



THE STATE BAR OF CALIFORNIA

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DATE: June 10, 2005

TO: Members of the Board Committee on Planning, Program Development, and Budget (“Planning”);
Members of the Board Committee on Member Oversight (“MOC”)

FROM: Starr Babcock, Special Assistant to the Executive Director;
Saul Bercovitch, Staff Attorney

SUBJECT: A. Rules and Regulations of the State Bar of California Article I, Section 2 [Enrollment as an Inactive Member] – Return from public comment of proposed amendments relating to active membership status requirement for members who serve as ADR neutrals, and request for authorization to release modified proposed amendments, in response to public comments. (MOC for action and Planning for information)

B. Rules and Regulations of the State Bar of California Article I Section 7.3 [Waiver of Outstanding Membership Fees for Former Judges] – Return from public comment of proposed addition of new Article I, Section 7.3 authorizing discretionary waiver of outstanding annual membership fees owed by former judges, and request for authorization to adopt new Article I, Section 7.3. (Planning for action and MOC for information)

EXECUTIVE SUMMARY

This agenda item contains two matters.

First, it requests authorization to release for public comment modified proposed amendments to the Rules and Regulations of the State Bar of California Article I, Section 2 [Enrollment as an Inactive Member], in response to the public comments received in connection with the original proposed amendments, released in January 2005.

Second, it recommends, following the return from public comment, that a new Section 7.3 be added to Article I, authorizing discretionary waiver of outstanding annual membership fees owed by former judges who have not advised the State Bar of their active or inactive status, on the condition of payment of current annual active membership fees.

For further information on this item, contact Starr Babcock at (415) 538-2070, or by email at Starr.Babcock@calbar.ca.gov; or Saul Bercovitch at (415) 538-2306 or by email at Saul.Bercovitch@calbar.ca.gov

I. PROPOSAL RE THE ACTIVE MEMBERSHIP STATUS OF ADR NEUTRALS

A. Background

At the January meeting, the Board Committee on Planning, Program Development and Budget, and the Board Committee on Member Oversight authorized staff to make available for public comment for a period of 90 days proposed amendments to Article I, Section 2. The stated purpose of the proposal was to amend Article I, Section 2 to clarify the active membership status requirement for members who serve as ADR neutrals. The public comment process was also viewed as providing a structure that would allow members to express themselves on the subject, and a means for educating the membership generally about the active membership status requirement.

Following the release of the proposal, State Bar staff arranged for discussions and meetings with interested individuals and organizations, including the San Francisco Mediation Society, JAMS, and the ADR Section of the San Diego County Bar Association, to answer questions and address issues concerning the proposal.

The public comment period is now closed. The State Bar received 71 written comments, 7 of which were submitted on behalf of organizations. All of those comments are being provided to the members of MOC and Planning, and the comments are available to others upon request. The comments have been carefully considered and, in response to those comments, authorization is requested to make available for public comment modified proposed amendments to Article I, Section 2, for a period of 90 days.

B. Public comments received on the proposed amendments to Article I, Section 2

Of the 71 comments received, 66 were opposed to the proposal as released for public comment. Some offered or suggested alternatives they would support, but the vast majority of those comments were simply opposed. Beyond opposing the proposal, some expressed the view that they or their ADR colleagues may resign from the State Bar if required to maintain active status as an arbitrator or mediator. Five of the public comments supported the proposal. The public comments raised a number of issues, and several common themes emerged. The main issues that were raised are summarized below.

1. The bulk of the comments opposed to the proposed amendments stated that ADR neutrals are simply not engaged in the activities that require active status

The terms and conditions of inactive status are defined by the Rules and Regulations of the State Bar, Article I, Section 2 [Enrollment as an Inactive Member]. In pertinent part, Section 2 currently provides:

“Any member of the State Bar not under suspension, who does not desire to engage in the active practice of law in the state, may, upon written request, be enrolled as an inactive member.... No member of the State Bar practicing law in this state, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”

The proposal circulated for public comment would have added the following language to the active status requirement: “or occupying a position wherein he or she provides dispute resolution services such as arbitration or mediation.”

