

AGENDA ITEM

MARCH 125

Resignations Without Charges
Pending – Adoption of Rule
2.40 of Rules of the State Bar
After 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 Adoption of Rule 2.40 the Rules of the State Bar re
Resignations Without Disciplinary Charges Pending and Approval
of Voluntary Resignation Form – Request for Adoption Following
Public Comment

EXECUTIVE SUMMARY

The Supreme Court has expressed concern about the fact that numerous attorneys have recently tendered voluntary resignations from the State Bar without disciplinary charges pending against them when, in fact, they were not entitled to do so because they had already been criminally convicted or were either charged or about to be charged with the commission or crimes. As a result, the Supreme Court has asked the State Bar to consider the adoption of a rule that would require members who wish to tender a voluntary resignation to declare, under penalty of perjury, that there are no criminal investigations or charges pending against them and that they have not been convicted of any crime that is required to be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5).

Proposed rule 2.40 of the Rules of the State Bar of California and the attached new Voluntary Resignation form was released for a 75-day public comment period that expired on February 3, 2009. No public comments were received. The Office of the Chief Trial Counsel now recommends that the Board of Governors adopt rule 2.40 and that it approve the proposed new Voluntary Resignation form, to become effective on April 1, 2009.

BACKGROUND

An attorney is not entitled to voluntarily resign from the State Bar of California without disciplinary charges pending if he or she is currently (1) suspended from the practice of law as a result of the imposition of discipline; (2) on disciplinary probation; (3) criminally charged with or convicted of a crime that must be reported to the State Bar pursuant to Business and Professions

Code section 6068, subdivision (o)(5)¹; or (4) has a disciplinary complaint, investigation or proceeding pending against him or her. If one or more of these circumstances exist, the attorney who desires to resign from the State Bar of California must tender his or her resignation in accordance with the requirements of rule 9.20 of the California Rules of Court.

Since approximately June 2007, there have been at least five attorneys who have tendered voluntary resignations without charges pending to the State Bar of California but who were not eligible to resign without charges pending because they had either been charged with or convicted of one or more felonies that were required to be reported to the State Bar pursuant to Business and Professions Code section 6068, subdivision (o)(5).

As a result of the failure of these members to report to the State Bar their convictions and/or the filing of the felony charges against them as required by section 6068, subdivisions (o)(4)² and (o)(5), the State Bar's Office of Member Services erroneously processed their respective resignations as voluntary resignations without disciplinary charges pending. However, when the Office of the Chief Trial Counsel and the Office of General Counsel subsequently learned of these members' criminal convictions, a request was filed in each instance asking the Supreme Court to vacate its earlier orders accepting their respective resignations without charges pending.

The Supreme Court has expressed its concern about these improper resignations without charges pending and has asked the State Bar to consider both a modification of the State Bar's voluntary resignation form as well as the adoption of a rule that would require members tendering a resignation from the State Bar without charges pending to declare, under penalty of perjury, that there are no criminal charges pending against them and that they have not been convicted of a crime that is required to be reported to the State Bar.

Currently, there is no rule that addresses the eligibility of a member to voluntarily resign from the State Bar without disciplinary charges pending. At its July 2008 meeting, the RAD Committee authorized the release of proposed new rule 2.40 of the Rules of the State Bar of California which, if adopted, would establish both the eligibility requirements for resigning without disciplinary charges pending and a process for handling those resignations.

Only one comment was received during the original public comment period.³ However, during the comment period, as a result of discussions between representatives of the Office of General Counsel and the Office of the Chief Trial Counsel, State Bar staff concluded that the version of rule 2.40 that was released for public comment did not fully address or resolve the problems that have been encountered with respect to members who tender voluntary resignations that are, purportedly at least, without charges pending.

¹ Section 6068, subdivision (o)(5) requires a member to report to the State Bar in writing, within 30 days, of the member's knowledge of "[t]he conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of laws; or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type."

² Section 6068, subdivision (o)(4) requires a member to report to the State Bar in writing, within 30 days, of the member's knowledge of "[t]he bringing of an indictment or information charging a felony against the attorney."

