

AGENDA ITEM

MARCH 133

Proposed Rule 9.6 Board Policy on Removal of One-time Only Fee Suspension from the Bar's Web Site

DATE: February 6, 2009

TO: Members, Board Committee on Member Oversight
Board of Governors

FROM: Starr Babcock, Senior Executive for Member Services
Dina DiLoreto, Director of Member Services

SUBJECT: Proposed Rule 9.6 Board Policy on Removal of One-time Only Fee Suspension from the Bar's Web Site

ATTACHMENTS: 1 - California Rule of Court 9.6
2 - Proposed Policy Statement
3 - Chart

EXECUTIVE SUMMARY

In 2007, on recommendation of the Board of Governors, the California Supreme Court amended Rule of Court 9.6 to authorize expungement of one-time only suspensions for non-payment of fees from the official membership records. To qualify for the expungement, a member must meet criteria in provision (b) of the rule. These criteria are: a) the member has not received an expungement under the rule; b) the suspension was for ninety days or less; c) the suspension ended at least seven years before the submission of the member's name to the Supreme Court; d) The member has no other suspension or involuntary inactive enrollment—in short, a limited, one-time only qualification. In accordance with the provisions of Rule 9.6, in 2007-08 over twelve hundred qualified members saw their one-time only record of suspension expunged from their membership record (California Rule of Court 9.6 is Attachment 1).

At its July 2008 meeting the Board directed staff to propose and submit for Board review a policy consistent with extension of application Rule 9.6 in order to remove or mask qualified suspensions for non-payment of dues from the State Bar's Web site before the seven-year expungement period. At its September 2008 meeting the Board directed staff to post the proposed revision to Rule 9.6 for a 45-day period public comment. No public or staff comment was received. At its November 2008 meeting, MOC denied the proposal. Past President Jeff Bleich requested that the item be revisited at the March 2009 MOC and Board meeting to allow him an opportunity to address the proposal. President Holly Fujie and MOC Chair John Peterson granted that request.

The proposed policy is set forth below. Member suspensions will be redacted from the Web site after two years of posting but be maintained on the member's record until such time as Rule 9.6 expunges the suspension. Only members who meet the criteria of 9.6 will be eligible for the Web site exclusion. Questions may be directed to Starr Babcock at starr.babcock@calbar.ca.gov or (415) 538-2070, or to Dina DiLoreto at dina.diloreto@calbar.ca.gov or (415) 538-2121.

DISCUSSION:

The Proposed Rule 9.6 Board Policy statement follows (also, see Attachment 2):

Two years after a suspension for nonpayment of dues has ended, the State Bar may provisionally redact the suspension from the State Bar Web site, provided the member meets all criteria for expungement except that of seven-years duration. If the member subsequently fails to meet a criterion for expungement, the State Bar must report the suspension at the Web site.

The Board policy proposal to extend the intent of Rule 9.6 is to redact the suspension from the Web site twenty-four months after the initial posting and maintain the suspension as public information on the internal member record until the suspension is expunged under rule 9.6. Removal from the Web site of one-time only suspensions for non-payment of fees within the Rule 9.6 (b) criterion is a benefit to members and is not expected to impact public protection. Redaction would occur after a twenty-four month period elapsed from the date of the Supreme Court's suspension order. The suspension would be maintained in the State Bar records and made available to the public upon inquiry to the Member Service Center ("MSC").

Staff also researched the number of potential members affected. The chart, included as Attachment 3, demonstrates that the number of members who will benefit is small and more importantly seventy-five percent will likely achieve expungement at year seven by operation of Rule 9.6. The suspension of the other 25% will return to the Web site as the member no longer is on the path for expungement, primarily because of an additional record of suspension or involuntary inactive enrollment.

Supreme Court staff is aware of the proposal. The Supreme Court does not ordinarily give advisory opinions or advice about Board policies.

A forty-five day public comment period began October 1, 2008 and expired on November 14, 2008. The State Bar did not receive any public comments regarding the proposed rule changes.

The arguments underlying the July and September discussions are included below.

Arguments in Support of Proposed Rule 9.6 Board Policy

- a) Rule 9.6 (e) authorizes the Board to adopt rules and regulations, as it deems necessary to comply with the expungement rule.
- b) Members will not be publicly embarrassed or have to respond to questions about a one-time only Supreme Court fee suspension on the Web site.
- c) One-time only fee suspensions do not reflect on competency and do not support any disciplinary action. Web site publication penalizes members who might have been suspended through no fault of their own.
- d) The number of members receiving the benefit of Web site removal after twenty-four months is likely to be modest. About one thousand members will benefit over the five-year period prior to the seven-year mark for expungement, making the administration of the proposed policy manageable.
- e) The Board approved a one-time only waiver of penalties and fees for members with no prior history of suspension or late compliance. This approach of giving members a one-time free pass is consistent with the Board's direction to Member Service Division staff to implement user friendly options at the most likely point of member and State Bar interface—payment of annual fees.
- f) This change in policy reflects Board direction to maintain a strong regulatory program as its core value, however, where possible provide a meaningful break to members on a one-time only basis within narrow criteria.

