receives approximately 100 resignations per year from State Bar members against whom disciplinary charges are pending. The acceptance of these resignations have typically allowed the disposition of approximately 350 complaints, investigations and proceedings annually.

When a resignation is received, the Office of the Chief Trial Counsel and the State Bar Court typically abate all pending proceedings against the attorney pending a determination of whether the resignation will be accepted. The public is protected from the attorney in the meantime because he or she is enrolled as an inactive member of the State Bar upon the tender of his or her resignation and is precluded from practicing law pending final action on the resignation.

Under the current procedure, the RAD Committee and the Board of Governors must consider and act upon each resignation. Regrettably, however, there are sometimes significant time lapses between regularly-scheduled meetings of the Board. As a result, there were sixteen (16) resignations on the RAD Committee and Board of Governors' agendas for the November 2007 meeting, eleven (11) resignations on the RAD Committee and Board of Governors' respective agendas for December 2007 and January 2008 and an additional fourteen (14) resignations on the RAD Committee and Board of Governors' agendas for the March 2008 meeting. Thus, there is both some unavoidable delay in the Board's ability to consider the resignation and the passage of time results in a significant "backlog" or build-up of resignations upon which recommendations are required.

The proposal of the staff working group is that the evaluation and recommendation regarding individual resignations be delegated to the State Bar Court Review Department, with either the Presiding Judge or the Review Department acting en banc making a recommendation to the Supreme Court as to the acceptance or rejection of the resignation. The clear advantage of this delegation is the availability of the Review Department and/or the Presiding Judge to act expeditiously on these resignations.

Resigning Member Must Admit or Plead No Contest to Allegations of Misconduct

As set forth above, the significant majority of jurisdictions either prohibit resignations with disciplinary charges pending (i.e., requiring the member to "consent" to disbarment) or require the member to admit or plead no contest to the allegations of misconduct as a condition of the acceptance of his or her resignation.

An attorney against whom disciplinary charges are pending does not have a right to resign. The primary advantage to the State Bar and to the Supreme Court in accepting a member's resignation is that (a) it promptly removes them from the practice of law, thereby protecting clients and the public; and (b) it may save significant resources that would otherwise be expended in the investigation, prosecution and adjudication of the underlying disciplinary complaints and proceedings.

However, there are also significant disadvantages to the administration of justice by allowing members to resign without any admission of wrongdoing. Pursuant to Business and Professions Code section 6049.1, the State Bar can take disciplinary action against a State Bar member who is admitted to the practice of law in another jurisdiction and has been disciplined in that other jurisdiction provided that his or her misconduct, if committed in California, would have violated a Rule of Professional Conduct or disciplinary provision of the State Bar Act and the disciplinary process in the other jurisdiction provided adequate due process rights. In those cases, the findings in the other proceeding constitute conclusive proof that the member committed the alleged misconduct. When a member is allowed to resign without an admission of misconduct, however, the other jurisdiction is unable to take advantage of such collateral estoppel effect and must separately prove the facts and legal basis for culpability. While the State Bar regularly shares its investigation and evidence with other jurisdictions, there is considerable added work, expense and delay to the other jurisdiction.⁵

The same adverse impact is felt by the State Bar's Client Security Fund. When a member is disciplined, whether that discipline involves disbarment or suspension, the State Bar Court's or Supreme Court's factual findings are used to determine a claimant's eligibility for payment from the Client Security Fund. However, when a member resigns and there are no admissions or factual findings, the Client Security Fund Commission must investigate and make independent findings of fact to determine whether the claimant is eligible for reimbursement by the Client Security Fund.

Accepting a member's resignation without requiring him or her to admit or plead no contest to the allegations against him or her allows the member to hide the nature and extent of his or her misconduct from the public. It also gives the impression that the State Bar is unfairly protecting the member's reputation by allowing him or her to resign without any finding that the member has acted dishonestly or unethically.

It is the strong recommendation of the staff working group that a member who desires to resign with disciplinary charges pending should be required to either admit or plead no contest to the allegations of misconduct pending against him or her.

Additional Grounds for Rejection of Resignation

The additional grounds for the potential rejection of a member's resignation (i.e., the filing of a decision or opinion by the State Bar Court recommending the member's disbarment and the fact that the member previously resigned or was disbarred and subsequently reinstated) are grounds currently specified in rule 657(b) of the Rules of Procedure.

The staff working group unanimously concluded that, since one of the primary advantages to the State Bar and the Supreme Court in accepting a resignation is that it may save significant resources, the resignation should be tendered at an early stage of the proceeding. If the member waits to resign until

⁵ The same problem exists when a member of the State Bar holds a license in another profession (e.g., certified public accountant, physician or real estate broker). Without an admission or finding regarding the facts and circumstances of the alleged misconduct, the other licensing agency cannot readily determine whether the misconduct adversely reflects upon the member's fitness to practice the other profession.

after trial and the Court's issuance of decision recommending disbarment, significant investigative, prosecutorial and adjudicate resources have already been devoted to the proceeding and there is little, if any, advantage to the discipline system in accepting the resignation at that stage. Moreover, the acceptance of the member's resignation after a disbarment recommendation has issued appears to inappropriately permit the member to avoid the opprobrium of a disbarment.

The staff working group also unanimously concluded that a member who has previously been disbarred or allowed to resign and has been subsequently reinstated to the practice of law should not be allowed to avoid a subsequent (and perhaps second) disbarment by resigning again.

