

***PUBLIC COMMENTS ON PROPOSED AMENDMENTS TO RULE 105
RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA***

From: Hawley, Robert
Sent: Friday, May 08, 2009 8:45 AM
To: Jeannine English
Cc: Hull, Doug
Subject: RE: RAD Consent Agenda Item II A - Proposed Amendment to Rule 105, Rules of Procedure of the State Bar Court

Thanks. I will assure this is included in the public comment. This is on the RAD agenda. RAH

Robert Hawley

Deputy Executive Director

State Bar of California

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Cell: 415-279-3407

From: Jeannine English [<mailto:english@jeannineenglish.com>]
Sent: Wednesday, May 06, 2009 2:32 PM

To: Hawley, Robert

Subject: Fw: RAD Consent Agenda Item II A - Proposed Amendment to Rule 105, Rules of Procedure of the State Bar Court

Fyi

----- Original Message -----

From: James Ham <jham@panskymarkle.com>

To: Jeannine English

Sent: Wed May 06 14:27:16 2009

Subject: RAD Consent Agenda Item II A - Proposed Amendment to Rule 105, Rules of Procedure of the State Bar Court

Dear Ms. English:

I am writing to ask that you support the proposed revision to Rule 105 of the State Bar Rules of Procedure. The proposed rule change would permit parties to file reply briefs in support of motions and to respond to evidentiary objections interposed to evidence submitted in connection with a motion. This rule change will promote uniformity in practice and assist the State Bar Court in evaluating and weighing arguments and evidence submitted for decision. The rule is also party neutral – benefitting both the State Bar prosecutor's office and respondents' counsel. Further, the proposed rule does not impose any new mandatory obligation on counsel.

Experienced litigators appreciate the value of allowing a moving party, who carries the burden of persuasion, to file a reply brief in response to arguments presented by the party opposing the motion. This is even more important in the Hearing Departments of the State Bar Court than in our superior courts, because there is no right to oral argument on a motion in State Bar Court. Likewise, it makes a great deal of sense to allow a proponent of evidence to respond to evidentiary objections interposed to that evidence. Such a response can assist the court in ruling on evidentiary objections.

I drafted and proposed this rule change in response to State Bar Court experiences. At present, reply briefs are often filed in State Bar Court by both prosecutors and respondents' counsel, but there is no rule expressly allowing that practice. The consequence is that similarly situated litigants can be treated differently. For example, I filed a reply brief in support of a motion made on behalf of my client, to respond to arguments made for the first time by the State Bar prosecutor. I also filed a response to evidentiary objections made by the prosecutor challenging the admissibility of evidence offered in support of the motion. The State Bar prosecutor objected to the filings and the trial court sustained the objections. Later, an unpublished Review Department opinion of the State Bar Court upheld the determination that the rules, as currently written, do not permit reply briefs or responses to evidentiary objections. Given the Review Department decision, which was contrary to much of the practice in the Hearing Departments, I believed that a Rule clarification was needed and appropriate.

The proposed amendment to Rule 105 will clarify the existing rule and conform it to actual practice by expressly providing that reply briefs and responses to evidentiary objections may be filed. The rule change should promote uniformity and benefit the State Bar Court and its Judges, by giving them the benefit of counsel's reply to opposition arguments and allowing a proponent of evidence offered in connection with a motion to respond to objections to such evidence.

Sincerely,

Jim Ham

Former Chair and Vice Chair (2008-09), Los Angeles County Bar Association Professional Responsibility and Ethics Committee

Former Member: State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC")

Member, Association of Professional Responsibility Lawyers

Member, Association of Discipline Defense Counsel

James I. Ham

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From: David Matt [jodlm1248@gmail.com]
Sent: Sunday, July 05, 2009 2:47 PM
To: Berrio, Itzel
Subject: Proposed Amendments to Rule 105, Rules of Procedure re Motions

This is a good proposal, one the Bar should support.

David L. Matt
SBN 101 826

July 20, 2009

VIA FACSIMILE – 415-538-2214
AND FIRST-CLASS MAIL

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Comment on Proposed Amendments to Rule 105, Rules of Procedure Re Motions

Dear Mr. Berrio:

I write in comment on the proposed amendment to Rule 105 regarding motions.

By way of brief background, I initiated the proposal to amend Rule 105, and drafted the original proposal, a copy of which is attached. This original proposal was presented to the Office of Chief Trial Counsel (“OCTC”) through the Association of Discipline Defense Counsel (“ADDC”). I participated in the meetings between ADDC and OCTC regarding the proposed rule change.

