

AGENDA ITEM

MAR 111

DATE: February 16, 2012

TO: Members, Board Committee on Operations
Members, Board of Trustees

FROM: Starr Babcock, General Counsel
Lawrence Yee, Chief Assistant General Counsel
Mary Yen, Assistant General Counsel

SUBJECT: State Bar Rules, Editorial Revisions - Recommendation of Adoption, Public Comment Is Not Required

EXECUTIVE SUMMARY

This agenda item recommends amendments to nine State Bar Rules in Titles 1, 2, and 3 in order to correct clerical errors; clarify grammar; update references or citations; or make similar editorial changes. No public comment is required.

If adopted by the Board, the amendments become effective immediately, with the exception of the amendments to the Law Corporations rules and Limited Liability Partnership rules identified in this agenda item. By statute, rules for law corporations and limited liability partnerships must be approved by the Supreme Court before they are effective.

Board members with any comments or questions may contact Mary Yen at (415) 538-2369 or mary.yen@calbar.ca.gov.

BACKGROUND

In the State Bar's public comment Rule 1.10, subdivision (B) states, in relevant part, that "(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 ...". Subdivision (D) states that "(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."

This agenda item recommends amendments to nine State Bar Rules in order to correct clerical errors; clarify grammar; update or delete references or citations; and make similar editorial changes. All of these changes fall within Rule 1.10(B) and do not require public comment.

The amendments become effective on the date of Board adoption, with the exception of the amendments to the Law Corporations rules and the Limited Liability Partnership rules identified in this agenda item. Amendments to rules for law corporations and limited liability partnerships must receive final approval by the Supreme Court before they are effective. (Business and Professions Code section 6171 [law corporations] and section 6174 [limited liability partnerships].)

ISSUE

Whether to adopt the amendments to the State Bar rules identified in this agenda item.

DISCUSSION

In 2005, the State Bar began a comprehensive project to revise, simplify and consolidate over two dozen sets of rules into a single structure called the Rules of the State Bar. The State Bar Rules consist of seven Titles followed by the Rules of Professional Conduct and Appendixes. As rules for various programs are revised and adopted by the Board, they are placed in a Title. To date, revised rules for Titles 1, 2, 4, 6 and 7 have been completed and Title 3 and 5 have been adopted in part.

The first sets of editorial changes in the State Bar Rules were adopted by the Board in November 2011. The Board adopted editorial changes resulting from the governance changes mandated in Senate Bill 163 (Stats. 2011, ch. 417). Separately, organizational changes for Title 3 [Programs and Services] were also approved.

This agenda item recommends editorial changes for nine rules located in Title 1 [Global Provisions], Title 2 [Rights and Responsibilities of members], and Title 3 [Programs and Services]. Many of the changes will update or delete citations in footnotes. In Title 1 [Global Provisions], a construction rule dealing with citations is applicable to all State Bar Rules. Rule 1.20(K) says “If a rule cites the authority for the rule, the citation is part of the rule.”

The nine rules and changes are discussed below. Additions are underlined and deletions are in strike out. For ease of readability, footnote citations in the rule are set forth in brackets.

1) Rule 1.5(B) [Contents of the State Bar Rules]

In July 2007, inconsistent descriptions of the name of Title 2 were inadvertently adopted. Title 2 is called “Rights and Responsibilities of Members.” Rule 1.5(B), however, describes Title 2 as “Membership Rights and Responsibilities.”

Accordingly, in Rule 1.5(B) the description of Title 2 should be changed to “Rights and Responsibilities of Members.”

2) Rule 2.16(G) [Fee Waivers]

Rule 2.16 is a discretionary rule for fee waivers. Subdivision (G) of Rule 2.16 authorizes fee waiver for a member who is an emeritus attorney. In 2008, however, the emeritus attorney program was changed to a pro bono practice program. Rule 2.16(G) should be updated to authorize fee waiver for an attorney who is enrolled in the Pro Bono Practice Program and to add a footnote citation to the rules for the program, State Bar Rules 3.325-3.330.

