

# AGENDA ITEM

NOV 125

**New Rule 216.5 and Proposed Amendment to Rule 803, Rules of Procedure Re: The Right of the Victims of Attorney Misconduct to Submit a Victim's Statement at the Mitigation/Aggravation Stage of Disciplinary Proceedings.**

**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:** New Rule 216.5 and Proposed Amendment to Rule 803, Rules of Procedure Re: The Right of the Victims of Attorney Misconduct to Submit a Victim's Statement at the Mitigation/Aggravation Stage of Disciplinary Proceedings. Request for adoption following public comment.

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## EXECUTIVE SUMMARY

Proposed new rule 216.5 of the Rules of Procedure of the State Bar of California, if adopted, would permit a person who was harmed by conduct of the respondent that is the subject of a pending disciplinary proceeding to submit a written statement, after culpability has been found, for the State Bar Court's consideration during the mitigation/aggravation phase of the disciplinary proceeding. If adopted, the proposed amendment to rule 803 of the Rules of Procedure of the State Bar of California would permit a victim's written statement to be submitted and considered by the State Bar Court in connection with proceedings under the Court's Alternative Discipline Program.

Following completion of the public comment period, the Office of the Chief Trial Counsel recommends adoption of the proposed amendments to the Rules of Procedure of the State Bar of California.

## **INTRODUCTION**

At the March 2009 meeting of the Committee on Regulation, Admissions and Discipline Oversight (“RAD Committee”) of the State Bar Board of Governors (“Board”), a Subcommittee of the RAD Committee – which was composed of Rex Heinke, Bill Hebert and Angela Davis and which had been formed to review specific recommendations relating to the State Bar Court’s Alternative Discipline Program – recommended that the Rules of Procedure of the State Bar of California (“Rules of Procedure”) be amended to permit a victim of a respondent’s misconduct to submit a victim’s statement for consideration by the State Bar Court in determining the appropriate degree of discipline to be imposed upon the respondent or recommended for imposition to the Supreme Court.<sup>1</sup>

Upon the recommendation of the Subcommittee, the RAD Committee requested that the Office of the Chief Trial Counsel draft a proposed Rule of Procedure granting to the victims of attorney misconduct the right to submit a written statement concerning the harm caused to the victim as a result of the respondent’s misconduct. The Subcommittee’s recommendation and the RAD Committee’s request were directed primarily at proceedings in the State Bar Court’s Alternative Discipline Program (“ADP”).

The Office of the Chief Trial Counsel subsequently drafted a proposed new rule 216.5 of the Rules of Procedure and proposed amendments to rule 803 of the Rules of Procedure. The rules permit a victim of attorney misconduct to submit a written victim’s statement in ADP cases, and would extend the victim’s right to do so in standard disciplinary proceedings as well.

The Office of the Chief Trial Counsel shared its proposed rule changes with the RAD Committee in a memorandum dated May 4, 2009. At the May 2009 RAD Committee meeting, the RAD Committee authorized the release of the proposed rule changes, in the form attached hereto as Attachment A, for a 75-day public comment period. Since releasing the proposed rule changes 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 the Rules of Procedure in the form attached hereto as Appendix A, to become effective on January 1, 2010.

## **DISCUSSION**

The proposed rule changes include the creation of new rule 216.5 of the Rules of Procedure, including subdivisions (a) and (b). The proposed rule changes also include

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<sup>1</sup> The Subcommittee’s concept was analogous to the right of a victim of criminal conduct under Penal Code section 1191.1 to appear at the defendant’s sentencing hearing and to express his or her views concerning the crime, the person responsible and the need for restitution.

the addition of a new subdivision, subdivision (b), to currently existing rule 803 of the Rules of Procedure.

If adopted, proposed new rule 216.5(a) would authorize any person who has been harmed by conduct of the respondent to submit a written statement setting forth the nature and extent of the harm and the manner in which the respondent's conduct caused the harm. The term "written statement," rather than declaration, has been used to make clear that the victim's statement can be in the form of a letter or statement, rather than a detailed declaration under penalty of perjury.