Arguments against the Proposed Rule 9.6 Board Policy

- a) The suspension involves more than simply failing to pay a bill. Practicing law, advertising, or holding out, as an attorney during the suspension period is a crime (see BPC §§6125, 6126). It will be harder for clients, opposing counsel, the courts, and the public to detect unlawful conduct.
- b) Masking the suspension from the Web site is inconsistent with the intention to provide true and accurate public information at the Web site. It also runs counter to the State Bar's effort to direct callers to the Web site for information.
- c) Interested parties and the courts rely on the State Bar's Web site. Some may be inconvenienced if they must call MSC every time they

need to find out about a member's status history of more than two years.

- d) The seven-year criterion in Rule of Court 9.6(b) is already a compromise. Staff recommended ten years. Because judicial applicants must be free of any suspension for ten years in order to qualify for appointment (Cal. Const. Art. VI, sec. 15), the seven-year criterion requires dual tracking of expunged suspensions, which complicates record keeping and IT programming.
- e) This extension of Rule 9.6 will further complicate I.T. programming & require additional administrative resources.
- f) The Board accepted the Office of the Chief Trial Counsel's ("OCTC") recommendation against a five-year criterion because a five-year period makes it possible that a fee suspension could be expunged before a disciplinary proceeding is initiated alleging the member's unauthorized practice of law during the suspension period. The expungement criteria in Rule 9.6 is a balance of member benefits without compromising public protection. The proposed change shifts that balance away from public protection.
- g) Redaction of public information from the Web site runs counter to public policy in favor of transparency and greater access to public records (see *Mack v. State Bar* (2001) 92 Cal. App.4th 957, holding the State Bar did not breach an agreement with an attorney not to affirmatively publicize a private reproof simply by making the information available on its Web site. The opinion favorably references the State Bar's commitment to the use of new technologies to increase public access to public records.

Response to Regulatory Concerns

All of the arguments overlook the fact that the suspension will be posted on the Web site for twenty-four months. Moreover, by the end of the twenty-four month posting period members receiving the benefit of removal from the Web site is small, roughly one thousand over the five-year period until the operation of Rule 9.6 expungement. If there is public inquiry about a member's record, the suspension will be disclosed, and the suspension will also be disclosed if the State Bar issues a Certificate of Good Standing.

The Clerk of the Supreme Court's reliance on the State Bar's Web site for Certificates of Good Standing will not be compromised as the Clerk reports current status.

Two years after the suspension is imposed, the vast majority of members who are on track for expungement are not likely to pose a threat to the public. Indeed, the reference to the *Mack* case is inapposite, as *Mack* was disciplinary action

against a lawyer. If the member gets an additional suspension or inactive order before the Rule 9.6 seven-year time limit, the member's Web site profile will be updated to include the masked suspension and the member is no longer eligible for Rule 9.6 relief.

FISCAL AND PERSONNEL IMPACT:

Projected costs can be covered within the existing budgetary framework. There is no additional anticipated personnel impact.

BOARD BOOK IMPACT:

There is no known impact on the Board Book.

RULE AMENDMENT IMPACT:

There is no impact to the related California Rule of Court or to the Rules and Regulations of The State Bar.

This is a policy decision that relates specifically to what member information is posted on the State Bar's Web site.

PROPOSED BOARD COMMITTEE RECOMMENDATION:

If the Board Committee on Member Oversight concurs with the proposed recommendation, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and no comments having been received, that the Board Committee on Member Oversight recommends that the Board of Governors of the State Bar of California approve the Proposed Rule 9.6 Board Policy on removal of a one-time only fee suspension from the State Bar's Web site in the form attached.

PROPOSED BOARD RECOMMENDATION:

If the Board of Governors concurs with the recommendation of the Board Committee on Member Oversight, the following proposed resolution would be in order:

RESOLVED, following publication for comment and consideration of comments received, and upon recommendation of the Board Committee on Member Oversight that the Board of Governors of the State Bar of California approve the Proposed Rule 9.6 Board Policy on removal of a one-time only fee suspension from the State Bar's Web site in the form attached.