

AGENDA ITEM

122 JULY13

DATE: July 9, 2013

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Trustees

FROM: Gayle Murphy, Senior Director, Admissions,
Dina DiLoreto, Director of Member Records and Compliance

SUBJECT: Proposal re: Refusal-of-Admission and Suspension for Tax
Delinquency (AB 1424, Stats. 2011, Ch. 455). Return from
Public Comment and Recommendation of Approval for
Transmittal to the Supreme Court

EXECUTIVE SUMMARY

AB 1424 (Stats. 2011, Chapter 455) is a comprehensive bill directed at the 500 largest state tax delinquents who owe over \$100,000. AB 1424 added section 494.5 to the Business and Professions Code to provide for denying a license to or suspending the professional license of a person who is among the 500 largest state tax delinquencies. The State Bar, its members and applicants for admission are covered in AB 1424.

Since the Supreme Court of California has inherent authority and power over admissions, discipline and regulation of attorneys in California, this memorandum proposes a new California Rule of Court and a new State Bar rule to authorize the suspension provided in Business and Professions Code section 494.5. The memorandum also proposes an amendment of existing State Bar rule 4.15 to add compliance with tax obligations as an admission requirement of certification to the Supreme Court.

In May, the Regulation, Admissions and Discipline Oversight Committee authorized 30 days of public comment on the proposed new and amended rules. One public comment was received.

It is recommended that the proposal be approved for transmittal to the California Supreme Court for final action.

Board members with any questions may contact Gayle Murphy at (415) 538-2322 or Gayle.Murphy@calbar.ca.gov, or Dina DiLoreto at (415) 538-2121 or Dina.DiLoreto@calbar.ca.gov, or Mary Yen at (415) 538-2369 or Mary.Yen@calbar.ca.gov.

BACKGROUND

AB 1424 (Stats. 2011, Chapter 455) is directed at taxpayers who are named on published lists of the Franchise Tax Board (“FTB”) and the State Board of Equalization (“BOE”) of the 500 largest tax delinquents who owe over \$100,000. AB 1424 added Business and Professions Code section 494.5 (“section 494.5”) to provide for denying a professional license to, and suspending the license of, a named tax delinquent. Section 494.5 contains notice and timeline provisions; conditions for reinstatement and re-suspension; and a process by for submitting a challenge to the FTB or BOE if the taxpayer contests being named on the lists.

Section 494.5 is patterned after Family Code section 17520, which provides for denial or suspension of a professional license of a person delinquent in child support. In 1993, the California Supreme Court adopted the predecessor to California rule of court 9.22 [suspension for failure to pay child or family support] to complement the then-newly enacted predecessor to Family Code section 17520. In adopting rule of court 9.22, the California Supreme Court acted on its inherent and primary constitutional authority over attorney admissions, discipline, and regulation of the practice of law in this State, including the power to suspend a member. (In Re Attorney Discipline (1998) 19 Cal.4th 582 [79 Cal. Rptr.2d 836, 967 P.2d 49], [inherent authority of the Court]; In re Shattuck (1929) 208 Cal. 6 [279 P. 998], [suspension for disciplinary reasons]; Carpenter v. State Bar of California (1931) 211 Cal. 358 [295 P. 23], [suspension for nonpayment of dues].)

In light of the Supreme Court’s inherent authority over admissions and regulation of the practice of law, in July 2012 the Board approved two new rules of court, one for refusal of admission and the other for suspension of large tax delinquents. The proposed new rules were filed with the Court in August 2012. It now appears that the Court would prefer to address refusal of admission of tax delinquents in existing State Bar rule 4.15 rather than a rule of court and to require a declaration under penalty of perjury as a condition of reinstatement in the rule of court for suspension of tax delinquents.

In May, the Regulation, Admissions and Discipline Oversight Committee authorized 30 days of public comment period on a revised proposal for: 1) a new rule of court 9.24, 2) a new State Bar rule 2.36 for suspension of tax delinquents, together with renumbering of existing rules 2.36 and 2.37, and 3) an amendment of existing State Bar rule 4.15 to add compliance with tax obligations as an eligibility requirement for admission.

During the 30-day public comment period, one public comment opposing the proposal was received. A summary of the comment is provided below and the entire comment is attached to this memorandum. No other public comments were received.

It is recommended that the Board approve the proposed new and amended rules, subject to final action by the California Supreme Court on new rule of court 9.24.

