

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

STAFF REPORT

TELEPHONIC BOARD MEETING

January 4, 2022

SUBJECT:

Alcoholic Beverage Control Appeals Board ("Board") Proposed Regulations

BACKGROUND:

At the Board's hearing on April 9, 2021, the Board voted to approve proposed regulations adding, amending, or revoking rules 176-178, 181.1, 183-184, 187-190, 193-197.1, 198-199. The Board filed its proposed regulations with the Office of Administrative Law ("OAL") and published its Notice of Proposed Rulemaking on June 25, 2021. The 45-day public comment period allowed interested persons to submit written comments to the Board on or before August 10, 2021. Initially, the Board did not schedule a public hearing. However, a public hearing was held on July 29, 2021 after one was requested. The Board received one oral comment at the July 29th hearing and one written comment prior to the August 10th deadline.

At the Board's public hearing on September 3, 2021, the Board determined that neither of the comments received were responsive or relevant to the Board's proposed rulemaking. On that basis, the Board determined that no changes to the proposed regulations were needed and voted to submit the proposed rulemaking file to OAL for review, and ultimately, publication.

After its review, an OAL staff attorney contacted the Board to discuss the proposed rulemaking package. Several additional revisions were discussed to sections 177, 178, 181.1, 194, 195, 196, 197, 197.1, 198, and 199. These changes are reflected in the attached Text of Modified Proposed ABCAB regulations.

ANALYSIS:

Almost all of the modifications to the proposed rules are minor and nonsubstantive in nature, such as grammatical corrections and syntax. However, a few of the modifications are substantive, and will require notice to the public, and a further opportunity for comment. One such substantive section is proposed rule 194(a), which adds a minimum font size for typed briefs. This is necessary to ensure that parties do not try to artificially make the font smaller to circumvent the page length requirements stated in section 194(b).

Another substantive change is to section 196(b), which states that failure to timely request oral argument "shall" result in submission of the appeal on the pleadings. The prior draft used "may" instead of "shall." This change is necessary to give the Board

and parties a clear standard to follow for a party's failure to timely request oral argument. Another addition to section 196(b) allows a party to request continuance of the hearing, even if they did not timely request oral argument. This change is necessary to allow a party to continue a hearing, and request oral argument, if circumstances change (and upon a showing of good cause).

Modification was also made to section 197(a)(1) to specify that all appellants and all respondents, collectively, will each have 15 minutes for oral argument. This change is necessary to ensure that appeals with numerous parties will be limited to a maximum 30 minutes of oral argument, which is the same standard for appeals with a single appellant and a single respondent. Without this modification, each party would have 15 minutes for oral argument, and in cases where there are numerous appellants and respondents, oral argument could last for several hours and strain the Board's time and resources.

Further change is made to section 197(a)(2) to state that "only one person for a party shall be heard." This change is necessary to ensure that oral argument proceeds in an organized and time-efficient manner but allows for each party to be represented and not grouped together by a single speaker for an entire side. Section 197(b) has been modified to grant additional time for oral argument upon a showing of good cause. This change is necessary to allow oral argument to exceed the proscribed time limits in the proper circumstances.

Finally, proposed rule 198(b) has been modified to remove "or the exclusion of evidence" as an invalid ground for remand. This is necessary to conform with existing statutory authority and to remove confusion as the exclusion of evidence may be a valid ground for remand.

ATTACHMENTS:

Text of Modified Proposed ABCAB regulations

STAFF RECOMMENDATION:

Approve the text of modified proposed ABCAB regulations and initiate 15-day public comment period.

STAFF CONTACT:

Sean D. O'Dowd, Attorney III
ABCAB
(916) 203-1913

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
TEXT OF MODIFIED PROPOSED REGULATIONS
January 4, 2022

4 CCR § 176

§ 176. Location of Offices. [Repealed]

(a) Any reference to the Board's "principal office" means the Board's physical mailing address as listed at abcab.ca.gov.

