

# AGENDA ITEM

**MARCH 123**

Permanent Disbarment –  
Proposed Amendments to  
Rules of Court and Adoption of  
Amendments to Rules of  
Procedure 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 Rules of  
Procedure of State Bar of California Regarding Permanent Disbarment  
And Passage of Attorney Bar Examination as Condition of Reinstatement  
-- Request for Approval Following Public Comment

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## **EXECUTIVE SUMMARY**

In August 2006, the Board of Governors approved, for recommendation to the Supreme Court, proposed amendments to the California Rules of Court that would (a) authorize, but not require, the State Bar Court to recommend the permanent disbarment of attorneys who are found culpable of specified offenses; and (b) require applicants for reinstatement following disbarment or resignation to take and pass the Attorneys' Bar Examination in order to demonstrate their present ability and learning in the general law.

After considering the State Bar's proposal, the Supreme Court has indicated that it desires to adopt a narrower rule regarding permanent disbarment. As a result of discussions between senior Supreme Court staff and representatives of the State Bar, amended versions of the previous proposal were released for a 75-day public comment period. Four public comments were received during the public comment period, three of which support the proposed amendments and one of which is opposed to the concept of permanent disbarment.

The Office of the Chief Trial Counsel now recommends that the Board of Governors approve the proposed amendments to the California Rules of Court and to the Rules of Procedure in the form attached hereto as Appendix A and that the Board recommend those amendments to the California Supreme Court.

## BACKGROUND

In 1996, the Board of Governors adopted proposed amendments to the Rules of Procedure that would have required the State Bar Court, in any decision recommending the disbarment of a member, to specify whether the minimum waiting period for seeking reinstatement should be 5 years, 10 years or, alternatively, whether the member should be permanently prohibited from seeking reinstatement.

The 1996 amendments to the Rules of Procedure required the State Bar Court to weigh various factors in determining whether permanent disbarment or a 5-year or 10-year waiting period should be imposed. The amendments also increased the minimum waiting period for seeking reinstatement following a resignation with disciplinary charges pending from 5 years to 10 years in those cases in which there was a pending criminal investigation or proceeding relating to a felony involving moral turpitude that would have qualified for summary disbarment pursuant to Business and Professions Code section 6102, subdivision (c). Finally, the amendments to the Rules of Procedure adopted by the Board of Governors in 1996 required petitioners for reinstatement to take and pass the Attorneys' Examination as the required means of demonstrating their present ability and learning in the general law.

In September 1996, shortly after the amendments to the Rules of Procedure were adopted by the Board, the Supreme Court requested that implementation of the amendments be suspended until further order of the Court. Thereafter, in 1997 and 1999, at the Supreme Court's request, the State Bar provided the Court with additional background information about its proposal and about the availability of permanent disbarment in other states. In November 2001, the State Bar formally withdrew its proposal for reconsideration in light of the Supreme Court's opinions in *In re Paguirigan* (2001) 25 Cal.4th 1 and *In re Lesansky* (2001) 25 Cal.4th 11, relating to the summary disbarment statute.

In May 2005, the Supreme Court asked the State Bar to further consider its permanent disbarment and other rule change recommendations and to provide the Court with a timeline for the submission of its updated information and proposal to the Supreme Court. At the request of Executive Director Judy Johnson, a working group consisting of representatives of the Office of General Counsel, the Office of the Chief Trial Counsel and the State Bar Court, met to further consider the proposed amendments to the Rules of Procedure previously approved by the Board of Governors in 1996. The working group's proposal regarding permanent disbarment was considered by the RAD Committee at its November 2005 meeting.

At the November 2005 meeting, the RAD Committee authorized public comment release of two different permanent disbarment proposals. The first proposal was similar to the 1996 version, identifying numerous factors to be considered by the State Bar Court in determining whether to recommend permanent disbarment. The second proposal more specifically identified the types of misconduct that might warrant a recommendation for permanent disbarment. Both versions of the proposals recommended increasing the minimum waiting period for seeking reinstatement in non-permanent disbarment cases from 5 years to 7 years and recommended requiring petitioners seeking reinstatement to take and pass the Attorneys' Examination in order to demonstrate their current ability and learning in the general law.

Following a 90-day public comment period, the RAD Committee further considered the permanent disbarment proposals and voted to publish modified amendments to the Rules of Court for an additional 90-day public comment period.

At its August 2006 meeting, the Board of Governors approved, for recommendation to the Supreme Court, proposed amendments to the Rules of Court that would:

1. Authorize (but not require) the State Bar Court to recommend permanent disbarment of respondent attorneys who are found culpable of specified misconduct<sup>1</sup>; and
2. Require applicants seeking to be reinstated to the practice of law to take and pass the Attorneys' Examination administered by the Committee of Bar Examiners in order to demonstrate their present ability and learning in the general law.

The Board of Governors did not recommend any change in the current 5-year waiting period for seeking reinstatement following disbarment or resignation with disciplinary charges pending.

