

AGENDA ITEM

121 MAY 9 2014

DATE: February 20, 2014

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

FROM: Hon. Joann Remke, Presiding Judge, State Bar Court
Colin Wong, Chief Administrative Officer, State Bar Court

SUBJECT: Proposed Revisions to the Rules of Procedure of the State Bar of California – Request for Adoption after Public Comment

EXECUTIVE SUMMARY

NOTE: This agenda item was considered at the March 2014 RAD meeting. At that meeting, the proposal was tabled by the Committee. The request for adoption of these rules is presented in the same form that was considered at the March 2014 meeting.

The Rules of Procedure of the State Bar of California, which provide both procedural and substantive requirements for cases in the State Bar Court, were substantially revised in 2010. After working with the amended rules for over two years, the State Bar Court determined that additional changes are needed to further clarify the process and to correct minor errors. With a few exceptions, most of the revisions are not intended to substantively change the procedures. Those rules with substantive changes deal mainly with default proceedings and are set forth in more detail below. At the October 2013 meeting, the Board Committee on Regulation, Admissions and Discipline Oversight approved the release of the proposed amendments for a 60-day public comment period. One public comment was received during the 60 day period.

BACKGROUND

In September 2010, the Board of Trustees approved for adoption the State Bar Court's proposed amendments to the Rules of Procedure of the State Bar of California ("Rules"), effective January 2011. In April 2013, the State Bar Court initiated a formal evaluation process to determine the efficacy of the amendments. Public comments were solicited and received regarding the amendments. A report was prepared and submitted to the Board in July 2013.

Based on the 2013 evaluation and report, the State Bar Court determined that amendments to the Rules are warranted. The majority of these amendments seek to

correct, clarify, or conform the Rules to current practices, but do not materially change the process. The few substantive revisions primarily address the default process.

DISCUSSION

We believe the proposed amendments will further improve efficiency and public protection, without sacrificing due process rights in the disciplinary system. The majority of the modifications are non-substantive. The more extensive changes relate primarily to the default process.

The current default rules were intended to eliminate the inefficiency of conducting multiple default proceedings against the same member. Previously, after a default was entered and allegations deemed admitted, a discipline recommendation was made based on the misconduct. While the member remained in default, a disbarment recommendation often occurred in a subsequent default proceeding as a result of the member's failure to comply with the discipline order issued in the first default proceeding. Recognizing that most members under these circumstances have essentially abandoned their law licenses, the current Rules place a defaulting member on inactive status pending a timely motion to set aside or vacate the default. Under existing rules, a member has 180 days to move to set aside a default entered after he or she fails to file a response to the charges, and 90 days after the default is entered for failing to appear at trial. If the member fails to take action within these time periods, the State Bar will file a petition for disbarment. If the member has not successfully sought relief from the default, and all due process procedures have been followed, the judge will recommend the member's disbarment.

We believe that shortening the time periods to 90 and 45 days, respectively, will result in more efficient resolution of matters where members have failed to participate in the disciplinary process. A member will continue to have several opportunities to move to set aside or vacate the default and to participate in the proceeding, including after the default is entered, after a petition for disbarment is filed, and after a disbarment recommendation is made. More importantly, the hearing judge will retain discretion to grant a motion to set aside or vacate the default, or to take other appropriate action, including vacating the default subject to appropriate conditions or setting it aside for limited purposes only (e.g., hearing on level of discipline). The amendments clarify that the judge maintains discretion to order appropriate relief at all stages of the process.

In addition, the amendments seek to correct, clarify, or conform the Rules to current practices in the following areas:

- Method and timing of service in different proceedings;
- Mandatory early exchange of all discovery, including expert witnesses;
- Procedure and timing for involuntary inactive enrollment due to a member's substantial threat of harm to a client or the public; and,
- Eligibility and timing for participation in the Alternative Discipline Program.

PUBLIC COMMENT:

There was one public comment received during the public comment period. The comment was submitted by Jayne Kim, Chief Trial Counsel, Office of the Chief Trial Counsel. A summary of the comments contained in a memorandum dated January 13, 2014, along with the State Bar Court's responses, are set forth below:

- OCTC contends that the proposed language in rule 5.83(H), stating that a motion to vacate or set aside a default may be granted “upon a showing of good cause,” is inconsistent or at odds with the requirements of rule 5.83(C) and (D).
 - Response: The amendment is not a substantive change and is intended only to clarify existing law. The purpose of the amendment is to list the permissible rulings on a motion in one place, which clearly includes granting it for “good cause.” This is the existing standard and either party can seek review for an error of law or abuse of discretion.
- OCTC believes rule 5.85(F)(1)(d) should be clarified by either deleting the proposed language (“or the notice of hearing on conviction”) or by replacing that language with “The Office of the Chief Trial Counsel’s statement of facts and circumstances surrounding a conviction.”
 - Response: The amendments clarify the process for admitting facts at the time of a default pursuant to *either* a notice of disciplinary charges *or* a notice of hearing on conviction. (Proposed rule 5.346.) Proposed rule 5.85 merely references the “factual allegations deemed admitted” at the time of default under rule 5.346 pursuant to *either* type of proceeding.
- OCTC argues that the proposed extension of time from 10 court days to 30 days for the Hearing Department to file a decision on applications for the involuntary inactive enrollment of a member under rule 5.231, should be limited to no longer than 20 days.
 - Response: Applications for the involuntary inactive enrollment of a member are perhaps the most document-intensive filings the State Bar Court receives, often containing volumes of declarations and documentation to support the application. Existing rules provide that the process is expedited and must be completed as soon as practicable. (Rule 5.229.) The modest increase in the submission time under the proposed amendment is intended to more accurately reflect the impact these applications have on the court’s workload; an issue outside the purview of either party.

A copy of the letter is attached as Attachment B.

FISCAL / PERSONNEL IMPACT:

None expected.

RULE AMENDMENTS:

See Attachment C for rule amendments.

BOARD BOOK IMPACT:

None known.

RECOMMENDATION

It is recommended that the Regulation, Admissions and Discipline Oversight Committee recommend that the Board of Trustees adopt the amendments to the Rules of Procedure of the State Bar of California, effective June 1, 2014, in the form attached hereto as Attachment A.

PROPOSED BOARD COMMITTEE RESOLUTION:

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

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board of Trustees approve the proposed amendments to the Rules of Procedure of the State Bar of California, as set forth in Attachment A to be effective June 1, 2014.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

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

RESOLVED, that upon the recommendation of the Regulation, Admissions and Discipline Oversight Committee, the Board of Trustees hereby approves the proposed amendments to the Rules of Procedure of the State Bar of California, as set forth in Attachment A to be effective June 1, 2014.