(b) Any reference to the Department's "principal office" means the Department's headquarters and its physical mailing address as listed at abc.ca.gov.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23050 and 23075, Business and Professions Code.

4 CCR § 177

§ 177. ~~Tenses, Gender, and Number.~~ [Repealed]

For purposes of these rules and regulations, any reference to gender shall extend to all genders and any reference to the singular number shall extend to and include the plural number also.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: ~~Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution Sections 23081 and 23083, Business and Professions Code.~~

4 CCR § 178

§ 178. Definitions.

For the purpose of these rules and regulations:

(a) "Board" means Alcoholic Beverage Control Appeals Board.

(b) "Department" means Department of Alcoholic Beverage Control.

(c) ~~Unless the context otherwise requires, the words "appellant" or "party," include the attorney or other authorized agent of such person.~~ "Appellant" means any person or entity who files an appeal with the Board.

(d) ~~"Party" includes the Department, the appellant and any person, other than an officer or an employee of the Department in his official capacity, who has been allowed to appear in the proceeding before the Department.~~ "Respondent" means any person or entity who responds to an appeal filed with the Board.

(e) "Party" includes the Department, appellant(s), and respondent(s).

(f) "Person or entity" includes the attorney or authorized agent of a party.

(g) "Day" refers to a calendar day, unless otherwise stated.

(h) "File" or "filed" refers to when a document is received by the Board, except when a document is mailed to the Board via registered or certified mail, in which case, the document is deemed "filed" on the date of registry or certification with the United States Post Office.

(i) "Section" or "subsection" refers to the rules and regulations contained in Title 4, Division 1.1 of the California Code of Regulations, unless otherwise specified.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23077 and 23081, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 181

§ 181. ~~Administration.~~ Proof of Service.

(a) A proof of service shall be attached to any documents filed or served under sections 175 through 200.1.

(b) A proof of service shall include all of the following:

(1) The address where the document was served;

(2) the date of service;

(3) the manner of service;

(4) a statement that the person making service is over the age of 18 years, and;

(5) signature of the person making service, under penalty of perjury.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23081.5, Business and Professions Code.

4 CCR § 181.1

§ 181.1 Manner of Service.

(a) A party may serve a document to the Board using any of the following means of service:

(1) in-person service, or;

(2) service by mail ~~(regular or certified)~~.

(b) A party may serve a document to the Department or other party using any of the following means of service:

(1) in-person service, or;

(2) service by mail ~~(regular or certified)~~.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081, 23081.5, and 23088, Business and Professions Code.

4 CCR § 183

§ 183. Form of Appeal [Repealed] Notice of Appeal.

Any person or entity aggrieved by the decision of the Department as defined in Business and Professions Code section 23080 may appeal the Department's decision to the Board as follows:

(a) The appellant shall file a Notice of Appeal with the Board in accordance with Business and Professions Code section 23081.5.

(b) The appellant must file the Notice of Appeal with the Board on or before the tenth day after the last day on which reconsideration of the underlying decision of the Department can be requested pursuant to Government Code section 11521(a).

(c) An appellant shall also serve a copy of the Notice of Appeal upon all parties, including the Department at its principal office.

(d) Failure to comply with the provisions in this section shall result in dismissal of the appeal pursuant to section 199.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23084, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 184

§ 184. Contents of Notice of Appeal.

~~(a) The Notice of Appeal shall be signed by the appellant or his its authorized agent. The Notice of Appeal should state the general grounds for appeal and the specific questions to be considered by the Board on review. The original and three copies of the Notice of Appeal shall be filed with the Board and a copy shall also be served upon all parties to the proceeding before the Department, including the Department at its principal office. Proof of service shall be filed with the original Notice of Appeal.~~

