

AGENDA ITEM

A& E III.B. NOVEMBER 2016

DATE: November 17, 2016

TO: Members, Admissions and Education Committee

FROM: Erika Doherty, Assistant General Counsel, Office of General Counsel

SUBJECT: Proposed Amendments to California Rule of Court, Rules 9.6 and 9.31 and State Bar Rules 2.32 and 2.50 to Permit Expungement of MCLE Involuntary Inactive Enrollment in the Limited Circumstances. Request for Public Comment.

EXECUTIVE SUMMARY

This agenda item requests 45-days of public comment on a proposal to amend California Rules of Court¹ 9.6 and 9.31 to permit a one-time only expungement of an isolated incident of minimum continuing legal education (“MCLE”) involuntary inactive enrollment. Expungement of information from State Bar membership records is currently governed by Rule 9.6(b)-(f) and Business and Professions Code² section 6092.5(e). Rule 9.6(b) authorizes the State Bar to recommend to the Supreme Court on an annual basis that an isolated incident of suspension for nonpayment of fees be expunged from an attorney’s membership record if the member meets four criteria prescribed in rule 9.6(b). The proposed amendments to rule 9.31 require a member to meet the same four criteria in Rule 9.6(b). The request also includes proposed amendments to the Rules of the State Bar. After public comment, if the Board of Trustees³ concurs with the proposal, the proposed amendments to rules 9.6 and 9.31 will be sent to the California Supreme Court for consideration and action. Any questions or comments about this proposal may be directed to Dina DiLoreto at dina.diloreto@calbar.ca.gov or at (415) 538-2121, or to Erika Doherty at erika.doherty@calbar.ca.gov or at (415) 538-2369.

This agenda item requests 45-days of public comment on proposed amendments to rules 9.6 and 9.31, set forth below, to permit expungement of an isolated record of MCLE involuntary inactive enrollment from a member’s record if the member meets certain criteria. Companion amendments to State Bar rules 2.32 and 2.50 are included in the request for public comment. After public comment, if the Board of Trustees concurs with the proposal, the proposed amendments to rules 9.6 and 9.31 will be transmitted to the California Supreme Court for consideration and action.

¹ Rule references are to the California Rules of Court unless otherwise stated.

² Statutory references are to the Business and Professions Code unless otherwise stated.

³ At the time of prior action relevant to this Agenda Item, the Board of Trustees was still the Board of Governors. For clarity, the Board of Governors is referred to as the Board of Trustees throughout this Agenda Item.

BACKGROUND

1. Expungement of Information from Membership Records

The California Supreme Court's expressly reserved power over the regulation of the practice of law includes power over the maintenance of the official membership records. In May 1996, the Supreme Court adopted rule 950.5 to delegate the function of maintaining the Roll of Attorneys and official membership records to the State Bar. In January 2007, rule 950.5 became rule 9.6 as part of a comprehensive reorganization of the California Rules of Court.

Business and Professions Code section 6092.5(e) permits expungement of State Bar records as directed by the California Supreme Court. However, prior to June 1, 2007, the official membership records contained each member's entire administrative and disciplinary history. Upon recommendation from the Board of Trustees, in June 2007, the Supreme Court amended rule 9.6 to add provisions authorizing expungement of an isolated incident of suspension for nonpayment of dues, and also approved an amendment to corresponding State Bar rule 2.33 [suspensions for nonpayment of dues].

2. Expanding Expungement to Include MCLE Involuntary Inactive Enrollment

Since June 2007, the one-time only expungement of a suspension for nonpayment of dues set forth in Rule 9.6(b) has worked well and without complaints. Some State Bar members and members of the Board of Trustees expressed interest in expanding the one-time only expungement policy to include an isolated incident of MCLE involuntary inactive enrollment.⁴ There are four criteria set forth in rule 9.6(b) in order to qualify for expungement:

- (1) The member has not on any previous occasion obtained an expungement under the terms of this rule;
- (2) The suspension was for 90 days or less;
- (3) The suspension ended at least seven years before the date of the submission of member's name to the Supreme Court;
- (4) The member has no other record of suspension or involuntary inactive enrollment for discipline or otherwise.

Members who meet these same four criteria would be eligible for expungement for MCLE non-compliance.

