

AGENDA ITEM

SEPTEMBER 702

Proposed Rule of Court 9.8 to Require Online Registration by Attorneys – Report on Public Comment and Recommendation to Supreme Court for Approval

DATE: September 11, 2007

TO: Members, Board of Governors;

FROM: Larry Doyle, Chief Legislative Counsel;
Marie M. Moffat, General Counsel;
Lawrence C. Yee, Chief Deputy General Counsel;
Mary Yen, Assistant General Counsel

RE: New Rule of Court 9.8 to Require Online Registration by Attorneys – return from public comment and recommendation of approval for transmittal to the California Supreme Court

Executive Summary

Legislation enacted in 2006 (SB 56 (Dunn), Ch. 390) requires the State Bar to adopt procedures to facilitate reporting of mandatory and voluntary information by providing members with a centralized mechanism for reporting information online at the State Bar's Web site. To fulfill this mandate, a new Rule of Court 9.8 is recommended.

Under the proposed rule, the State Bar must provide a centralized mechanism for registration and reporting information online at the Bar's Web site. Each member would be required to create a member profile at the Web site and use the profile to report mandatory and voluntary information as well as changes in that information. A member who does not have online access may request an exemption and provide the information in a format prescribed by the State Bar. The State Bar would have the authority to set and collect an appropriate fee from any member who fails to register online or to request an exemption, and to add the fee to the member's annual membership fee for the year following the failure to register. There would be no change in the public or confidential nature of information provided online.

The Board Committee on Member Oversight authorized a 90-day public comment period at its May meeting. The State Bar received 19 comments, which are discussed below.

The agenda item recommends approval of proposed Rule 9.8. After the Board approves the proposal, it will be transmitted to the Supreme Court for final action.

Questions or concerns may be directed to Larry Doyle at (916) 323-0092 or larry.doyle@calbar.ca.gov, or to Mary Yen at (415) 538-2369 or mary.yen@calbar.ca.gov.

BACKGROUND

All members of the State Bar are subject to mandatory registration and reporting requirements that are specified primarily, but not exclusively, in the State Bar Act. In 2006, SB 56 (Ch. 390) added section 6009.5 to the Business and Professions Code. That section states:

6009.5. The State Bar shall adopt procedures to facilitate reporting of mandatory and voluntary information by providing members with a centralized mechanism for reporting information online at the State Bar Internet Web site, including, but not limited to, data required to be provided pursuant to the State Bar Act, or by other statutes, rules, and case law, and demographic information. Any demographic data collected shall be used only for general purposes and shall not be identified to any individual member or his or her State Bar record.

In accordance with the legislative mandate, a staff working group proposed new Rule of Court 9.8 to the Board Committee on Member Oversight (MOC) at its May 2007 meeting. MOC authorized a 90-day public comment period ending August 13, 2007.

This agenda item brings the proposal back following public comment. It is recommended that the Board of Governors approve new Rule of Court 9.8, which would direct the State Bar to provide the centralized mechanism and require online registration and reporting of information by members. After approval by the Board of Governors, the proposal will be transmitted to the Supreme Court for consideration and adoption.

DISCUSSION

1. Proposed Rule of Court 9.8

Under the proposed rule, the State Bar is directed to provide members with a centralized mechanism for registration and reporting information online. Each member must create a member profile at the State Bar's Web site in order to register online. Creating the profile obligates the member to use it to report required information and to report changes in that information. A newly admitted member must create the profile and register within 90 days after admission.

Proposed Rule 9.8 would require that members provide an e-mail address to the State Bar when they create the profile. The e-mail address would be used exclusively for disciplinary or regulatory purposes, unless the member indicates that the email address may be made available to the public. Members must report changes to their e-mail address within 30 days. Proposed Rule 9.8 also would require members to report whether the member, or the member's law firm, has established and maintained one or

more trust fund accounts required by Business and Professions Code section 6211.¹ Any changes to that information must be reported each year on or before February 1.

The proposed rule makes no change to the public or confidential nature of information provided through the member profile. A member who does not have online access will, upon written request, be granted an exemption from using the online member profile and must provide the information in a format prescribed by the State Bar. The State Bar would have the authority to set and collect an appropriate fee from any member who fails either to register online or to request an exemption, and to add the fee to the member's annual membership fee for the year following the failure to register.

A clean version of proposed Rule 9.8 is at Attachment 1.

