



THE STATE BAR OF CALIFORNIA

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DATE: December 13, 2007

TO: Members of the Board Committee on Operations

FROM: Marie M. Moffat, General Counsel
Lawrence C. Yee, Chief Assistant General Counsel
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RE: Proposed Revisions to State Bar Rules, Title 1, Division 2, Rule 1.10(A),
Shortening of Public Comment Period - Request for Public Comment

EXECUTIVE SUMMARY

Under the State Bar's current public comment rules, "[rule] proposals are circulated for 90 days, but the Board may shorten the comment period to a reasonable period that may not be fewer than 30 days." (State Bar Rules, Title 1, Division 2, Rule 1.10(A).) Thus, although the Board has broad discretion to shorten the circulation period to a 30-day comment period, 90 days is the norm and the standard that is generally applied. The public comment rules further require that if a proposal is significantly modified after comment, the changes must then be re-circulated for an additional comment period, which may be up to another 90 days. (*Id.*) Moreover, given that the public comment cycle must also be timed to coincide with the Board's meeting schedule, which is currently set at 5-6 meetings a year, there is concern over the length of time it takes to implement rule changes.

The State Bar President has asked staff to propose a change to shorten the standard 90-day public comment period in order to improve overall efficiency in the State Bar's rule-making process. By way of comparison, other state and government agencies generally utilize a comment period ranging from 45-75 days when promulgating agency rules. A shorter period of time (30 days for example) is also within the discretion of the Board to adopt, but may be problematic with respect to receiving public comment from many local bar associations that do not meet monthly or for members who depend on the print version of the California Bar Journal for receipt of notices about State Bar matters.

At State Bar President's request, staff has drafted a proposed amendment to State Bar Rules, Division 2, Rule 1.10(A), shortening the existing 90-day public comment period to a standard 45-day period, which could be modified to as few as 30 days or as long as 90 days, on a per item basis as determined by the Board or Board Committee. Staff recommends that the proposed amendment be circulated for public comment.

DISCUSSION

A. Authority for Establishing the State Bar's Public Comment Process

The State Bar's rule making authority is derived from Business and Professions Code section 6025, which authorizes the Board to adopt rules and regulations "necessary or expedient" for the carrying out of the Bar's duties under the State Bar Act. (Cal. Bus. & Prof. Code, § 6025.) In the exercise of rule making authority, the California Administrative Procedure Act ("APA") establishes basic minimum procedural standards governing the adoption, amendment or repeal of rules for many state agencies in the executive branch. (Cal. Gov. Code, §§ 11340 et. seq.) As a judicial branch agency, however, the State Bar is not subject to the APA. (Cal. Gov. Code, § 11340.9(a) [APA does not apply to agencies in the judicial branch of the state government].) Nonetheless, as a matter of policy the State Bar's Board of Governors has adopted procedures that include a provision for a period of public comment in the enactment of State Bar rules. The primary goal of these public comment procedures is to provide interested individuals or entities with adequate notice and opportunity to comment on rule proposals.

B. Rationale for Shortening the Standard Public Comment Period

Originally, in 1990, the Board of Governors adopted a "Procedure for Adoption, Amendment or Repeal of State Bar Regulations" that provided for public comment as part of the Board's rule-making process. These procedures became known as the State Bar's "Public Comment Rules." In July 2007, the Public Comment Rules were revised as part of the State Bar's rule revision project to simplify and reorganize the more than two-dozen separate rule sets of State Bar regulations into a single structure. The Public Comment Rules may now be found at the State Bar Rules, Title 1, Division 2, Rules 1.10, 1.11.

The current Public Comment Rules include a requirement that the Board or a Board Committee circulate rule proposals for a 90-day comment period. (State Bar Rules, Title 1, Division 2, Rule 1.10(A).) Although the rules do allow the Board, in its discretion, to shorten the comment period to a reasonable period of at least 30 days¹; the **general rule** is that proposals must be circulated for 90 days. (*Id.*) If after public comment, a proposal is then materially modified, the Board or a Board Committee must circulate the change for additional comment, which may be for another full 90-day period. (*Id.*) The timing of

¹ Historically, the Board or Board Committee retained discretion to adjust the public comment period between the standard 90-day period and the minimum 30-day period for any number of reasons. Although the Public Comment Rules listed factors that had to be considered for shortening of the comment period (e.g., the complexity of the proposed rule change, the number of individuals or organizations likely to be affected by the change, the reasons why urgency is required, and "other relevant facts and circumstances which the Board or Board Committee deems relevant to its determination"), no combination of factors was a prerequisite and broad discretion was retained by the Board to propose the minimum 30-day period. (See former Public Comment Rules, § 4 (B), adopted January 1, 2003.) The listing of these factors has since been omitted in the new State Bar Rules to avoid confusion that the period may be shortened only if all the factors have been met. (State Bar Rules, Title 1, Division 2, Rules 1.10, 1.11, adopted July 20, 2007.)

