

AGENDA ITEM

NOV 124

**Proposed Amendments
to Rule 105, Rules of
Procedure of the State
Bar of California –
Request for adoption
following public
comment**

DATE: October 19, 2009

TO: Members of the Discipline Oversight Committee of the State Bar of California Board of Governors

FROM: Russell G. Weiner, Interim Chief Trial Counsel

SUBJECT: Proposed Amendments to Rule 105, Rules of Procedure of the State Bar of California – Request for adoption following public comment

EXECUTIVE SUMMARY

The amendments to rule 105 of the Rules of Procedure of the State Bar of California, if adopted, would expressly permit a moving party who has filed a motion in the State Bar Court Hearing Department to file a written reply within three days following service of any opposition to the motion. The amendments to rule 105 would also shorten the time for filing an opposition to a motion from ten (10) days to seven (7) days.

INTRODUCTION

During the course of the regular quarterly meeting between representatives of the Office of the Chief Trial Counsel, the State Bar Court and members of the Association of Discipline Defense Counsel (“ADDC”) in February 2009, the latter requested that the State Bar consider an amendment to rule 105 that would expressly permit a moving party to file a reply to any opposition to the moving party’s motion. Members of the ADDC noted that, since the Rules of Procedure of the State Bar of California (“Rules of Procedure”) do not expressly permit the moving party to file a reply to the opposing party’s opposition, there is not a consistent practice among the State Bar Court Hearing Judges as to whether such written replies will be accepted. The ADDC supports clarification of this ambiguity by expressly permitting the filing of a

written reply. The ADDC proposed allowing five (5) days after filing and service of the opposition for the filing of the written reply.

After discussion with representatives of the ADDC and with State Bar Court staff, the Office of the Chief Trial Counsel proposed amendments to rule 105 of the Rules of Procedure in the form attached hereto as Attachment A. The proposed amendments shorten the time for filing an opposition to a motion filed in the State Bar Court Hearing Department from ten days to seven days and expressly permit the moving party to file a written reply to any opposition to the motion within three days following service of the opposition to the motion.

The Office of the Chief Trial Counsel shared its proposed amendments with the Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") of the State Bar Board of Governors ("Board") in a memorandum dated May 1, 2009. At the May 2009 RAD Committee meeting, the RAD Committee authorized the release of the proposed amendments, in the form attached hereto as Attachment A, for a 75-day public comment period. Since releasing the proposed amendments for public comment, the Office of the Chief Trial Counsel has received eight public comments.

The Office of the Chief Trial Counsel now recommends that the Board's Discipline Oversight Committee approve the proposed amendments to rule 105 of the Rules of Procedure in the form attached hereto as Appendix A, to become effective on January 1, 2010.

DISCUSSION

The primary concern with permitting the filing of a written reply is the extent to which the filing of multiple pleadings with respect to each motion will tend to slow down the timely and efficient adjudication and disposition of proceedings. Both the State Bar Court and the Office of the Chief Trial Counsel are committed to streamlining the attorney discipline process and reducing the pendency of proceedings in the State Bar Court without impairing the essential due process rights of respondent attorneys.

The proposed amendments to rule 105 would shorten the time for filing an opposition to a motion from ten days to seven days after filing and service of the motion and would grant the moving party three days within which to file a reply following the filing of any opposition to the motion. Since the service of pleadings by first-class mail extends the time within which to file a response by five days (see rule 63 of the Rules of Procedure), the elapsed time from the filing of a motion in the State Bar Court Hearing Department to the date the motion is taken under submission for decision could be as long as 21 days, or even longer if the court determines that a hearing on the motion is either necessary or appropriate.

However, if ultimately adopted, the proposed amendments to rule 105 of the Rules of Procedure will specifically permit the filing of a reply and, by shortening the

time for filing the opposition to seven days and the reply to three days, it will not drastically extend the pendency of these matters.

A summary of the eight public comments in order in which they were received – including two sets of public comments from ADDC member James Ham (one in which he supports the proposal and another in which he recommends changes to the proposal) and one set of comments from the Los Angeles County Bar Association Committee on Professional Responsibility and Conduct, on which Mr. Ham serves as chair – are as follows. The full text of each of the comments is attached hereto as Attachment B.

In an electronic mail message sent directly to former Board of Governors member Jeannine English, James Ham (SBN 100849) urges Governor English to support the proposal.

David L. Matt (SBN 101826) states in support of the proposal, “This is a good proposal, one the Bar should support.”

A second public comment from James Ham in which he urges the Board of Governors to modify the current proposal by maintaining the current ten day period for opposing a motion and allowing five days to reply.

The Los Angeles County Bar Association Committee on Professional Responsibility and Conduct (“PRAC”), in a letter signed by the Committee’s secretary Robert K. Sall (SBN 83782), urges the Board of Governors to modify the current proposal by maintaining the current ten day period for opposing a motion and allowing five days to reply.

Donavon Marble (SNB 51100) urges the Board of Governors to modify the current proposal by increasing the current ten day period for opposing a motion to 14 days, arguing that shortening the time amounts to a denial of due process. Mr. Marble did not comment on the period of time for replying to an opposition.

The Orange County Bar Association (“OCBA”), in a letter signed by its President, Michael G. Yoder (SBN 83059), urges the Board of Governors to modify the current proposal by maintaining the current ten day period for opposing a motion. The OCBA does not comment on the period of time for replying to an opposition.

Steven C. Smith (SBN 80684) urges the Board of Governors to modify the current proposal by maintaining the current ten day period for opposing a motion. Mr. Smith does not comment on the period of time for replying to an opposition.

The ADDC, in a letter from ADDC member David Carr (SBN 124510), urges the Board of Governors to modify the current proposal by maintaining the current ten day period for opposing a motion and allowing five days to reply.

FISCAL/PERSONNEL IMPACT: None

RULE AMENDMENTS: Title 5, Rule 105

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT: None

PROPOSED RESOLUTIONS

Should the board committee agree with the above recommendation, the following resolution would be appropriate:

Proposed Resolution for the Discipline Oversight Committee

“RESOLVED that the Discipline Oversight Committee of the Board of Governors hereby recommends to the Board of Governors that the proposed amendments to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, be approved effective January 1, 2010.”

Should the Board concur with the board committee’s recommendation, the following resolution would be in order:

Proposed Resolutions for the Board of Governors

“RESOLVED, upon the recommendation of the Discipline Oversight Committee of the Board of Governors, that the Board of Governors hereby adopts the proposed amendments to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, effective January 1, 2010.”

RGW:idb
Attachments