For over 28 years, I have litigated in the federal and state courts. I am a partner at Pansky Markle Ham LLP, a firm that focuses on legal ethics compliance issues and disciplinary defense. Prior to that, I was an equity partner in the Los Angeles office of Arnold & Porter, LLP and a shareholder at Quinn, Kully and Morrow, P.C., also in Los Angeles. I have served twice as Chairman of the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee, and also served a term on the State Bar’s Standing Committee on Professional Responsibility and Conduct. I also served as a special prosecutor for the State Bar a number of years ago.

I urge the Board of Governors to modify the current proposal by maintaining the current ten day period for opposing a motion and allowing five days to reply. The current proposal reduces to seven days the time to oppose a motion and allows merely three days for a reply. There is no sound justification for reducing the existing opposition time or allowing only three days for a reply. The proposed timing change will have no impact on the overall length of State Bar proceedings, will unnecessarily burden counsel appearing in State Bar court without any corresponding benefit, and will not accomplish the objective of insuring a fair and efficient process.

As currently proposed, Rule 105 takes one step forward in fair procedure by allowing a reply, but then takes one step back by unreasonably constraining the time allowed for briefing. Indeed, the

proposed reduction in briefing time was never discussed or vetted with practitioners during the meetings between the proponents of amending Rule 105 and OCTC. During these meetings, no OCTC representative suggested reducing the existing 10 day period to oppose a motion and never proposed less than a five day reply period.

By nature, motions under Rule 105 are *pre-trial* motions. Because motions are brought *prior* to trial, their briefing schedule will not impact on the overall length of a State Bar case. Far more significant factors influence the length of State Bar cases. Indeed, the majority of State Bar cases do not involve pre-trial motions. In cases where they are brought, they typically address important procedural and legal issues.

By the same token, the length of a State Bar proceeding will not be shortened by compressing the motion briefing period to require an opposition and reply brief to be submitted within a total of 10 days instead of 15 days. The length of a typical proceeding is still governed by the trial date and the conclusion of the trial.

In contrast, the unreasonably short briefing period in the proposed rule will impair the quality of briefing and threaten the fairness of State Bar proceedings. There are many reasons why this will occur. First, State Bar prosecutors carry heavy case loads and maintain busy trial calendars. Likewise, most State Bar defense attorneys are solo practitioners or work in small law firms, and also maintain busy calendars. Reducing the time period for opposing a motion, and allowing only three days for reply, will place additional and unnecessary time pressures on all counsel. All counsel need reasonable time to research the applicable law, review evidence and prepare the required legal briefs. Second, the short proposed opposition and reply period would be subject to unfair manipulation by litigants.¹ Third, reducing time to oppose a motion will make it very difficult to review important documents, and assemble evidence and declarations, needed to oppose a motion. This would result in prejudice and unfairness to both the State Bar and to respondents appearing before the State Bar court.

The Board of Governors should be mindful of the fact the reduction of time to oppose motions in the proposed rule was not discussed or vetted with practitioners before it was presented to the Board. This is significant. Had the proposal been vetted, there would have been an opportunity for dialog about the logic behind the proposal, and whether it would, in fact, impact the length of State Bar proceedings. Concerns about the impact of the proposal on the fairness of proceedings, and the negative impacts on OCTC line prosecutors as well as defense counsel, could have been considered and discussed. It is respectfully submitted that had such a dialog occurred, the consensus would have been that the proposal to compress the briefing schedule would have been rejected on the grounds that it offered no benefit but carried a substantial risk of unfairness.

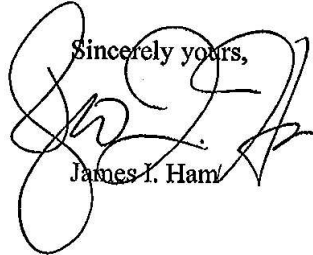
¹ While, as the State Bar notes, a litigant has five additional days to oppose or respond to a motion *if* the motion is served *by mail*, not all motions are served by mail, and the opportunity to "game" the system for unfair tactical advantage by same day delivery is very real when a party is allowed just seven days (two of which may be a weekend) to oppose a motion or only three days (two of which may be a weekend) to file a reply.

Itzel D. Berrio
July 20, 2009
Page 3

Finally, the version of proposed Rule 105 offered by OCTC does not address procedures for filing responses to evidentiary objections filed by parties. Currently, there is no rule allowing the filing of written responses to evidentiary objections on a motion. Fundamental fair procedure requires that a party be allowed to explain to the court the reasons why evidence offered in connection with a motion is admissible. The court is assisted in making correct evidentiary decisions when the proponent of the evidence is allowed to respond to evidentiary objections.

