

AGENDA ITEM

SEPTEMBER 114

Proposed New Rule of Court 9.7
(Online Reporting by Attorneys) –
Proposed Approval Following Public
Comment Period

DATE: September 4, 2008

TO: Members, Board of Governors;
Members, Board Committee on Operations

FROM: Staff

RE: Proposed New Rule of Court 9.7 (Online Reporting by Attorneys) –
Proposed Approval Following Public Comment Period

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 use an online membership account, to report their current office address, telephone number, and e-mail address that will not be disclosed to the public without the member's consent. Additional optional use of the online membership account, an exclusion, and an exemption are provided in the proposal.

In June, the Board Committee on Member Oversight authorized a 45-day public comment period for proposed rule 9.7. This agenda item brings the proposal back from public comment. Eleven comments were received. Two modifications have been made to respond to comments. The modifications are non-substantive or reasonably implicit in the proposal, therefore no additional comment period is needed. It is recommended that the Board Committee on Operations recommend that the Board approve proposed rule 9.7 and instruct staff to transmit it to the Supreme Court for 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 a narrowly tailored rule for online reporting by members. The proposed new rule, now re-numbered as rule 9.7¹, was sent out for public comment because it contains substantive revisions from the 2007 proposal. (Rules of the State Bar, rule 1.10)

This agenda item brings the comments received and proposed rule 9.7 to the Board with a recommendation of approval of the rule and instruction that it be transmitted to the Court. Two modifications have been made to the rule. These changes are non-substantive or reasonably implicit in the proposal; therefore no additional comment period is needed.

DISCUSSION

A. 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, also known as “My State Bar Profile”, to report their current address, telephone number, and an e-mail address that will not be disclosed on the State Bar’s web site or otherwise disclosed to the public without the member’s consent. 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).) Providing an e-mail address to the State Bar is an essential part of the process that a member goes through to create access to the online membership account and would be a new requirement.

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 A member who exercises this option may use the same e-mail address for public as well as private purposes, or may provide a separate e-mail address for public purposes.

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 exemption from the reporting requirement in provision (a). The exemption must be requested in the manner prescribed by the State Bar.

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

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

2. Changes from the 2007 proposal

The 2007 proposal was phrased in terms of “registration”. A member’s completion of the process of accessing My State Bar Profile amounts to the registration contemplated. When members initiate the process, My State Bar Profile already contains 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 confusion with the concept of registration as a new member of the State Bar, and to avoid a possible impression that the member would be doing more than accessing pre-existing data incorporated from the attorney’s membership record, proposed rule 9.7 does not use 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 time, new IOLTA compliance statutes in the State Bar Act and companion Bar rules make it more fitting for an IOLTA reporting requirement to appear in the statutory provisions for IOLTA accounts rather than a rule of court.

The 2007 proposal had a mandatory reporting requirement that was phrased as a general enabling provision. However, this made it difficult to determine what precise information would be required. In proposed rule 9.7 the reporting requirement in provision (a) 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.

Proposed rule 9.7 deletes a statement that there is no change in the public or confidential nature of information reported at My State Bar Profile. The statement is deleted as being unnecessary.

Proposed rule 9.7 deletes a non-compliance fee provision that was in the 2007 proposal. The State Bar can achieve its purpose of facilitating enhanced communications with members by e-mail without resorting to a non-compliance fee.

A clean style version of proposed Rule of Court 9.7 is attached.

3. Supreme Court Authority over Membership Information

The State Bar maintains membership information as a function performed 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 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.

[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.³ 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.⁴

³ The special assessment was authorized in former Rule of Court 963.

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 of Court 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.

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 accessed their profile into the online system. While members who do not have online access or an e-mail address would be eligible for 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.

For example, in January the State Bar sent an e-mail blast extra reminder to members who had not yet paid their dues. The e-mail reminder is an example of how My State Bar Profile can provide an efficient and cost-effective way for the Bar to send an important courtesy communication at no extra cost. Whether or not related to the e-mail blast, this year more members than ever paid their membership fees on or before the due date of February 1st.⁵

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 their My State Bar Profile to enter supplemental personalized information for the Find A Lawyer online directory. Members would also enter My State Bar Profile to initiate Affinity Circles, a social network for members.

Finally, it may be noted that a member's e-mail address is not provided when a qualifying outside entity requests the Bar's membership list under the Membership List Policy.

6. Online Use In Other States and Jurisdictions

In March 2008 the U.S. Court of Appeals for the Ninth Circuit implemented a new system for electronic case management and files, and this summer the Ninth Circuit began implementing electronic filing by attorneys. Attorneys must participate in the new system and provide an e-mail address and register electronically with the Ninth Circuit, unless an exemption form is submitted and granted for good cause. In addition, each U.S. District Court in California already uses e-filing, which requires attorneys to provide an e-mail address unless they are exempt under the court's general order or local rule. The Central and Eastern districts send filing announcements and instructions by e-mail to attorneys.

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

⁵ Additional uses are under consideration. For example, in the future My State Bar Profile could be used for elections of the Board of Governors, or to send the monthly *California Bar Journal* issue to members. It has been estimated that e-mail delivery of the *Journal* could mean a savings of approximately \$70,000 per month.

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.

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 Bar members 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.

Beginning October 1, 2008, the Michigan State Bar will require members who pay by credit card to do so online.

