

AGENDA ITEM

MAY

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

DATE: May 5, 2010

TO: Members of the Board Committee on Regulation Admissions & Discipline Oversight

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 Release for Public Comment

EXECUTIVE SUMMARY

The Rules of Procedure of the State Bar of California, which provide both procedural and substantive requirements for cases in the State Bar Court, have been revised as part of the ongoing efforts of the State Bar to clarify the organization and language of its rules. With some exceptions, most of the revisions are not intended to substantively change the rules of procedure. The substantive changes, which are set forth in more detail below, are intended to streamline the processing of discipline matters. The proposed amendments would be released for a 45-day public comment period.

BACKGROUND:

In 2006, the State Bar undertook a rules revision project to integrate the organization's more than two dozen sets of rules into a comprehensive structure of seven titles and to make the rules simpler, clearer, and more uniform. 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 Supreme Court asked the State Bar Court to review the rules and determine whether revisions were warranted.

We have reviewed the rules with two main goals: (1) simplifying the language as part of the State Bar's overall rules revision project, and (2) streamlining the adjudicatory process before the State Bar Court. 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 Respondent's bar attended both meetings. At that time, the proposed changes were discussed and input was requested.

The attached draft provides a side-by-side comparison of the original rules (left side) and corresponding proposed revisions (right side).

DISCUSSION:

While seeking to maintain fairness to all litigants, listed below are the substantive revisions included in the proposal, which were discussed at the March 2010 Board meeting and the public hearings:

1. Revise the Default Process

Under the current process, if a respondent fails to file a response to the notice of disciplinary charges, the deputy trial counsel may file a motion to enter default. Once default is entered, the factual allegations are deemed admitted and the respondent is placed on involuntary inactive status. An expedited hearing may be held where the deputy trial counsel presents evidence. The judge then prepares a decision. There can be two or three default proceedings against one respondent before he or she is ultimately disbarred.

The default procedure is one of the processes that the Supreme Court has explicitly criticized. The proposal provides that once a default is entered, the respondent is placed on inactive status pending a timely motion to set aside the default. There would be no hearing or decision. If the respondent fails to move to set aside the default within a specified amount of time (six months if no response or 90 days for failure to appear at trial), the Office of Trials can file a petition requesting the respondent's disbarment. The revisions can be found at proposed rules 7.1 – 7.7.

2. Require an Open Exchange of Evidence

After formal charges are filed the parties have 120 days to complete formal discovery pursuant to the Civil Discovery Act in the Code of Civil Procedure. The parties may serve subpoenas, interrogatories, inspection demands and requests for admissions, and take depositions.

The proposal requires a mandatory exchange of discovery, which is modeled after rule 26 of the Federal Rules of Civil Procedure and the process used by the Commission on Judicial Performance. Upon a showing of good cause, the court would be permitted to order limited discovery. Failure to disclose any required information would preclude its admissibility at trial. The revisions can be found at proposed rules 6.6 and 6.7.

3. Modify the Evidence Standard

With some exceptions, the Evidence Code is applicable in discipline proceedings. In order to avoid excessive evidentiary disputes, we are proposing to streamline the process by adopting

the standard in the Administrative Procedure Act, which allows for the admissibility of only relevant and reliable evidence. As a full-time professional court, the hearing judges are the experts and should be provided more control over the admissibility of evidence. Any issues concerning due process should be alleviated since this standard is well-established in administrative license revocation proceedings and is currently used by state agencies overseeing hundreds of professional licenses, including dentist, engineers, physicians and surgeons, optometrist, pharmacist, and psychologist. The revision can be found at proposed rule 7.12.

4. Scheduling and Conducting Trials on Consecutive Days

With extremely limited exceptions, State Bar Court trials should begin as soon as possible after the charges are filed and should be conducted on consecutive days until the matter is taken under submission. While a rule is not required to make these changes, we believe it is helpful to provide notice and clarify expectations. The revisions can be found at proposed rule 7.10(C).

5. Eliminate Post-Trial Briefs

Post-trial briefs should be the exception rather than the rule. In order to further reduce delay, we are proposing a rule that provides that post-trial briefs are not permitted unless good cause is shown. The revision can be found at proposed rule 7.18.

6. Limit Timing and Length of Briefs on Review

There are currently no page limits for opening and responsive briefs on review. In addition, the parties have 45 days plus an automatic 15-day extension to file the briefs. We have proposed both page limits and shorter filing times. The revisions can be found at proposed rules 9.3 and 9.4.

7. Standard of Review

The Review Department must independently review the findings, conclusions and recommendations of the hearing judge. While maintaining this standard, we believe deference should be given to the hearing judge's findings of fact. The proposal also clarifies that it is the appellant's burden to specify the findings of fact that are in dispute, and waives any factual error not raised. The revisions can be found at proposed rules 9.3 and 9.6.

8. Settlement Conferences on Review

After a hearing judge's decision has been filed, rather than spend the time and expense of seeking review, both sides may be more open to a stipulated settlement. We are proposing an opportunity for the parties to jointly request a settlement conference after the hearing judge's decision but before the request for review is filed. The revisions can be found at proposed rule 9.11.

9. Standardize Procedures (Not Included - Ongoing Project)

The objective is to eliminate the redundancy and confusion that exists with each type of proceeding having its own set of rules. We would like to combine similar procedures under one set of rules, and to the extent possible, have primarily three categories of cases: expedited, standard processing and regulatory. Due to the complexity of the revisions, they have not yet been completed. These revisions remain a priority and will be presented to the Board of Governors at a later time.

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 Board Committee on Regulation, Admissions and Discipline Oversight authorizes staff to make available for public comment for a period of 45 days, the proposed amendments to the Rules of Procedure of the State Bar of California, in the form attached as Appendix A; 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.