In 2011, a proposed amendment to rule 9.6 to permit expungement of MCLE involuntary inactive enrollment was authorized by the Board of Trustees for a 45-day public comment period. On November 4, 2011, after receiving three public comments in favor of the expansion and none opposing, the Board of Trustees approved proposed amendments to rule 9.6 (which generally covers the roll of attorneys admitted to practice and records to be maintained by the State Bar) and corresponding State Bar Rules, identical to the State Bar Rule changes proposed herein. The Board of Trustees directed State Bar staff to transmit the proposal to the Supreme Court with a recommendation of approval of the amendments to rule 9.6, however, to date, the State Bar has not submitted a recommendation to the Supreme Court. Due to the time that has elapsed since the Board's recommendation, State Bar staff revisited the proposed rule change and determined that a rule amendment is more appropriate to rule 9.31 because it exclusively addresses the MCLE program and members would be able to locate all rules and requirements related to MCLE in that rule without cross-referencing other rules.

⁴ An MCLE involuntary inactive enrollment is also known as an administrative inactive enrollment.

Current data shows that approximately 400 members could immediately benefit from the proposed rule changes. The initial number of qualified members is large given it includes all members who qualified for the expungement prior to the promulgation of this rule. Thereafter, the State Bar anticipates a small number of members newly eligible for MCLE expungement each year.

DISCUSSION

1. Expungement of Information from State Bar Records

Business and Professions Code section 6092.5(e) permits expungement of State Bar records. The statutory provision states:

“In addition to any other duties specified by law, the disciplinary agency shall do all of the following: ...

(e) Expunge records of the agency as directed by the California Supreme Court.”

Rule 9.6 subsection (b) states the State Bar may annually transmit to the Court the names of members who meet the four criteria listed in subsection (b) (set forth above), along with a recommendation that their fee suspension be expunged. Subsection (c) states what internal records the State Bar must maintain regarding expunged fee suspensions. Subsection (d) states the circumstances in which the member has a duty to disclose his or her expunged suspension. Subsection (e) authorizes the Board to adopt rules and regulations to comply with the rule. Subsection (f) states that nothing in Rule 9.6 may be construed as affecting the Court’s power to exercise its inherent power to direct the State Bar to expunge its records. Each of these concepts would be included in the proposed amendment to Rule 9.31.

2. MCLE Requirements

In 1989, the Legislature added Business and Professions Code section 6070 to the State Bar Act to formalize MCLE requirements for State Bar members and MCLE providers. Section 6070(a) is particularly relevant, providing:

(a) The State Bar shall request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program.... A member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the State Bar.

In 1990, in accordance with section 6070, the Supreme Court adopted the predecessor to current Rule 9.31 authorizing the State Bar to establish and administer a MCLE program, including the ability to enroll a noncompliant member on involuntary inactive status under rules adopted by the State Bar. (See Rule 9.31, subd. (d).) Pursuant to these rules, State Bar Rule 2.93, provides that “Enrollment as inactive for MCLE noncompliance terminates when a member submits proof of compliance and pays noncompliance fees.” (State Bar Rule 2.93, Title 2, Division 4.) As drafted, the State Bar’s MCLE rules are the only rules that provide for a member to be reinstated after involuntary inactive enrollment by the State Bar, rather than obtaining

reinstatement through the Supreme Court. The Supreme Court performs all other administrative suspensions and reinstatements, including for failure to pay membership fees⁵ (Bus. & Prof. Code § 6143; State Bar Rule 2.33), failure to pay child support (Rule 9.22, California Rules of Court; State Bar Rule 2.34), and failure to pay state taxes (Rule 9.24, California Rules of Court; State Bar Rule 2.36).

In accordance with section 6092.5(e) and Rule of Court 9.6(f), the Court must authorize expungement before a record of MCLE involuntary inactive status can be removed from the membership records. The proposed amendments to Rule 9.31 provide criteria for expungement that is identical to those in Rule 9.6, providing for a one-time only expungement of a failure to comply with MCLE requirements, as an administrative function performed by the State Bar rather than by the Supreme Court.

3. Proposed Amendments to California Rule of Court 9.6

It is proposed that Rule 9.6 be amended as follows (proposed deletions are ~~struck~~, amendments are underlined):

Rule 9.6. Roll of attorneys admitted to practice

(a) State Bar to maintain the roll of attorneys

The State Bar must maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this state. Such records must include the information specified in Business and Professions Code section 6002.1 and 6064 and other information as directed by the Supreme Court.

