# AGENDA ITEM

**SEPTEMBER 121**
Rules of Procedure of the State Bar – Proposed Rules of Procedure Revisions

**DATE**: September 7, 2010

**TO**: Members of the Board of Governors
Members of the Discipline Oversight Committee

**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 Adoption after Public Comment

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**EXECUTIVE SUMMARY**

The proposed amendments to the Rules of Procedure of the State Bar of California seek to clarify language and streamline cases before the State Bar Court. At the May 2010 Board meeting, the proposed amendments to the Rules were released for a 45-day public comment period. Two public comments were received during the 45-day public comment period and two comments were received prior to the commencement of the public comment period. At the July 2010 Board meeting, the public comment period for the proposed rules was extended for an additional 30 days to allow the new Chief Trial Counsel Jim Towery an opportunity to review the proposed amendments and provide comments if necessary. Since that time, two additional public comments were received.


**BACKGROUND:**

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 State Bar Court commenced a review of the rules to determine whether revisions were warranted.

The rules were reviewed with two main goals: (1) simplifying the language as part of the State Bar's overall rules revision project, and (2) streamlining the process. 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 carefully examined our procedures to identify the obstacles we face in timely case resolution. Based on this evaluation, we propose adopting some of the case processing procedures of other regulatory and licensing bodies while, where appropriate, moving away from the costly and time consuming civil litigation model. The proposed changes will allow the full-time professional State Bar Court to increase our efficiency and public protection, without sacrificing any due process rights of the members. The key eight substantive changes are discussed below in greater detail.

As part of the process, the Court presented an overview of proposed changes at the March 2010 Board of Governors meeting in Los Angeles. Following that Board meeting, the State Bar Court held two public hearings: April 8, 2010 in Los Angeles and then on April 9, 2010 in San Francisco. Representatives from the Office of the Chief Trial Counsel (OCTC) and the respondents' bar attended both meetings. At that time, the proposed changes were discussed and input was requested.

The proposed rules were presented at the May 2010 Board of Governors meeting, at which time the Discipline Oversight Committee resolved to release them for a 45-day public comment period. At the July 2010 Board meeting, the State Bar Court agreed to extend the time for public comment for an additional 30 days to allow the new Chief Trial Counsel time to review the proposed rules and provide comments.

Based on the public comments and other suggestions from State Bar staff, we have made minor clean-up changes to some of the proposed rules. These changes are set forth in Attachment A. The full set of all proposed rules are set forth in Attachment B, and the public comments are in Attachment C.

**DISCUSSION:**

Listed below are the substantive revisions included in the proposal:

**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, and then the judge prepares a decision as if the matter were fully tried. There can be two or three default proceedings against one respondent. In reviewing all default cases over a five-year period from 2004-2008, over 90% of the members were ultimately disbarred or resigned with charges pending. The current default procedure is one of the processes that had been 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 for failure to respond to the charges or 90 days for failure to appear at trial), OCTC will file a petition requesting the respondent's disbarment. Based on suggestions from staff, minor changes have been made to the proposed rules to clarify the language regarding entering defaults. The revisions can be found at proposed rules 7.1-7.7. (Attachment B, pages 113-133.)

## 2. Require an Open Exchange of Evidence

Under the current rules, once 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 120-day discovery period is in addition to the investigation period conducted by OCTC before charges are filed, which often takes six months and sometimes up to one year.

The proposal seeks to accelerate case processing by requiring a mandatory exchange of discovery. This proposal is modeled after procedures followed in criminal cases, the Commission on Judicial Performance, other administrative proceedings, and under rule 26 of the Federal Rules of Civil Procedure. Failure to disclose any required information may preclude its admissibility at trial. If good cause is shown, the Court may permit limited additional discovery.

In opposition to the proposal, it was suggested that after charges are filed each party should at least be allowed to conduct one deposition of a non-expert and unlimited depositions of expert witnesses without court order. However, we believe that need for such discovery is avoidable, and if provided as a matter of course, would cause unwarranted delay and expense.

The commencement of State Bar discipline matters can be analogized to criminal cases. Prior to filing formal charges, OCTC conducts an investigation to determine whether there is "reasonable cause" to believe the member has violated an ethical obligation and whether there is "sufficient evidence" to support the allegations. (Rules Proc. of State Bar, rule 2401.) OCTC may depose witnesses and subpoena records during the investigation. (Rules Proc. of State Bar, rule 2502-2503.) A member has a duty to cooperate. (Bus. & Prof. Code, § 6068(i).) Upon request, other than privileged information, members are provided a complete copy of OCTC's file, including any exculpatory evidence. The investigation can take up to six months and in complex cases up to one year. Like in criminal cases, and all other administrative proceedings, the parties should be prepared to proceed to trial at the time the charges are filed without the need for further discovery.

For consistency with other rules, the proposal has been clarified to provide that the judge has discretion to decide whether or not to admit information that was not previously disclosed. The revisions can be found at proposed rules 6.6 and 6.7. (Attachment B, pages 95-101.)