Numerous comments opposed the proposal on the grounds that ADR neutrals are not engaged in the activities set forth in Article I, Section 2, and that adding dispute resolutions services such as arbitration or mediation to that language would be an unwarranted extension of the rule. As one comment viewed the issue, the proposal hinged on the faulty assumption that an attorney who serves as an ADR neutral is likely to engage in the conduct currently described in Article I, Section 2.

This point was made in a variety of ways. Several comments expressed the view that the proposal incorrectly treats all forms of ADR the same, and many drew a distinction between mediation and arbitration. Arbitrators, it was stated, hear evidence and make decisions, whereas mediators are more like counselors who simply assist the parties in attempting to resolve a dispute. One comment stated that a mediator may suggest that the parties explore the law, but does not “apply” the law. Others stated that their role as neutrals precludes advice about the law or the legal effect of any act, document, or law.

Several organizations and individuals involved with community mediation and similar services opposed the proposal. One stated that although efforts to resolve litigation through mediation are widespread, the mediation of litigated cases is only a fraction of the mediation that takes place in California, and many mediations conducted by community mediation programs do not even involve legal disputes. Another noted that there are hundreds of groups and agencies in California that provide ADR services with no connection to the court system, and a third stated that a key function of community-based ADR organizations is to intervene in disputes before they escalate into violence or are brought to the police or courts. The largest full-service mediation center in Southern California stated that, through 20 years of experience, it has worked with other

organizations to develop a field separate and distinct from the legal field. It was also noted that many community mediation services are staffed in part by retired or otherwise inactive attorneys who provide a volunteer service.

One mediator stated that she mediates between neighbors, family members and in workplace environments where communication is not good and the parties would like to improve it, and the mediations do not involve “things” such as money. Others also noted that many matters that are mediated have no legal implications, such as matters involving parent-teen relationships, elder care, and neighborhood disputes such as barking dogs.

Other comments drew a distinction between different forms of mediation. Some, it was noted, are “evaluative mediators” who seek to bring the parties to settlement by evaluating their respective cases or assessing probable court outcomes. Some believed that those who employ evaluative techniques – particularly if they are “advising” the parties on substantive or procedural legal issues – may indeed fall within the activities requiring active status. But the comments also expressed the view that a mediator may conduct his or her mediation practice without ever engaging in any of those activities, and may function exclusively by using other mediation techniques, such as “facilitative mediation” where the mediator may structure a process to assist the parties in reaching a mutually agreeable resolution, but would not make recommendations to the parties, give his or her own advice or opinion as to the outcome of a case, or predict what a court would do in a case. Other comments mentioned various other forms of dispute resolution services, and expressed the view that they should not all be treated the same.

Some had no objection to *arbitrators* being required to maintain active status, reasoning that they are likely to be engaged in the activities listed in Article I, Section 2. Others, however, stated that under California law, arbitration proceedings are not governed or constrained by the rule of law, and that arbitrators do not practice law, examine the law or pass upon the legal effect of any act or document in the sense a lawyer would.

One comment opposed the proposed new language as overly broad, and expressed the view that the language of Article I, Section 2 is already very clear. The comment also stated that if the State Bar would like to make the language even clearer, it may wish to consider amending the rule to state, in relevant part: “wherein he or she is called upon in any capacity whatsoever to give legal advice or counsel or examine the law . . .” The comment noted that the focus would then address the activity rather than the role.

Finally, an issue related to the definition of active status was raised by some who questioned why ADR neutrals were being singled out. Some asked why law professors – who “examine the law” – were not being required to maintain active status. One comment noted that, if enforced, the State Bar should enforce the same provisions against lawyers who are accountants, real estate brokers and others, reasoning that a failure to do so would raise equal protection problems.

