

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

TIMOTHY JOHN MACKENZIE

Petitioner for Reinstatement

No. 04-R-15895

Filed May 11, 2007

Reconsideration denied, opinion modified June 29, 2007

SUMMARY

Approximately one year after petitioner filed his petition for reinstatement (and one month before trial), the State Bar filed a motion to dismiss the reinstatement proceeding on the ground that prior to filing the reinstatement petition, petitioner had failed to comply with Rules of Procedure of the State Bar, rule 662(c) by failing to provide proof to the State Bar Court that he had paid all discipline costs from his previous disbarment case. Petitioner opposed the motion to dismiss on the grounds that the rule was nonenforceable as more restrictive than the controlling costs statute and that the costs were discharged in his bankruptcy case, which he filed after the State Bar Court issued its disbarment recommendation. The hearing judge granted the motion to dismiss, concluding that the costs were not discharged in bankruptcy and that the rule required the payment of costs prior to filing a reinstatement petition. Petitioner then filed a motion to set aside the dismissal on the ground that he had paid in full all assessed discipline costs. The State Bar opposed setting aside the dismissal because petitioner had not met the threshold requirement of the rule at the time he filed the reinstatement petition and therefore the court was divested of jurisdiction to hear the motion to set aside the dismissal. The hearing judge denied the motion to set aside the dismissal, determining that the court lacked jurisdiction to consider the motion. (Hon. Richard A. Platel, Hearing Judge.)

Petitioner requested review of both the order of dismissal and the order denying the motion to set aside the dismissal. The review department determined that Rules of Procedure of the State Bar, rule 662(c) was directory rather than mandatory and that noncompliance with the rule did not divest the court of jurisdiction. The review department therefore concluded that the hearing judge erred in denying the motion to set aside the dismissal for lack of jurisdiction and remanded the matter to the hearing department for further consideration.

COUNSEL FOR PARTIES

For State Bar: Diane J. Meyers

For Respondent: Timothy G. Dallinger

HEADNOTES

[1a, b] 101 Procedure—Jurisdiction

117 Procedure—Dismissal

135.87 Revised Rules of Procedure—Reinstatement (rules 660-666)

2509 Reinstatement—Other Procedural Issues

The review department concluded that the hearing judge erred as a matter of law in denying the motion to set aside the dismissal for lack of jurisdiction and found that the procedural requirement of Rules of Procedure of the State Bar, rule 662(c) did not divest the court of jurisdiction to extend the time for, or to grant relief from, payment of costs. Relying on well-settled rules of statutory construction, the review department construed the rule to be directory rather than mandatory or jurisdictional and thus found that the court retained jurisdiction to determine whether petitioner's failure to provide proof of payment of costs prior to filing the reinstatement petition should have resulted in a dismissal under the facts and circumstances of the case.

[2a, b] 101 Procedure—Jurisdiction

135.87 Revised Rules of Procedure—Reinstatement (rules 660-666)

2509 Reinstatement—Other Procedural Issues

Despite its seemingly mandatory wording, Rules of Procedure of the State Bar, rule 662(c) is merely procedural, advancing a time requirement for the payment of costs, while the relevant Business and Professions Code sections confer jurisdiction to decide the substantive issues of costs and relief therefrom. There is no evidence that the Board of Governors of the State Bar attempted to supplant the statutory authority set forth in Business and Professions Code section 6140.7 and 6086.10, or to divest the State Bar Court of jurisdiction, by implementing a rule of procedure, and indeed, the Board of Governors is proscribed from doing so by Business and Professions Code section 6086. That section is consistent with the more general rule that, where a statute empowers an administrative agency to adopt regulations, those regulations must be consistent and not conflict with the governing statute. Because there is no express language or clear intent to render the rule jurisdictional, the review department looks to the cost provisions as a whole, the nature and character of these provisions, and the consequences that would follow from potential constructions. If the rule were interpreted to be mandatory or jurisdictional, the rule would conflict with and/or constrict relevant statutes and other rules, inadvertently alter the reinstatement requirements, and at times produce unreasonable results. Construing the rule as directory, however, in no way interferes with or compromises the ability of the State Bar or the State Bar Court to effectuate the intent of obtaining costs as money judgments.