ISSUE

Whether to approve the proposal for a new rule of court 9.24, a new State Bar rule 2.36 regarding suspension for tax delinquency and renumbering of existing rules 2.36 and 2.37, and an amendment of State Bar rule 4.15, subject to final action by the California Supreme Court on rule of court 9.24, in the form attached to this memorandum.

DISCUSSION

The FTB and BOE publish lists of the 500 largest state tax delinquencies owing over \$100,000. The FTB list is published twice a year; the BOE list is published quarterly.

In April 2012, the FTB list named 15 active State Bar members, 1 inactive member, and 3 people who were not eligible to practice or disbarred. The second largest income tax delinquent was a State Bar member who owed over \$6,000,000. The 15 other active and inactive members owed a totaled amount over \$6,500,000.

More recently, in February 2013 the FTB list named 12 active State Bar members and 1 member who is not eligible to practice. The fourth largest tax delinquent, owing over \$6,118,000, is the same active Bar member who had been the second largest tax delinquent named on the FTB list in April 2012. The 11 other active members together owed over \$4,079,400. Seven attorneys are named on both the April 2012 list and the February 2013 list.

In light of this data, there is a need for a new rule of court and new State Bar rule governing suspension of attorneys who are tax delinquents under section 494.5.

1. New Rule of Court 9.24

Proposed new rule of court 9.24 authorizes the suspension, reinstatement and re-suspension of members named on a list of the FTB or BOE. The proposed rule is patterned after rule of court 9.22 (child or family support suspension), with slight variations due to differences in the nature of the delinquent obligation and requirements for reinstatement and re-suspension. Proposed rule of court 9.24 authorizes the State Bar to transmit a recommendation for initial suspension on a quarterly basis for members listed by the BOE and twice a year for members listed by the FTB.

Proposed rule of court 9.24, provision (b) requires a declaration under penalty of perjury. The declaration is intended to promote compliance and enforcement and to emphasize the importance of complying with a suspension order of the Court, even if the suspension is for a reason unrelated to the practice of law. Another agenda item requests public comment on an amendment to add a comparable declaration in rule of court 9.22, suspension for child support delinquency.

Proposed new rule of court 9.24 would read as follows:

[Proposed] California Rule of Court 9.24 Suspension of members of the State Bar for failure to pay state taxes

(a) State Bar recommendation for suspension of delinquent members

The State Bar is authorized to transmit to the Supreme Court twice a year the names of those members who are on a list of the State Franchise Tax Board of the 500 largest tax delinquencies under Business and Professions Code section 494.5, and on a quarterly basis the names of those members who are on a list of the State Board of Equalization of the 500 largest tax delinquencies under Business and Professions Code section 494.5, with a recommendation for the members' suspension from the practice of law.

(b) Conditions for reinstatement of suspended members

The Supreme Court may reinstate a member suspended under this rule only after receipt of notification from the State Bar that the member's name has been released by the State Franchise Tax Board or the State Board of Equalization and that the member has submitted a declaration under penalty of perjury stating whether the member practiced law during the suspension.

(c) Additional recommendation for suspension by the State Bar

The State Bar is further authorized to promptly transmit to the Supreme Court with a recommendation for their suspension from the practice of law the names of those members previously listed by the State Franchise Tax Board or the State Board of Equalization as delinquent in their payment of state taxes, who obtained releases under Business and Professions Code section 494.5(h), and who have subsequently been identified by the State Franchise Tax Board or the State Board of Equalization under Business and Professions Code section 494.5(j) as failing to comply with an installment payment plan that the member entered into with the State Franchise Tax Board or the State Board of Equalization.

(d) Authorization for the Board of Trustees of the State Bar to adopt rules

The Board of Trustees of the State Bar is authorized to adopt such rules as it deems necessary and appropriate in order to comply with this rule. The rules of the State Bar must contain procedures governing the notification, suspension, and reinstatement of members of the State Bar in a manner not inconsistent with Business and Professions Code section 494.5.

