

INFORMATIONAL ITEM

JULY 30-2

Proposed Rule 9.6
Board Policy on
Removal of One-time
Only Fee Suspensions
from The State Bar of
California Web site

DATE: June 17, 2008

TO: Members, Board Committees' on Member Oversight and Regulation and Discipline and the Board of Governors

FROM: Starr Babcock, Senior Executive for Member Services

SUBJECT: Proposed Rule 9.6 Board Policy on Removal of One-time Only Fee Suspensions from The State Bar of California Web site

ATTACHMENT: California Rule of Court, 9.6

BACKGROUND

In 2007, on recommendation of the Board of Governors, the California Supreme Court amended Rule of Court 9.6 to authorize expungement of one-time only suspensions for non-payment of fees from the official membership records. To qualify for the expungement, a member must meet criteria in provision (b) of the rule. These criteria are: a) the member has not received an expungement under the rule; b) the suspension was for ninety days or less; c) the suspension ended at least seven years before the submission of the member's name to the Supreme Court; d) The member has no other suspension or involuntary inactive enrollment—in short, a limited, one-time only qualification. In accordance with the provisions of Rule 9.6, last year over twelve hundred qualified members saw their one-time only record of suspension expunged from their membership record (California Rule of Court, 9.6 is attached).

Member response to Rule 9.6 is positive. Moreover, the research contained in the Supreme Court petition confirms that a one-time only suspension for late payment of fees is not indicative of member misconduct and is worthy of one free pass. President Jeffrey Bleich directed staff to develop a proposed Board policy consistent with Rule 9.6 for removing or masking suspensions for non-payment of dues from the State Bar's Web site before the seven-year expungement period.

This memorandum is intended to inform the discussion of the proposed policy at MOC, RAD, and the Board.

DISCUSSION

For purposes of MOC, RAD, and Board discussion the proposal to implement the intent of Rule 9.6 is to remove the suspension from the Web site twenty-four months after the initial posting and maintain the suspension on the internal roll until the Rule 9.6 expungement. Discipline and other staff oppose removing the suspension from the Web site after twenty-four months. Board and staff

opposition was vetted in the original initiative and petition to gain Supreme Court adoption of Rule 9.6. Recently, staff provided additional feedback on the removal of the suspension from the Web site before the Rule 9.6 seven-year mark. Staff comments are included in the memo.

Rule 9.6 Board Policy

Removal from the Web site of one-time only suspensions for non-payment of fees within the Rule 9.6 (b) criterion is a benefit to members and will not impact public protection. Removal would occur after a twenty-four month period elapsed from the date of the Supreme Court's suspension order. The suspension would be maintained in the State Bar records and made available to the public upon inquiry to the Member Service Center ("MSC").

Arguments in Support of Proposed Rule 9.6 Board Policy

- a) Rule 9.6 (e) authorizes the Board to adopt rules and regulations, as it deems necessary to comply with the rule.
- b) Members will not be publicly embarrassed or have to respond to questions about a one-time only Supreme Court fee suspension on the Web site.
- c) One-time only fee suspensions do not reflect on competency and do not support any disciplinary action. Web site publication penalizes members who might have been suspended through no fault of their own.
- d) About twenty percent of the membership change addresses during the year resulting in fee statements that do not reach members
- e) The number of members receiving the benefit of Web site removal after twenty-four months is likely to be modest. About one thousand members will benefit over the five-year period prior to the seven-year mark for expungement, making the administration of the proposed policy manageable.
- f) The Board approved a one-time only waiver of penalties and fees for members with no prior history of suspension or late compliance. This approach of giving members a one-time free pass is consistent with the Board's direction to Member Service Division staff to implement user friendly options at the most likely point of member and State Bar interface—payment of annual fees.
- g) This change in policy reflects Board direction to maintain a strong regulatory program as its core value, however, where possible provide a meaningful break to members on a one-time only basis within narrow criteria.

Arguments against the Proposed Rule 9.6 Board Policy

- a) The suspension involves more than simply failing to pay a bill. Practicing law, advertising, or holding out, as an attorney during the suspension period is a crime (see BPC §§6125, 6126). It will be harder for clients, opposing counsel, the courts, and the public to detect unlawful conduct.

- b) Masking the suspension from the Web site is inconsistent with the intention to provide true and accurate public information at the Web site. It also runs counter to the State Bar's effort to direct callers to the Web site for information.
- c) The Supreme Court and other courts rely on the State Bar's Web site. At a minimum, for the Supreme Court's Certificates of Standing, current information about a member's status should be retained at the Web site. The courts will be inconvenienced if they must call MSC every time they need to find out about a member's status history.
- d) The seven-year criterion in Rule of Court 9.6(b) is already a compromise. Staff recommended ten years. Because judicial applicants must be free of any suspension for ten years in order to qualify for appointment (Cal. Const. Art. VI, sec. 15), the seven-year criterion requires dual tracking of expunged suspensions, which complicates record keeping and IT programming.
- e) The Board accepted the Office of the Chief Trial Counsel's ("OCTC") recommendation against a five-year criterion because a five-year period makes it possible that a fee suspension could be expunged before a disciplinary proceeding is initiated alleging the member's unauthorized practice of law during the suspension period. The expungement criteria in Rule 9.6 is a balance of member benefits without compromising public protection. The proposed change shifts that balance away from public protection.
- f) At a minimum, the Supreme Court should be informed of any proposal to remove the suspension and change in status from the Web site or to otherwise change the suspension process or the balance of member benefits and public protection interests.
- g) Removal of public information from the Web site runs counter to public policy in favor of transparency and greater access to public records (see *Mack v. State Bar* (2001) 92 Cal. App.4th 957, holding the State Bar did not breach an agreement with an attorney not to affirmatively publicize a private reproof simply by making the information available on its Web site. The opinion favorably references the State Bar's commitment to the use of new technologies to increase public access to public records.

Response to Regulatory Concerns

All of the arguments overlook the twenty-four month posting of the suspension on the Web site that addresses the arguments about unauthorized practice of law and public protection. Moreover, by the end of the twenty-four month posting period members receiving the benefit of removal from the Web site is small, roughly one thousand over the five-year period until the operation of Rule 9.6 expungement. If there is public inquiry about a member's record, the suspension will be disclosed, and will also be disclosed if the State Bar issues a Certificate of Good Standing.

The Clerk of the Supreme Court's reliance on the State Bar's Web site for Certificates of Good Standing will not be compromised as the Clerk reports current status. However, there is no argument that consultation with Court staff and the Clerk's office is necessary before implementation of the proposed Rule 9.6 Board Policy.

There is no statistical support that members who fall through the cracks with a one-time only fee suspension within Rule 9.6 criteria are a greater threat to the public. Indeed, the reference to the *Mack* case is inapposite, as *Mack* was disciplinary action against a lawyer. If the member gets an additional suspension or inactive order before the Rule 9.6 seven-year time limit, the member's

Web site profile will be updated to include the masked suspension and the member is no longer eligible for Rule 9.6 relief.

Staff asks for direction from MOC, RAD, and the Board to:

- 1) Pursue discussions with Supreme Court staff and return with a final proposal at the next scheduled meeting of the Board of Governors, or
- 2) Take no further action and continue the current policy of posting one-time only fee suspensions until Rule 9.6 permits expungement.