

AGENDA ITEM

MAR 54-112
Proposed Rev to
SB Rules, Title 1,
Shortening of Public
Comment Period

DATE: February 14, 2008

TO: Members of the Board of Governors
Members of the Board Committee on Operations

FROM: Marie M. Moffat, General Counsel
Lawrence C. Yee, Chief Assistant General Counsel
Rachel S. Grunberg, Senior Attorney

RE: Proposed Revisions to State Bar Rules, Title 1, Division 2, Rule
1.10(A), Shortening of Public Comment Period – Return from Public
Comment

EXECUTIVE SUMMARY

This item recommends adoption of the State Bar President's proposal to amend State Bar Rules, Division 2, Rule 1.10(A), shortening the State Bar's 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. This change will help to expedite and improve overall efficiency in the State Bar's rule-making process.

The public comment period has passed and the State Bar has not received any public comments regarding the proposed rule change. At this time, it would be appropriate for the Board of Governors, upon the recommendation of the Board Committee on Operations, to approve the rule change.

DISCUSSION

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 comment periods must also be coordinated with the meetings of the Board of Governors, which currently are held 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 in some cases can be quite lengthy and time consuming, resulting in delays in rule implementation. In order to help expedite this system and increase overall efficiency in the State Bar's rule making process, the State Bar President has recommended a proposal to modify the current public comment period from 90-days to a new standard 45-day period.

This shorter public comment period is in keeping with those utilized by other executive and judicial branch agencies. For example, state agencies subject to the California Administrative Procedures Act ("APA")² have a minimum 45-day public comment period³ (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).) 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

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.)

² In the exercise of rule making authority, the 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].)

³ 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.)

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.)⁴

In addition, while the proposed rule change sets the State Bar’s standard public comment period at 45-days, it also allows the Board and Board Committees the flexibility to modify the comment period to as few as 30 days or as long as 90 days, on a per item basis. Thus, for more important or controversial items, the circulation period can be extended to up to 90 days; and for items of a more routine or basic nature, the Board can expedite the process and set a 30-day public comment period. Also, on a case by case basis, the Board can increase the public comment period, if it so desires, 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.

In January, the Committee on Operations of the Board of Governors authorized a 45-day public comment period on the proposed rule change. The public comment period has now closed and no comments on this item have been received.

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 hereby recommends that the Board of Governors adopt the proposed amendment to State Bar Rules,

⁴ For more information on the California Judicial Council’s public comment cycle, visit: <http://www.courtinfo.ca.gov/invitationstocomment/schedule.pdf>.

Title 1, Division 2, Rule 1.10(A) (“Public Comment Rules”) in the form attached as Exhibit 1.

PROPOSED BOARD RESOLUTION

If the members of the Board of Governors agree with the recommendation of the Board Operations Committee, you may adopt the following:

RESOLVED, that upon recommendation of the Board Committee on Operations, the Board of Governors hereby adopts the proposed amendment to State Bar Rules, Title 1, Division 2, Rule 1.10(A) (“Public Comment Rules”) in the form attached as Exhibit 1.

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~~ ~~forty-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; amended March 7, 2008.