[3a-e] 135.87 Revised Rules of Procedure—Reinstatement (rules 660-666)

2504 Reinstatement—Burden of Proof

2509 Reinstatement—Other Procedural Issues

A strict and unyielding interpretation of rule 662(c) of the Rules of Procedure of the State Bar mandating that costs be paid prior to filing a reinstatement petition is more restrictive than the requirement of Business and Professions Code section 6140.7 that costs be paid as a condition of reinstatement of active membership. A strict interpretation is also inconsistent with the State Bar Court's delegated authority to give relief from costs in whole or in part or to extend the time to pay costs. If a resigned or disbarred attorney were completely relieved of the obligation to pay costs or were provided an extension of time to pay, it would be impossible to provide proof that all discipline costs have been paid prior to filing a reinstatement petition. If the rule were interpreted to be mandatory, it would render relevant costs provisions irrelevant; but the finding that the rule is directory harmonizes all provisions and avoids an unnecessary and impermissible conflict with state

statutes and other rules of procedure of the State Bar. Also, such a construction is consistent with the rehabilitative goals of the discipline system by maintaining the court's discretion to consider the timely payment of costs as a factor in determining a petitioner's rehabilitation.

**[4a-d] 135.87 Revised Rules of Procedure—Reinstatement (rules 660-666)
2504 Reinstatement—Burden of Proof**

The statutory intent that discipline costs are penalties payable to and for the benefit of the State Bar of California to promote rehabilitation and to protect the public supports the position that nonpayment of these costs should not be construed as an absolute roadblock to a reinstatement proceeding in every case, but a factor in determining overall rehabilitation during the proceeding. Rule 9.10(f) of the California Rules of Court does not require or address payment of costs, and the long-standing procedure for dealing with outstanding discipline costs has been to order reinstatement upon payment of all fees and costs. If Rules of Procedure of the State Bar, rule 662(c) is construed as directory, it allows timely payment of costs to be a relevant factor in determining whether a petitioner has been rehabilitated, which is the very essence of a reinstatement proceeding and consistent with rehabilitative goals. Conversely, if the rule were interpreted to be mandatory, the court would be precluded from considering all relevant factors regarding efforts toward rehabilitation, including the timing and efforts at paying costs. Such an interpretation would effectively change the reinstatement requirements, inadvertently rendering the timing of the payment of costs to be a conclusive determination of rehabilitation.

**[5a b, c] 101 Procedure—Jurisdiction
117 Procedure—Dismissal
135.87 Revised Rules of Procedure—Reinstatement (rules 660-666)
2504 Reinstatement—Burden of Proof
2509 Reinstatement—Other Procedural Issues**

In construing statutes, a practical construction is preferred. A construction of Rules of Procedure of the State Bar, rule 662(c) which permits the State Bar Court to retain jurisdiction is manifestly more practical than one which cuts off the court's jurisdiction regardless of the time and resources the parties have already expended in the court proceedings. Where a reinstatement proceeding had been pending for almost a year at the time a motion to dismiss was filed, the State Bar's investigation period and the discovery period for both parties had expired, and the trial was set to commence in approximately one month, dismissal was a severe remedy for noncompliance with payment of costs, and denial of a motion to set aside the dismissal was draconian. If a petitioner fails to pay the disciplinary costs prior to filing his reinstatement petition, the hearing judge has discretion to dismiss the reinstatement proceeding rather than to undertake a lengthy trial. But the hearing judge may also consider the failure to timely pay costs as a negative factor in petitioner's showing of rehabilitation or condition a petitioner's return to active status on the payment of some or all of the costs. Finally, if a disbarred or resigned attorney has failed to pay costs, the State Bar may enforce an order imposing costs as a money judgment. Construing Rules of Procedure of the State Bar, rule 662(c) as directory will continue to promote timely payment of costs, while not mandating unreasonable consequences in pending proceedings.

OPINION

REMKE, P.J.

Petitioner Timothy John MacKenzie, who is seeking reinstatement, asks this court to review the hearing judge's orders dismissing this case and denying petitioner's motion to set aside the dismissal. The dismissal was based on petitioner's failure to provide proof to the State Bar Court that he had paid all discipline costs imposed under Business and Professions Code section 6086.10, subdivision (a),¹ prior to filing his petition for reinstatement. (Rules Proc. of State Bar, rule 662(c).²) The order denying the motion to set aside the dismissal was based on the hearing judge's determination that he lacked jurisdiction to rule on the motion.

Upon our independent review (Cal. Rules of Court, rule 9.12; *In re Morse* (1995) 11 Cal.4th 184, 207; rule 305(a)), we determine that the hearing judge erred in denying the motion to set aside the dismissal based on lack of jurisdiction. We find that rule 662(c) is directory, and therefore, noncompliance with the rule does not divest the court of jurisdiction. Accordingly, we remand the matter to the hearing department for further consideration consistent with this opinion.

