

MEMORANDUM

February 24, 2009

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

From: Rex S. Heinke, Angela Davis, and William Hebert

Subject: Response to March 7, 2008 Proposals by Nancy W. Keough, Esq.

On March 7, 2008, Nancy W. Keough, Esq. (“Keough”) submitted proposals to the State Bar of California Board of Governors concerning modifications to the Alternative Discipline Program (“ADP”). You have asked our subcommittee to make recommendations to you on these proposals. A copy of her proposals is attached as Exhibit 1. This memo uses her headings and numbering, and responds to those proposals in the same order as in Exhibit 1.

The Board of Governors made various revisions to the ADP, which became effective July 1, 2008. Some of those modifications are relevant here, so those revised Rules of Procedure for the ADP are attached as Exhibit 2.

Part One – Restrictions On Using ADP As A Safe Haven

In essence, Ms. Keough wants to bar a lawyer’s participation in the ADP if the charged offense is a violation of a prior disciplinary order (1-1), constitutes moral turpitude (1-2), is obstructing a client from access to the State Bar Disciplinary program or retaliating against a client for having used that program (1-3), or if there have been two prior suspensions (1-4).

The essence of 1-2 has been incorporated into Rule 802(c)(3), which bars participation in the ADP if the lawyer’s current conduct involves moral turpitude, dishonesty, or corruption resulting in significant harm to a client or the administration of justice.

Rule 802(c) provides four other circumstances in which a lawyer shall not be admitted to the ADP: if the required stipulation of facts and law demonstrates the lawyer should be disbarred, irrespective of mitigating circumstances; the lawyer has been convicted of a criminal offense that subjects him or her to summary disbarment; expert testimony demonstrates the lawyer will not substantially benefit from treatment or the lawyer’s substance abuse or mental health problem cannot be overcome or controlled so that the lawyer is unlikely to engage in further misconduct; or the lawyer has previously participated in the ADP and has either successfully completed it or been terminated from it. We believe that these additional restrictions on participation in the ADP give the State Bar Court sufficient authority to bar lawyers from participating in the ADP where that is appropriate. We therefore recommend that RAD reject the changes to the State Bar Court rules that Ms. Keough suggests in Part 1.

Part Two – Immediate Continuing Relief To Prevent Violations During ADP Rehabilitation

Ms. Keough proposes that where an attorney claims there is a nexus between his or her misconduct and his or her disability, the attorney should be immediately suspended from practice until a State Bar Court Judge determines based on “well nigh irrefutable evidence” that the disability does not remain sufficiently operative to constitute a significant risk of further misconduct during the rehabilitation period (2-1). She further proposes that any attorney engaged in rehabilitation must practice under the auspices of another licensed attorney in California (2-2).

Rule 803(c) now provides that if a lawyer is accepted into the ADP and the proposed disposition that will be recommended to the Supreme Court if the lawyer successfully completes the ADP involves a period of actual suspension of 90 days or more, there is a presumption that the lawyer shall be placed on inactive enrollment unless a State Bar Court Judge finds that inactive enrollment is not necessary for the protection of the public or the lawyer’s clients. In addition, Business and Professions Code Section 6007(c) provides that an attorney may be involuntarily enrolled as an inactive member upon a finding by the State Bar Court that the attorney’s conduct poses a substantial threat of harm to the attorney’s clients or the public. In addition, Section 6007(h) permits the State Bar Court to appoint “monitors” to supervise an attorney’s practice as an alternative to an inactive enrollment.

We believe that these protections for the lawyer’s clients and for the public are adequate to deal with such problems. We therefore recommend that RAD reject the revisions to the State Bar Court rules which Ms. Keough suggests in Part 2.

Part Three – Victim’s Right To Testify At ADP Proceedings

Ms. Keough proposes that victims be allowed to testify at ADP proceedings (3-1) and that they have access to all matters that have been introduced into evidence (3-2).

ADP proceedings do not involve evidentiary hearings. The facts are established by a stipulation agreed to by the lawyer and the Office of the Chief Trial Counsel.

With regard to 3-1, we recommend that RAD recommend a revision to the rules that would allow complaining parties to provide the court a written “victim impact” statement to be considered by the State Bar Court when it decides whether to admit someone to the ADP.

As to 3-2, Business and Professions Code Section 6234 provides that information given to or obtained by the ADP is confidential unless waived by the attorney. However, a stipulation of facts and conclusions of law are made public at the time they are approved by the State Bar Court. Rule 803(b).

We believe that this public disclosure is adequate, particularly since the *fact* of attorney's entry into the ADP program is publicly available information, and, in addition, pending disciplinary charges now appear (or should now appear) on the Bar's website, regardless of whether or not the attorney facing such charges is attempting to resolve them through ADP.. Additional public disclosure could significantly discourage participation in the ADP. We therefore recommend that RAD formulate a revision to the Rules that would allow complaining parties to submit a "victim impact" statement to be considered by the State Bar Court when it decides whether to admit someone to the ADP. We recommend that RAD reject the remaining revisions to the State Bar Court rules that Ms. Keough suggests in Part 3.

Part Four – Transparency

Ms. Keough proposes that all confidentiality be eliminated at all stages of the disciplinary program from the time a charge is filed (4-1). In addition, she proposes that former employees of the Office of the Trial Counsel or judges of the State Bar Court be prohibited from appearing in disciplinary cases for five years after they leave the Office or the Court (4-2).

As to 4-1, the Board of Governors has already provided at its July 2008 meeting for the posting of filed notices of disciplinary charges. Pursuant to Business and Professions Code Section 6086.1(a), hearings and records of all disciplinary proceedings in the State Bar Court are also made public after a notice of disciplinary charges is filed.

