

AGENDA ITEM

NOV 132

DATE: October 17, 2011

TO: Members, Member Oversight Committee
Members, Board of Governors

FROM: Dina DiLoreto, Director of Administration, Member Services Center

SUBJECT: Proposed Amendments to California Rule of Court 9.6 to Permit Expungement of MCLE Involuntary Inactive Enrollment in the Limited Circumstances Prescribed in Rule 9.6: Return from Public Comment and Request for Approval of Proposal for Transmission to the California Supreme Court

EXECUTIVE SUMMARY

Expungement of information from State Bar membership records is governed by California Rule of Court 9.6(b)-(f) and Business and Professions Code section 6092.5(e). Rule of Court 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).

This agenda item brings back from public comment a proposal to amend Rule of Court 9.6(b)-(d) to permit a one-time only expungement of an isolated incident of MCLE involuntary inactive enrollment if a member meets the same four criteria in Rule 9.6(b). The proposal includes amendments to the Rules of the State Bar, which will be effective only if the Supreme Court approves the proposed amendments to Rule 9.6(b).

If the Board concurs with the proposal, the proposed amendments to Rule of Court 9.6 will be transmitted 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 Mary Yen at mary.yen@calbar.ca.gov or at (415) 538-2369.

This agenda item brings proposed amendments to California Rule of Court 9.6 ("Rule 9.6"), and companion amendments to State Bar rules 2.32 and 2.50, back from public comment. The proposed amendments would permit expungement of an isolated record of minimum continuing legal education ("MCLE") involuntary inactive enrollment from a member's record if the member meets the four criteria prescribed in Rule 9.6(b).

Three public comments were received in support of the proposal. There were no opposing comments.

If the board committee and the Board concur with the proposal, the proposed amendments to Rule 9.6 will be transmitted to the California Supreme Court (“Court”) with a recommendation for their approval. The proposed amendments to State Bar rules 2.32 and 2.50 will become effective only if the amendments to Rule of Court 9.6 are approved by the Court.

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 1996, the Court delegated maintenance of the official membership records to the State Bar. Prior to June 1, 2007, the official membership records contained each member’s entire administrative and disciplinary history. There had been a “no exception” policy to the official membership records containing the entire history, and the policy had provided consistency and was considered in the interest of public protection as well as the public’s right to know public information.

Upon recommendation of your Board, effective June 1, 2007, the Supreme Court authorized a one-time only expungement of an isolated incident of suspension for nonpayment of dues from a member’s record if four limiting criteria are met. The Board’s recommendation originated from a member’s request to expunge a single five-day suspension for failing to pay annual dues in the 1980s. The member was unaware of the suspension until 2004, when he checked his own member record on the State Bar website. His suspension resulted from circumstances at a large firm which were out of his control or knowledge and were inadvertent. The suspension was not due to State Bar staff error.

2. Expanding Expungement to Include MCLE Involuntary Inactive Enrollment

Since June 2007, the one-time only expungement of a suspension for nonpayment of dues has worked well and without complaints. Board members and attorney members of the State Bar have expressed interest in expanding the one-time only expungement policy to include an isolated incident of MCLE involuntary inactive enrollment¹ of those members who meet the same four criteria specified by the Court for expungement of a suspension for nonpayment of dues.

Current data shows that approximately 130 members could immediately benefit from the proposed rule changes. Annually thereafter, it is estimated that 10-20 members per year would benefit.

ISSUE

Whether to approve proposed amendments to California Rule of Court 9.6 and State Bar rules 2.32 and 2.50. The amendments would permit a one-time only expungement of an

¹ An MCLE involuntary inactive enrollment is also known as an administrative inactive enrollment.

involuntary inactive enrollment for MCLE noncompliance under the limited circumstances prescribed in Rule 9.6.