I. PROCEDURAL HISTORY

On November 13, 1998, the State Bar filed a Notice of Disciplinary Charges against petitioner in case number 96–O–08652. After trial on October 19, 1999, the hearing judge in that case issued a decision recommending petitioner's disbarment. One month later, on November 16, 1999, petitioner filed a chapter 7 bankruptcy proceeding. On March 13, 2000, an order was issued granting a discharge of petitioner's debts under title 11 United States Code section 727. The State Bar was not listed as a creditor in petitioner's bankruptcy proceeding.

Petitioner tendered his resignation on August 23, 2000, and by order filed on September 20, 2000, the Supreme Court accepted the resignation with charges pending, effective October 20, 2000. In that order, the Supreme Court awarded discipline costs to the State Bar.

On December 27, 2004, petitioner filed his petition for reinstatement in this matter, and the State Bar filed its response on May 20, 2005.³ Then, on December 9, 2005, the State Bar filed a motion to dismiss under rule 662(c) on the ground that prior to filing his petition, petitioner had failed to establish that he had paid all discipline costs imposed pursuant to section 6086.10, subdivision (a). On December 22, 2005, petitioner filed his opposition, arguing that rule 662(c) was more restrictive than the controlling statute on costs, section 6140.7, and therefore, the rule could not be enforced. He also contended that the costs were discharged in his bankruptcy. The State Bar filed a reply on December 23, 2005. On January 13, 2006, the hearing judge granted the motion to dismiss, finding that the costs were not discharged in bankruptcy and that rule 662(c) required the payment of costs prior to filing a petition.

Subsequently, on January 26, 2006, petitioner filed a motion to set aside the dismissal. This motion was premised upon petitioner's payment in full of the assessed discipline costs in the sum of \$9,079.10. On February 1, 2006, the State Bar filed its opposition, arguing that since petitioner had not met the threshold requirement of rule 662(c) at the time he filed his petition for reinstatement, the court was divested of jurisdiction to hear the motion to set aside the dismissal. The State Bar argued that, despite his payment of costs, petitioner should be required to file a new petition for reinstatement and to pay another \$1,600 filing fee. Petitioner filed a reply on February 7, 2006. On February 8, 2006, the hearing department denied petitioner's motion to set aside the order of dismissal,

1. Unless otherwise noted, all further references to section(s) are to the Business and Professions Code.

2. Unless otherwise noted, all further references to rule(s) are to the Rules of Procedure of the State Bar of California.

3. In its response, the State Bar did not object to the petition based specifically on respondent's failure to pay costs prior to filing his petition for reinstatement. As a general objection, the State Bar argued, "petitioner has not demonstrated that he is in control of his outstanding financial obligations," and listed various debts, including the discipline costs.

finding that it lacked jurisdiction to consider the motion.

Petitioner filed a request for review on February 15, 2006.

II. DISCUSSION

The Legislature has developed a statutory framework in the Business and Professions Code to govern discipline costs, which generally requires errant attorneys to pay the costs resulting from their disciplinary proceedings. (§§ 6086.10 and 6140.7.) Discipline costs are considered “penalties,” payable to the State Bar “to promote rehabilitation and to protect the public.” (§ 6086.10, subd. (e).)

As for reinstatement proceedings, section 6140.7 provides, in relevant part, that: “Unless time for payment of discipline costs is extended pursuant to subdivision (c) of Section 6086.10, costs assessed against a member who resigns with disciplinary charges pending . . . or [is] disbarred shall be paid as a condition of reinstatement of . . . active membership.” Section 6086.10, subdivision (c), provides: “A member may be granted relief, in whole or in part, from an order assessing costs under this section, or may be granted an extension of time to pay these costs, in the discretion of the State Bar, upon grounds of hardship, special circumstances, or other good cause.” This statutory discretion is expressly delegated to the court to grant requests for relief from costs or for extensions of time to pay costs pursuant to rules 280(f) and 282.

