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January 30, 2009

Board of Governors
The State Bar of California
1149 So. Hill Street
Los Angeles CA 90015

Attn: Itzel D. Berrio

Re: Proposed Changes to Rule of Court 9.21 and Rule of Procedure 658
Resignations with Charges Pending

Dear Members of the Board of Governors:

I write this letter on my own behalf and not as a member of any association. I have practiced law in the area of State Bar disciplinary law for twenty-seven (27) years. For almost 15 years, I served as a prosecutor and then a Hearing Judge for the State Bar, and for the last twelve years, I have represented attorneys before the State Bar. Because of the length and depth of my experience, I offer my thoughts and opinions regarding the Office of the Chief Trial Counsel's recent proposals for dramatic changes in the rules regarding the processing of the **resignations** of attorneys against whom charges are pending.

The proposed amendments to **Rule of Court 9.21** include a **new procedure** by which the State Bar Court will consider whether or not to recommend that the Supreme Court accept the resignation, and **three new grounds** for rejection of the resignation. I understand and agree with the basic procedure proposed for the State Bar Court to consider resignations, with some exceptions, and have no opposition to the first two of the new grounds: 1) that the State Bar Court had recommended disbarment; or 2) that the member has previously been disbarred or resigned from the practice of law. These two grounds are based on existing facts as already determined by the State Bar Court at some point in the past, in which attorneys have been afforded the opportunity to defend themselves against allegations against them.

The third new ground for rejection, however, number 8, is based **solely** on attorneys declining to **stipulate to the facts and conclusions of law** presented to them by the Chief Trial Counsel, which may at that time be nothing more than unsubstantiated allegations by a complaining witness. This ground is completely at odds with the nature of all the other grounds. It is also a dramatic departure from the Supreme Court's historic position regarding the importance of due process and the opportunity for attorneys to avail themselves of the full panoply of rights and protections, to insure justice and fairness in the process.

New Ground for Rejection in Rule 9.21(d)(8)

Almost all of the other grounds are based either on conduct of the attorney **after** a resignation is filed (numbers 2 through 4, regarding failure to comply with Rule 9.20 or unlawful practice of law) or facts that have been determined by a Court (numbers 5 through 7, recommendation of disbarment or previous disbarment or resignation).

However, new subsection Rule 9.21(d) (8) (**"ground number 8"**) is based on nothing more than the Office of the Chief Trial Counsel's unilateral determination of the facts and conclusions of law in the case, and the attorney's disagreement with those facts and conclusions. This new ground leaves it in the sole discretion of the State Bar prosecutors to decide the facts which the attorney would be obligated to admit, whether or not they are proven by sufficient evidence, in order to be allowed to resign. This is patently unfair and highly prejudicial to the due process rights of attorneys who are charged with misconduct.

Current Provisions for Resignation

Resignation is one of the major methods by which a member may choose to respond to disciplinary charges. This has historically saved the State Bar a great deal of time and money, instead of going through the lengthy and expensive process of a disciplinary trial. A member agrees to give up practice, meet certain requirements and not reapply for at least five years. (In fact, most members who resign never apply for reinstatement and it is only a very small percentage that are ever reinstated.)

However, under the current procedures, the resigning member is not forced to admit all charges, whether or not they are true. Some members choose to settle their disciplinary cases and others choose to vigorously defend against the charges. However,

some, for a wide variety of reasons, choose to resign from the State Bar. While the reasons may be personal, financial or emotional, members are advised by the resignation form that they sign, *inter alia* (1) that they are giving up the right to practice law; (2) that they would have to petition for reinstatement, to be readmitted; and (3) that the current charges may be considered at that time.

A very substantial number of members who are charged with misconduct are experiencing serious physical, emotional or psychological problems. Whether these stem from medical, family or professional difficulties, these problems are frequently the reason that members choose to resign instead of defend themselves against the allegations against them.