(b) Annual State Bar recommendation for one-time expungement of suspension for nonpayment of membership fees

The State Bar is authorized to transmit to the Supreme Court on an annual basis the names of those members who meet all of the following criteria, along with a recommendation that their public record of suspension for nonpayment of membership fees be expunged:

- (1)The member has not on any previous occasion obtained an expungement under the terms of this rule or rule 9.31;
- (2)The suspension was for 90 days or less;
- (3)The suspension ended at least seven years before the date of the submission of member's name to the Supreme Court;
- (4)The member has no other record of suspension or involuntary inactive enrollment for discipline or otherwise.

⁵ The court order typically states: "Upon payment in *certified funds* of all current and accrued fees and/or penalties and/or costs, the suspension for nonpayment shall terminate and such person may be fully restored to membership in the State Bar of California and to all rights and privileges, duties and responsibilities incident thereto.

(c) Records to be maintained by State Bar

Upon order of the Supreme Court of expungement of a member's record under (b) of this rule, the State Bar will remove or delete the record of such suspension from the member's record. Notwithstanding any other provision of this rule, the State Bar must maintain such internal records as are necessary to apply the terms of (b) of this rule and to report to the Commission on Judicial Nominees Evaluation or appropriate governmental entities involved in judicial elections the member's eligibility for a judgeship under the California Constitution, article VI, section 15.

(d) Duty of disclosure by member

Expungement of a member's suspension under (b) of this rule will not relieve the member of his or her duty to disclose the suspension for purpose of determining the member's eligibility for a judgeship under the California Constitution, article VI, section 15. For all other purposes the suspension expunged under (b) of this rule is deemed not to have occurred and the member may answer accordingly any question relating to his or her membership record.

(e) Authorization for the Board of ~~Governors~~ Trustees of the State Bar to adopt rules and regulations

The Board of ~~Governors~~ Trustees of the State Bar is authorized to adopt such rules and regulations as it deems necessary and appropriate in order to comply with this rule.

(f) Inherent power of Supreme Court

Nothing in this rule may be construed as affecting the power of the Supreme Court to exercise its inherent power to direct the State Bar to expunge its records.

4. Proposed Amendments to California Rule of Court 9.31

It is proposed that Rule 9.31 be amended as follows (proposed deletions are ~~struck~~, amendments are underlined):

Rule 9.31. Minimum continuing legal education

(a) Statutory authorization

This rule is adopted under Business and Professions Code section 6070.

(b) State Bar minimum continuing legal education program

The State Bar must establish and administer a minimum continuing legal education program under rules adopted by the Board of ~~Governors~~ Trustees of the State Bar. These rules may provide for carryforward of excess credit hours, staggering of the education requirement for implementation purposes, and retroactive credit for legal education.

(c) Minimum continuing legal education requirements

Each active member of the State Bar (1) not exempt under Business and Professions Code section 6070, (2) not a full-time employee of the United States Government, its departments, agencies, and public corporations, acting within the scope of his or her employment, and (3) not otherwise exempt under rules adopted by the Board of ~~Governors~~ Trustees of the State Bar, must, within 36-month periods designated by the State Bar, complete at least 25 hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Four of those hours must address legal ethics. Members may be required to complete legal education in other specified areas within the 25-hour requirement under rules adopted by the State Bar. Each active member must report his or her compliance to the State Bar under rules adopted by the Board of ~~Governors~~ Trustees of the State Bar.

(d) Failure to comply with program

A member of the State Bar who fails to satisfy the requirements of the State Bar's minimum continuing legal education program must be enrolled as an inactive member of the State Bar under rules adopted by the Board of ~~Governors~~ Trustees of the State Bar.

(e) Fees and penalties

The State Bar has the authority to set and collect appropriate fees and penalties.

(f) One-time expungement of inactive enrollment for failure to comply with the minimum continuing legal education program

The State Bar is authorized to expunge a public record of inactive enrollment for failure to comply with the minimum continuing legal education program for those members who meet all of the following criteria:

(1) The member has not on any previous occasion obtained an expungement under the terms of this rule or rule 9.6;

(2) The inactive enrollment was for 90 days or less;

(3) The inactive enrollment ended at least seven years before the date of expungement;

(4) The member has no other record of suspension or involuntary inactive enrollment for discipline or otherwise.