Effective January 1, 2004, the Legislature amended the Business and Professions Code to authorize the State Bar to enforce orders regarding

discipline costs and Client Security Fund (CSF) reimbursements as money judgments in an attempt to increase the State Bar’s collection efforts.⁴ In August 2004, the State Bar’s Board of Governors (Board) adopted “a number of proposed amendments to the Rules of Procedure to both implement the statutory amendments and to clarify the process for assessing discipline costs, seeking relief from costs and compromising judgments for costs and Client Security Fund payments and assessments.” (Agenda Item 122, Board of Governors Meeting, July 2004, p. 4.) Among the various amendments were modifications to rule 282, providing for the court’s authority to grant requests for relief from costs or for extensions of time to pay costs to “permit a member against whom judgment enforcement efforts are being made, to seek a compromise of that judgment in the State Bar Court,”⁵ and to “clarify that the State Bar Court has authority to grant appropriate relief from discipline costs or an extension of time to pay those costs even after the Supreme Court has suspended the member for nonpayment of his annual membership fees.” (*Id.* at pp. 5–6.)

The Board also adopted subdivision (c) to rule 662, which provides: “No petition for reinstatement shall be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid all discipline costs imposed pursuant to Business and Professions Code section 6086.10(a) and all reimbursement for payments made by the Client Security Fund as a result of the petitioner’s conduct, plus applicable interest and costs, pursuant to Business and Professions Code section 6140.5(c).” While recognizing that sections 6140.7 and 6140.5 require the payment of costs and CSF reimbursements as a condition of reinstatement, the Board amended this procedural rule to provide for

4. “This action also responds to a criticism of the 2001 State Auditor’s report that opined that the State Bar was not aggressively seeking these reimbursements, therefore requiring higher membership fees to fund the disciplinary program. [The auditor] contended that if the Bar could increase its collection results, the resulting additional recovered funds could then be used to offset some of the costs. Similarly, increased recoveries could also be used to fund the Client Security Fund Account and decrease reliance on membership dues.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1708 (2003–2004 Reg. Sess.) as amended July 2, 2003, p. 13.)

5. Effective April 1, 2007, as recommended by the Board, the Supreme Court adopted rule 9.23 of the California Rules of Court expressly to authorize the State Bar to enforce discipline costs and CSF payments as money judgments, and to authorize the State Bar Court to hear motions to compromise these judgments. Subdivision (c) of rule 9.23 provides “[m]otions for the compromise of any judgment entered under this rule must, in the first instance, be filed and heard by the State Bar Court.”

payment at the time of filing the petition in an attempt to promote judicial economy.⁶ In so doing, it recognized the proper role and discretion of a judge in deciding the issues relating to the payment of discipline costs:

“The proposed amendment to rule 662 would require the payment of these amounts prior to the filing of the petition for reinstatement. Under the current version of rule 662, reinstatement petitioners sometimes approach the time of trial continuing to owe substantial, if not huge, sums in assessed disciplinary costs and CSF payments and assessments with no financial ability to make those payments. Under these circumstances, State Bar Court hearing judges have sometimes dismissed the reinstatement proceeding rather than to undertake a lengthy trial and prepare a written decision in the matter when the reinstatement petitioner will not be eligible to return to active membership status and has no prospects for payment of the disciplinary costs or CSF payments and assessments.” (Agenda Item 122, Board of Governors Meeting, July 2004, p. 10.)

[1a] In the present case, it is undisputed that when petitioner filed his petition on December 27, 2004, he had not provided proof of payment of discipline costs. Approximately one year later – and one month before trial – the hearing judge dismissed the petition for reinstatement, pursuant to rule 662(c). The judge then denied petitioner’s motion to set aside the dismissal, holding that the court lacked jurisdiction to rule on the motion. For the reasons stated herein, we conclude the hearing judge erred as a matter of law in denying the motion to set aside the dismissal for lack of jurisdiction. We find that the procedural requirement of rule 662(c) does not divest the court of the jurisdiction to extend the time for payment or to grant relief from payment provided in sections 6086.10 and 6140.7 and rules 280(f) and 282.

[1b] When interpreting rules of procedure, we utilize rules of statutory construction. (*In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267.) Relying on well-settled rules of statutory construction, which we discuss below, we construe rule 662(c) to be directory rather than mandatory or jurisdictional, and thus, find the court retained jurisdiction to determine whether petitioner’s failure to provide proof of payment of costs prior to the filing of his petition for reinstatement should have resulted in a dismissal under the facts and circumstances of this case.

A. Rule 662(c) is directory
rather than jurisdictional

The California Supreme Court has stated that “jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional.” (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291 [held district court of appeal was without jurisdiction to issue writ of mandate before administrative proceeding was final].)