2. New State Bar Rule 2.36

Proposed new State Bar rule 2.36 is patterned after State Bar rule 2.34 for suspension due to child support delinquency. If the Supreme Court adopts rule of court 9.34 as

proposed, new State Bar rule 2.36 would read as follows, including footnote citations that are recited in the rule in brackets for ease of readability:

[Proposed New] State Bar Rule 2.36 Suspension for failure to pay state taxes

(A) A member identified under the terms of Business and Professions Code section 494.5 as delinquent in the payment of state taxes will be suspended from the practice of law by the Supreme Court. [Footnote cites as follows: “California Rules of Court, [proposed] Rule 9.24.”]

(B) The State Bar will send a written notice of suspension for failure to pay state taxes to the member’s address of record. The suspension will be effective on the date ordered by the Supreme Court.

(C) The State Bar will ask the Supreme Court to reinstate a member if it receives statutory notice [Footnote cites as follows: “Business and Professions Code section 494.5.”] releasing the member, if the member submits a declaration under penalty of perjury stating whether the member practiced law during the suspension and if the member has paid any fee authorized by statute. [Footnote cites as follows: “California Rules of Court, [proposed] Rule 9.24; Business and Professions Code section 494.5(l).”]

(D) If a reinstated member subsequently fails to comply with an installment payment agreement that the member entered into with the State Franchise Tax Board or the State Board of Equalization, [Footnote cites as follows: “Business and Professions Code section 494.5(j).”] the State Bar will request that the Supreme Court suspend the member within thirty days and will send written notice of its request to the member’s address of record.

(E) Annual membership fees accrue according to the member’s status prior to suspension.

The effective date of the proposed new State Bar rule 2.36 is contingent on the Supreme Court’s adoption and the effective date of proposed new rule 9.24 of the California Rules of Court.

3. Renumbering Existing State Bar Rules 2.36 and 2.37

In order to place proposed new State Bar rule 2.36 with other suspension rules and to reserve rule numbers for the possibility of adding new suspension rules in the future, existing rule 2.36 [multiple accrual rates for annual membership fees] should be renumbered as rule 2.40 and existing rule 2.37 [voluntary resignation] should be renumbered as rule 2.45.

4. Amendment of State Bar Rule 4.15 Regarding Admission Requirements

There is no indication that any applicants for admission have been on the FTB list or BOE list. Nevertheless, it is appropriate to provide for denial of admission of persons who are named on these lists.

State Bar rule 4.15 states the eligibility requirements for certification to the Supreme Court for admission to the practice of law. Currently, State Bar rule 4.15(D) requires that an admission applicant be in compliance with child or family support obligations pursuant to Family Code section 12750. There is no reason to treat compliance with tax obligations differently than compliance with child support obligations. Accordingly, it is proposed that compliance with tax obligations be a new provision (E) and that existing provisions (E) and (F) be renumbered.

Amended rule 4.15 would read as follows, with compliance with tax obligations as a new (E) (the rule has a footnote citation that is recited in brackets in the rule for ease of readability):

Rule 4.15 Certification to California Supreme Court

To be eligible for certification to the California Supreme Court for admission to the practice of law, an applicant for admission must:

- (A) be at least eighteen years of age;
- (B) file an Application for Admission with the Committee;
- (C) meet the requirements of these rules regarding education or admission as an attorney in another jurisdiction, determination of moral character, and examinations;
- (D) be in compliance with California court-ordered child or family support obligations pursuant to Family Code § 17520;
- (E) be in compliance with tax obligations pursuant to Business & Professions Code § 494.5;
- (F) until admitted to the practice of law, notify the Committee within thirty days of any change in information provided on an application; and
- (G) otherwise meet statutory criteria for certification to the Supreme Court. [Footnote cites as follows: “Business & Professions Code § 6060.”].

The effective date of the proposed amendment to State Bar rule 4.15 will depend on the effective date of proposed new rule 9.24 so that all new requirements relating to Business and Professions Code section 494.5 will be implemented at the same time. The State Bar will also request that the Court permit withdrawal of the previous proposal for a new rule of court on refusal of admission.

PUBLIC COMMENT:

Vicken O. Berjikian, Esq. opposes the proposal because he believes section 494.5 is unconstitutional. He contends that section 494.5 lacks the due process protections of Family Code section 17520 because, while section 494.5 provides a review process by the FTB, section 494.5 does not provide an opportunity for a court review with removal from the list upon initiation of such review. He believes a license to practice law is a vested property right that the State Bar would be taking away without due process. He also contends that section 494.5 permits, but does not require, the State Bar to recommend refusal to license and suspension of a member who is on a certified list and that the State Bar is acting arbitrarily and contrary to the apparent intent of the Legislature. The member contends that the State Bar has not adequately researched the reasons why attorneys who are on the certified list have not paid their tax obligations; the statute is being applied retroactively without a provision authorizing retroactive application; and the proposal will have a fiscal impact because affected attorneys will litigate the application of the statute to take away their professional license.