2. Many were concerned that the proposed amendments would directly or indirectly define mediation and arbitration as the “practice of law”

As noted in the agenda item containing the proposed amendments to Article I, Section 2 that were circulated for public comment in January 2005: “It is not necessary to resolve the practice of law issue when focusing on the active/inactive membership status of ADR neutrals who are members of the State Bar. The active membership requirement is *not* dependent on whether or not the activity of the ADR neutral constitutes the practice of law. The State Bar is not rendering an opinion on whether the provision of ADR services constitutes the practice of law.” Nevertheless, there remains concern that the proposed amendments (in the absence of a definitive statement that mediation and arbitration do *not* constitute the practice of law) would constitute a statement, suggestion, or implication that arbitration and mediation *do* constitute the practice of law, and would be read as such.

One comment stated that the existing language of Article I, Section 2, conforms to the definition of the “practice of law.” Based on the existing language of the rule, some believe it would be an easy step to the claim that the proposed amendment is evidence that the State Bar considers the practice of ADR to be the practice of law. Another comment proposed creating some distance between the conduct currently described in the rule and the newly proposed phrase dealing with “providing dispute resolution services such as arbitration or mediation” by numbering as “(1)” the existing conduct, and as “(2)” the phrase about dispute resolution services.

One comment expressed the view that the *principle* distinction between active and inactive status is the ability to practice law, noting that inactive status means a member cannot practice law, and active status allows the member to practice law. According to this comment, the unavoidable implication of the proposed rule change is that the only reason for the active status requirement for ADR providers is that practicing ADR is equivalent to practicing law. Others stated a belief that practice of law is and should remain the *sole* distinction between inactive and active status, and one comment expressed the view that under the Business and Professions Code, individuals who practice law, and no others, are required to be active. A related comment stated that there is no attorney-client relationship between the ADR provider and the parties, and expressed the view that the rule should be clarified so that “pass upon the legal effect of any act, document or law” applies only to attorneys who make such decisions or findings within an attorney-client relationship.

It should be noted that the State Bar has defined the conduct that requires active status more broadly than whether that conduct constitutes the practice of law. Although it is true that only active members may practice law, it does not follow that the active membership requirement is limited to those who practice law. The Business and Professions Code simply precludes inactive members from practicing law, and generally references the process for changing from active to inactive status.

Several comments expressed specific concerns arising out of the “practice of law” issue. One comment stated that his concern was not premised on a desire to avoid payment of higher dues or to avoid MCLE requirements, but on the overall impact on mediation and arbitration in general, which he believed would be detrimental. Several comments expressed the following, potential adverse consequences arising from a view that mediation and arbitration are the “practice of law”: 1) It would restrict access to qualified ADR neutrals. Many – or most – ADR neutrals are not attorneys, and unauthorized practice of law issues would be raised; 2) It would be an invitation to seek legal recourse against mediators and arbitrators for claims that may not otherwise be available; 3) It would lead insurance carriers – which now offer economical liability insurance that covers mediation, arbitration, or other dispute resolution services – to raise rates and possibly deny coverage of a claim on the ground that the conduct giving rise to the claim constitutes the practice of law, as distinguished from serving as an ADR neutral; 4) Inactive members of the State Bar who serve only as volunteer neutrals would have a strong incentive to cease serving; 5) It would create an incentive for inactive members who provide solely mediation and arbitration services to resign from the State Bar.

3. Several comments raised issues concerning the “regulatory” implications of the proposed amendments

One comment expressed the view that the proposal creates the basis for the State Bar regulating the conduct of mediators and arbitrators, and believes the State Bar should make it clear that it does not intend to regulate the conduct of ADR neutrals who are members of the Bar in their role as ADR neutrals. Another comment stated that the State Bar should not regulate “quasi-judicial activities” and a third stated that the State Bar’s regulatory function should remain with those who represent clients.

An “equal protection” issue was raised, because non-lawyers can engage in arbitration, mediation and other ADR activities without any license or governmental control. A similar comment asked why an attorney who chooses not to be on active status should be prohibited from providing the very same service as someone who has never been licensed as an attorney in the first place. A third stated that the proposed amendments would create confusion in the courts and the public by essentially creating a two-tiered system for the practice of dispute resolution, and noted that there are more non-attorney mediators practicing in California than attorney mediators.

