

AGENDA ITEM

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Proposed New Rule of Court
9.7 Re- Online Reporting by
Attorneys – Request for
Public Comment

DATE: June 16, 2008

TO: Members, Board Committee on Member Oversight

FROM: Staff

SUBJECT: Proposed New Rule of Court 9.7 (Online Reporting by Attorneys) – Request for Public Comment

ATTACHMENT: Attachment A: California Rules of Court Proposed Rule 9.7 (July 11, 2008)

Executive Summary

This proposal is for a new California Rule of Court 9.7 intended to facilitate the State Bar's maintenance of the roll of attorneys and the Bar's communications with members. Proposed Rule 9.7 does this by requiring that members would use their online membership account, My State Bar Profile (Profile), to report their current office address, telephone number, and e-mail address. The proposal also provides for additional optional use of the Profile, an exclusion, and an exemption.

It is requested that the Board Committee on Member Oversight authorize a 45-day public comment period for proposed Rule 9.7. If the Board approves proposed Rule 9.7 following public comment and any revisions made in response, it will be transmitted to the Supreme Court for final action consideration.

Questions may be directed to Starr Babcock at starr.babcock@calbar.ca.gov or (415) 538-2070, or to Mary Yen at mary.yen@calbar.ca.gov or (415) 538-2369.

BACKGROUND

In September 2007 the Board approved a proposal (2007 proposal) for a new Rule of Court 9.8 that would require online registration and reporting by members. The proposal was transmitted to the Supreme Court. It now appears that the Court would prefer a rule with specific provisions rather than one drafted as an enabling rule. Proposed Rule 9.7 is drafted as a narrowly tailored rule for online reporting by members. It is appropriate that the proposed new rule, now re-

numbered as Rule 9.7¹, be sent out for public comment because it contains substantive changes to the 2007 proposal. (Rules of the State Bar, rule 1.10)

DISCUSSION

1. Provisions of proposed Rule of Court 9.7

Provision (a) contains the core reporting requirement. Members would be required to use their online membership account known as “My State Bar Profile” to report their current address, telephone number, and an e-mail address. State Bar members are already required to maintain a current address and telephone number with the State Bar. (See Bus. & Prof. Code section 6002.1(a).) Rule 9.7 would make an e-mail address mandatory. Those who choose to create a Profile must provide the e-mail address so that the State Bar can acknowledge that the account has been created or changed.

Under provision (b), a member may, but is not required to, use the online membership account to provide an e-mail address for public disclosure; and to provide additional information as authorized by statute, rule, or Supreme Court directive, or as requested by the State Bar.²

Provision (c) places a restriction on the State Bar’s use of the member’s e-mail address. Under (c), unless permitted by law or the Supreme Court, the State Bar may not use e-mail as substitute means of providing a notice required to initiate a State Bar disciplinary or regulatory proceeding or to otherwise change a member’s status involuntarily.

Provision (d) provides an exemption for a member who does not have online access or an e-mail address. Members may claim an annual exemption from the reporting requirement in provision (a). The exemption must be requested for each year to which it applies and in the manner prescribed by the State Bar.

2. Changes from the 2007 proposal

The 2007 proposal was phrased in terms of “registration.” A member’s creation of a Profile amounts to the registration contemplated. When members initiate the process, the Profile retrieves pre-existing basic data from the attorney’s membership record. When members complete the process, they will have created a password of their choice and set up and answered questions that make the profile secure, unique, and individualized. To avoid confusing Profile creation with the registration required of a new member of the State Bar, proposed Rule 9.7 deletes the words “register” or “registration”.

The 2007 proposal had an IOLTA reporting requirement that is deleted from proposed rule 9.7. The IOLTA requirement had been inserted to respond to a recommendation of the State Auditor. However, since that recommendation was made, new IOLTA compliance statutes in the State Bar Act and companion Bar rules would make it more fitting for an IOLTA reporting requirement to appear in the statutory provisions for IOLTA accounts.

¹ In September 2007, rule number “9.7” was intended for a mandatory insurance disclosure rule of court. The Board is not recommending that draft rule of court, so the number “9.7” is available.

² Under the judicial construction of rules and standards, “may” is permissive, not mandatory. (Calif. Rules of Court, Rule 1.5(b)(2).)

The 2007 proposal had a mandatory reporting requirement that was phrased as a general enabling provision. However, this provision made it difficult to determine what precise information would be required. The reporting requirement in provision (a) of proposed Rule 9.7 is now narrowly tailored. Additional reporting using My State Bar Profile would be optional under provision (b).

An exclusion provision in the 2007 proposal has been revised with the intention of making a clearer statement of the restriction that would be placed on the State Bar's use of the e-mail addresses.

An exemption provision in the 2007 proposal did not expressly state that the exemption must be requested annually. Proposed Rule 9.7 eliminates this ambiguity.