## 3. Modify the Evidence Standard

With some limited exceptions, the Evidence Code is applicable in discipline proceedings. We propose adopting a standard similar to that provided in the Administrative Procedure Act, which allows for the admissibility of only relevant and reliable evidence. This change is intended to both streamline hearings by reducing excessive evidentiary disputes, and increase public protection by ensuring all essential evidence is considered.

Under the current process, in a highly contested matter it is not uncommon for there to be excessive evidentiary objections. Although the objections are permissible under the Evidence Code, it is clear that they are often used to hinder the process rather than to raise legitimate evidentiary concerns. In addition, the restrictive rules are often used to preclude the admissibility of otherwise reliable and relevant evidence. Thus, eliminating the technical hurdles inherent in the Evidence Code will allow judges to focus on hearing facts that are important to the particular case instead of spending time on unwarranted objections. 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 dentists, engineers, physicians and surgeons, optometrists, pharmacists, and psychologists.

There has been some concern expressed with regard to reliability, predictability and efficiency under the proposed evidence standard. However, as stated, under the proposal evidence must still be both relevant and reliable to be admitted. As a full-time professional court, the experienced judges should be provided more control over the admissibility of evidence. As for efficiency, the judge will have the discretion to exclude evidence if its probative value is outweighed by the probability that its admission will waste time. While hearsay evidence is admissible, it is not sufficient in itself to support a finding unless it is admissible over objection in civil actions and the State Bar Court's findings must be supported by at least some evidence that is not hearsay.

Another concern raised is that proposed rule allows hearsay objections to be lodged, but permits rulings on the objections to be delayed until the time the case is submitted. This concern raises a valid point, and the proposed rule has been amended to delete the delay in ruling on objections. The revision can be found at proposed rule 7.12. (Attachment B, pages 138-139.)

**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. We have already implemented this change and have noticed an appreciable difference in the pendency of cases. Thus, while a rule is not required to make these changes, we believe it is helpful to provide notice and clarify expectations. To promote compliance with these expectations, it was suggested that the judges be required to reduce their findings of good cause to writing. The revisions can be found at proposed rule 7.10(C). (Attachment B, page 136.)

**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 revisions can be found at proposed rule 7.18. (Attachment B, pages 146-147.)

**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. (Attachment B, page 194.)

**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 more 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 factual findings in dispute on review, and thus, the appellant would waive any factual error not properly raised. The revisions can be found at proposed rules 9.3 and 9.6. (Attachment B, pages 194, 197.)

**8. Settlement Conferences on Review**

After a hearing department decision has been filed, rather than spend the time and resources on 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. (Attachment B, pages 212-214.)

**PUBLIC COMMENT:**

There were two public comments received during the first public comment period, two public comments during the second comment period and two comments received prior to the commencement of the public comment period in response to the public hearings. Copies of the six letters are attached as Attachment C.

## 1. Four public comments addressing the specific amended rules:

**James Towery, Chief Trial Counsel, Office of the Chief Trial Counsel**. With the exception of two of the proposed changes, Mr. Towery was generally supportive of the proposed changes. A summary of Mr. Towery's concerns pertaining to the proposed rule changes to the discovery procedures and the evidentiary standard contained in a letter dated August 20, 2010 are set forth below:

- As for discovery, each party should continue to be allowed at least one deposition of a non-expert witness and without court approval;
- Unlimited depositions of expert witnesses;
- Parties should be allowed to take depositions of out-of-state witnesses;
- Parties should have the right to unlimited depositions in reinstatement and moral character cases;
- As for the evidence standard, reliability and predictability of evidence is best served employing the high standards and safeguards of the Evidence Code;
- The relaxed standard of evidence would permit parties to offer large quantities of hearsay testimony and documents
- APA hearsay objections can be lodged but not ruled upon until just prior to submission;
- Outside training for judges and OCTC counsel may help with the undue consumption of time pertaining to evidentiary objections.

**Michael Asimow, Visiting Professor of Law, Stanford Law School**. Professor Asimow was asked by the Court to review the proposed change to the evidence standard for any potential issues, including due process concerns. Professor Asimow believes the proposed standard is right for the discipline system. A summary of the comments contained in a letter dated July 27, 2010, from Professor Asimow are set forth below:

- Under both federal and state law, administrative agencies do not follow the rules of evidence;
- Under the proposed rule, there are substantial constraints on the admission of hearsay evidence;
- The hearing judge has discretion to exclude evidence if its probative value is outweighed by the probability that its admission will waste time;

- Attorneys subject to discipline enjoy a variety of extraordinary protections against error, such as, cases decided by judges wholly independent of the State Bar disciplinary staff, a separate review department, no agency head can reject a hearing judge's decisions, and charges must be proved by clear and convincing evidence;
- Technical rules of evidence were designed for jury trials rather than trials by expert adjudicators;
- Current rule is out of sync with disciplinary cases involving other professions.

**David Cameron Carr on behalf of the Association of Discipline Defense Counsel**. A summary of the comments contained in a letter dated June 28, 2010, from the Association of Discipline Defense Counsel ("ADDC") are set forth below.

