

AGENDA ITEM

NOVEMBER 124

Rules of Procedure of the State Bar – Proposed Modifications to Rules of Procedure Governing Conviction Proceedings

DATE: October 27, 2008

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

FROM: Colin Wong, Chief Administrative Officer, State Bar Court
George Scott, Chief Court Counsel, State Bar Court

SUBJECT: Proposed Modifications to the Rules of Procedure of the State Bar of California Governing Conviction Proceedings – Request for Adoption After Public Comment

EXECUTIVE SUMMARY

Currently, the Rules of Procedure of the State Bar governing State Bar disciplinary proceedings that result from an attorney's conviction of a crime focus primarily on procedures that occur in the Hearing Department of the State Bar Court and do not provide for many of the procedures followed by the Review Department of the State Bar Court in these cases. The lack of written rules results in confusion for the parties as to the procedure to be followed and additional work for the Court in responding to procedural questions. These proposed modifications to the Rules of Procedure will add Rules governing the procedures followed by the Review Department.

In addition, the current Rules of Procedure of the State Bar provide for the entry of an attorney's default in conviction proceedings. However, the default procedures in conviction cases are significantly different from the default procedures that apply in original disciplinary proceedings. These proposed amendments to the Rules of Procedure will modify the default procedures in conviction cases to make them more consistent with the default procedures applicable in all other cases.

At its July 10, 2008, meeting, the Board Committee on Regulation Admissions & Discipline Oversight authorized the release of the proposed modifications to rules 600 through 608 of the Rules of Procedure of the State Bar of California for public comment. The 45-day public comment period expired on August 29, 2008. No comments were received.

A copy of the proposed modifications to rules 600 through 608 of the Rules of Procedure of the State Bar of California that were released for public comment is attached as Appendix A. For convenience, a copy of the proposed modifications to rules 600 through 608 of the Rules of Procedure of the State Bar of California in non-legislative style format is attached as Appendix B.

BACKGROUND:

An attorney's conviction of a felony or misdemeanor involving moral turpitude or other misconduct warranting discipline constitutes cause for the imposition of discipline. (Bus. & Prof. Code, § 6101, subd. (a);¹ *In re Kelley* (1990) 52 Cal.3d 487, 494.) These two standards, "moral turpitude" and "other misconduct warranting discipline," provide the grounds for the imposition of discipline in a conviction proceeding the same as a violation of the Rules of Professional Conduct and State Bar Act provide the grounds for the imposition of discipline in an original disciplinary proceeding. An attorney convicted of a felony or misdemeanor which involves "moral turpitude" or "other misconduct warranting discipline" is culpable of professional misconduct in a conviction proceeding.

The moral turpitude standard is a statutory ground for levying discipline. (§ 6101, subd. (a).) The "other misconduct warranting discipline" standard is a ground for levying discipline established by the Supreme Court in the exercise of its inherent power to control the practice of law and to protect the public and the profession. (*In re Kelley* (1990) 52 Cal.3d 487, 494.) If the crime involves moral turpitude per se, culpability for professional misconduct is conclusively established and the issue to be determined is limited to the degree of discipline to be imposed. For all other crimes, the facts and circumstances surrounding the conviction must be examined in order to determine whether the criminal conduct involved moral turpitude or other misconduct warranting discipline and, if so, the degree of discipline that should be imposed.

The imposition of final discipline in an attorney conviction case is not authorized until the judgment of conviction has become final on appeal or the time for seeking appeal has passed. (§ 6102, subds. (c) and (d); rule 9.10(a), Cal. Rules of Court.). However, if the crime of which the attorney was convicted involved, or there is probable cause to believe that it involved, moral turpitude, or the crime was a felony, the attorney may be interimly suspended pending finality of the conviction and until further order of the court. (§ 6102, subd. (a).) Interim suspension is the method by which the court "may temporarily suspend an attorney whose acts indicate he or she may be unfit to practice law" pending finality of the conviction. (*In re Strick* (1983) 34 Cal.3d 891, 898.) In 1990, the Supreme Court delegated to the State Bar Court the power to place attorneys on interim suspension and to vacate, delay or temporarily stay interim suspension orders. (Rule 9.10(a), Cal. Rules of Court.) The Review Department exercises these delegated powers. (Rule 320, Rules. Proc. of State Bar.)²

Unlike ordinary discipline cases, conviction proceedings are initiated in the Review Department of the State Bar Court. The clerk of the court in which the attorney was convicted is required to transmit a certified copy of the record of conviction to the State Bar. (§ 6101, subd. (c).) The Office of the Chief Trial Counsel monitors the convictions and, when appropriate, transmits a certified copy of the record of conviction to the Review Department of the State Bar Court. The transmittal of the record of conviction initiates the conviction proceeding within the State Bar Court. Upon receipt of the record of conviction, the Review Department must 1) determine whether the crime is a felony or misdemeanor and 2) classify the crime as one which involves moral

¹ All further references to sections are to the Business and Professions Code unless otherwise indicated.