2. Supreme Court Authority over Membership Information

Even though Business and Professions Code section 6009.5 gives legislative authorization for the centralized mechanism for members to report information online, it is appropriate to propose a new rule of court on the same subject for adoption by the California Supreme Court. The Court has inherent and primary constitutional authority over attorney admissions and the practice of law in this state. (*In re Attorney Discipline* (1998) 19 Cal.4th 582; 79 Cal. Rptr.2d 836.) While the Legislature may enact specific provisions of law relating to the practice of law, through the Court's inherent powers to issue rules for the practice of law in California, the Court may require more.

Legislative regulations regarding the qualifications of attorneys are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient ... *In other words, the courts in the exercise of their inherent power may demand more than the legislature has required* ... [W]hen the matter at issue involves minimum standards for engaging in the practice of law, *it is this court and not the Legislature which is the final policy maker.*

(*In re Attorney Discipline, supra*, 19 Cal.4th at p. 602.)

Proposed new Rule 9.8 goes beyond the minimum standards of Business and Professions Code section 6009.5. It would require members to provide an e-mail address to the State Bar and to report whether they have trust accounts.

Furthermore, the State Bar maintains membership information as a function performed for the Supreme Court in accordance with Rule of Court 9.6, which states:

Rule 9.6 The State Bar must maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this state. Such records must include the information specified in Business and Professions Code sections 6002.1 and 6064 and other information as directed by the Supreme Court.

¹ Section 6211 authorizes IOLTA trust accounts and individual trust accounts where the interest earned on the account is payable to the client for whom the trust account was set up.

In re Attorney Discipline discussed Rule 9.6 (formerly numbered Rule 950.5) when it considered whether it is appropriate to fund the State Bar's Membership Records function from a special assessment to reopen the Bar's discipline system in 1998.²

[T]his court maintained the roll until the adoption of California Rules of Court, rule 950.5 in 1996. Although the court formerly maintained the physical roll of attorneys, keeping the roll up-to-date, taking changes of address, entering information on the status of attorneys, and the like, were functions performed by the State Bar personnel even before 1996.

(*In re Attorney Discipline*, *supra*, 19 Cal.4th at p. 619, fn. 23.)

In re Attorney Discipline authorized funding for the membership records functions. The Court determined that accurate records are integral to a meaningful licensing and disciplinary system, and confirmed the function that the State Bar performs for the Court by maintaining the Roll of Attorneys.

3. My State Bar Profile

The "My State Bar Profile" service at the State Bar's web site functions as the centralized mechanism for online member profiles. To date, over 130,000 State Bar members have created their profiles voluntarily. This includes providing the State Bar with one or more e-mail addresses. Successful creation of the profile meets the registration requirement of the proposal. The proposed registration requirement would bring the approximately 80,000 members who have not created their member profile into the centralized mechanism system. While members who do not have online access would be authorized to obtain an exemption, there are advantages to creating the profile. These advantages include cost-effective enhancements in security of member identification, in membership benefits, and in communications between the State Bar and members.

4. Online Registration In Other States

Texas has an online attorney profile registration information statute. While the statute is informative as to the information that will be made publicly available online, it is not particularly applicable in California.

Connecticut attorneys must register online, beginning in 2007. Connecticut's rule is solely a registration rule. An exemption may be requested but it will be applicable only for the year in which it is granted.

Vermont requires its attorneys to provide an e-mail address, with no exemptions. Any lawyer who does not provide the e-mail address is placed on administrative suspension.

² The special assessment became former Rule of Court 963.

Thus, it appears that states are moving toward adopting various forms of online requirements for attorneys. Proposed rule 9.8 is drafted to fit our needs in California and is more member-friendly than Connecticut's and Vermont's provisions.

PUBLIC COMMENTS RECEIVED

The 90-day public comment period expired on August 13, 2007. In addition to the public comment announcement, the proposal was featured in an article of the July 2007 publication of Cal Bar Journal.

The State Bar received 19 comments, which are briefly summarized below. A longer summary is given at Attachment 3.

Gerald McNally, Attorney. A good idea.

Jack Firestone, Attorney. Was unable to use online registration last year for a technical reason. If online registration is mandated, an escalation or circumvention process should be established for those who have problems.

Mark A. Anderson, Attorney. Supports facilitating electronic filings and registration, however, it is another thing to require it. Not everyone has the capability, snail-mail or personal delivery should be options.