To the extent that Ms. Keough wants to make the bar's investigations public when an initial complaint is received, Business and Professions Code Section 6086.1(b) would have to be amended because it provides that all disciplinary investigations are confidential until formal charges are filed. This can be waived by the attorney or by either the State Bar President or the Chief Trial Counsel if warranted for protection of the public. The mere filing of a complaint is not public in the vast majority of jurisdictions because many such complaints are found to be baseless. We do not believe it would be sound public policy to seek such a legislative amendment.

As to 4-2, Rule 3101 provides for a six month disqualification period and permanently precludes a former judge or employee of the Office from representing anyone who he or she personally or materially had dealt with at the State Bar or obtained confidential information about. We believe that the current restrictions are adequate.

We therefore recommend that RAD reject the revisions to the State Bar Rules that Ms. Keough suggests in Part 4.

Part Five – Timeliness

Ms. Keough makes a number of proposals about the time limits within which disciplinary proceedings must occur (5-1 to 5-7).

We have consulted with the Chief Trial Counsel Scott Drexel about whether these timelines could be met. He informs us that with the State Bar Court's current staffing it would be impossible to meet any of these time limits. The State Bar Court does have Performance Standards that establish a goal of scheduling each trial within six months of the date the proceeding was filed. Once the matter is tried and under submission, the Court has ninety days within which to issue its written decision. We believe these limits are reasonable and we therefore recommend that RAD reject the revisions to the State Bar Court rules that Ms. Keough suggests in Part 5.

Part Six – Indemnification

Ms. Keough proposes that the State Bar indemnify any victims of financial, emotional, physical, or other abuse by an attorney that has been allowed to practice by the State Bar or State Bar Court in violation of her proposals in Parts 1 to 5 (6-1). She also proposes to increase State Bar dues to fund this (6-2).

No governmental entity that we are aware of accepts such liability. We do not believe that the Legislature would authorize such an enormous expansion of liability nor fund it. We therefore recommend that RAD reject the revisions that Ms. Keough suggests in Part 6.

Part Seven – Fail Safe Enforcement Proceedings And Supervision Through The Department Of Consumer Affairs

Ms. Keough proposes that the Director of the Department of Consumer Affairs have access to all disciplinary proceedings and documents (7-1). She further proposes that the Director be authorized and required to institute disciplinary proceedings against an attorney directly in the California Supreme Court if the Director believes that the State Bar has been ineffective or dilatory or otherwise has insufficiently protected consumers, clients, and the public (7-2). She further proposes the Director would be authorized to report to the Legislature and Supreme Court such instances (7-3) and act on them (7-4). She would also require the State Bar to pay the costs of such proceedings and increase bar dues to fund this (7-5 & 7-6).

The power to discipline attorneys in California is an inherent power of the Supreme Court. *Hustedt v. Workers Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337 (“an attorney is an officer of the court and whether a person shall be admitted (or disciplined) is a judicial, not a legislative, question.”). In contrast, the Department of Consumer Affairs is part of the

Executive Branch. Thus, giving the Director authority over disciplining attorneys would raise a serious separation of powers question. We also do believe there is an adequate justification for these changes. We therefore recommend that RAD reject the revisions that Ms. Keough suggests in Part 7.

Part Eight – Sexual Relations By Paralegals And Other Law Firm Employees

Ms. Keough proposes that paralegals and other employees of a State Bar member should be subject to the same requirements as attorneys with respect to sexual relations with the clients of the attorney or law firm (8-1). Further, she proposes that an attorney's and a law firm's failure to enforce these requirements would be a disciplinary offense (8-2). She further proposes that there be civil liability and punitive damages for violations of 8-1 and 8-2 (8-3).

Because the Commission on Rules Revisions is studying the issue of sexual relations as part of its comprehensive revision of our Disciplinary Rules, we recommend that RAD forward this suggestion to the Commission on Rules Revisions for its consideration. We otherwise recommend that RAD reject the revisions Ms. Keough suggests in Part 8.

Part Nine – Obstruction Of Administrative Justice

Ms. Keough proposes the creation of a civil remedy for obstructing or threatening to obstruct by physical activity or by litigation or threat of litigation a complainant or witness from complaining to the State Bar or providing evidence to it (9-1).

Intimidating witnesses or victims is already a felony. Penal Code Section 136.1. In addition, Business and Professions Code Section 6094(a) provides that all communications with the State Bar relating to attorney discipline are privileged, so they cannot be the basis for a civil lawsuit.

The changes that Ms. Keough proposes would require legislation. To our knowledge there is no evidence of a substantial number of problems like this. Therefore, we believe that the Legislature would not feel there is a sufficient issue that justifies special legislation. We recommend that RAD reject the suggestions that Ms. Keough makes in Part 9.

Conclusion

We have reviewed Ms. Keough's memorandum, considered her suggestions and discussed them with State Bar staff. Based upon our review, we recommend that:

1. RAD should accept a modified version of Ms. Keough's suggestion that complaining witnesses be permitted to testify at ADP hearings by formulating a revision to the Rules that would allow complaining parties to submit a victim

impact statement to be considered by the State Bar Court when it decides whether to admit someone to the ADP.

2. RAD should forward to the Commission on Rules Revisions for its consideration the proposal for a new Rule of Professional Conduct that paralegals and other employees of a State Bar member should be subject to the same requirements as attorneys with respect to sexual relations with the clients of the attorney or law firm and that an attorney's and a law firm's failure to enforce these requirements would be a disciplinary offense.
3. We recommend that RAD otherwise reject Ms. Keough's suggestions for the reasons stated in detail above.