The proposed Amendments to Article I, Section 2 would not have an impact on the State Bar’s regulatory jurisdiction. As noted in the agenda item containing the proposed amendments circulated in January 2005, ADR neutrals who are not attorneys are not subject to the State Bar’s regulatory jurisdiction. Attorneys, however, whether active or inactive, are subject to the State Bar’s regulatory jurisdiction to the extent they engage in conduct governed by the Rules of Professional Conduct and other regulatory authorities.

The professional responsibilities of a lawyer do not turn on whether the lawyer acts as a lawyer in the strictest sense. As observed in *Libarian v. State Bar* (1943) 21 Cal.2d 862, 865, "One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter." See also *American Airlines v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1033. The State Bar's disciplinary system focuses on whether the alleged misconduct violates the Rules of Professional Conduct or other governing authorities, rather than on the membership status of the accused member, or on whether the alleged misconduct constitutes the practice of law. Thus, an attorney remains subject to the State Bar's disciplinary jurisdiction while performing services as an ADR neutral, or in any other professional capacity, to the extent the conduct at issue is governed by the Rules of Professional Conduct or other authorities governing attorneys.

4. Some commented on the MCLE requirements for active members

One comment supported requiring ADR neutrals to maintain active status because of the MCLE requirements, which the comment viewed as a matter of consumer protection. A second comment stated that most ADR practitioners present their services as an extension of the justice system, that lawyers market themselves as lawyers, and that they should be required to comply with the MCLE requirements imposed on active members. Others disagreed, and believe that attorneys who provide solely ADR services should not be subject to the MCLE requirements.

5. Amendments were suggested to the language that exempts from the active status requirement members who serve as ADR neutrals for governmental agencies

The Judicial Council's Civil and Small Claims Advisory Committee submitted a letter in which it noted that it was not commenting on the general issue of whether mediators or other ADR neutrals should be required to maintain active status, but did express an interest in the potential impact of the proposal on ADR neutrals serving in court-connected dispute resolution programs. Currently, Article I, Section 2 exempts members "employed in a quasi-judicial capacity by any governmental agency" from the active status requirement, if not otherwise engaged in the practice of law or holding oneself out as being entitled to practice law. The proposal circulated for comment left those provisions unchanged, and the Judicial Council's Civil and Small Claims Advisory Committee suggested clarifying amendments. That same Advisory Committee also suggested that the rule be broken down into subdivisions, replacing the reference in a new subdivision (a) to "the active practice of law" with a cross-reference to all of the activities listed in a new subdivision (b) that preclude inactive status, to reduce confusion over whether the eligibility for inactive status hinges solely on whether an attorney is engaged in "the active practice of law."

6. Some comments proposed a separate membership category for ADR neutrals

Several retired judges proposed a special category for members who engage solely in arbitration and mediation. Many of those comments referred to support of a “CJA proposal.” Although the State Bar has had several discussions with the California Judges Association about this issue, a formal “CJA proposal” has not been received.

There was some variation in the comments received on this issue. Most of the comments specifically proposed a special *inactive* category for retired judges. Some stated that the category could have a separate dues structure commensurate with the associated administrative cost to the State Bar (possibly greater than active dues, to justify the expense of creating and administering a special category), while others thought the category should have the same dues that active members pay.

One retired judge stated that he would willing to take the required MCLE courses, if a special category were to be created, while a second urged the creation of an inactive category that would include the payment of active dues, but *not* the MCLE requirements.

One member who is not a retired judge proposed consideration of a new membership category for all professions that the State Bar considers linked to the practice of law, but not specifically the practice of law. Another comment stated that adding a third category of membership would lead to the same set of problems as requiring active status for ADR providers, and could only work if there were completely separate requirements for fees, MCLE, etc.

Membership status in the State Bar is currently defined by Business and Professions Code sections 6004-6005 to be either active or inactive. Creation of a special category would likely require a statutory change.