Rule 2.16(G) should be amended as follows: “(G) Annual membership fees may be waived for a member who is ~~an emeritus attorney~~ enrolled in the Pro Bono Practice Program. [footnote cites See Rules 3.325-3.330]”

3) Rule 3.158 [Law Corporations, Proof of Security]

Rule 3.158 concerns the form of security for claims for errors and omissions that a law corporation must provide to the State Bar. Rule 3.158(A) has couple of minor grammatical errors. It also grandfathered an exception under former Rule IV.B of the old Law Corporations Rules for approximately 60 law corporations that registered with the State Bar before October 27, 1971. (See Board Agendas 2010, [MARCH 153](#), p. 5; Board Agendas 2009, November 13, 2009, [MIRS III.B](#), pp. 4-5.) When old Rule IV.B was being revised as part of the new State Bar Rules, this historical exception was explained in a footnote to Rule 3.158, which stated: “Law corporations incorporated before October 27, 1971 that have elected to provide security by insurance must provide as a guarantee a certificate of insurance issued by the insurer.” The footnote was subsequently deleted in a later amendment to Rule 3.158(A)(3).

Corrections to grammar and to provide for the historical exception in the rule are shown below:

Rule 3.158 Security

(A) Each law corporation must provide the State Bar with proof of security for claims for errors and omissions of the corporation or any person who practices law on behalf of the corporation, on its behalf as an employee or otherwise. The law corporation must provide proof of security with its Application to Register as a Law Corporation and provide new proof of security when that last provided is no longer current. Proof of security must be provided as indicated below.

(1) All law corporations, except as otherwise provided in this rule, must provide as a Law Corporation Guarantee providing that the shareholders jointly and severally agree to pay all claims established against the law corporation for errors and omissions arising out of the rendering of professional services. The guarantee must name each shareholder and be executed by each. [footnote 1 cites Business & Professions Code § 6171(b)]

(2) A nonprofit public benefit corporation [footnote 2 cites Corporations Code § 13406(b)] must provide a certificate of annual insurance.

(3) Law corporations incorporated and registered with the State Bar before October 27, 1971, and that have elected to provide security by insurance, must provide a certificate of insurance.

4) Rule 3.159 [Law Corporations Program, Voluntary termination of registration]

In Rule 3.159, the first sentence is missing a “the”, which should be added in the first sentence, as follows: “A law corporation may by resolution request that the State Bar terminate its registration.”

5) Rule 3.170 [Limited Liability Partnerships Program, Scope]

Two statutes dealing with limited liability partnerships were added to the State Bar Act in 2010. In Rule 3.170, a new footnote should be added with a citation to the new statutes, Business and Professions Code sections 6174 and 6174.5, as authority for the rules of the limited liability partnership program.

The new footnote should be added in Rule 3.170 at the end of the following sentence: “These rules apply to California limited liability partnerships issued a certificate of registration by the State Bar in accordance with these rules. [footnote cites Business and Professions Code sections 6174-6174.5]”

6) Rule 3.172 [Application for Certification as a Limited Liability Partnership]

Business and Professions Code section 6174.5 provides that an applicant for registration must file with the State Bar a form stating that the limited liability partnership has complied with the security requirements described in Corporations Code section 16956. This statute was added in 2010.

In Rule 3.172(A)(2), a new footnote should be added with a citation to Business and Professions Code section 6174.5 as authority for the rule, as follows: “(A) To apply to be certified as a limited liability partnership an applicant must ...(2) submit on a separate State Bar form a statement that the limited liability partnership has complied with an security requirement prescribed by statute [footnote cites Business and Professions Code section 6174.5] and these rules;”.

7) Rule 3.179 [Involuntary Termination of Certification of a Limited Liability Partnership]

A footnote in Rule 3.179 cites two authorities, Rule of Court 9.13(d) and Business and Professions Code section 6170. The citation to Business and Professions Code section 6170 is incorrect since that statute deals with judicial review of a State Bar action

concerning registration of law corporations. It appears that the statutory citation may have been inadvertently transferred over from the comparable provision in the law corporations rule on involuntary termination of registration.

In Rule 3.179(C), the footnote citation should delete the second authority, as follows: “The partnership may request Supreme Court review of any termination. [footnote cites Rule of Court 9.13(d). ~~And see Business & Professions Code § 6170.~~]”

8) Rule 3.242(A) [Lawyer Assistance Program]

Rule 3.242(A) provides that the committee overseeing the Lawyer Assistance Program “is to meet regularly at locations within California. Special meetings may be called by the chair or vice chair and must be held at the State Bar offices in San Francisco or Los Angeles. Meetings must comply with State Bar requirements.” A footnote cross-references to State Bar Rules 6.60-6.63, four meeting rules that apply to all State Bar committees. Actually, six meeting rules should be referenced, Rules 6.60-6.65.