Gerald G. Knapton, Attorney. Does not have a clear idea of what sort of mandatory and voluntary information must be provided online. Is this left open-ended in order to retain flexibility to deal with future changes? Would like a list of the requirements included in the rule or notes.

Richard Bauer, Attorney. Does not like the fact that it is mandated with fines for noncompliance.

Dwight Willard, Attorney. Many semi-retired members do not use e-mail and do not want that to be the authorized method of communication. Members should not be required to have e-mail or to monitor e-mail for State Bar purposes.

Stephen A. Glasser, Attorney. Opposed to it being a requirement, to having all information and communications occur electronically. CCP does not allow service electronically unless agreed by parties.

Andrew E. Levinson, Attorney. Opposes it being mandatory. Concerned about the e-mail address requirement and type of computer software required for State Bar web site usage.

Robert Beaver, Attorney. It is a violation of California privacy rights. E-mail addresses are not confidential unless you use encryption keys.

"Klaatu Servant", (Attorney). E-mail is not private, it can be read and published by interceptors. E-mail requirement exceeds the statutory authority, imposes

unprecedented technical and notice requirements and obligations on members, invades privacy rights of attorneys and maybe clients.

Philip Sheuerman, Attorney. It is probably illegal because a member must consent to the Bar's user agreement, and the web site is unreliable and at times inaccessible. To require members to register online, need to ensure there are no obstructions.

Ted W. Isles, Attorney. Is inactive and does not have Internet access.

John H. Pattie, Attorney. Is inactive and does not have Internet access. Requests an exemption.

Monique Botkin, Attorney. Online registration is not necessary to achieve simple things like address changes, sending in MCLE cards, or paying dues. This is a burdensome requirement, requiring members to check their online profile on a regular basis. Updates can be mailed to the Bar.

Stephany Yablow, Attorney. Just because some can, doesn't mean everyone must. Not everyone has a computer or can maneuver through the Internet and an error could be costly; not everyone wants their bank account information on line; hacking can be devastating. It ought not be mandatory.

Erin Wilson, Attorney. The statute requires the Bar to provide a "centralized mechanism" to "facilitate reporting," contrary to the proposed Rule that requires online reporting, unless exempted. The e-mail address requirement mandates members to have Internet access and an e-mail account. Some members do not have these. While a member may request an exemption, the Bar may deny the request. U.S. Postal Services effectively transmits information, and allowing members to use those services is not an unfair burden on the Bar. The non-compliance fee insinuates the Bar may view this Rule as a possible revenue source. The fee amount is not in the proposed Rule. Requiring attorneys to report the establishment and maintenance of a trust fund account appears unprecedented. Many associates do not know their firm's account information.

Charles W. Stricklen, Attorney. Many older attorneys are not proficient in online procedures. Has privacy issues and is worried about hackers.

Sarah Shena, Attorney. E-mail is a flawed method of communication. Has had Internet and the e-mail service provider blocks important e-mail as suspected Spam. Lives in a rural area where e-mail access is not easy. It is not a secure method for disciplinary communication. Some might say they have no Internet access to avoid agreeing to receive important communication via e-mail.

Joe Ingber, Attorney. Would the Bar compel him to give up pen and pad and but a computer? The new rule might force him to "inactivate".

RESPONSE TO PUBLIC COMMENTS

Comments that express opposition tend to fall into four categories: 1) those that do not have online access and do not realize that there is an exception; 2) those that fear

privacy violations and do not know that the information that will be sought is required by statute and that their e-mail address will not be made public unless the member agrees; 3) those who believe that the technology is wanting and fear a security breach; and 4) those that oppose because it is a mandatory requirement. Comments in the first through third categories suggest lack of familiarity with the My State Bar Profile service, or a misunderstanding of the proposal. For example, instead of posing a security risk, creating the individual member profile allows members to supply unique identifying information, which improves the security of the member's membership information.

In order to respond to concerns frequently raised in the comments, the following actions are suggested. First, an article in the Cal Bar Journal will discuss frequently asked questions such as security risks, intrusion into privacy, technological requirements for registering online, and what information is required of members. Second, the Member Service Center's staff will have information on the technological requirements for registering online to give to members who call with questions along that line. Member Service Center's staff will also be able to discuss the advantage that the unique identifying information that online registration affords members. Finally, to assist members with the reporting requirements an information piece will be posted at My State Bar Profile.

Several specific comments call for clarification as well. These follow below.