However, “[m]ost procedural steps, including those regarded as ‘mandatory,’ are not jurisdictional. Errors or omissions in compliance with them are not fatal to the fundamental subject matter jurisdiction of the court . . . nor to its jurisdiction to act. [Citations.]” (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 281, p. 848.) Such procedural rules, even if worded as “mandatory,” are often construed as directory. (*In re Jones* (1971) 5 Cal.3d 390, 394 [rule that petition for review “shall” be filed within 60 days of disciplinary decision is not jurisdictional]; *In the Matter of*

6. The Board agenda specifically referenced *In the Matter of Jauregui* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56, wherein we raised in dicta the State Bar’s concern with “the potential waste of judicial and State Bar resources.” (*Id.* at p. 60.) In that case, we were not faced with a conflicting rule of

procedure, and held that the unambiguous language of section 6140.5, subdivision (c), did not “preclude the filing of a petition for reinstatement without including a showing of repayment to the client security fund.” (*Id.* at p. 59.)

Petilla (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 246 [rule requiring hearing judges to file decision within 90 days after submission is neither mandatory nor jurisdictional]; *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198, fn. 5 [time limit for filing an answer to a notice to show cause is not jurisdictional]; see generally *McDonald's Systems of California, Inc. v. Board of Permit Appeals* (1975) 44 Cal.App.3d 525, 544–545, fn. 15 [citing numerous authorities construing “mandatory” time limitations for filing decisions as directory and not jurisdictional⁷]; but see *Davis v. Superior Court* (1921) 184 Cal. 691, 693–695 [noncompliance with filing fee statutes divests a court of jurisdiction].)

“[T]he ‘directory’ or ‘mandatory’ designation does not refer to whether a particular statutory requirement is ‘permissive’ or ‘obligatory,’ but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. [Citations.]” (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) Thus, “[a] statutory requirement may impose on the state a duty to act in a particular way, and yet failure to do so may not void the governmental action taken in violation of the duty. [Citations.]” (*In re Richard S.* (1991) 54 Cal.3d 857, 865.)

“ ‘In order to determine whether a particular statutory provision . . . is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would

follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation]. . . .’ [Fn. omitted.]” (*Morris v. County of Marin*, *supra*, 18 Cal.3d at p. 910.)

[2a] In spite of its seemingly “mandatory” wording, rule 662(c) is merely a procedural rule, advancing a time requirement for the payment of costs. It is the statutory provisions of the Business and Professions Code that confer jurisdiction to decide the substantive issues of costs and relief therefrom. There is no evidence that the Board attempted to supplant the statutory authority set forth in sections 6140.7 and 6086.10, or to divest the court of jurisdiction, by implementing a rule of procedure, and indeed, the Board is proscribed from so doing. Section 6086 expressly provides: “The board of governors, *subject to the provisions of this chapter* [of the Business and Professions Code], may by rule provide the mode of procedure in all cases of complaints against members.” (Italics added.)⁸ This provision is consistent with the more general rule that, where a statute empowers an administrative agency to adopt regulations, those regulations must be consistent and not conflict with the governing statute. (See *Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816.)

[2b] There is no express language or clear intent to render rule 662(c) jurisdictional; we therefore look to the cost provisions as a whole, the nature and character of these provisions, and the consequences that would follow from both potential constructions. (*In re Richard S.*, *supra*, 54 Cal.3d at pp. 865–866.) If rule 662(c) were interpreted to be mandatory or jurisdictional, the rule would, as discussed *post*, conflict with and/or constrict relevant statutes and other

7. Cases cited included: *Garrison v. Rourke* (1948) 32 Cal.2d 430, overruled on another ground in *Keane v. Smith* (1971) 4 Cal.3d 932, 939 [held that the time limitation for the court’s action is not mandatory, regardless of the mandatory nature of the language, unless a consequence or penalty is provided for failure to do the act within the time commanded]; and *Buswell v. Supervisors, Etc.* (1897) 116 Cal. 351, 354 [concluded that even in the absence of a statutory enactment, the provisions as to the time upon which, or within which, acts are to be done

by a public officer regarding the rights and duties of others are directory, unless the nature of the act or language of the legislature makes it clear that the time fixed is by way of limitation].

8. In addition, section 6025 provides, in pertinent part, that “[s]ubject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter.”

rules, inadvertently alter the requirements for reinstatement, and at times, produce unreasonable results. Moreover, as noted, the various amendments to the procedural rules, including rule 662(c), were intended to “implement the statutory authority to enforce orders regarding disciplinary costs and CSF reimbursements as money judgments.” (Agenda Item 122, Board of Governors Meeting, July 2004, p. 3.) Construing rule 662(c) as directory in no way interferes with or compromises the ability of the State Bar or this court to effectuate the intent of obtaining costs as money judgments. Thus, to avoid the potential invalidity of the rule, while at the same time advancing the goal of collecting discipline costs, we construe the rule as directory. (See *Dickers v. Superior Court* (1948) 88 Cal.App.2d 816, 818 [court interpreted rule that applied to demurrers to apply only to special demurrers to avoid invalidity of rule].)