Permanent Preclusion from Reinstatement of Member Who Fails to Comply with Rule 9.20

A member of the State Bar who resigns or who is either disbarred or actually suspended from the practice of law for a period in excess of 90 days is required to comply with rule 9.20 of the California Rules of Court.

When imposed, rule 9.20 requires a member to notify the member's clients of his or her disqualification from practicing law, return the client's papers and property, refund unearned fees and notify the client of any urgent action that must be taken in the client's matter. The member must also notify courts, co-counsel and opposing counsel in any pending matters of the member's disqualification to practice law. All notices must be given by certified or registered mail.

When a member tenders his or her resignation from the practice of law, he or she is required to sign a resignation form that contains the language specified in rule 9.21(b) of the California Rules of Court. The language of the resignation includes a specific acknowledgement by the member that he or she will comply with rule 9.20(a)-(b) of the California Rules of Court within 30 days of the filing of his or her resignation by the State Bar Court Clerk and that the member will file an affidavit attesting to his or her compliance with those requirements within 40 days of the filing of his or her resignation.

Despite this requirement and the member's specific agreement that he or she will timely comply with rule 9.20, many resigning members fail to comply with the rule. The staff working group recommends that the State Bar Court Presiding Judge or Review Department be authorized to recommend to the Supreme Court that a member who has willfully failed to comply with rule 9.20 should be permanently precluded from seeking reinstatement to the practice of law.

PUBLIC COMMENT

Only three public comments were received during the 90-day public comment period.

In an email received on December 12, 2007, State Bar member Fredrica Kertz Greene (SBN 71043) commented that a member may decide to "drop out of the Bar" rather than to fight charges that may or may not have any basis because of personal situations, such as illness or family problems. Ms. Greene stated her opinion that the proposal is punitive.

In an email received on January 9, 2008, State Bar member Susan L. Jeffries (SBN 95296) commented that the proposal assumes that the attorney is guilty of the charged misconduct because they have chosen to resign rather than to contest the charges. According to Ms. Jeffries, many complaints are “bogus” or “weak” and members should not have to deal with those complaints if they choose to resign.

Finally, in a letter dated February 6, 2008, State Bar member David Cameron Carr (SBN 124510), writing in his capacity as interim president of the Association of Discipline Defense Counsel (“ADDC”), states that the ADDC does not oppose referring to resignations with disciplinary charges pending as “disciplinary resignations” or to the delegation to the State Bar Court of the obligation to make recommendations to the Supreme Court regarding the acceptance or rejection of a member’s resignation. However, Mr. Carr states that the ADDC is opposed to (a) requiring the member’s submission of his or her resignation to be deemed an admission or no contest plea to the allegations of a pending notice of disciplinary charges or statement of undisputed facts filed by the Office of the Chief Trial Counsel; (b) adding the two proposed additional grounds for the Supreme Court’s potential rejection of a member’s resignation; and (c) potentially permanently prohibiting a resigning member who fails to comply with rule 9.20 of the California Rules of Court from seeking reinstatement to the practice of law.

Mr. Carr states, on behalf of the ADDC, that requiring a member to admit the allegations against him or her and adding two additional grounds for the potential rejection of the member’s resignation will unnecessarily increase the workload and cost of the discipline system and that the proposal unfairly assumes that the member is culpable of the alleged misconduct. Mr. Carr predicts that requiring an admission of the allegations will result in more respondents who will contest the disciplinary investigations or proceedings against them. Moreover, he asserts that, if the existence of a pending disbarment recommendation is a grounds for rejecting the resignation, more respondents will contest the proposed disbarment in the Review Department and the Supreme Court.

Finally, Mr. Carr states that permanently prohibiting a member who fails to comply with rule 9.20 from seeking reinstatement is unfair because “[t]hese respondents are often eager to leave law practice behind and everything associated with it.” Mr. Carr asserts that the member’s failure to comply with rule 9.20 does not, in every case, harm the un-notified client.

The members of the staff working group will be pleased to discuss these proposals with you and to respond to the points raised in the public comments at the time of the RAD Committee’s meeting on March 8, 2008 in San Francisco and, as appropriate, at the meeting of the Board of Governors on March 9, 2008.

RECOMMENDATION

The staff working group recommends that you approve the adoption of the proposed amendments to the Rules of Procedure of the State Bar of California and that you recommend to the Supreme Court the adoption of the proposed amendments to the California Rules of Court. If you agree, your adoption 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 that it recommend to the Supreme Court the adoption of the proposed amendments to rules 9.20 and 9.21 of the California Rules of Court, in the form attached hereto as Appendix A; and it is

FURTHER RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends to the Board of Governors that it adopt proposed rule 658 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, to become effective upon the Supreme Court’s adoption of amendments to rules 9.20 and 9.21 of the California Rules of Court in the form attached hereto as Appendix A or in such other form as the Court deems appropriate.”

Proposed Resolutions for the Board of Governors:

“**RESOLVED**, upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight that the Board hereby recommends to the Supreme Court that it adopt the proposed amendments to rules 9.20 and 9.21 of the California Rules of Court, in the form attached hereto as Appendix A; and it is

FURTHER RESOLVED, upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, that the Board hereby adopts rule 658 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, to become effective upon the Supreme Court’s adoption of amendments to rules 9.20 and 9.21 of the California Rules of Court, in the form attached hereto as Appendix A or in such other form as the Court deems appropriate.”