The proposed amendments approved by the Board of Governors were subsequently transmitted to the California Supreme Court. Thereafter, following the Court's consideration of the State Bar's proposed amendments in September 2008, senior Supreme Court staff contacted Presiding Judge Remke and the undersigned, as Chief Trial Counsel, to indicate that the Court had changes that it wanted made in the proposed rules. A meeting between the Chief Justice's Principal Attorney, Presiding Judge Remke and appropriate staff from the Office of the Chief Trial Counsel, State Bar Court and Office of General Counsel was held on October 10, 2008, to discuss the Court's issues and proposed changes.

Other than some minor, technical language modifications, the primary substantive change requested by the Supreme Court was a limitation on the application of permanent disbarment to those respondent attorneys who have been disbarred for a second time by the Supreme Court.

The Court did not request any change in the proposed requirement that an applicant for reinstatement take and pass the Attorneys' Examination. Although there was some discussion about the reason for requiring a member who resigned *without* charges pending to take and pass the Attorneys' Examination if he or she subsequently seeks reinstatement to the practice of law, there was no indication that the Court was opposed to such a requirement. The requirement has been retained in the proposed amendments to rule 665 of the Rules of Procedure because it is consistent with the practice of the Committee of Bar Examiners in the case of all applicants seeking admission to the practice of law in California. An applicant who is not admitted to practice in another jurisdiction, and who takes and passes the General Bar Examination, must take the oath as an attorney and be formally admitted to the practice of law within five years of his or her passage of the Examination. If he or she fails to take the oath within the 5-year period, the applicant must again take and pass the Examination. Moreover, an applicant who is admitted to the practice of law in another jurisdiction and desires admission to the practice of law in California must take and pass the Attorneys' Examination and must, likewise, take the oath as an attorney and be formally admitted within five years of his or her passage of the Attorneys' Examination. There appears to be no logical reason for exempting from this requirement an individual who resigns from the practice of law and subsequently desires to be reinstated, even if there were no disciplinary investigations or proceedings pending against the attorney at the time of his or her resignation.

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<sup>1</sup> The misconduct that could potentially warrant permanent disbarment included: (a) conviction of a crime involving malfeasance in public office which involved fraud or the embezzlement or intentional misuse of public funds; (b) engaging in multiple instances of the intentional theft or conversion of client funds, resulting in substantial harm to one or more victims; (c) engaging in the intentional corruption of the judicial process, including but not limited to, bribery, forgery, perjury or subornation of perjury; (d) engaging in multiple instances of insurance fraud committed in the course of the practice of law, including but not limited to, staged accidents, the submission of false or fraudulent claims for the payment of a loss or injury or repeated instances of runner-based solicitation; (e) engaging in the unauthorized practice of law when the member knew of his or her disbarment, resignation or suspension from practice; (f) the member was previously disbarred or resigned with disciplinary charges pending; and (g) engaging in conduct, involving fraud, moral turpitude or a pattern of serious misconduct, that is so egregious that the member should be permanently disbarred.

## **FISCAL AND PERSONNEL IMPACT**

Approval of the proposed amendments to rule 9.10 of the California Rules of Court and to rule 665 of the Rules of Procedure of the State Bar might result in a reduction in the number of petitions filed by disbarred or resigned attorneys who are seeking reinstatement to the practice of law in the event that they have difficulty in passing the Attorney's Bar Examination. The investigation, defense and adjudication of reinstatement proceedings is very resource-intensive for both the Office of the Chief Trial Counsel and the State Bar Court. There were 11 reinstatement petitions filed in 2007 and 8 petitions filed in 2008. A reduction in the number of reinstatement petitions filed in the State Bar Court could result in a corresponding reduction in the resources required to be expended on those matters by the Office of the Chief Trial Counsel and the State Bar Court.

## **PUBLIC COMMENT**

There were four public comments received during the public comment period. Copies of the four public comments are attached hereto as Appendix B.

In summary, the public comments were as follows:

**David Cameron Carr/Association of Discipline Defense Counsel:** In an email sent on February 3, 2009, Mr. Carr states, on behalf of the Association of Discipline Defense Counsel ("ADDC"), that the ADDC supports the proposed amendments to rule 9.10 of the California Rules of Court.

**San Diego County Bar Association:** In a letter dated January 28, 2009, San Diego County Bar Association President Jerrilyn T. Malana states that the SDCBA supports the proposed version of rule 9.10 of the California Rules of Court that was released for public comment and recommends that it be forwarded to the Supreme Court for its review and adoption.

**Robert Klepa:** In an email sent on January 26, 2009, attorney Klepa states that he agrees with the proposed changes to the rules requiring individuals seeking reinstatement to take and pass the Attorney's Bar Examination. However, Mr. Klepa further states that he would broaden the grounds for imposing permanent disbarment beyond those currently set forth in proposed rule 9.10 of the California Rules of Court.

**Paul Eisner:** In an email sent on January 30, 2009, attorney Eisner states that he is opposed to permanent disbarment and suggests instead that attorneys who would otherwise be subject to permanent disbarment be required to make an even greater demonstration of rehabilitation in order to qualify for reinstatement.

## **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 9.10 of the California Rules of Court and rule 665 of the Rules of Procedure of the State Bar, in the form attached hereto as Appendix A, and that it recommend the adoption of the amendments to rule 9.10 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 9.10 of the California Rules of Court for recommendation to the California Supreme Court and hereby adopts the amendments to rule 665 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 9.10.

SJD:dim  
Attachment