The initial draft of the rule assumed that a member without online access would be exempt from the requirement. This was expressly stated in the agenda item of the Member Oversight Committee at its May 11, 2007, authorizing public comment and in the public comment notice.³ In response to member comments that suggested a need for greater clarity in the rule to state that exemption from online registration will be granted to those members who make a request and show they do not have online access, staff has proposed amending the original language in Rule 9.8(f), now renumbered as 9.8(e), to read: "A member who does not have online access is exempt from using the online member profile, provided the member requests the exemption in the manner that the State Bar prescribes. A member who is granted an exemption must comply with reporting requirements within the time limits prescribed by the State Bar Act, other statute, case law, rule or other relevant authority."⁴

Inclusion of disciplinary use in the proposed rule of court provides enabling language only. Currently, there are no plans to utilize My State Bar Profile for disciplinary communications. Future use for disciplinary purposes would be subject to amendments of existing rules and procedures applicable to the disciplinary system. That revision process would include public comment period that will afford members an opportunity to comment.

³ Both the May 11 Agenda Item and the notice on the State Bar's Web site (http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=85643) stated: "A member who does not have online access would, upon request, be permitted to provide the required information in a format provided by the State Bar."

⁴ This replaces the original language of the paragraph, which read: "A member who does not have online access may request exemption from using the online member profile. A member who has requested an exemption must provide the required information in a format and within the time limits prescribed by the State Bar."

Online communications will not completely replace U.S. postal service communications from the State Bar. For example, the State Bar will continue to send the annual fee statement to the member's physical address of record. Experience this past year has shown, however, that e-mail addresses were helpful to send delinquent members a supplemental e-mail blast reminding them to pay their dues before the February 1 deadline.

As for possible spam treatment of e-mails from the State Bar, recently e-mails were sent to 26,000 Los Angeles area attorney e-mail addresses to relay President Sloan's invitation for the Bar card court access pilot project. Only 1 or 2 complaints were received about spam mail treatment.

With respect to the reporting of trust account information, a requirement of this sort is not unprecedented. At least 16 other states have this type of requirement in place.

The amount of the noncompliance fee has not yet been determined. However, the amount will cover costs only and will be approved by the Board. An implementation component under assessment is the amount of staff time needed to process exemption requests along with assisting members who have technological problems with creating the My State Bar Profile. This is not expected to be an overwhelming demand on staff resources since approximately two-thirds of the membership have already created their profiles.

In summary, the comments do not indicate a need to change the proposal in substantive ways. Editorial and organizational modifications are shown in legislative style at Attachment 2. The implementation date of February 1 is removed because the Supreme Court usually states the effective date in the order approving a rule of court.⁵ No further public comment is required because the changes are nonsubstantive, editorial changes that improve organization. (Rules of the State Bar, rule 1.10(B)(1) and (2).)

FISCAL AND PERSONNEL IMPACT:

Projected costs can be covered within the existing budgetary framework. There is no additional anticipated personnel impact.

BOARD BOOK/ADMINISTRATIVE MANUAL UPDATE:

There is no known impact on the Board Book.

STATE BAR RULES IMPACT

None known.

⁵ By removing the implementation date, there is little left to distinguish the lead-in sentence in provision (c) from the sole sentence in provision (b), so remaining language in (c) has been collapsed into (b) and the remaining subdivisions have been renumbered accordingly..

PROPOSED BOARD COMMITTEE RECOMMENDATION:

Should the Committee on Member Oversight concur with the propose recommendation, the following resolution would be in order:

RESOLVED that, following publication for comment and consideration of public comments received, the Board Committee on Member Oversight recommends that the Board of Governors approve proposed new Rules of Court, Rule 9.8, in the form attached, with direction that said proposed Rule 9.8 be forwarded to the California Supreme Court with a recommendation that the proposed new rule be adopted an approved.

Should the Board of Governors concur with the recommendation of the Committee on Member Oversight, the following resolution would be in order:

RESOLVED that, following publication for comment and consideration of public comments received, and upon recommendation of the Board Committee on Member Oversight, the Board of Governors hereby approves proposed new Rules of Court, Rule 9.8, in the form attached, with direction that said proposed Rule 9.8 be forwarded to the California Supreme Court with a recommendation that the proposed new rule be adopted an approved.

Attachments: 1) proposed rule 9.8 clean style; 2) proposed rule 9.8 legislative style; 3) public comment chart