The version of proposed Rule 105 offered by ADDC (see attached) addresses this significant gap in the State Bar's procedural rules. During our discussions with OCTC regarding this proposed rule, no material concerns or objections were raised regarding this proposed modification. OCTC has offered no explanation or a rationale regarding why this change was not included in the proposed rule change.

Experienced litigators understand the need for sufficient time to prepare an effective brief. They also understand the need to respond to evidentiary objections. These are matters universally understood to be essential to fundamental due process and fair procedure. The Board of Governors of the State Bar should adopt ADDC's proposed amendment to Rule 105, as the proposed rule will improve the State Bar Rules of Procedure and make them a model for other disciplinary systems to emulate.

Sincerely yours,

James I. Ham

encls.

**PROPOSED AMENDMENT TO
RULE 105, RULES OF PROCEDURE
OF THE STATE BAR OF CALIFORNIA**

**Proposed Amendment Expressly Permitting the
Filing of Reply Briefs and Responses to Evidentiary Objections
to Evidence Submitted in Support of or in Opposition to Motions**

BACKGROUND:

Rule 105 of the State Bar Rules of Procedure governs motion practice in the State Bar Court. Currently, Rule 105 (b) of the Rules allows a party opposing a written motion to file and serve a written response within ten (10) days of service of a motion. Rule 105(c) provides the method for submitting evidence to the Court in support of or in opposition to a motion.

Current Rule 105 does not expressly allow a moving party to file a written reply to an opposition to a motion, although Rule 1110(g) of the Rules of Practice of the State Bar Court places a ten (10) page limit on the length of reply briefs. Current Rule 105 also does not expressly allow a proponent of evidence submitted in support of or in opposition to a motion to respond to evidentiary objections made to such evidence by a party objecting to the admissibility of that evidence.

The proposed amendments to current Rule 105 would clarify State Bar Court procedure by (1) providing that a moving party may file a written reply to an opposition brief within five (5) days of service of the opposition; and (2) allowing the proponent of evidence submitted in support of or in opposition to a motion to file and serve a written response to written evidentiary objections filed by the opposing party.

Fiscal and Personnel Impact:

None.

Rule Amendments Impact:

If adopted, this item would amend Rule 105 of the Rules of Procedure of the State Bar of California.

Proposed Board Committee Recommendation:

RESOLVED that the Board Committee on Regulation, Admissions and Discipline Oversight, recommends that the Board of Governors adopt the proposed amendments to Rule 105 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, to become effective on _____.

Discussion:

Currently, there is no uniform practice regarding the filing of reply briefs and responses to evidentiary objections. Although reply briefs and responses to evidentiary objections are filed by parties, the Review Department has held in at least one unpublished opinion that the present Rules of Procedure do not provide for the filing of reply briefs or responses to evidentiary objections.

The interests of justice and fair procedural process are furthered by rules that permit the proponent of a motion, who carries the burden of persuasion, to reply to legal positions and arguments made by the opponent of a motion, and to reply to evidentiary objections when they are made, in which the proponent of the evidence is permitted to respond to the opponent's evidentiary objections and present argument why the evidence is admissible.

The Court is aided in its decision making process by full and complete briefing of legal and procedural issues. When a motion is filed, the proponent of the motion usually carries the burden of persuasion that the motion should be granted. A party opposing the motion has the right under Rule 105 to file and serve an opposition brief setting forth arguments why the motion should be denied. Generally, motions are submitted and decided by the Hearing Department of the State Bar Court without oral argument. See Rule 105(d), Rules of Procedure. Consequently, under current law, the moving party is not allowed by rule the opportunity to address new facts or legal arguments raised for the first time in opposition to a motion. By allowing a moving party to file a reply brief, the contested issues on a motion are fully joined, and the Court receives the benefit of the moving party's briefing of issues raised by the opponent of the motion.

Similarly, where a party offers evidence in support of or in opposition to a motion, and the party opposing the evidence files written objections to the admissibility of the evidence, the current Rules of Procedure do not allow the proponent of the evidence to file a written response setting forth the reasons why

the proffered evidence is admissible. A proponent of evidence offered in support of or in opposition to a motion should be permitted the opportunity to present to the Court the proponent's legal arguments in favor of the admissibility of the evidence, when that evidence is challenged by an opponent through the filing of evidentiary objections. By allowing a party to respond in writing to evidentiary objections, the Court receives the benefit of the proponent's briefing of the evidentiary issue. This assists the Court in resolving the evidentiary objections, since the proponent of the evidence may be able to present facts and information necessary to assist the Court in determining whether the evidentiary objections should be overruled or sustained.

