

AGENDA ITEM

MARCH 125
Request for
Adoption following
Public Comment for
new rule 323 of the
Rules of Procedure

DATE: February 20, 2007

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

FROM: George Scott, Chief Court Counsel/Acting Administrative Officer
State Bar Court

SUBJECT: Proposed New Rule of Procedure that Provides for Consideration of Resignations with Charges Pending by the State Bar Court under Rule 9.21 (formerly 960) of the California Rules of Court—Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

The proposed new rule delegates to the State Bar Court Review Department the Board of Governors' duties and authority under rule 9.21¹ of the California Rules of Court ("rule 9.21") to recommend to the Supreme Court whether a member's resignation with disciplinary charges pending should be accepted. This rule also provides an opportunity for the Office of the Chief Trial Counsel ("OCTC") to present evidence to the Court relevant to that recommendation. The reason for this requested delegation is that rule 9.21 requires consideration of resignations with charges pending on a case-by-case basis and may require the resolution of contested factual matters. Approximately five to ten resignations with charges pending are filed each month. It is difficult, if not impossible, for the Board Governors to consider timely each of these resignations and resolve whatever factual disputes that may exist. The State Bar Court is better situated to perform these adjudicatory duties.

¹ A renumbering of the California Rules of Court became effective January 1, 2007. Former rule 960 was renumbered to rule 9.21 and former rule 955 was renumbered to rule 9.20. Copies of these two rules are attached for reference as Appendix B.

The public comment period ended on February 16, 2007. The State Bar Court now seeks adoption by the Board of Governors of the proposed rule.

DISCUSSION

Rule 9.21(c) of the California Rules of Court provides, among other things, that the Board of Governors shall consider a member's resignation with charges pending and recommend to the Supreme Court whether the resignation should be accepted. The rule provides further that the Supreme Court may decline to accept the resignation upon report by the Board of Governors that perpetuation of necessary testimony is not complete; that after transfer to inactive status, the member has practiced law or has advertised or held himself or herself out as entitled to practice law; that the member has failed to perform the acts specified by rule 9.20(a)-(b) of the California Rules of Court; that the member has failed to provide proof of compliance as specified in rule 9.20(c) of the California Rules of Court; that the Supreme Court has filed an order of disbarment as to the member or upon such other evidence as may show that acceptance of the resignation of the member will reasonably be inconsistent with the need to protect the public, the courts or the legal profession.

Whether the above factors exist and the impact they may have on the ultimate recommendation to the Supreme Court are issues to be considered with every resignation with charges pending. Further, consideration of these factors may require receiving and weighing evidence that is outside the record of the resignation proceeding. The resolution of such factual matters is essential to an appropriate recommendation to the Supreme Court. The proposed rule will provide a procedure by which OCTC can present evidence to the Review Department and the Review Department can perform the required adjudicatory functions. The Board of Governors' structure and limited meeting dates makes it difficult, if not impossible, for it to perform timely the duties required by rule 9.21.²

The proposed new rule 323 will permit, but not require, the presentation of evidence in every case and will provide for what is essentially a motion procedure for the presentation of evidence. The reasoning is twofold. First, permitting attorneys to resign from the State Bar with disciplinary charges pending furthers the goals of protecting the public, courts and legal profession in part by providing for the prompt resolution of disciplinary proceedings and the efficient use of discipline resources. Protracted proceedings in the State Bar Court would not further these goals. Second, most of the resignations with charges pending do not implicate any of the factors set out in rule 9.21. It is therefore anticipated that for most resignations, the presentation of evidence will not

² As directed by a Board resolution adopted on April 5, 1986, the State Bar Court currently transmits all resignations with charges pending to the Supreme Court with the Board's recommendation that the Court accept the resignation.

be required and the Review Department will consider only the record of the resignation proceeding in making its recommendation to the Supreme Court.

PUBLIC COMMENT

One response was received during the public comment period. That comment is from the State Bar's Chief Trial Counsel, Scott J. Drexel. While the comment is strongly in support of the proposal, Mr. Drexel expressed concern about the relatively narrow grounds upon which a resignation may be rejected. A copy of the comment is attached as Appendix C. As noted by Mr. Drexel, the grounds set forth in rule 321(c) are the same grounds specified in rule 9.21 of the California Rules of Court and any expansion of those grounds would be made by modification of rule 9.21 by the Supreme Court.

FISCAL AND PERSONNEL IMPACT

None. Costs will be absorbed within existing operating budgets.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

PROPOSED RESOLUTION

If the Board Committee on Regulation, Admissions and Discipline Oversight agrees that the proposed new rule 323 of the Rules of Procedure should be adopted, adoption of the following resolutions would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends to the Board of Governors that proposed rule 323 of the Rules of Procedure of the State Bar of California be adopted in the form attached hereto as Appendix A, to become effective July 1, 2007.

If the Board of Governors agrees that the proposed new rule 323 of the Rules of Procedure should be adopted, adoption of the following resolutions would be appropriate:

RESOLVED, that upon recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors hereby adopts proposed rule 323 of the Rules of Procedure of the State Bar of California, in the form attached to these minutes and made a part hereof, to become effective July 1, 2007

Rule 323. Consideration of a Member's Resignation with Charges Pending.

- (a) Resignations with charges pending are governed by rule 9.21 of the California Rules of Court and shall be in the form required by rule 9.21(b). Charges are pending when the member is the subject of an investigation by the Office of Investigations, or a disciplinary proceeding under these rules, or when the member is the subject of a criminal charge or investigation, or has been convicted of a felony or misdemeanor.
- (b) When the Office of the Clerk of the State Bar Court receives a member's resignation, tendered in conformity with rule 9.21(b) of the California Rules of Court, it must promptly file the resignation and serve a copy on the Office of the Chief Trial Counsel of the State Bar. The Review Department must thereafter consider the member's resignation and recommend to the Supreme Court whether the resignation should be accepted and, if so, whether testimony should be preserved. The Office of the Clerk of the State Bar Court must transmit to the Clerk of the Supreme Court three certified copies of the Review Department's recommendation together with the member's resignation, when, by the terms of the Review Department's recommendation, the resignation should be transmitted to the Supreme Court.
- (c) The Review Department may recommend that the Supreme Court decline to accept the member's resignation upon a finding that:
 - (1) Preservation of necessary testimony is not complete;
 - (2) After transfer to inactive status, the member has practiced law or has advertised or held himself or herself out as entitled to practice law;
 - (3) The member has failed to perform the acts specified by rule 9.20(a)-(b) of the California Rules of Court;
 - (4) The member has failed to provide proof of compliance as specified in rule 9.20(c) of the California Rules of Court;
 - (5) The Supreme Court has filed an order of disbarment as to the member; or
 - (6) On such other evidence as may show that acceptance of the resignation of the member will reasonably be inconsistent with the need to protect the public, the courts or the legal profession.
- (d) Within 15 days of service of the member's resignation with charges pending, the Office of the Chief Trial Counsel may move the Court to recommend that the Supreme Court decline to accept the resignation based on any of the factors specified in section (c) of this rule. Within 10 days after service of the Office of the Chief Trial Counsel's motion, the member may file a reply. Proceedings under this section are governed by rule 105 of these rules.