² All further references to Rules are to the current Rules of Procedure of the State Bar unless otherwise noted.

turpitude per se, one which may or may not involve moral turpitude depending on a review of the facts and circumstances surrounding the criminal conduct, or one for which there is probable cause to believe that it involves moral turpitude. These determinations then form the basis for deciding whether or not the attorney should be intermly suspended and, once the conviction becomes final, ultimately dictate the scope of the hearing to be held in the Hearing Department.

Current rules 600 through 608 focus primarily on the procedures to be followed by the Hearing Department after finality of the conviction. The current rules do not provide procedures for the tasks undertaken by the Review Department prior to finality. The proposed new rules 600 through 603 will fill this gap. Proposed rule 600 sets forth the nature of conviction proceedings and provides for the transmittal of the record of conviction to the Review Department by the Office of the Chief Trial Counsel. Proposed rule 601 sets out the procedures for imposing interim suspension and seeking relief from such suspension. Proposed rule 602 sets out the procedure in summary disbarment matters. Proposed rule 603 provides for the referral of a final conviction to the Hearing Department. Except for the default procedures and the rule numbers, the remaining new rules regarding proceedings in the Hearing Department, proposed rules 604 and 605, are the same as the existing rules 600 through 608.

An attorney's default may be entered in an original disciplinary case where the attorney fails to file a response to the notice of disciplinary charges or fails to appear at trial. (Rules 200-210.) Among other things, upon entry of default the factual allegations in the notice of disciplinary charges are deemed admitted unless otherwise ordered by the court based on contrary evidence, and no further proof is required to establish the truth of those facts. (Rule 200(d)(1).) Default proceedings, including any hearing that occurs and the hearing judge's decision in the case, are considerably streamlined as a result of the deemed admissions that result from the member's default in original discipline cases.

In conviction cases, however, it is solely the event of the attorney's conviction that is the initiating basis for a conviction proceeding. Currently, the initiating pleading in a conviction case is a notice of hearing on conviction issued by the State Bar Court clerk following finality of the conviction and referral of the case to the Hearing Department. (Rule 600(b).) The notice of hearing on conviction informs the member of various procedural matters but does not contain any factual allegations regarding the alleged misconduct. The attorney is required to file a response to the notice of hearing on conviction and the attorney's default may be entered if no response is filed. (Rules 601-602.) However, as the notice of hearing on conviction does not contain any factual allegations regarding the alleged misconduct, the Office of the Chief Trial Counsel must offer evidence at the default hearing in all conviction cases showing that the accused attorney is culpable of professional misconduct.

The proposed new rules will require that the Office of the Chief Trial Counsel set forth in a motion for entry of default the facts and circumstances surrounding the conviction that it contends it has clear and convincing evidence to prove. (Proposed rule 604(c)(3).) The motion for entry of default must be served on the accused attorney. (Rule 200(b).) If the attorney does not file a response to the notice of hearing on conviction within 10 days of the service of the motion for entry of default, the attorney's default shall be entered. (Rule 200(c).) Upon entry of the default, the factual allegations in the Office of the Chief Trial Counsel's statement of facts and circumstances surrounding the conviction shall be deemed admitted unless otherwise ordered by the Court and, as in original disciplinary proceedings, no further proof will be required to establish those facts.

(Proposed rule 604(c)(4).) Thus, the adoption of the proposed new rules will provide for default procedures in conviction cases that are consistent with the default procedures in original disciplinary cases.

At its July 10, 2008, meeting, the Board Committee on Regulation Admissions & Discipline Oversight authorized the release of the proposed modifications to rules 600 through 608 of the Rules of Procedure of the State Bar of California for public comment. The 45-day public comment period expired on August 29, 2008. No comments were received.

FISCAL AND PERSONNEL IMPACT:

None

BOARD BOOK / ADMINISTRATIVE MANUAL IMPACT:

None

RULE AMENDMENTS IMPACT:

If approved, this item would amend rules 600 through 608 of the Rules of Procedure of the State Bar of California.

PROPOSED BOARD COMMITTEE RECOMMENDATION:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight, recommends that the Board of Governors adopt the proposed modifications to rules 600 through 608 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, to become effective on January 1, 2009.

PROPOSED BOARD RECOMMENDATION:

RESOLVED, following public comment period and consideration of comments received, and upon recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors of the State Bar hereby adopts the proposed modifications to rules 600 through 608 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, to become effective on January 1, 2009.