1. Construing rule 662(c) to be directory harmonizes the rule with relevant statutes and avoids eviscerating sections 6140.7 and 6086.10, subdivision (c)

It is a well-established rule of statutory construction that “potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act. [Citation.]” (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.) Accordingly, “[a] construction which makes sense of an apparent inconsistency is to be preferred to one which renders statutory language useless or meaningless. [Citation.]” (*Ibid.*) As noted *ante*, rule 662(c) is a procedural rule within a broader statutory scheme governing cost provisions, and if at all possible, the cost provisions should be construed as a whole to create harmony and reconcile conflict.

[3a] Rule 662(c) declares that no petition for reinstatement shall be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid all discipline costs. In contrast, as set forth *ante*, section 6140.7 provides that “[u]nless time for payment of discipline costs is extended . . . , costs . . . shall be paid as a condition of reinstatement of . . . active membership.” Thus, a strict and unyielding interpretation of rule 662(c) mandating that costs be paid *prior* to filing a reinstatement petition is more restrictive than the requirement of section 6140.7 that costs be paid “as a condition of reinstatement of . . . active membership.”

[3b] Such an interpretation of rule 662(c) also is inconsistent with this court’s delegated authority pursuant to section 6086.10, subdivision (c), which authorizes relief from costs, in whole or in part, or an extension of time to pay costs, upon grounds of hardship, special circumstances, or other good cause. Rule 280(f), previously adopted by the Board, expressly recognizes the court’s authority to grant relief from costs pursuant to section 6086.10, subdivision (c), and rule 282 sets forth the procedure to seek relief or an extension of time to pay costs from this court. In none of these statutes or rules is there a conclusive obligation to pay costs in every case upon resignation or disbarment. Indeed, a person may be completely relieved of the obligation to pay costs or may be provided an extension of time to pay. In such cases, it would be impossible to provide proof that “all discipline costs” have been paid prior to the filing of a petition.⁹

[3c] Local rules may be adopted to the extent they are not in conflict with state law. (See Gov. Code, § 68070; see also *Lang v. Superior Court* (1984) 153 Cal.App.3d 510, 516.) If rule 662(c) were

9. At oral argument, the State Bar conceded that rule 662(c) should be considered in light of rule 282 and sections 6140.7 and 6086.10. However, deputy trial counsel argued that at the time of filing the petitions for reinstatement, petitioners could submit court orders, which provide for relief from or extensions to pay costs, to the court’s clerks to satisfy the “proof” requirement of rule 662(c). This contention is unreasonable for at least two reasons. First, a clerk’s role is limited to ministerial duties (*Rojas v. Cutsforth* (1998) 67 Cal.App.4th 774, 777), which does not include making judicial determinations such as

“satisfactory proof.” (See, e.g., *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 71 [stating a clerk is not a judicial officer]; see also *Rose v. Leland* (1912) 20 Cal.App. 502, 503–504 [no power to enter default by determining if the defendant’s answer is legally insufficient].) Second, rule 662(c) explicitly provides that proof shall be shown to the “State Bar Court.” Accordingly, the court, not the clerk, must determine whether petitioner has provided “satisfactory proof” of payment of all costs, or has been relieved of the obligation, in whole or in part.

interpreted to be mandatory, it would render the relevant cost provisions of sections 6140.7 and 6086.10 and rules 280(f) and 282 irrelevant. Our finding that rule 662(c) is directory thus harmonizes all provisions, and avoids an unnecessary and impermissible conflict with state statutes and other rules of procedure of the State Bar.