For precisely the same reasons that many members choose to resign, a very significant number of members are unable to logically and rationally consider a stipulation of facts and conclusions of law by which they will be bound forever. The failure of a member to agree to a binding legal stipulation may have little to do with the member's guilt or innocence and a great deal to do with the member's psychological state or financial resources at that time. The proposed language of the new Rules implies that if a stipulation is not reached, it is somehow the fault of the member. The wording of the Rule gives all power and authority to OCTC to submit any proposed Stipulation to the member, reasonable or not, and implies lack of cooperation by the member if it is not signed.

Many members are in highly emotional and very vulnerable circumstances when they file a resignation. For this very reason, it is unfair to place on them the additional burden of trying to determine whether they should or should not sign a Stipulation. If they had the ability to rationally do so, many of them would defend themselves against the charges. Most members who resign do so specifically so that they can give up the practice of law and put the matter behind them, because they are unable to fight the charges at that time. It is quite likely that the situation would be different at some other point in time.

It is neither fair nor just to place such a coercive requirement on a member who is willing to give up practicing law. Due process demands that a member not be put in a situation of duress, in which he or she must choose whether to stipulate to facts or conclusions with which he or she does not agree, or face the powerful State Bar and be disbarred.

Perpetuation of Evidence

There is already in place a comprehensive system by which evidence can be perpetuated after a resignation is filed, **Rules of Procedure 651 through 656.** Those Rules provide for extensive methods of perpetuation of evidence, including subpoenas, depositions and stipulations of fact. These methods furnish abundant opportunities for the Chief Trial Counsel to gather information to submit to the State Bar Court at a later time, if and when the attorney ever petitions for reinstatement. None of them, however, deprive attorneys of the opportunity to bring forth evidence and information at a later time, to defend themselves against allegations of wrongdoing.

There is No Change in the Need for New Ground Number 8

The Chief Trial Counsel has articulated no reason why this new ground number 8, the simple failure of the attorney to sign a stipulation as to facts and conclusions of law, is necessary. In fact, the remaining procedures proposed appear to provide for an orderly process and the determination of the State Bar Court as to whether sufficient grounds are present based on the other seven grounds to reject the resignation. In fact, resignations have historically been encouraged by the Chief Trial Counsel, as a method of bringing a disciplinary matter to a swift and efficient close.

Ground number 8, requiring a stipulation by the member, will cause many members to refuse to file resignations, because they are unable in good faith to stipulate to facts they know to be untrue, or cannot make a rational decision to do so at that time. This would lead to more trials in the State Bar Court, and a **greater expenditure** of the resources of the State Bar. This would be a tragic waste of the membership dues of California attorneys, and the time and resources of the State Bar Court. There is so much that would be lost and so little to be gained.

Revisions of the Proposed Rules

If the Board of Governors decides to amend Rule 9.21 to include new ground number 8, regarding a stipulation, I submit that it should revise the rule so as not to elevate the new ground to any other level not accorded to the other grounds. If it is to be a new ground, ground number 8 should be on the same plane as all the other reasons for rejection of a resignation.

In Rule **9.21(b)**, the language should be changed from the new wording inserted, to provide that a member filing a resignation **understands** (not "agrees") that there are **several** grounds on which a resignation **may** be rejected. These include such things as failing to comply with Rule 9.20 or practicing after the resignation is filed. The alternative, of course, is to delete the new language altogether.

In Rule **9.21(c)**, the new language proposed in the second sentence should be changed to provide that the State Bar Court must "consider the member's resignation and **any grounds on which the resignation may be rejected.**"

In Rule **9.21(d)**, if ground number 8 is included, it should be phrased in more objective and less conclusory language, such as, "The **existence** of a written stipulation as to facts and conclusions of law regarding the **allegations** contained in **any** disciplinary matters that were pending . . . . "

In proposed Rule of Procedure **658(b)**, the mandatory language presently included in the first sentence should be changed to "the member and the Office of the Chief Trial Counsel shall **seek to agree** on a stipulation . . . ."