APPENDIX A

**THE STATE BAR OF CALIFORNIA
RULES OF PROCEDURE
Proposed Revision – Rule 105**

Rule 105. Motions

(b) Except as otherwise ordered or provided in these rules, an opposing party shall have ten (10) days from service of a motion to file and serve a written response. The moving party shall have five (5) days from service of a written response by an opposing party to file and serve a written reply.

(c) Facts relied upon in support of or in opposition to a motion shall be supported by a declaration, except facts already in the record or subject to judicial notice. Exhibits submitted in support of or in opposition to a motion shall be authenticated by declaration unless already admitted in evidence. The proponent of any evidence offered in support of or in opposition to a motion shall have five (5) days from service of written evidentiary objections to file and serve a written response to the evidentiary objections.



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July 21, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Comment on Proposed Amendments to Rule 105, Rules of
Procedure Re Motions

Dear Ms. Berrio:

The Los Angeles County Bar Association's Professional
Responsibility and Ethics Committee ("PREC") writes in comment on the
proposed changes to Rule 105 of the Rules of Procedure.

PREC agrees that litigants in State Bar Court should be afforded an
opportunity to submit a reply brief in support of a motion, particularly since
oral argument is not usually permitted in State Bar Court on motions. PREC
also believes that proponents of evidence on a motion should be afforded a
right to respond to objections to the admissibility of such evidence. These
procedures are consistent with fundamental fairness and due process in court
proceedings.

PREC opposes that part of the proposed rule change that would reduce
the time to file an opposition brief to just seven days and allow just three days
to file a reply brief. PREC believes the existing 10 day period within which to
file an opposition brief should be maintained and that parties should be
allowed five days to file a reply brief. Compressing the briefing time for the
filing of opposition and reply briefs will not shorten the length of State Bar
proceedings. Likewise, maintaining the existing 10 day time period for filing
an opposition brief and adding a five day reply period will not lengthen State
Bar proceedings. Rule 105 relates to pre-trial motions, and the briefing
schedule will have no material impact on the length of State Bar proceedings.

PREC is also concerned that the proposal to shorten the briefing time places unnecessary burdens on litigants and their lawyers, and will undermine the fairness and integrity of the proceedings. Parties need reasonable time to research the law, gather relevant evidence and respond to an opposing party's legal arguments. The proposed shortening of the briefing schedule will impinge on the ability of all parties appearing before the State Bar court to provide timely appropriate briefing. As a consequence, the quality of the decision making process could be undermined, and the fairness of the proceedings could be compromised.

PREC recommends that the Board of Governors revise proposed Rule 105 to allow parties the opportunity to file reply briefs in support of motions and to respond in writing to objections to evidence offered in support of, or in opposition to, a motion. PREC recommends that the existing 10 day period to oppose a motion be maintained, and that parties be allowed five days to reply to an opposition to a motion.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Robert K. Sall". The signature is written in a cursive, somewhat stylized font.

Robert K. Sall
Secretary, Los Angeles County
Bar Association Committee on
Professional Responsibility and Conduct

From: DRMimplaw@aol.com
Sent: Wednesday, July 22, 2009 10:00 PM
To: Berrio, Itzel
Subject: Public comment on Shortening time on Motions

July 22, 2009

Itzel.berrio@calbar.ca.gov

RE: Public comment on Shortening time on Motions

Dear Mr. Berrio,

I must have had a tough day. I have never dealt with the state bar nor do I know anything of its rules. I do not even know which party is more likely to file Opposition to a Motion. But the idea of making it more difficult for a party to respond or oppose a motion is absurd.

Make no mistake, shortening time means it will be harder to effectively oppose motions, at least that is the case in civil practice. If you are deciding the fate of money under \$1.00, then I suppose it is Ok, but anything more important than that and NO. If such a rule change impacted an attorney's case, then such a rule is absurd.

I would instead suggest that the time be extended to 14 days and not ten days. Seven days is absurd. (I seem to keep saying that, but it was a bad day, remember!)

Who comes up with these ideas? What good purpose would be served by shortening time, especially given the uncertainty of all forms of mail, people's busy schedules, other emergencies, etc?