comment periods must also be coordinated with the schedule of Board meetings, which currently occur only 5-6 times per year. Given the length of the general comment period (90 days), the possibility that the item may be modified and need to be re-circulated for comment, and the intermittent basis on which the Board of Governors meets, the State Bar's comment process can be quite lengthy and time consuming, resulting in delays in rule implementation. The President has asked staff to propose amending the general public comment period of 90-days to a new standard 45-day period to expedite the process and improve overall efficiency in the State Bar's rule-making process.

C. Factors to Consider in Determining the Appropriate Length of Time for the Comment Period

The specific length of the comment period is a matter of policy to be determined by the Board. Although the State Bar is not bound by the APA or the practices of other judicial branch agencies, review of these procedures is instructive. Most agencies have a general comment period that extends anywhere from 45-75 days. State agencies subject to the APA have a minimum 45-day public comment period (see Cal. Gov. Code, § 11346.4(a)), which can be extended for a period not to exceed one year. (Cal. Gov. Code, § 11346.4(b).)² Likewise, the Judicial Council meets twice a year, in April and October, to consider proposals for the adoption, amendment or repeal of California Rules of Court, California Standards of Judicial Administration, and Council Forms (see Cal. Rules of Court, rule 10.20) and proposals are generally required to be circulated for public comment prior to Council action. (Cal. Rules of Court, rule 10.22.) Proposals with an anticipated effective date of January 1st generally have a spring comment period, which extends from April through June (approximately 75 days). Rules with a July 1st effective date have a shorter comment period in the winter – January through February (approximately 60 days.) (For more information on the Judicial Council comment cycle, see: <http://www.courtinfo.ca.gov/invitationstocomment/schedule.pdf>.)

In considering the appropriate length of time for the public comment period, the Board may also take into account the State Bar's publication process. Currently, all items circulated for comment are posted on the State Bar's Web site.³ Notice of public comment is also published in the print version of the California Bar Journal ("CalBar Journal"), the official publication of the State Bar that is distributed monthly to every member of the State Bar. (See Board Book, tab 13, art. 1, § 1.)

The CalBar Journal is printed on the first day of each month and mailed sometime thereafter. Members of the Bar generally receive their copies anywhere between the 2nd and 10th day of the month. To be included in the upcoming edition of the publication, an item must be received mid-month (around the 15th). A 30-day public comment period is

² As adopted in 1979, the APA required an agency to accept comment for a minimum of 30 days. (See Cal. Gov. Code, § 11364.4, as adopted by Stats. 1979, Ch. 567, § 1.) This was later extended to 45 days. (See Cal. Gov. Code, § 11346.4, as amended by Stats. 1979, Ch. 1203, § 5.)

³ See http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145

not likely to provide enough time to include the item in the CalBar Journal. A 45-day period may suffice, depending on what day of the month the Board meeting falls. However, in some instances, even if the item makes it into the Journal, members may not get their copy until the 10th of the following month – only giving them a few days, if any, to comment.⁴ Depending on when the Board meeting falls, if there is concern regarding print deadlines for the CalBar Journal, the Board may want to extend the 45-day period to a 60-day period to ensure inclusion in at least one edition of the CalBar Journal and the ability to comment.

Also, as part of the publication process, the Bar often seeks comment from targeted groups and specifically sends notice of rule proposals to the media, consumer groups, or other interested individuals and organizations – in particular **local bar associations**. Again, in determining the appropriate length of time for the State Bar public comment process, the Board may want to give consideration with regard to accommodating these groups and permitting them sufficient time to comment on rule proposals, which may affect them or their constituents. Currently, the State Bar tracks approximately 250 local bar associations.⁵ Usually, the Boards or executive committees of these local bars will need to meet, discuss, and reach consensus on State Bar proposals before submitting comments. Of the 250 local bars, it is estimated that for about half of them, their Boards or executive committees meet monthly. For the other half, their decision-making bodies meet less frequently – either bi-monthly or quarterly. However, an emergency meeting could always be called to discuss anything of major impact. A 45-day public comment period would probably suffice and allow the majority of these groups to have sufficient time to comment on State Bar proposals; a longer period of time may benefit some of the smaller groups.⁶

There is no requirement that the State Bar maintain these hard-copy distribution methods, since all notices of public comment are currently posted on the State Bar’s Web site. However, should the Board desire to maintain these practices to accommodate that segment of the membership who are not computer literate or who do not have Internet access, sufficient time should be built in to the public comment process.