Rule 216.5(b) provides that the victim's statement must be admitted into evidence, but only after a finding of culpability has been made. If the respondent demonstrates good cause, the State Bar Court may order the Office of the Chief Trial Counsel to produce the victim for cross-examination during the mitigation/aggravation phase of the disciplinary proceeding. However, the requirement of good cause has been included to preclude a respondent from simply demanding the production of all victims of his or her misconduct without demonstrating that there is a legitimate basis for challenging the accuracy or extent of the harm claimed by the victim.

The proposed amendment to rule 803 of the Rules of Procedure, if adopted, would likewise permit the victim of a respondent's misconduct to submit a written statement regarding the harm caused by such misconduct. However, unlike standard disciplinary proceedings, there are no evidentiary hearings in the State Bar Court. The respondent attorney must stipulate to facts and conclusions of law relating to his or her misconduct and, typically, the respondent and the Office of the Chief Trial Counsel stipulate to factors in mitigation or aggravation of the respondent's misconduct. The nature and extent of harm suffered by the victim of the respondent's misconduct is one of the recognized aggravating factors to be considered in determining the appropriate degree of discipline to be imposed. (See, e.g., rule 803(a), Rules Proc. of State Bar; see *also*, Std. 1.2(b)(iv), Stds. for Atty. Sanctions for Prof. Misconduct.)

If adopted, the new subdivision (b) of rule 803 would require the ADP Judge to consider the victim's statement in determining the degree of discipline to be imposed or recommended to the Supreme Court in connection with the ADP proceeding.

A summary of the public comments in order in which they were received are as follows. The full text of each of the comments is attached hereto as Attachment B.

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

A State Bar member identified only as "Robert" opposes the proposal, stating, "[W]hile it may be appropriate for victims to have opportunity to address the court to explain the damage suffered by them as a result of the misconduct, I don't think unsworn, written statement is fair. They should be allowed to appear and testify subject

to cross exam, or at a minimum, swear under penalty of perjury, what they claim in writing.”

Jonathan Stein (SBN 224609) opposes the proposal stating, “Allowing unsworn testimony without the ability to cross examine undermines the fundamental principle of our legal system.”

The Association of Disciplinary Defense Counsel, in a letter from Noah Rosenthal (SBN 240742), states in opposition to the proposal, “We oppose these modifications to the Rules of Procedure because they are unnecessary and inconsistent with the rights of respondent attorneys.”

The Orange County Bar Association (“OCBA”), in a letter signed by its President, Michael G. Yoder (SBN 83059), states that the OCBA is in favor of adopting standards for the use of victim’s statements in disciplinary proceedings and recommends (1) changing the title of the rule to “Victim Impact Statement” and (2) changing “may” to “shall” in the last sentence of subdivision (b) (so that, upon a finding of good cause, “the State Bar Court **shall** require the Office of the Chief Trial Counsel to produce the victim(s) at the mitigation/aggravation phase of the hearing for purposes of cross-examination by the respondent.” The OCBA proposes no changes to the proposed amendment to rule 803.

Member of the Association of Disciplinary Defense Counsel Jerome Fishkin (SBN 47798) opposes the proposal and urges its defeat based upon his belief that they are “contrary to the law”, “denigrate the three stated purposes of attorney discipline” and “erode the legitimacy of the discipline system.”

The Los Angeles County Bar Association Committee on Professional Responsibility and Conduct (“PRAC”), in a letter from a member of the Association of Disciplinary Defense Counsel and PRAC chair James Ham (SBN 100849), opposes the proposal, arguing that it “overturns years of disciplinary jurisprudence” and “is redundant.”

The State Bar Court, in a letter signed by the Court’s Chief Administrative Officer Colin Wong (State Bar No. 130033), opposes the proposal and states that it is “concerned that the proposal would conflict with the existing burden of proof in disciplinary proceedings and unintentionally restrict judicial discretion.”

**FISCAL / PERSONNEL IMPACT:** None

**RULE AMENDMENTS:** Title 5, Rule 216.5 (Proposed), Rule 803

**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, and that those rules, as amended, shall apply to all pending and future disciplinary matters.”

### **Proposed Resolutions for the Board of Governors**

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

**“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.

**“FURTHER RESOLVED** that the aforementioned amendments to the Rules of Procedure of the State Bar of California shall apply to all pending and future matters.”

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Attachments