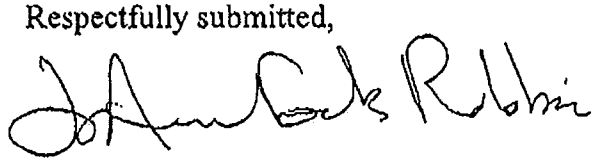
In proposed Rule of Procedure **658(c)**, the time during which a member may file a response to the Chief Trial Counsel's report should be changed to **sixty (60) days**, instead of thirty (30) days, to afford the member an adequate opportunity to provide a reply to the report. The recommendation of the State Bar Court will be based in part on this information, and the attorney deserves a fair chance to respond. There should be a similar change in the time period provided in Rule of Procedure **658(d)**.

In Rule of Procedure **658(d) and (e)**, the provisions for approval by the **Presiding Judge** should be changed to the approval by the **Review Department**. This recommendation is of great importance to the member, and may be based in part on a member's explanation of various facts and circumstances. It is of tremendous consequence to the member whether or not the State Bar Court recommends that a resignation be rejected. This is not an administrative or ministerial act, but one which requires a reasoned determination of all the factors of the case. Please note that at this point, the member has already been placed on inactive enrollment and cannot practice law, so there is no urgency of time during which to make this critical decision regarding a member's status.

Conclusion

There is no compelling reason why a member who wishes to resign should be forced into a situation in which he or she may make a hasty and ill-advised decision because of pressure to sign a stipulation. The coercive situation in which an attorney merely wants to resign, and will likely never petition for reinstatement, places unfair pressure on the attorney. Such a situation of duress deprives that attorney of due process and occurs at a time when a substantial number of attorneys are unable to make a rational and logical decision about facts and conclusions. To impose such an requirement will likely decrease the number of resignations and increase the workload of the State Bar and the cost of the disciplinary system.

Respectfully submitted,



JoAnne Earls Robbins
Attorney at Law

Drexel, Scott

From: David Cameron Carr [dccarr@ethics-lawyer.com]
Sent: Tuesday, February 03, 2009 11:19 AM
To: Berrio, Itzel
Subject: Public Comment -- Resignation with Charges Pending

The Association of Discipline Defense Counsel offers the following comment on the proposed amendments to rule 9.21, California Rules of Court regarding resignations with charges pending.

The proposed amendments to Rule of Court 9.21 include a new procedure by which the State Bar Court will consider whether or not to recommend that the Supreme Court accept the resignation, and three new grounds for rejection of the resignation. We have no objection to the basic procedure proposed for the State Bar Court to consider resignations, with some exceptions, and no opposition to the first two of the new grounds, that the State Bar Court had recommended disbarment or that the member has previously be reinstated to practice law. These two grounds are based on existing facts as already determined by the State Bar Court at some point in the past, in which attorneys have been afforded the opportunity to defend themselves against allegations against them.

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However, under the current procedures, the resigning member is not forced to admit all charges, whether or not they are true. Some members may choose to settle a disciplinary case and others choose to vigorously defend against the charges. However, others for a wide variety of reasons, choose to resign from the State Bar. While the reasons may be personal, financial or emotional, members are advised by the resignation form that they sign, *inter alia* (1) that they are giving up the right to practice law; (2) that they would have to petition for reinstatement, to be readmitted; and (3) that the charges may be considered at that time.

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In proposed Rule of Procedure 658(**b**), the mandatory language presently included in the first sentence should be changed to "the member and the Office of the Chief Trial Counsel shall **seek to agree** on a stipulation . . . ."

In proposed Rule of Procedure 658(**c**), the time during which a member may file a response to the Chief Trial Counsel's report should be changed to sixty (60) days, instead of

thirty (30) days, to afford the member an adequate opportunity to provide a reply to the report. There should be a similar change in the time period provided in Rule of Procedure 658(**d**).

In Rule of Procedure 658(d) and (e), the provisions for approval by the **Presiding Judge** should be changed to the approval by the **Review Department**. This decision is of great import to the member, and may be based on a member's explanation of various facts and circumstances. It is of tremendous consequence to the member whether or not the State Bar Court recommends that a resignation be rejected. This is not an administrative or ministerial act, but one which requires a reasoned determination of all the factors of the case. Please note that at this point, the member has already been placed on inactive enrollment and cannot practice law, so there is no urgency of time during which to make this critical decision regarding a member's status.

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