C. Proposal

It is proposed that that the following, modified proposed amendments to Article I, Section 2 be approved for circulation for 90-day comment period:

“§ 2. Enrollment as an Inactive Member

(a) Any member of the State Bar not under suspension, who does not ~~desire to engage in the active practice of the law~~ any of the activities listed in subdivision (b) in this state California, may, upon written request, be enrolled as an inactive member. The secretary or designee ~~shall~~ may, in any case in which to do otherwise would work an injustice, and subject to any directions which may be given by the board or by ~~the president and the chair of the Board Committee on Administration and Finance~~ its designee permit retroactive enrollment of inactive members.

(b) No member of the State Bar practicing law ~~in this state~~, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law shall be enrolled as an inactive member.

(c) ~~Nothing in this section shall prohibit the enrollment as an inactive member of~~ Notwithstanding subdivisions (a) and (b) a member employed in a quasi-judicial capacity by serving for a court or any other governmental agency as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator or in another similar capacity is eligible for enrollment as an inactive member if he or she does not otherwise engage in the practice of law any of the activities listed in subdivision (b) or hold himself or herself out as being entitled to practice law. A member employed or engaged in the capacity of referee, hearing officer, court commissioner, or in a similar capacity, shall be deemed to be employed in a quasi-judicial capacity.”

[Proposed deletions in strikeout, and additions underlined.]

The purpose of the proposed amendments would be as follows:

The rule would be separated into three subdivisions for overall clarity. The first sentence in subdivision (a) would delete “desire to” because active or inactive membership status depends upon actual conduct, not a desire. The first sentence would also be clarified by replacing “the active practice of law” with a reference to the activities that preclude active status, which would be listed in the new subdivision (b).

The second sentence of subdivision (a) addresses the separate issue of retroactive enrollment of inactive members. The word “shall” would be changed to “may” because retroactive enrollment should be an exception, not a presumption, and the rule is discretionary in any event. The change of “the president and the chair of the Board Committee on Administration and Finance” to “its designee” is an update in language that was included in the proposed amendments circulated in January 2005, and received no comment.

A new subdivision (b) would be added, but the activities described would remain unchanged from the activities described in the current rule. The language “in any capacity” would be added, which would not single out any particular role, and the focus would address the conduct rather than the role. The language “in this state” would be deleted because subdivision (a) would already refer to engaging in any of the activities listed in subdivision (b) “in California” so the language would be redundant.

A new subdivision (c) would be added, and it would contain the existing exemption for members serving for courts or other governmental agencies. The clarifying language would respond to the issues that the Judicial Council’s Civil and Small Claims Advisory Committee raised about these provisions.

II. PROPOSAL RE WAIVER OF OUTSTANDING FEES FOR SOME FORMER JUDGES

A. Background

When a member of the State Bar becomes a judge or justice, the individual’s membership in the State Bar is stayed under Business and Professions Code section 6002 and the California Constitution, Article VI, Section 9. State Bar member records policy also categorizes judges in a “J” category during their bench service. When the judge or justice retires from the judiciary, the State Bar advises this member that, upon retirement, he or she automatically resumes active membership in the State Bar and becomes obligated to pay active or inactive membership fees, unless he or she resigns State Bar membership entirely.

The vast majority of judges and justices who leave the bench advise the State Bar that they will resume active or inactive status. Unfortunately, a number of judges retired and notice of the retirement was not received by the State Bar. Moreover, there was no agreement with the Administrative Office of the Courts and the State Bar to insure that judges about to retire were advised of their obligation to contact the State Bar and declare a status.

The former judges who did not respond to the State Bar defaulted to the active or inactive status they maintained before joining the judiciary. However, they have not met their obligation to pay outstanding annual membership fees. Cumulatively, some 60-plus retired judges fall into this category.

At the January meeting, the Board Committee on Planning, Program Development and Budget, and the Board Committee on Member Oversight authorized staff to make available for public comment for a period of 90 days a proposed new rule to provide a process for these former judges to come into compliance with their State Bar membership fee obligations. New Section 7.3 would be added to Article I to authorize a stated period of time for discretionary waiver of outstanding membership fees owed by former judges on condition of payment of current annual membership fees. The purpose is to encourage these members to meet the financial obligations of their reactivated status as active or inactive members.