In the Matter of Sheppard (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91 is illustrative of the need to harmonize various rules and statutes. In *Sheppard*, the issue was whether rule 665(a), requiring a petitioner for reinstatement to show proof of passage of a professional responsibility examination (PRE) “with any petition for reinstatement,” conflicted with former California Rules of Court, rule 951(f), requiring that a petitioner for reinstatement “[p]ass a professional responsibility examination.” There, this court noted that the language of the rule was ambiguous as to whether it required passage of the PRE at the time of filing a petition for reinstatement or merely “during the course of hearing on the petition.” (*Id.* at p. 98.) After considering the language and the purpose of the rule, we interpreted the relevant language to require merely that proof of passage of the PRE be shown during the petition process, not to require that proof of passage be shown at the time of filing the reinstatement petition. (*Id.* at p. 99.) Significantly, we there emphasized that the interpretation of the rule that we were adopting would not “add to the burdens of an applicant for reinstatement as established by rule 951(f) of the California Rules of Court and Supreme Court case law, whereas the interpretation of rule 665(a) urged by the State Bar would make petitions for reinstatement more restrictive than the California Rules of Court.” (*Ibid.*) We thus made it clear that the interpretation we were adopting saved rule 665(a) from impermissibly con-

flicting with rule 951(f) of the California Rules of Court.

[3d] In similar situations, where local rules have been deemed to impose greater restrictions on a litigant’s ability to bring motions or conduct discovery than provided under state statutes or California Rules of Court, courts have invalidated the local rules as impermissibly conflicting with the state statutes or rules.

For example, in *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, the court invalidated a local rule that allowed a trial court to grant summary judgment in favor of a party opposing summary judgment if it appeared appropriate from all the evidence; the summary judgment statute required that a motion be filed in a specific form. (Code Civ. Proc., § 437c.) The court stated that because summary judgment is a drastic remedy, “it is important that all of the procedural requirements for the granting of such a motion be satisfied before the trial court grants the remedy. Local rules may not provide a shortcut for these requirements. [The local rule] is not consistent with [the summary judgment statute] and is consequently invalid . . .” (*Sierra Craft, Inc. v. Magnum Enterprises, Inc.*, *supra*, 64 Cal.App.4th at p. 1256.)¹⁰

[3e] Construing rule 662(c) as directory avoids eviscerating the statutory authority set forth in sections 6140.7 and 6086.10, subdivision (c), as well as in rules 280(f) and 282. Also, as we discuss *post*, such a construction is consistent with the rehabilitative goals of our discipline system by maintaining the court’s discretion to consider the timely payment of costs as a factor in determining a petitioner’s state of rehabilitation. This interpretation harmonizes the rule

10. See also *People v. Smith* (2002) 95 Cal.App.4th 283, 302–303 [appellate court invalidated a local rule that deprived a criminal defendant of the “right to fully litigate the validity of a search or seizure on the basis of evidence presented at a special hearing on a suppression motion if the defendant files an initial brief making a prima facie case” simply because the criminal defendant in that case did not file a reply brief]; *Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, 1317–1320 [trial court’s order setting discovery cutoff date before having set a trial date denied parties their statutory right to have up to the

30th day before the initial trial date to complete discovery]; *Carlson v. Department of Fish and Game* (1998) 68 Cal.App.4th 1268 [local rule requiring a certificate of assignment to be provided at the time of filing a complaint could not be the basis for a clerk’s refusal to file the complaint when presented for filing since the California Rules of Court explicitly stated that the Judicial Council intended to fully occupy the field of form and format for pleadings and since noncompliance with the California Rules of Court constituted the only permissible basis for a clerk’s refusal to file a pleading].

with relevant statutes and avoids an impermissible conflict.

2. Construing the rule as directory ensures that all relevant factors in a reinstatement proceeding are considered

[4a] After the court in *In re Taggart* (9th Cir. 2001) 249 F.3d 987, 994 concluded that attorney discipline costs in California are dischargeable in bankruptcy because they are not penal in nature, section 6086.10 was amended to clarify that “costs imposed pursuant to this section are penalties, payable to and for the benefit of the State Bar of California . . . to promote rehabilitation and to protect the public.”¹¹ Thus, the statutory intent regarding the nature and character of discipline costs further supports the position that the payment of these costs should not be construed as jurisdictional and an absolute roadblock to a reinstatement proceeding in every case, but a factor in determining overall rehabilitation during the proceeding.

[4b] In subdivision (f) of rule 9.10 of the California Rules of Court, the Supreme Court has set forth the requirements for reinstatement: “Applications for readmission or reinstatement shall, in the first instance, be filed and heard by the State Bar Court. Applicants for readmission or reinstatement must: [¶] (1) Pass a professional responsibility examination; [¶] (2) Establish their rehabilitation and present moral qualifications for readmission; and [¶] (3) Establish present ability and learning in the general law.” The rule does not require or address payment of costs, and, in fact, the long-standing procedure for dealing with outstanding discipline costs has been to order a petitioner’s reinstatement *upon payment* of all fees and costs. (§ 6140.7; see also *Calaway v. State Bar* (1986) 41 Cal.3d 743 [“ordered that petitioner be reinstated on the roll of attorneys at law in this state on payment of the fees and taking the oath required by law”].)

