



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: November 6, 2008

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Amendments to the California Rules of Court and to
The Rules of Procedure of the State Bar of California re: Resignations
With Disciplinary Charges Pending -- Request for Authorization to
Release for Public Comment

ISSUE

At their respective March 2008 meetings, the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") and the Board of Governors approved, for recommendation to the Supreme Court, proposed amendments to the California Rules of Court ("Rules of Court") and to the Rules of Procedure of the State Bar of California ("Rules of Procedure") relating to the resignations of State Bar members against whom disciplinary charges are pending. The proposed amendments were developed in response to a letter dated May 17, 2007, in which the Supreme Court expressed its concern about the State Bar's application of the process for considering those resignations.

The proposed amendments to the Rules of Court and Rules of Procedure approved by the Board of Governors were subsequently filed with the Supreme Court on May 27, 2008. However, following the Supreme Court's consideration of the proposed amendments in September 2008, senior Supreme Court staff advised State Bar staff that the Supreme Court had questions and concerns about implementation of the State Bar's proposal without some modifications.¹ As a result, senior Supreme Court staff, State Bar Court Presiding Judge JoAnn M. Remke and appropriate State Bar staff met with senior Supreme Court staff on October 10, 2008, to discuss the Court's concerns and the manner in which those concerns could be addressed and resolved.

As explained below, the proposed amendments to the Rules of Court and the Rules of Procedure are aimed at addressing the Court's questions and concerns. The issue presented by this agenda item is whether the RAD Committee should authorize the release of the proposed amendments, in the form attached hereto as Appendix A, for a 45-day public comment period.

¹ Because the Court concluded that further amendments to the Rules of Court and to the Rules of Procedure would be necessary, by minute order filed September 24, 2008, the Supreme Court denied the State Bar's petition to amend the rules in the form approved by the Board of Governors in March 2008.

RECOMMENDATION

The Office of the Chief Trial Counsel respectfully recommends that the RAD Committee authorize the release of the proposed amendments to the California Rules of Court and to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, for a 45-day public comment period.

DISCUSSION

As previously indicated, 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 on an individual basis with respect to each resignation tendered by a member.² 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.³

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.

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 because 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."

³ In her response to the Supreme Court's letter, State Bar 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 consistently followed the procedure specified by the Board of Governors from April 1986 through July 2007, when the Board adopted interim rule 657 of the Rules of Procedure.

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 its 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.

At your November 8, 2007 meeting, the RAD Committee also 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.

Following expiration of the public comment period, during which only three public comments were received, the RAD Committee and the Board of Governors, at their respective March 2008 meetings, approved the proposed amendments to the Rules of Court and to the Rules of Procedure and recommended to the Supreme Court that the proposed amendments be adopted. The proposal approved by the RAD Committee and the Board of Governors had the following primary features:

1. It proposed to refer to the resignation of a member against whom a disciplinary complaint, investigation or proceeding was pending as a *disciplinary resignation*;
2. It proposed to delegate 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. It proposed to require that the member admit or plead no contest to any pending notice of disciplinary charges ("NDC") and/or to any statement of undisputed facts filed by the Office of the Chief Trial Counsel relating to any pending disciplinary investigation or charges against the member in which no NDC had been filed;
4. It proposed to add two additional grounds to rule 9.21(d) of the Rules of Court for rejecting a member's resignation, 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 reinstated⁴; and
5. It proposed to authorize the Review Department to recommend the potential permanent prohibition of a member's reinstatement following resignation if the member willfully failed to comply with rule 9.20 of the Rules of Court at the time of his or her resignation.

⁴ With the Supreme Court's consent, these two additional grounds had already been added through the adoption of interim rule 657 of the Rules of Procedure.

The proposed amendments to the Rules of Court and Rules of Procedure approved by the RAD Committee and the Board of Governors were filed with the Supreme Court on May 27, 2008. Thereafter, in September 2008, after the Supreme Court had considered the proposed amendments, senior Supreme Court staff telephoned the undersigned and State Bar Court Presiding Judge JoAnn M. Remke to report that the Court had concerns about several aspects of the State Bar's proposal.

While the Court was comfortable with the delegation of authority to the State Bar Court Review Department, with the additional grounds for the potential rejection of the member's resignation and with the concept that the member should admit to his or her misconduct as a prerequisite to the acceptance of the member's resignation, the Court had specific concerns with several aspects of the proposal. In particular, the Court's concerns were as follows:

1. The Court preferred the current terminology of a "resignation with charges pending" as opposed to a "disciplinary resignation." The Court felt that the current terminology is more accurate and more descriptive of the actual nature of the resignation;
2. The Court did not want to have a permanent preclusion from seeking reinstatement following a resignation with charges pending, even for those members who fail to comply with rule 9.20 at the time of their resignation;
3. With respect to the admission to the allegations of an NDC or to a statement of undisputed facts prepared by the Office of the Chief Trial Counsel, the Court was concerned that (a) the language of the resignation form provided that the member was admitting to a statement of undisputed facts when, in reality, he or she may not have seen those documents at the time of the tender of the resignation; and (b) it appeared that, if the member disputed the accuracy of the allegations of the NDC or of the statement of undisputed facts, his or her only recourse was to withdraw the resignation and go to trial.

On this last point, senior Supreme Court staff suggested that the Office of the Chief Trial Counsel seek to reach agreement with the member on a stipulation as to facts and conclusions of law regarding any pending complaint, investigation or proceeding that was pending at the time the member tendered his or her resignation. This is very similar to the process that occurs when OCTC and the member stipulate to facts and conclusions of law in connection with a member's application to participate in the Alternative Discipline Program. In the discussions with senior Supreme Court staff, it was agreed that if the member and the Office of the Chief Trial Counsel are unable to reach agreement on a stipulation as to facts and conclusions of law, that such failure could be a grounds for the Supreme Court's decision not to accept the member's resignation.

Based upon the Supreme Court's concerns and our discussions with senior Supreme Court staff, we have prepared proposed amendments to the California Rules of Court and to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, to specifically address the Court's concerns. In particular, the proposed amendments attached hereto as Appendix A address the Court's concerns by (1) deleting all references to a resignation with disciplinary charges pending as a

“disciplinary resignation”; (2) deleting any delegation to the State Bar Court Review Department to recommend that a member be permanently prohibited from seeking reinstatement to the practice of law; (3) requiring the member and the Office of the Chief Trial Counsel, within 60 days of the tender of the member’s resignation, to enter into a stipulation as to facts and conclusions of law regarding any pending disciplinary complaints, investigations or proceedings; and (4) adding the failure to enter into a stipulation as to facts and conclusions of law as a potential grounds for the Supreme Court’s refusal to accept the member’s resignation.

Since the proposed amendments reflect a significant change from the version of the amendments previously approved by the RAD Committee and the Board of Governors, it is appropriate to release the proposed amendments for a further public comment period.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that you approve the release for public comment of the proposed amendments to the California Rules of Court and to the Rules of Procedure of the State Bar of California. If you agree, your adoption of the following resolutions would be appropriate:

“**RESOLVED** that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the amended version of proposed amendments to the California Rules of Court and to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, for a 45-day public comment period; and it is

FURTHER RESOLVED, that the release of the aforementioned proposed amendments to the California Rules of Court and to the Rules of Procedure does not constitute, and shall not be considered, as approval by the Board of Governors of the State Bar of California of the matters published.”