B. Public comments on proposed new rule 7.3

The State Bar received two comments opposed to this proposal. The first stated in part: "To give retired judges a break (waiver) simply because of their prior status as a judge, holds them to a different and privileged standard that is unfair to the rest of us annual card-carrying active members." The second stated in part: "Make them pay." The remaining comments did not address the rule 7.3 proposal.

C. Proposal

Proposed rule 7.3 is aimed at the 60-plus retired judges who did not respond to the State Bar, defaulted to the active or inactive status they maintained before joining the judiciary, and have not paid outstanding annual membership fees since retirement. The proposal is designed to bring those retired judges back into the system, because receipt of annual membership fees going forward is preferable to the current situation, where nothing is being received. It is proposed that the Board Committee on Planning, Program Development, and Budget recommend that the Board of Governors adopt new rule 7.3.

III. FISCAL/PERSONNEL IMPACT

There is no expected impact on personnel and there may be a slight increase in member fees.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

New rule 7.3, if adopted, will need to be added to the Board Book and Administrative Manual.

V. PROPOSED RESOLUTIONS

Should the Board Committee on Member Oversight approve the request to release for public comment the modified, proposed amendments to Article I, Section 2, the following resolutions would be appropriate:

RESOLVED that the Board Committee on Member Oversight hereby authorizes staff to make available for public comment for a period of 90 days the proposed revisions to Rules and Regulations of the State Bar of California Article I, Section 2 [Enrollment as an Inactive Member], in the form attached hereto; and it is

FURTHER RESOLVED that 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

Should the Board Committee on Planning, Program Development, and Budget approve the proposal to adopt new Article I, Section 7.3, the following resolution would be appropriate

RESOLVED that the Board Committee on Planning, Program Development and Budget hereby recommends to the Board of Governors that new Article I, Section 7.3 [Waiver of Membership Fees and Penalties for Former Judicial Officers] of the Rules and Regulations of the State Bar, in the form attached hereto, be adopted.

Proposed Amendments to
RULES AND REGULATIONS OF THE STATE BAR OF CALIFORNIA
(June 23, 2005)

Article I

Section 2. Enrollment as an Inactive Member

(a) Any member of the State Bar not under suspension, who does not ~~desire to engage in the active practice of the law~~ any of the activities listed in subdivision (b) in this state California, may, upon written request, be enrolled as an inactive member. The secretary or designee ~~shall~~ may, in any case in which to do otherwise would work an injustice, and subject to any directions which may be given by the board or by ~~the president and the chair of the Board Committee on Administration and Finance~~ its designee permit retroactive enrollment of inactive members.

(b) No member of the State Bar practicing law ~~in this state~~, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law shall be enrolled as an inactive member.

(c) ~~Nothing in this section shall prohibit the enrollment as an inactive member of~~ Notwithstanding subdivisions (a) and (b) a member employed in a quasi-judicial capacity by serving for a court or any other governmental agency as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator or in another similar capacity is eligible for enrollment as an inactive member if he or she does not otherwise engage in the practice of law any of the activities listed in subdivision (b) or hold himself or herself out as being entitled to practice law. A member employed or engaged in the capacity of referee, hearing officer, court commissioner, or in a similar capacity, shall be deemed to be employed in a quasi-judicial capacity."

Proposed Addition to
RULES AND REGULATIONS OF THE STATE BAR OF CALIFORNIA
(June 23, 2005)

Article I

Section 7. Waiver of Annual Membership Fees

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7.3 Waiver of Membership Fees and Penalties for Former Judicial Officers

- A. The Secretary, or his or her designee, may waive any unpaid annual membership fees and penalties of former judicial officers which have accrued since their leaving of office. This waiver is conditioned upon the officers' payment or satisfaction of the current annual membership fees.
- B. Definitions:
 - (1) Judicial Officers: Justices and judges of courts of record.
 - (2) Unpaid Annual Membership Fees and Penalties: Accrued active or inactive annual membership fees and any accrued late payment penalties attached thereto.
- C. This section shall remain in effect only until December 31, 2007, and is repealed as of that date, unless otherwise acted upon by the Board of Governors.