Like I said, I may have had a bad day but even then I would never consider rules that amount to an incremental denial of Procedural Due Process. What is the excuse of the author of this rule?

I know this is only for Motion Practice and not the case in chief but still important things are decided on motions!

**Donavon Marble
FAX 650 508 1113**

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July 24, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

VIA FAX (415-538-2214) and US MAIL

RE: Amendments/Adoption of Rules 105, 216.5, & 803,
State Bar Rules of Procedure

Dear Ms. Berrio:

The Orange County Bar Association (OCBA) has reviewed the proposed amendments to the Rules of Procedure and makes the following comments:

Proposed Amendment to Rule 105 (Motions) - The proposed amendment would authorize the use of replies in support of a motion and would lower the time for filing any opposition from ten (10) to seven (7) calendar days. Any reply would have to be filed and served within three (3) days from service of the opposition. While the OCBA is in favor of the proposal to add replies to the list of authorized papers, we are not in favor of reducing the time for filing/serving opposition papers. Instead we recommend that the time for filing/serving opposition remain the same as currently set at ten (10) days. It seems unfair to reduce the time for opposition papers while at the same time giving the moving party extra time to file a reply. Since the opposing side only gets one chance at arguing their position we believe that fairness requires that they be given the same time as currently allotted for the full 10 days from service. We do not believe the additional times allowed by this amendment in total will significantly delay any trial/hearing proceedings.


Proposed New Rule 216.5 (Victim's Declaration) - The OCBA is in favor of adopting standards for use of victim's statements in disciplinary proceedings. However, we recommend that (a) the title of this Rule be changed to "Victim Impact Statement" to coincide with the terminology used in criminal proceedings and to clarify that formal "declarations" are not being required; and (b) the last sentence be changed to provide that upon a finding of good cause the Court "shall" require the Office of the Chief Trial Counsel to produce the victim(s) at the mitigation/aggravation phase of the hearing for purposes of cross-examination. This latter change appears necessary in order to comply with due process requirements and prevent a trial Judge from denying a request for cross after the respondent has already satisfied the "good cause" requirement. As written, the last sentence only presents an illusory right to cross-examination.

OCBA Comments
July 24, 2009
Page 2

Proposed Amendment to Rule 803 (Disposition; Deferral of Imposition - Alternative Disposition Program) - The OCBA is in favor of this amendment which would add procedures for submission of written statements by victims in these proceedings after entry of stipulations as to wrongful conduct. Since no evidentiary hearings take place in these stipulated & expedited proceedings then no cross-examination issues necessarily are involved.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

A handwritten signature in black ink, appearing to read "Michael G. Yoder", written in a cursive style.

Michael G. Yoder
2009 President

From: SC Smith [professordad@msn.com]
Sent: Monday, July 27, 2009 4:15 PM
To: Berrio, Itzel
Subject: St. Bar Rule 105 Amendment

Regarding the proposed amendment to State Court Bar Rules of Procedure, Rule 105 (shortening motion response time from 10 to 7 days and opposition reply time of three days).

As both a Cal Bar member and Administrative Law Judge (I do not write on behalf of the Office of Administrative Hearings, nor are my opinions representative of OAH) I am in opposition to the time amendments as too short.

As a former litigator of 30+ years, and as a judge, I have found that short time frames do not give parties reasonable, much less due process. Quick turn arounds deny the parties the opportunity to fully consider most matters important enough to have been brought before a court in the first place. Less than well-considered legal work not only deprives parties of due process by denying them effective counsel, it also makes likely that the judge will have to do more independent research than otherwise necessary.

With the ever decreasing reliability of the postal service, it is not uncommon to have a motion or opposition delivered after relevant time lines have already expired. Accordingly, counsel must seek relief from default to file an opposition or reply. Again, rushed, ill-considered work from counsel and more work for the court.

In short, I would urge you to keep the 10 day time line for opposition to motions and to provide a 5 day time line for replies to oppositions.

Thank you for considering my remarks.

Steven C. Smith
Administrative Law Judge
CBN 80684
Personal Cellular: 1.503.544.2220

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From: David Cameron Carr [dccarr@ethics-lawyer.com]
Sent: Tuesday, July 28, 2009 10:33 AM
To: Berrio, Itzel
Subject: Comment Re: Rule 105 Proposal

The Association of Discipline Defense Counsel (“ADDC”) wishes to comment on proposed Rule 105 of the Rules of Procedure.