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

PUBLIC COMMENT RECEIVED AND RESPONSE TO COMMENTS

Eleven comments were received. The comments were all from members of the State Bar, as follows:

1. Mark Alexander Anderson: He uses the online resources, and finds this more convenient, but is still concerned that the opt-out provisions make it easy for those without online access or email to be exempt. He is more comfortable if the rule specified that the opt-out could be done at the same time as annual renewals, and that a form can be sent in with dues.
2. Robert deSpelder: He asks why the State Bar does not provide an e-mail service such as attorney@calbar.org so all members would have an e-mail address where clients could reach them.

⁶ Rhode Island and Michigan are a unified Bar states; Vermont and Connecticut are not.

3. Earl Antonio Thompson: Inactive members should be exempt from the online reporting requirement.
4. Archer Pugh: He opposes the proposed rule on the issue of providing an e-mail address that would be posted in an open directory. His e-mail address is to be used only with clients and those to whom he gives it out.
5. Janice Jenkins: Requests that public listing of e-mail addresses be optional. Represents indigent parents in court-appointed appeals. Does not want certain people to have her e-mail address and the onslaught of electronic mail adds a layer of uninvited e-mail from clients who expect immediate answers in confidential matters.
6. Janet Saalfield: Opposes the requirement to provide an e-mail address. She represents indigent clients on appeals. She screens the clients to whom she gives her e-mail address, does not want unreasonable clients to feel that they can obtain her immediate attention by e-mail. A number of e-mail lists she is on already take up an enormous amount of time and she does not want be burdened with unreasonable client requests.
7. Senya Means: Opposes a rule that contributes to members' e-mail load. She does not want clients who will bombard her by e-mail, or who are dangerous or emotionally distraught, to have her e-mail address.
8. Sheri Cohen: Opposes any rule of court that requires publicly accessible e-mail addresses. Member accepts court appointment in appellate juvenile dependency cases and foresees a problem if her e-mail address is readily accessible to occasional clients who are unstable.
9. Marcia Levine, obo Calif. Appellate Defense Counsel: Recognizes proposed rule requires attorneys to provide an e-mail address for use by the Bar to communicate with members and gives attorneys the choice of disclosing the e-mail address to the public on the bar's web site. They urge the Bar to insure that an attorney's e-mail address remains secure and private unless the attorney chooses to publicize it. They are concerned that providing an e-mail address to the bar could lead to its dissemination to the public, which would result in an unreasonable amount of communications to which the attorneys would have to respond. They are also concerned that publication of e-mail addresses will result in additional unsolicited advertisements, fraudulent requests for information and assistance, viruses, etc., because addresses have been harvested from the Bar's web site.
10. Roger Kohn opposes the e-mail reporting requirement. The language should be clarified. Is "an online membership account" the same as the "Attorney Search" feature of the web site and "Attorney Profiles" which is displayed on Attorney Search? Provision (a) should be modified to state the

information will be used only for State Bar business and not be available to others or the public. Member has additional concerns about mandatory submission of e-mail addresses: possible breach by hackers that compromises confidentiality and security of use of e-mail for communications; e-mail is less reliable than other modes of communication; unsolicited broadband transmittals can crash or tie up a computer; spam and huge volumes of unsolicited and unwanted e-mails. By mandating that members report an e-mail address, the State Bar will be mandating a mode of communication that the member has made a professional decision generally to avoid.

11. Theodore Garelis opposes the proposed rule because not everyone has access to a computer or the Bar's Web site. It is not reasonable to force these members to jump through an extra hoop each year to seek an exemption. Those with access to the Internet may not have sufficient experience with computers to comfortably navigate a web site to comply with the rule.

The first comment concerns operational details that need not be incorporated into a rule of court. The idea conveyed in the second comment was considered and rejected years ago because it would involve the Bar in being a provider of online communication services and dealing with troublesome on-going issues such as spam filtering and communications failures. The third comment would make unnecessary, irrelevant distinctions based on membership status. The fourth through eighth comments misunderstand the proposal, which is that the e-mail address referenced in provision (a) will not be publicly available without the member's authorization. In response to these comments, a clarifying modification is proposed in the next paragraph. The ninth and tenth comments express concerns about IT security issues and are similar to comments expressed in the public comment on the 2007 proposal. In response to the concern raised in the eleventh comment about the exemption authorized in provision (d), a modification is proposed below.

Two modifications are suggested. First, in response to comments that display confusion about the e-mail address requirement, the language of proposed provision (a) has been modified to say that the required e-mail address will not be disclosed on the State Bar's Web site or otherwise to the public without the member's consent. Second, provision (d) has been modified so that members would not have to request the exemption on an annual basis. Since there is no annual online reporting requirement proposed in the rule, there is no reason to require an annual request for exemption. These modifications are non-substantive or reasonably implicit, and therefore do not require an additional public comment period.

A legislative style version of proposed Rule of Court 9.7 is attached. It shows suggested additions and deletions made to the public comment version of the rule.

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:

Should the Committee on Operations concur with the proposed recommendation, the following resolution would be in order:

RESOLVED, following publication for comment and consideration of comments received, that the Board Committee on Operations recommends that the Board of Governors of the State Bar of California approve proposed new Rule of Court 9.7 in the form attached, with direction that said proposed rule be forwarded to the California Supreme Court with a recommendation that it be adopted.

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

RESOLVED, following publication for comment and consideration of comments received, and upon recommendation of the Board Committee on Operations, that the Board of Governors of the State Bar of California hereby approves proposed new Rule of Court 9.7 in the form attached, with direction that said proposed rule be forwarded to the California Supreme Court with a recommendation that it be adopted.

Attachments: 1) proposed Rule of Court 9.7, clean style and legislative style showing changes to the public comment version
 2) public comments received