Staff response: Existing law provides due process for delinquent taxpayers. The “permissive” language that the comment refers to is section 494.5(a)(3), which states: “The State Bar of California may recommend to refuse to issue, reactivate, reinstate, or renew a license and may recommend to suspend a license if a licensee’s name is included on a certified list. The word “may” shall be substituted for the word “shall” relating to the issuance of a temporary license, refusal to issue, reactivate, reinstate, renew, or suspend a license in this section for licenses under the jurisdiction of the California Supreme Court.” This language recognizes that it is the Supreme Court that determines policy on the procedures and grounds for suspension of the license to practice of law and how the State Bar will implement section 494.5 will be subject to a new rule of court adopted by the Court under its inherent authority. Finally, the legislative intent of the retroactive effect of the statute is found in Business and Professions Code section 494.5(v), which states: “This section shall apply to any licensee whose name appears on a list of the 500 largest tax delinquencies pursuant to Section 7063 or 19195 of the Revenue and Taxation Code on or after July 1, 2012.”

FISCAL / PERSONNEL IMPACT:

None known.

RULE AMENDMENTS:

Title II, Division 3, add new rule 2.36 and renumber existing rule 2.36 as rule 2.40 and renumber existing rule 2.37 as rule 2.45, subject to Supreme Court approval of proposed rule of court 9.24.

Title IV, Division 1, Chapter 2, amend rule 4.15 to add new (E) and renumber existing (E) as (F) and existing (F) as (G), subject to Supreme court approval of proposed rule of court 9.24.

The effective date of the new and amended rules in Title II and Title IV is dependent on the effective date of proposed new rule of court 9.24.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

It is recommended that the proposal for new rule of court 9.24, new State Bar rule 2.36, amendment of State Bar rule 4.15, and renumbering of existing State Bar rule 2.36 as 2.40 and rule 2.37 as 2.45 be approved, subject to Supreme Court approval of new rule of court 9.24. The proposed new and amended rules are the same as the versions published for public comment.

PROPOSED BOARD COMMITTEE RESOLUTION:

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

RESOLVED, RESOLVED, that following a period of public comment and consideration of the public comment received, the Regulation, Admissions and Discipline Oversight Committee recommends that the Board approve the proposal for California new rule of court 9.24 and new State Bar rule 2.36 regarding suspension, amendment of State Bar rule 4.15, and renumbering of existing State Bar rule 2.36 as 2.40 and rule 2.37 as 2.45, and direct staff to transmit the proposal to the California Supreme Court for consideration and final action; and it is

FURTHER RESOLVED, that the recommended effective date of new State Bar rule 2.36, amendment of State Bar rule 4.15, and renumbering of existing rule 2.36 as 2.40 and rule 2.37 as 2.45 be dependent on the effective date of the California Supreme Court's approval and adoption of proposed rule of court 9.24.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Regulation, Admissions and Discipline Oversight Committee's recommendation, the following resolutions would be in order:

RESOLVED, that that following a period of public comment and consideration of the public comment received, and upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board hereby approves the

proposal for California new rule of court 9.24 and new State Bar rule 2.36 regarding suspension, amendment of State Bar rule 4.15, and renumbering of existing State Bar rule 2.36 as 2.40 and rule 2.37 as 2.45, and directs staff to transmit the proposal to the California Supreme Court for consideration and final action; and it is

FURTHER RESOLVED, that the effective date of new State Bar rule 2.36, amendment of State Bar rule 4.15, and renumbering of existing rule 2.36 as 2.40 and rule 2.37 as 2.45 is dependent on the effective date of the California Supreme Court's approval and adoption of proposed rule of court 9.24.

ATTACHMENTS: [Proposed] new rule of court 9.24;

[Proposed] new State Bar rule 2.36; and renumbering of existing State Bar rule 2.36 as rule 2.40 and existing State Bar rule 2.37 as rule 2.45, in legislative style

Amended State Bar rule 4.15, in legislative style

Vicken O. Berjikian letter

Business and Professions Code, section 494.5