Accordingly, the citation in the footnote in Rule 3.242(A) should be amended to refer to State Bar Rules 6.60-6.65.

9) Rule 3.420(A) [Client Security Fund]

Rule 3.420(A) has two footnotes. Footnote 2 incorrectly cites to Business and Professions Code section 6125, which provides that “No person shall practice law in California unless the person is an active member of the State Bar.” The citation to section 6125 is not relevant to Rule 3.420(A) and it invites a strained—if not erroneous—interpretation of the provision.

In Rule 3.420(A), footnote 2 and its citation to Business and Professions Code section 6125 should be deleted as set forth below in brackets with a strikeout:

Pursuant to statute the Board of Trustees of the State Bar of California has established a Client Security Fund (“Fund”) that may reimburse individuals who have suffered a loss of money or property because of the dishonest conduct of an attorney [footnote 1 cites Business and Professions Code § 6140.5]. For the purposes of these rules, an attorney is a current or former member of the State Bar of California, ~~[footnote 2 cites Business and Professions Code § 6125]~~ a Foreign Legal Consultant registered with the State Bar, or an attorney registered with the State Bar under the Multijurisdictional Practice Program.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

In Title 1, Division 1, Rule 1.5(B), change the description of Title 2 to “Rights and Responsibilities of Members;”

In Title 2, Division 2, Rule 2.16(G), change the wording from “an emeritus attorney.” to “enrolled in the Pro Bono Practice Program. [footnote cites See Rules 3.325-3.330]”

In Title 3, Division 2, Chapter 5, Rule 3.242(A), change the citation in footnote 2 to “See State Bar Rules 6.60-6.65”; and

In Title 3, Division 4, Chapter 1, Rule 3.420(A), delete footnote 2 and its citation to Business and Professions Code section 6125.

The following rule amendments are subject to approval by the California Supreme Court:

In Title 3, Division 2, Chapter 3, Rule 3.158(A), make editorial changes in grammar and change the description of the historical exception, as shown on Attachment B.

In Title 3, Division 2, Chapter 3, Rule 3.159, in the first sentence add “the” before “State Bar”.

In Title 3, Division 2, Chapter 4, Rule 3.170, add a footnote citation to Business and Professions Code sections 6174 - 6174.5, as shown on Attachment B.

In Title 3, Division 2, Chapter 4, Rule 3.172, add a footnote citation to Business and Professions Code section 6174.5, as shown on Attachment B.

In Title 3, Division 2, Chapter 4, Rule 3.179, in the footnote delete the citation to Business and Professions Code section 6170.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

It is recommended that the board committee and the Board concur with the proposed changes to the Rules of the State Bar.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee on Operations agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that no public comment being required, the Board Committee on Operations recommends that the Board of Trustees adopt the editorial changes to State Bar Rule 1.5(B); Rule 2.16(G); Rule 3.242(A); and Rule 2.420(A) in the form attached, effective immediately; and

FURTHER RESOLVED that no public comment being required, the Board Committee on Operations recommends that the Board of Trustees adopt the editorial changes to State Bar Rule 3.158(A); Rule 3.159; Rule 3.170; Rule 3.172; and Rule 3.179 in the form attached, and instruct staff to transmit the rules to the California Supreme Court for consideration and final action.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Board Committee on Operations's recommendation, the following resolutions would be in order:

RESOLVED, that no public comment being required and upon the recommendation of the Board Committee on Operations, the Board hereby adopts the editorial changes to State Bar Rule 1.5(B); Rule 2.16(G); Rule 3.242(A); and Rule 2.420(A) in the form attached, effective immediately; and

FURTHER RESOLVED that, no public comment being required and upon recommendation of the Board Committee on Operations, the Board of Trustees hereby adopts the editorial changes to State Bar Rule 3.158(A); Rule 3.159; Rule 3.170; Rule 3.172; and Rule 3.179 in the form attached, and instructs staff to transmit the rules to the California Supreme Court for consideration and final action.

Attachment A: Rule 1.5(B); Rule 2.16(G), Rule 242(A); and Rule 2.420(A) with proposed changes in legislative style;

Attachment B: Rule 3.158, Rule 3.159, Rule 3.170, Rule 3.172; and Rule 3.179 with proposed changes in legislative style