[4c] The amendment to rule 662 was promulgated to preserve judicial resources by avoiding lengthy proceedings when a petitioner “has no prospects for payment of the disciplinary costs or [Client Security Fund] payments and assessments.” (Agenda Item 122, Board of Governors Meeting, July 2004, p. 10.) “Thus the detailed procedure set forth in rule [662(c)] appears to us designed to serve collateral interests of the judicial system” (*In re Richard S.*, *supra*, 54 Cal.3d at p. 866), unrelated to the substance of a reinstatement proceeding. However, if rule 662(c) is construed to be directory, it allows the timely payment of costs to be a relevant factor in determining whether a petitioner has been rehabilitated, which is the very essence of a reinstatement proceeding and consistent with rehabilitative goals.

[4d] Conversely, if rule 662(c) were interpreted to mandate payment of costs before a petition is filed, the court would be precluded from considering all relevant factors regarding a petitioner’s efforts towards rehabilitation, including the timing of and efforts at paying costs. (See *Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1093 [restitution is not conclusive of rehabilitation and ability to repay must be considered as a factor].) Such an interpretation of rule 662(c) would effectively change the reinstatement requirements, inadvertently rendering the timing of the payment of costs to be a conclusive determination of “rehabilitation.”

3. Construing the rule as directory avoids unreasonable consequences

[5a] “In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore, a practical construction is preferred. [Citation.]” (*California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147.) A construction of rule 662(c) which

11. Without referencing the *Taggart* case, the Legislature provided that the amendment was “declaratory of existing law.” (§ 6086.10, subd. (e); see also *In re Findley* (Bankr. N.D. Cal., April 25, 2007, No. 06–4180–AT) 2007 WL 1231621 [amendment clarifies that discipline costs imposed against an attorney

in California are penal in nature and nondischargeable].) This amendment to section 6086.10 was also included in Assembly Bill 1708 (2003–2004 Reg. Sess.) as part of the broader statutory scheme to increase the State Bar’s collections efforts.

permits the court to retain jurisdiction “is manifestly more practical than one which cuts off the jurisdiction of the [court] regardless of the time and resources the parties have already expended in proceedings before the [court].” (*Ibid.*)

[5b] The case at hand is a perfect example of the potential problems with construing rule 662(c) as mandatory. The petition had been pending for almost a year at the time the motion to dismiss was filed. The 120-day investigation period afforded the State Bar and the additional 120-day discovery period for both parties had expired (rule 663(a) and (b)), and the trial was set to commence within approximately one month. Under these circumstances, dismissal was a severe remedy for noncompliance with payment of costs, and the denial of the motion to set aside the dismissal was draconian.

[5c] If a petitioner fails to pay the disciplinary costs prior to filing his petition, the hearing judge has the discretion to dismiss the reinstatement proceeding rather than to undertake a lengthy trial. But the hearing judge may also consider the failure to timely pay costs as a negative factor in a petitioner’s showing of rehabilitation. In addition, the hearing judge may condition a petitioner’s return to active status on the payment of some or all of the costs – a strong incentive for payment. (§ 6140.7.) Finally, if a disbarred or resigned attorney has failed to pay costs, the State Bar may enforce an order imposing costs as a money judgment. (§ 6086.10, subd. (a).) In other words, the statutory scheme governing costs pro-

vides for several alternative remedies to assure compliance with and enforcement of the cost provisions. Thus, construing rule 662(c) to be directory will continue to promote timely payment of costs, while not mandating unreasonable consequences in pending proceedings.

B. The Issue of the Dischargability of Costs in Bankruptcy is Moot

Finally, as to petitioner’s contentions regarding the discharge in his bankruptcy case of the costs at issue here, in view of petitioner’s payment of these disciplinary costs subsequent to the hearing judge’s order of dismissal, we need not and do not address the bankruptcy discharge issues on review. (See *In the Matter of Jaurequi*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 59–60.)

III. DISPOSITION AND REMAND ORDER

Because we find that the hearing judge erred in ruling that he lacked jurisdiction to consider petitioner’s motion to set aside the dismissal, we reverse his order and remand this proceeding to the hearing department for further consideration consistent with this opinion.

We Concur:

WATAI, J.
EPSTEIN, J.