

# AGENDA ITEM

## MARCH 122

Proposed Amendments to  
Rules of Court and Adoption of  
Proposed Amendments to  
Rules of Procedure re  
Resignations With Disciplinary  
Charges Pending Following  
Public Comment

**DATE:** February 11, 2009

**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:** Proposed Amendments to California Rules of Court and to the Rules  
of Procedure re Resignations With Disciplinary Charges Pending --  
Request for Adoption Following Public Comment

---

### EXECUTIVE SUMMARY

In March 2008, the Board Committee on Regulation, Admissions and Discipline Oversight 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. 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 to discuss the Court's concerns and the manner in which those concerns could be addressed and resolved.

As a result, the RAD Committee authorized the public comment release of proposed amendments to the California Rules of Court and the Rules of Procedure that address the Supreme Court's concerns. Two public comments were received during the public comment period, both of which opposed the concept of requiring resigning members to admit to their misconduct as a prerequisite to the acceptance of their resignation. Notwithstanding these comments, the Office of the Chief Trial Counsel recommends that the Board of Governors approve the proposed amendments to the California Rules of Court and the Rules of Procedure and that it recommend those proposed amendments to the California Supreme Court.

## BACKGROUND

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.<sup>1</sup> 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.<sup>2</sup>

At its July 2007 meeting, a working group consisting of representatives of State Bar Court, Office of General Counsel and 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 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 its November 8, 2007 meeting, the RAD Committee also authorized the release for public comment of the proposal of the above-referenced 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.

---

<sup>1</sup> 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."

<sup>2</sup> 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.

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 reinstated<sup>3</sup>; 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.

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)

---

<sup>3</sup> 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 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, State Bar staff 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 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.

The RAD Committee authorized release of the proposed amendments for an additional 75-day public comment period. As set forth below, two comments were received during the public comment period. Although both of these comments were opposed to the general concept of requiring a member who wishes to resign with disciplinary charges pending to admit to some or all of the pending allegations, the Office of the Chief Trial Counsel believes that such admissions are necessary and appropriate and, significantly, that such a requirement is acceptable to the Supreme Court.

## **FISCAL AND PERSONNEL IMPACT**

Approval of the proposed amendments to the California Rules of Court and to the Rules of Procedure could increase the workload of the Office of the Chief Trial Counsel because it will be necessary to negotiate with the respondent attorney and/or his or her counsel and prepare stipulations as to fact and conclusions of law in these resignation matters.

## **PUBLIC COMMENT**

As previously indicated, two comments were received during the public comment period. Copies of these comments are attached hereto as Appendix B. In summary, the public comments are as follows:

**Association of Discipline Defense Counsel ("ADDC"):** In an email sent on February 3, 2009, David Cameron Carr makes the following points on behalf of the ADDC in opposition to the

proposed rule amendments: (1) the ADDC does not oppose delegation of the consideration of resignations to the State Bar Court and does not oppose the first two additional grounds for the potential rejection of a resignation (i.e., there is a pending disbarment recommendation against the member or that the member has previously been disbarred or has resigned and subsequently reinstated); (2) the ADDC opposes the proposal that the failure to agree upon a stipulation as to facts and conclusions of law can be a grounds for rejection of the resignation; (3) members who wish to resign with charges pending should not be required to stipulate to their culpability in the pending disciplinary proceedings or investigations because many of them resign as a result of serious physical, emotional or psychological problems and have chosen to resign rather than contest the charges; (4) the Office of the Chief Trial Counsel already has the right to perpetuate evidence for use at a later time in the event the member seeks reinstatement; and (5) the resignations should be considered by the entire Review Department and not solely by the Presiding Judge.

**JoAnne Earles Robbins:** Ms. Robbins' letter, dated January 30, 2009, is virtually identical to the email that was sent by Mr. Carr on February 3, 2009.

### **PROPOSED BOARD COMMITTEE RECOMMENDATION**

The Office of the Chief Trial Counsel has recommended to the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") that it adopt the following resolution:

**RESOLVED**, following expiration of the public comment period and having considered the public comments that were received, the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends to the Board of Governors that it approve the proposed amendments to rule 9.21 of the California Rules of Court and that it adopt proposed rule 658 of the Rules of Procedure, in the form attached hereto as Appendix A, and that it recommend the adoption of the proposed amendments to rule 9.21 of the Rules of Court to the California Supreme Court.

This item is on the RAD Committee's agenda for its scheduled meeting on March 5, 2009. The RAD Committee's recommendation will be reported to you at the time of your meeting on Friday, March 6, 2009.

### **PROPOSED BOARD RECOMMENDATION**

**RESOLVED**, following expiration of the public comment period and having considered the public comments that were received, and upon recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors hereby approves the proposed amendments to rule 9.21 of the California Rules of Court for recommendation to the California Supreme Court and 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 the amendments to rule 9.21.

SJD:dim  
Attachment