There is a proposal by the Board of Governors for new California Rule of Court, Rule 9.8 currently pending before the California Supreme Court, which would establish a mandatory on-line registration and reporting requirement for Bar members. To the extent the State Bar, in many respects, is moving toward a paperless system, the Board may want to consider the implications of proposed Rule 9.8 on the length of the State Bar’s

⁴ This information was provided by the State Bar’s Office of Media Information Services.

⁵ According to the State Bar’s Office of Bar Relations Outreach, about 80 of the local bars (primarily the county bar associations) are actually staffed with full time employees. For these groups, the State Bar will address the notice of public comment to the staff at the business office. The remaining 170 voluntary bars, however, do not have staff, and notice can be harder to deliver. Generally, the State Bar will send the notice of public comment to the “president of record” – with the hope that the listing is accurate and that the president will communicate the information to the membership.

⁶ This information was provided by the State Bar’s Office of Bar Relations.

public comment cycle. If implemented, this rule would create a centralized mechanism for registration and reporting information online at the State 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. This system could ultimately be used as part of the State Bar's public comment process, to allow attorneys to sign up for and receive instant electronic notification regarding pending rule proposals. This immediate access to the State Bar's public comment process may alleviate some of the concerns regarding a shortened public comment cycle and may encourage and facilitate more direct participation by Bar members – since presently members only receive notice of public comment items through the Cal Bar Journal or by perusing the State Bar's Web site on their own accord. This system would not completely eliminate the need for print distribution however, since the Rule of Court only applies to members of the State Bar, not members of the public, or other agencies. Moreover, State Bar members who do not have Web access may request an exemption from the on-line registration requirement.

CONCLUSION

Currently, State Bar policy requires that rule proposals be circulated for a standard 90-day public comment period. By way of comparison, other state and government agencies utilize a considerably shorter comment period, somewhere between 45 and 75 days. In order to improve efficiency in the State Bar's rule making process, the Board, in its discretion, has authority to adopt a new standard public comment period. At the request of the State Bar President, staff has drafted a proposed amendment to State Bar Rules, Division 2, Rule 1.10(A), shortening the existing 90-day public comment period to a standard 45-day period, which could be modified to as few as 30 days or as long as 90 days, as determined by the Board. This new rule will permit the Board to modify the public comment period, on a per item basis, if desired, to take into account the State Bar's traditional practice of including public comment items in the print version of the CalBar Journal and also, when appropriate, sending targeted mailings to local bar associations and other interested groups that may be affected by pending State Bar proposals.

EFFECTIVE DATE OF PROPOSAL

The proposed effective date of this rule change will be the date the Board acts.

FISCAL AND PERSONNEL IMPACT

There are no known fiscal or personnel impacts that will result from this rule change.

BOARD POLICY AND RULE IMPACT

If adopted, confirming changes will need to be made to Board Book, Tab 12.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Board Committee on Operations agree with the proposed recommendation, adoption of the following resolution would be appropriate.

RESOLVED, that the Board Committee on Operation authorizes staff to make available for public comment for a period of 45 days, the proposed revisions to the State Bar Rules, Title 1, Division 2, Rule 1.10(A) (“Public Comment Rules”) in the form attached as Exhibit 1; 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.

EXHIBIT 1

RULES OF THE STATE BAR OF CALIFORNIA

Title 1. Global Provisions

Division 2. Public comment

Rule 1.10 Public comment

- (A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Governors. The State Bar also makes available for public comment its proposals for the California Rules of Court. Proposals are circulated for a standard ninety-fourty-five days day period, which can be shortened to a minimum of 30 days or extended to a maximum of 90 days, as designated by the board. ~~but the board may shorten the comment period to a reasonable period that may not be fewer than thirty days.~~
- (B) Public comment is not required
- (1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;
 - (2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal; or
 - (3) to add or modify an appendix to these rules.
- (C) The board may determine that an emergency requires it to adopt, amend, or suspend a rule on an interim basis without first circulating it for public comment. No interim measure may remain in effect for more than 120 days.
- (D) The adoption, amendment, or repeal of a rule becomes effective as of the date specified by the board. If it specifies no date, the date of its action is the effective date.

Rule 1.10 adopted effective July 20, 2007.