- Discovery – adoption of proposed changes will result in many motions seeking additional discovery;
- Evidentiary Standard – State Bar discipline is not like other licensing proceedings;
- Defaults – proposal would allow a complete deprivation of a property right regardless of the gravity of the misconduct;
- Fast Track Trial Calendaring – requiring the Hearing Department to complete its work in half the time cannot realistically be met without sacrificing quality and efficiency. Consecutive trial days is also unrealistic;
- Suggests the Board of Governors defer consideration of the proposals until a more comprehensive review of the system and its current status can be undertaken with the new Chief Trial Counsel.

**Ronald Gottschalk, J.D**. A summary of the comments contained in a letter dated June 28, 2010, from Ronald Gottschalk are set forth below:

- The default rules as applied to his disciplinary matter are unconstitutional;
- The proposed changes do not address the criticisms of former Governor Wilson;
- The proposed rules do not address the constitutional issues pertaining to the fairness of the State Bar Court.

## 2. Two letters submitted prior to the release of the proposed rules that do not specifically address the rules but rather the concepts that were discussed at the public hearings:

**David Cameron Carr on behalf of the Association of Discipline Defense Counsel**: A summary of the comments contained in a letter dated April 28, 2010, from the Association of Discipline Defense Counsel ("ADDC") are set forth below.

- Defaults - attorneys placed in default should be put on not entitled to practice status until they seek to return active status;
- Mandatory Discovery Exchange – one party should not be rewarded for its indolence by not taking properly investigating a case and then rely on the other party's efforts and significant sanctions should be available for discovery abuse;
- Evidence Standard – believes little time is spent during trial on evidentiary objections therefore unclear how this will help streamline case processing;
- Post Trial Briefs – believes that a time limit of 30 days after the case is submitted would be workable;

- Consecutive Trial Days – believes that this will result in "trailing" which is impractical in a large state with only two venues;
- Length of Briefs – appropriate to adopt limits similar to California Rules of Court (14,000 words if prepared by word processing, 50 pages if produced on typewriter) and if appropriate relief available if matter is complex; and
- Standard of Review – proposal should be submitted to Supreme Court because it may impact Supreme Court workload.

**James Ham, Esq.**: A summary of the comments contained in a letter dated May 4, 2010, from James Ham are set forth below.

- Alternative Dispute Resolution – the discipline system would benefit from a more robust settlement mechanism;
- Limitations Period – there should be a more reasonable and definite period of limitations;
- Uniform Timelines – has some merit and should be explored;
- Mandatory Discovery Exchange – Not clear how mandatory exchange will expedite process, possible conflict issues with such an exchange, must be accompanied by significant sanctions, depositions should be limited;
- Standard of Review – not clear that changing standard of review will streamline process;
- Post-trial Briefs – briefing should be left to discretion of judge but could include requirement that briefing be completed within 30 days;
- Consecutive Trial Days – requirement would be problematic and impractical because it would favor long cause trials over shorter trials. A rule stating a preference for consecutive days would be a reasonable incremental step;
- Timing and Length of Briefs – a 45 day period for filing an opening brief and a page limit of 40 pages would be appropriate providing a party is allowed to seek relief to file additional pages;
- Independent Probable Cause Determination – an independent judge should be used to approve disciplinary charges before they are filed.

**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 Discipline Oversight Committee, recommends that the Board of Governors adopt the amendments to the Rules of Procedure of the State Bar of California in the form attached hereto as Attachment B, effective January 1, 2011, and the amended rules will apply to all pending and future matters filed in the State Bar Court, except as to:

1. Hearing Department proceedings in which the taking of testimony or the offering of evidence at trial has commenced;
2. Review Department matters in which a request for review is filed prior to January 1, 2011; and,
3. Any other particular proceeding pending as of the effective date in which the Court orders the application of a former rule(s) based on a determination that injustice would otherwise result.

**FURTHER RESOLVED**, that two years after the effective date of the amendments the State Bar Court will, in consultation with the Office of the Chief Trial Counsel and other interested parties, administer an evaluation and prepare a report to determine the efficacy of the amendments to the Rules of Procedure.

**PROPOSED BOARD RECOMMENDATION:**

**RESOLVED**, following public comment period and consideration of comments received, and upon recommendation of the Discipline Oversight Committee, the Board of Governors of the State Bar hereby adopts the amendments to the Rules of Procedure of the State Bar of California in the form attached hereto as Attachment B, effective January 1, 2011, and the amended rules will apply to all pending and future matters filed in the State Bar Court, except as to:

1. Hearing Department proceedings in which the taking of testimony or the offering of evidence at trial has commenced;
2. Review Department matters in which a request for review is filed prior to January 1, 2011; and,
3. Any other particular proceeding pending as of the effective date in which the Court orders the application of a former rule(s) based on a determination that injustice would otherwise result.

**FURTHER RESOLVED**, that two years after the effective date of the amendments the State Bar Court will, in consultation with the Office of the Chief Trial Counsel and other interested parties, administer an evaluation and prepare a report to determine the efficacy of the amendments to the Rules of Procedure.