CONCLUSION

If your board committee and Board approve of the proposal, the proposed amendments to Rule of Court 9.6 and State Bar rules 2.32 and 2.50 will be transmitted to the California Supreme Court with a recommendation that the Court approve the amendments to Rule 9.6. The effective date of amendments to State Bar rules 2.32 and 2.50 depends on the effective date of amendments to Rule of Court 9.6.

DISCUSSION

1. Legislation Permits Expungement of Information from State Bar Records

Business and Professions Code² 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.*” (emph. added in *italics*)

2. California Rule of Court 9.6 Authorizes Expungement of Information from the Membership Records

In May 1996, the Court adopted Rule 950.5 (“Rule 950.5”) of the California Rules of Court to officially delegate to the State Bar the function of maintaining the Roll of Attorneys and official membership records.³ In January 2007, Rule 950.5 became Rule 9.6 as part of a comprehensive reorganization of the California Rules of Court.

In June 2007, upon recommendation of the Board of Governors, the 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 State Bar rule 2.33 [suspensions for nonpayment of dues], which added subpart (e) regarding expungement.⁴ Rule 9.6 subpart (b) states the State Bar may annually transmit to the Court the names of members who meet four criteria listed in (b) along with a recommendation that their fee suspension be expunged. One of the criteria is that the member has not on any previous

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

³ Rule 950.5 (Roll of Attorneys of California) originally stated: “The State Bar shall 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 shall include the information specified in sections 6002.1 and 6064 of the Business and Professions Code and other information as directed by the Court.”

⁴ Rule 2.33(e) states: “Annually the State Bar may recommend that the Supreme Court expunge a suspension for nonpayment of membership fees if the suspension meets the criteria adopted by the court. [footnote to Rule of Court 9.6(b)].”

occasion obtained an expungement under Rule 9.6. Subpart (c) states what internal records the State Bar must maintain of expunged fee suspensions. Subpart (d) states the circumstances in which the member has a duty to disclose his or her expunged suspension. Subpart (e) authorizes the Board to adopt rules and regulations to comply with the rule. Subpart (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.

3. Legislation Regarding MCLE Requirements

In 1989, the Legislature added section 6070 to the State Bar Act (Bus. & Prof. Code §§6000 et seq.) to formalize MCLE requirements for State Bar members and MCLE providers.⁵ Section 6070(a) is particularly relevant. It provides, in relevant part:

(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.

4. California Rule of Court 9.31 Regarding MCLE

In accordance with section 6070, in 1990 the Supreme Court adopted the predecessor to current Rule 9.31. Consistent with section 6070, Rule 9.31 authorizes the State Bar to administratively enroll a noncompliant member on involuntary inactive status without going to the Supreme Court. Subparts (a) and (d) of Rule 9.31 state:

Rule 9.31 Minimum Continuing Legal Education

(a) [Statutory authorization]

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

...

(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 of the State Bar.

Nothing in Rule 9.31 or section 6070 authorizes expungement of the involuntary inactive status. 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.

⁵ In 1991, the Legislature added section 6071, an MCLE statute that is not relevant to the proposal.

5. Proposed Amendments to California Rule of Court 9.6

It is proposed that the expungement provisions of Rule 9.6 be amended as follows:

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 [\[Insert text begin\] or involuntary inactive enrollment for minimum continuing legal education noncompliance](#) [\[Insert text end\]](#)]

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 [\[Insert text begin\] or involuntary inactive enrollment for minimum continuing legal education noncompliance](#) [\[Insert text end\]](#) be expunged:

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

(2) The suspension [\[Insert text begin\] or involuntary inactive enrollment](#) [\[Insert text end\]](#) was for 90 days or less;

(3) The suspension [\[Insert text begin\] or involuntary inactive enrollment](#) [\[Insert text end\]](#) ended at least seven years before the date of the submission of member's name to the Supreme Court; [\[Insert text begin\]](#) [\[Insert text end\]](#)

(4) The member has no other record of suspension or [\[Insert text begin\] involuntary inactive enrollment](#) [\[Insert text end\]](#) for discipline or otherwise.