³ By e-mail on August 8, 2008, State Bar member Peter Corcoran objected to the proposed rule. Mr. Corcoran stated that, in his opinion, an attorney should be able to resign from the State Bar without any questions and that any acts of misconduct or questions about the attorney's conduct can be addressed at such time, if ever, that he or she seeks reinstatement. However, that is neither the current law nor practice. (See, e.g., rule 9.21, Calif. Rules Ct.)

Proposed rule 2.40, as previously released for public comment, would preclude a member from tendering his or her voluntary resignation if:

1. The member is currently suspended or subject to disciplinary probation or an agreement in lieu of discipline;
2. The member currently has a disciplinary complaint, investigation or proceeding against him or her;
3. The member is currently charged with the commission of a crime described in Business and Professions Code section 6068, subdivision (o)(5); or
4. The member has been convicted of a crime described in Business and Professions Code section 6068, subdivision (o)(5) for which discipline has previously been imposed by the State Bar Court or the Supreme Court.

However, there have been two recent resignation cases that are not specifically covered by the above-referenced eligibility requirements. In each case, although no criminal charges had been filed, the member was aware of the pendency of a criminal investigation against him and, in fact, was actively engaged in plea negotiations with the prosecutor at the time he tendered his resignation from the practice of law. In both cases, no criminal charges had yet been filed on the date the member tendered his resignation but, a few days later, the indictment or criminal complaint was filed and the member entered a negotiated guilty plea to one or more of the charged offenses. Because no charges had been filed as of the date the resignations were received, the Office of Member Services processed the tendered resignations as being without charges pending and it was transmitted to the Supreme Court, who subsequently accepted the resignations. When the subsequent conviction information was received by the Office of the Chief Trial Counsel, however, it became necessary to request the Supreme Court to vacate the resignations.

In order to address this additional circumstance, an amended version of proposed rule 2.40 was drafted that would provide that a member is not eligible to tender a voluntary resignation if, to his or her knowledge, the member is the subject of a current criminal investigation or grand jury proceeding regarding the member's alleged commission of a felony or of a misdemeanor described in Business and Professions Code section 6068, subdivision (o)(5). A similar change was made to the proposed Voluntary Resignation form. In addition, the amended version of rule 2.40 and of the Voluntary Resignation form added a specific warning that the member's false statement in the submission of his or her resignation can result in the denial or vacating of the resignation and that it can constitute a cause for disbarment or for punishment as a contempt or a crime.

The amended versions of rule 2.40 and the Voluntary Resignation form were released for an additional 75-day public comment period, that ended on February 3, 2009. No comments were received during the second public comment period. However, Victor Rowley, with whom the State Bar has contracted to assist in a comprehensive rule-editing project, has offered proposed amendments to rule 2.40 that do not constitute substantive changes to the proposed rule but, rather, clarify their intent and make them more easily understood. Mr. Rowley's proposed changes have been incorporated into the final version of proposed rule 2.40 of the Rules of the State Bar.

The Office of the Chief Trial Counsel recommends to the RAD Committee and the Board of Governors that the rule 2.40 of the Rules of the State Bar of California and the Voluntary Resignation form be approved in the form attached hereto as Appendices A and B.

FISCAL AND PERSONNEL IMPACT

Adoption of proposed rule 2.40 and approval of the Voluntary Resignation form would not have any fiscal or personnel impact upon the State Bar of California.

PUBLIC COMMENT

No public comments were received during the 75-day public comment period that ended 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 with no public comments having been received, that the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that it adopt proposed rule 2.40 of the Rules of the State Bar of California, in the form attached hereto as Appendix A, and that it approve the Voluntary Resignation form, in the form attached hereto as Appendix B, with both the rule and the Voluntary Resignation form to become effective on April 1, 2009.

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 with no public comments having been received, and upon recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors hereby adopts proposed rule 2.40 of the Rules of the State Bar of California, in the form attached hereto as Appendix A, and approves the Voluntary Resignation form, in the form attached hereto as Appendix B, with both the rule and the Voluntary Resignation form to become effective on April 1, 2009.

SJD:dim
Attachment