Proposed Rule 9.7 deletes a statement that there is no change in the public or confidential nature of information in a Profile because the statement is unnecessary.

Proposed Rule 9.7 deletes a non-compliance fee provision that was in the 2007 proposal. The change to a narrowly tailored reporting requirement in provision (a) combined with the exemption in provision (d) make the non-compliance fee unnecessary.

A clean version of proposed Rule 9.7 is attached.

3. Supreme Court Authority over Membership Information

The State Bar maintains membership information for the Supreme Court under Rule of Court 9.6(a):

Rule 9.6 Roll of attorneys admitted to practice

(a) State Bar to maintain the roll of attorneys

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.

In re Attorney Discipline, (1998) 19 Cal.4th 582; 79 Cal. Rptr.2d 836, discussed Rule 9.6(a) (formerly numbered Rule 950.5) when the State Bar sought a special assessment to reopen the Bar's discipline system in 1999 and fund the State Bar's Membership Records function.

[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 authorizing funding for the membership records functions,³ the Court determined that accurate records are integral to a meaningful licensing and disciplinary system, and it confirmed the function that the State Bar performs for the Court by maintaining the roll of attorneys.⁴

³ The special assessment was former Rule of Court 963.

4. Use of My State Bar Profile

As of June 3, 2008, a total of 123,840 members accessed their profiles voluntarily. Proposed Rule 9.7 would bring approximately 92,620 members who have not created Profiles into the online system, unless they qualify for an exemption. There are advantages to creating the profile. The principal advantages the Profile offers are cost-effective enhancements in security of member identification, in membership benefits, and in communications between the State Bar and members.

For example, in January the State Bar sent an e-mail blast reminder to members who had not yet paid their dues. The e-mail reminder was an efficient and cost-effective way to send an important courtesy communication at no extra cost. After the e-mail blast more members than ever paid their membership fees on or before the due date of February 1st. It seems reasonable to think that the e-mail blast was a significant factor in achieving this result.

As for member benefits, the State Bar is planning to add services that members will be able to initiate at My State Bar Profile. Members would access the Profile to enter supplemental personalized information for the Find A Lawyer online directory. Members would also use the Profile to initiate Affinity Circles, a social network for members.

Finally, it may be noted that members who wish to remove their names for the State Bar's promotional membership list (which is provided to outside entities that qualify under the Bar's membership list policy) may do so by logging into to the Profile and selecting the opt-out choice provided there.⁵

5. Online Use In Other States and Jurisdictions

⁴ In addition, Business and Professions Code section 6009.5, which was enacted in 2006, 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 Bar's web site. The State Bar has done this with My State Bar Profile. Because the Court has inherent and primary constitutional authority over attorney admissions and the practice of law in this state, 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 9.7 would add the narrow requirement that members report their current address, telephone number, and e-mail address to the State Bar at My State Bar Profile.

⁵ Members who opt-out will not receive promotional information at their e-mail address.

California would not be the first state to require that attorneys provide an e-mail address to the licensing agency. Vermont's licensing office, which is an arm of the Vermont Supreme Court, requires its attorney to list an e-mail address on licensing forms, with no exemptions. The Vermont Court Administrator notifies attorneys by e-mail of all proposed and adopted changes to the state's rules and statutes. Rhode Island's annual registration form with the Supreme Court also requires a business e-mail address, which is provided under a general rule provision of "such other information as the court may time to time direct."

As of January 1, 2007, the State of Connecticut Judicial Branch requires its attorneys to register online. Connecticut lawyers enroll into the Judicial Branch's E-Services and use the E-Services system as the platform to access registration information and register online. As part of the enrollment process for E-Services, Connecticut attorneys must provide an e-mail address.

Texas was one of the first unified Bar states with individual member pages at its web site. A statute enacted in 2000 required the Texas State Bar to provide an individual profile online for each of its members. In May 2008, a review of web sites of other unified state bars showed that Florida, Louisiana, Nevada, North Carolina, and Wyoming have some form of an online individual profile which members access by logging in at their option.

Each U.S. District Court in California uses e-filing, address unless they are exempt under the court's general order or local rule. E-filing requires attorneys to provide an e-mail. The Central and Eastern districts send filing announcements and instructions by e-mail to attorneys.

Thus, other state bars and attorney licensing agencies are moving toward various forms of Internet member pages or profiles and e-mail address requirements for attorneys. It appears that California would be the first unified Bar⁶ to specifically require that members use an online individual profile that includes an e-mail address for State Bar purposes.

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.

PROPOSED BOARD COMMITTEE RECOMMENDATION:

⁶ Rhode Island is a unified Bar state; Vermont and Connecticut are not.

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

RESOLVED that the Board Committee on Member Oversight authorizes a 45-day public comment period for proposed new Rules of Court, Rule 9.7, in the form attached; and it is

FURTHER RESOLVED that authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval by the Board Committee.

Attachment: 1) proposed Rule 9.7