

# AGENDA ITEM

JULY

Rules of Procedure of the State Bar – Proposed Rules of Procedure Revisions

**DATE:** July 7, 2010

**TO:** Members of the Discipline Oversight Committee

**FROM:** Colin Wong, Chief Administrative Officer of the State Bar Court

**SUBJECT:** Proposed Revisions to the Rules of Procedure of the State Bar of California – Request for Authority to Extend Time for Public Comment

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## EXECUTIVE SUMMARY

At the May 2010 Board meeting, proposed amendments to the Rules of Procedure of the State Bar of California were released for a 45-day public comment period. The proposed amendments seek to clarify language and streamline cases before the State Bar Court. Two public comments were received during the 45-day public comment period and two comments were received prior to the commencement of the public comment period.

With the appointment of James Towery as the new Chief Trial Counsel, the State Bar Court has agreed to extend the time for public comment for an additional 30 days to allow Mr. Towery to review the proposed rules and provide comments if necessary.

## **BACKGROUND:**

The Rules of Procedure of the State Bar were originally adopted by the Board of Governors in 1989 to provide both procedural and substantive requirements for cases in the State Bar Court. While the rules of procedure have been amended on occasion, in recent years the rules have been criticized as too complex and cumbersome. In addition, while the majority of cases are processed in a fairly timely manner, highly contested cases can take several years to reach their final outcome as a result of the detailed procedures. To address these concerns, the State Bar Court commenced a review of the rules to determine whether revisions were warranted.

The rules were reviewed with two main goals: (1) simplifying the language as part of the State Bar's overall rules revision project, and (2) streamlining the process. To facilitate our first goal, we contracted with Bryan Garner to redraft the rules using straightforward language, i.e., plain English. This process did not involve any substantive changes to the existing rules.

As for streamlining the process, we examined our current procedures to determine where delays and other obstacles to a timely resolution exist. As part of this process, Presiding Judge

Joann Remke of the State Bar Court, presented an overview of possible changes at the March 2010 Board of Governors meeting in Los Angeles. Following that Board meeting, the State Bar Court held two public hearings. The first on April 8, 2010 in Los Angeles and the second on April 9, 2010 in San Francisco. Representatives from the Office of the Chief Trial Counsel and the Respondents' bar attended both meetings. At that time, the proposed changes were discussed and input was requested.

At its May 2010 Board of Governors meeting the Discipline Oversight Committee resolved to release for a 45-day public comment period the proposed amendments to the Rules of Procedure. The original May 2010 agenda item and the proposed rules are posted under the public comment section on the State Bar's website.

## **PUBLIC COMMENT:**

There were two public comments received during the public comment period and two comments received prior to the commencement of the public comment period in response to the public hearings. Copies of the four letters are attached as Attachment A.

### **1. Two public comments addressing the specific amended rules:**

**David Cameron Carr on behalf of the Association of Discipline Defense Counsel:** A summary of the comments contained in a letter dated June 28, 2010, from the Association of Discipline Defense Counsel ("ADDC") are set forth below.

- Discovery – adoption of proposed changes will result in many motions seeking additional discovery;
- Evidentiary Standard – State Bar discipline is not like other licensing proceedings;
- Defaults – proposal would allow a complete deprivation of a property right regardless of the gravity of the misconduct;
- Fast Track Trial Calendaring – requiring the Hearing Department to complete its work in half the time cannot realistically be met without sacrificing quality and efficiency. Consecutive trial days is also unrealistic;
- Suggests the Board of Governors defer consideration of the proposals until a more comprehensive review of the system and its current status can be undertaken with the new Chief Trial Counsel.

**Ronald Gottschalk, J.D.:** A summary of the comments contained in a letter dated June 28, 2010, from Ronald Gottschalk are set forth below:

- The default rules as applied to his disciplinary matter are unconstitutional;
- The proposed changes do not address the criticisms of former Governor Wilson;
- The proposed rules do not address the constitutional issues pertaining to the fairness of the State Bar Court.

**2. Two letters submitted prior to the release of the proposed rules that do not specifically address the rules but rather the concepts that were discussed at the public hearings:**

**David Cameron Carr on behalf of the Association of Discipline Defense Counsel:** A summary of the comments contained in a letter dated April 28, 2010, from the Association of Discipline Defense Counsel (“ADDC”) are set forth below.

- Defaults - attorneys placed in default should be put on not entitled to practice status until they seek to return active status;
- Mandatory Discovery Exchange – one party should not be rewarded for its indolence by not taking properly investigating a case and then rely on the other party’s efforts and significant sanctions should be available for discovery abuse;
- Evidence Standard – believes little time is spent during trial on evidentiary objections therefore unclear how this will help streamline case processing;
- Post Trial Briefs – believes that a time limit of 30 days after the case is submitted would be workable;
- Consecutive Trial Days – believes that this will result in “trailing” which is impractical in a large state with only two venues;
- Length of Briefs – appropriate to adopt limits similar to California Rules of Court (14,000 words if prepared by word processing, 50 pages if produced on typewriter) and if appropriate relief available if matter is complex; and
- Standard of Review – proposal should be submitted to Supreme Court because it may impact Supreme Court workload.

**James Ham, Esq.:** A summary of the comments contained in a letter dated May 4, 2010, from James Ham are set forth below.

- Alternative Dispute Resolution – the discipline system would benefit from a more robust settlement mechanism;
- Limitations Period – there should be a more reasonable and definite period of limitations;
- Uniform Timelines – has some merit and should be explored;
- Mandatory Discovery Exchange – Not clear how mandatory exchange will expedite process, possible conflict issues with such an exchange, must be accompanied by significant sanctions, depositions should be limited;
- Standard of Review – not clear that changing standard of review will streamline process;
- Post-trial Briefs – briefing should be left to discretion of judge but could include requirement that briefing be completed within 30 days;
- Consecutive Trial Days – requirement would be problematic and impractical because it would favor long cause trials over shorter trials. A rule stating a preference for consecutive days would be a reasonable incremental step;
- Timing and Length of Briefs – a 45 day period for filing an opening brief and a page limit of 40 pages would be appropriate providing a party is allowed to seek relief to file additional pages;
- Independent Probable Cause Determination – an independent judge should be used to approve disciplinary charges before they are filed.

**FISCAL AND PERSONNEL IMPACT:**

None

**BOARD BOOK / ADMINISTRATIVE MANUAL IMPACT:**

None

**RULE AMENDMENTS IMPACT:**

If approved, this item would amend the Rules of Procedure of the State Bar of California.

**PROPOSED BOARD COMMITTEE RECOMMENDATION:**

**RESOLVED**, that the Discipline Oversight Committee authorizes staff to extend the time made available for public comment for an additional period of 30 days, on the proposed amendments to the Rules of Procedure of the State Bar of California which are already posted on the State Bar's website; and it is

**FURTHER RESOLVED**, this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.