(g) Records to be maintained by State Bar

Under (f) of this rule, the State Bar will remove or delete the record of such inactive enrollment from the member's record. Notwithstanding any other provision of this rule, the State Bar must maintain such internal records as are necessary to apply the terms of (f) of this rule and to report to the Commission on Judicial Nominees Evaluation or appropriate governmental entities involved in judicial elections the member's eligibility for a judgeship under the California Constitution, article VI, section 15.

(h) Duty of disclosure by member

Expungement of a member's inactive enrollment under (f) of this rule will not relieve the member of his or her duty to disclose the inactive enrollment for purpose of determining the member's eligibility for a judgeship under the California Constitution, article VI, section 15. For all other purposes, the inactive enrollment expunged under (f) of this rule is deemed not to have occurred and the member may answer accordingly any question relating to his or her membership record.

(i) Authorization for the Board of Trustees of the State Bar to adopt rules and regulations

The Board of Trustees of the State Bar is authorized to adopt such rules and regulations as it deems necessary and appropriate in order to comply with (f) of this rule.

(j) Inherent power of Supreme Court

Nothing in this rule may be construed as affecting the power of the Supreme Court to exercise its inherent power to direct the State Bar to expunge its records.

5. Proposed Amendments to State Bar Rules

The proposal to permit expungement of an MCLE involuntary inactive enrollment implicates companion State Bar rules dealing with MCLE requirements for members.⁶ For this proposal, it would be appropriate to amend two State Bar rules, as follows.

First, in State Bar Rules Title 2, Division 3 (Member Status), the following amendment is proposed:

Rule 2.32 Inactive enrollment for failure to comply with Minimum Continuing Legal Education (MCLE) requirements

(A) A member who fails to meet requirements for Minimum Continuing Legal Education (MCLE) will be involuntarily enrolled as inactive.

(B) To terminate inactive enrollment for MCLE noncompliance, a member must comply with the MCLE rules governing reinstatement.⁷

(C) Annual membership fees accrue at the inactive rate.

(D) Annually the State Bar may expunge an involuntarily inactive enrollment for MCLE noncompliance if the enrollment meets the criteria adopted by the court.⁸

Second, in State Bar Rules Title 2, Division 4 (Minimum Continuing Legal Education by Members), the following amendment is proposed:

⁶ State Bar MCLE rules 2.50-2.93 are for members and rules 3.500-3.521 are for MCLE providers.

⁷ See State Bar Rule 2.93.

⁸ California Rules of Court, Rule 9.31(f). (A footnote reference to Rule 9.31 would be part of rule 2.32(D).)

Rule 2.50 Purpose of MCLE

Rules for Minimum Continuing Legal Education (MCLE) require active members of the State Bar of California to remain current regarding the law, the obligations and standards of the legal profession, and the management of their practices. A member's involuntary enrollment as inactive for failing to comply with these rules is public information available on the State Bar Web site, unless otherwise provided by rule.⁹

FISCAL/PERSONNEL IMPACT

It is expected that computer programming costs associated with this proposal will be absorbed in the budget. No overall fiscal impact or staff impact is expected.

RULE AMENDMENTS

Title 2, Division 3, Rule 2.32 and Title 2, Division 4, Chapter 1, Rule 2.50.

The Supreme Court must adopt the proposed amendments to Rules of Court 9.6 and 9.31 in order for the proposed amendments to State Bar Rules 2.32 and 2.50 to be effective. The effective date for the proposed amendments to Rules 2.32 and 2.50 depends on the Court's action on Rules 9.6 and 9.31.

BOARD BOOK IMPACT

None known.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Admissions and Education Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Admissions and Education Committee hereby authorizes staff to make available for public comment for a 45-day period the proposed amendments to Rule 9.6 and Rule 9.31 of the California Rules of Court regarding expungement of an MCLE involuntary inactive enrollment and to State Bar Rule 2.32 of Title 2, Division 3 and State Bar Rule 2.50 of Title 2, Division 4, in the form attached; and it is

FURTHER RESOLVED that 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.

ATTACHMENT(S) LIST

- A. Proposed amendments to California Rule of Court 9.6
- B. Proposed amendments to California Rule of Court 9.31
- C. Proposed amendments to State Bar rules 2.32 and 2.50

⁹ See California Rules of Court, Rule 9.31(f), and Rule 2.32(D). (A footnote reference to Rule 9.31 and to State Bar rule 2.32(D) would be part of rule 2.50.)