ADDC was instrumental in proposing a modification to Rule 105 that would allow litigants in State Bar Court proceedings the opportunity to respond to opposition briefs and to evidentiary objections associated with pre-trial motions. ADDC met with representatives of the Office of Chief Trial Counsel to discuss ADDC’s proposed rule.

ADDC is pleased that the OCTC decided to submit a proposed rule change, but is concerned that OCTC’s proposal unnecessarily truncates the time allowed to file opposing and reply briefs and fails to address the lack of a rule governing the right of a litigant to respond to evidentiary objections. Reducing the time to oppose a motion to only seven days, and allowing only three days to reply, is not reasonable and will unnecessarily burden both line prosecutors at the OCTC and legal counsel representing respondents in such proceedings. The reduced briefing time raises the risk of inadequate and incomplete briefing of legal issues important to the proceedings, and could be subject to improper manipulation. Because the briefing schedule associated with these types of pre-trial matters will have no impact on the length of State Bar proceedings, there is no reason to reduce from ten days to only seven days the time to oppose a motion and to allow just three days to file a reply brief.

Both OCTC prosecutors and Respondents’ counsel can and do serve pleadings and motions by hand. Depending on the date of service, oppositions could be due in only five business days and replies due in only one business day. This is insufficient time to research the relevant law, review pertinent documents, submit any necessary documentary or testimonial evidence by way of declaration, and prepare a brief. Both OCTC prosecutors and respondents’ counsel have heavy case loads, and it can be expected that such shortened response timelines will have a detrimental impact on the quality of the briefing and the fairness of the proceedings, and will not be as effective in assisting the Hearing Department in deciding motions on their merits.

ADDC wishes to point out that during its consultations with OCTC regarding ADDC’s proposed revisions to Rule 105, OCTC never proposed the seven and three day briefing schedules it has presented to the State Bar Board of Governors. As a consequence, this aspect of the proposed Rule change was never vetted or discussed with practitioners, and the rationale behind the shortened briefing schedule was never subject to examination or testing. Had this aspect of the proposal been subject to examination, we believe that the existing 10 day time period for opposing motions would have been retained and the proposed 5 day period for filing of reply briefs adopted, since there is no persuasive rationale for compressing the briefing schedule as proposed in the current draft of revised Rule 105.

OCTC has also not articulated to ADDC or to the public why its proposed version of Rule 105 does not address the lack of a procedural rule for opposing objections to evidence submitted on a motion. It is a fundamental tenant of due process that a party be allowed to respond to objections to evidence they have submitted in support of a motion. We are not aware of any court system in California, or elsewhere, that employs legal rules of evidence yet prohibits a party from responding to an opponent’s legal objections to such evidence. By failing to allow a proponent of evidence the opportunity to respond to objections by presenting the court with reasons

why the evidence is legally admissible, the adjudicative system is undermined and the risk of erroneous evidentiary rulings is significantly compounded.

OCTC has suggested that a shortened briefing schedule is consistent with streamlining and reducing the length of State Bar proceedings. However, adjusting the briefing schedule on pre-trial motions as proposed by OCTC will have no impact on the length of State Bar proceedings. It will not lengthen such proceedings, because the rule governs pre-trial motions. By definition, these motions are heard before trial. The briefing schedule applicable to such motions will have no discernable impact on the length of State Bar investigations or formal proceedings. Other factors have substantially more impact on the length of proceedings, including the time the State Bar takes to investigate a matter, the State Bar's decision to prosecute rather than settle many cases, the complexity of the underlying case, and the date and length of the trial.

If anything, improving the quality of pre-trial motion practice would *reduce* the length of State Bar proceedings by addressing and resolving, in advance of trial, key legal points that will otherwise result in the consumption of time at trial and could, if incorrectly resolved, spawn a lengthy appeal. For this reason, litigants in State Bar court must be given reasonable time to prepare briefs in opposition to pre-trial motions, to reply to such motions, and to address evidentiary objections

The right of a party to reply to an opposition to a motion, and to present their position regarding the admissibility of evidence that has been challenged by the opposite party in the litigation, are fundamental characteristics of a fair procedural system. ADDC encourages the Board of Governors to adopt the amendments of Rule 105 that were proposed by ADDC. More specifically, we recommend that Rule 105 be modified by maintaining the existing 10 day period to oppose a motion, and by adding a five day reply period and allowing a proponent of evidence to respond in writing to objections to the admissibility of such evidence. All lawyers experienced with litigation recognize that these are inherent elements of fair procedural system that is consistent with due process requirements.

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