(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 [\[Insert text begin\] or involuntary inactive enrollment](#) [\[Insert text end\]](#) 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 [Insert text begin] or involuntary inactive enrollment [Insert text end] under (b) of this rule will not relieve the member of his or her duty to disclose the suspension [Insert text begin] or involuntary inactive enrollment [Insert text end] 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 [Insert text begin] or the involuntary inactive enrollment [Insert text end] 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~~ [Insert text begin] Trustees⁶ [Insert text end] of the State Bar to adopt rules and regulations]

The Board of ~~Governors~~ [Insert text begin] 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.

6. 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.⁷ For this proposal, it would be appropriate to amend two State Bar rules, as follows.

⁶ Senate Bill 163 (2011 Statutes, Chapter 417) changes the Board's name to "Board of Trustees" effective January 1, 2012. Under State Bar Rule 1.10(B) [Public comment], no public comment is required since the name change conforms to a change in law.

⁷ State Bar MCLE rules 2.50-2.93 are for members and rules 3.500-3.521 are for MCLE providers.

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.⁸

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

[Insert text begin] (D) Annually the State Bar may recommend that the Supreme Court expunge an involuntarily inactive enrollment for MCLE noncompliance if the enrollment meets the criteria adopted by the court. [Insert text end] ⁹ [Insert text end]

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

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 website, [Insert text begin] unless otherwise provided by rule.¹⁰ [Insert text end]

PUBLIC COMMENTS:

The proposed amendments were published for a 45-day period of comment. Three comments were received in support of the proposal. No comments opposed the proposal.

A summary of the comments follows:

⁸ See State Bar Rule 2.93.

[Insert text begin]⁹ California Rules of Court, Rule 9.6(b). (A footnote reference to Rule 9.6 would be part of rule 2.32(D).) [Insert text end]

[Insert text begin]¹⁰ See California Rules of Court, Rule 9.6(b), and Rule 2.32(D). (A footnote reference to Rule 9.6 and to State Bar rule 2.32(D) would be part of rule 2.50.) [Insert text end]

1. Paul Virgo, member, favors the proposed change. Publication of MCLE inactive enrollment has been a bane to many California attorneys and some of his clients.
2. Steven A. Lewis, member, favors the proposal.
3. Ellen Pansky, member, favors the proposal. Similar to the circumstances that may cause suspension for nonpayment of dues, occasionally a lawyer overlooks the due date and notices regarding presenting evidence of MCLE compliance. There is no logical basis to treat differently such administrative delay in failing to comply with the MCLE requirements.

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:

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

BOARD BOOK IMPACT:

None known

RECOMMENDATION

It is recommended that the board committee and the Board approve the proposed amendments to Rule of Court 9.6 and to State Bar rules 2.32 and 2.50, subject to the Court's approval of the amendments to rule of Court 9.6.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Member Oversight Committee agree with the above recommendation to amend Rule of Court 9.6 and State Bar rules 2.32 and 2.50, the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of the three comments received, that the Member Oversight Committee recommends that the Board approve the proposed amendments to Rule 9.6 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 1 and State Bar Rule 2.50 of Title 2, Division 4, in the form attached and direct staff to transmit the proposal to the Supreme Court with a recommendation of approval of the amendments to Rule 9.6.

PROPOSED BOARD OF GOVERNORS RESOLUTION:

Should the Board concur with the Member Oversight Committee's recommendation of the to amend Rule of Court 9.6 and State Bar rules 2.32 and 2.50, the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of the three comments received, and upon recommendation of the Member Oversight Committee, the Board hereby approves the proposed amendments to Rule 9.6 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 1 and State Bar Rule 2.50 of Title 2, Division 4, in the form attached and directs staff to transmit the proposal to the Supreme Court with a recommendation of approval of the amendments to Rule 9.6.

ATTACHMENTS

Attachment A: Proposed amendments to California Rule of Court 9.6

Attachment B: Proposed amendments to State Bar rules 2.32 and 2.50

Attachment C: Public comments received