~~(b) The Notice of Appeal should state the general grounds for appeal (see Business and Professions Code Section 23084) and the specific questions to be considered by the Board on review. The original and three copies of the Notice of Appeal shall be filed with the Board and a copy shall also be served upon all parties to the proceeding before the Department, including the Department at its principal office. Such service shall be made by delivering or mailing a copy of the Notice of Appeal to each party. Proof of service shall be filed with the original Notice of Appeal.~~

~~(c) The Notice of Appeal should be typewritten or printed upon paper 8 1/2 x 11 inches in size and be double spaced.~~

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23084, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 187

§ 187. ~~Filing Record. Preparation, Payment, and Filing of the Record of Appeal.~~

~~(a) Upon the filing of the Notice of Appeal, the Department shall calculate the estimated cost of the record of appeal, notify appellant thereof, and demand payment. When a Notice of Appeal has been filed with the Board, the Board shall request the Department to furnish appellant an itemized statement of the estimated cost of the record on appeal in accordance with the fee schedule provided in Section 69950 of the Government Code.~~

~~(b) Appellant shall make payment to the Department within fifteen days after the date of the Department's demand for payment.~~

~~(c) Cost of the record of appeal shall include the filing of an original and three copies of the reporter's transcript and file transcript, accompanied by the original exhibits, with the Board preparation and filing of the record of appeal with the Board.~~

~~(d) Such statement of costs shall also include the cost of preparing and delivering to appellant serving a copy of the reporter's transcript, exhibits and file transcript record of appeal on appellant, should any or all it be requested by appellant.~~

~~(e) In those instances, however, wWhere the Department has previously ordered an original copy of the reporter's transcript because of action taken by it pursuant to Government Code Section 11517(c), the appellant need only pay the fee for a first copy of the reporter's transcript, plus the fee for each additional copy, as provided by Section 69950, for the record on appeal furnished to the Board and appellant.~~

~~(f) Upon receipt of payment from appellant, the Department shall forthwith immediately arrange for the preparation of the record on appeal and file it with the Board.~~

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 188

§ 188. Contents of Record.

The record on appeal filed with the Board shall consist of:

~~(1)~~(a) The Department's file transcript, which shall include:

- (1) all notices and orders issued by the administrative law judge and the Department, including any proposed decision by an administrative law judge and the final decision issued by the Department;
- (2) pleadings ~~and correspondence by a~~ filed by any party;
- (3) any filed notices, orders, or pleadings ~~and correspondence~~ pertaining to reconsideration;

~~(2)~~(b) the hearing reporter's transcript of all proceedings;

~~(3)~~(c) exhibits admitted or rejected.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 189

§ 189. Documents Filed with Board.

~~In addition to the Notice of Appeal and the record on appeal, other documents which may be legally filed with and received by the Board in connection with the appeal, shall also become part of the record.~~

~~Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23083 and 23085, Business and Professions Code; and Article XX, Section 22, California Constitution.~~

4 CCR § 190

~~§ 190. Cost of Record and Payment Therefor.~~

~~The Department shall calculate the cost of the record on appeal as provided by Section 187, shall notify appellant thereof, and demand payment. Payment shall be made by appellant to the Department within fifteen days after the date of issuance of such demand.~~

~~Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; Section 69950, Government Code; and Article XX, Section 22, California Constitution.~~

4 CCR § 193

§ 193. Filing of Briefs ~~by Parties.~~

(a) Appellant may file an opening brief, respondent may file a reply brief, and appellant may thereafter file a closing brief.

~~(a) Form and Filing of Briefs. Briefs shall be typewritten or printed upon paper 8 1/2 x 11 inches in size. Reproduction thereof may be by any process, provided all copies are clear and permanently legible. Only one side of the paper shall be used, unless printed, and the margins shall not be less than one inch on all sides of the page. The lines shall be double spaced. Headings shall be capitalized. An original and three copies of all briefs shall be filed with the Board. The original of each brief shall contain a certification that copies have been served upon or mailed to each party, his attorney or agent, as well as the Department, and the Attorney General's office.~~

~~(b) Time for Service and Filing. The opening brief shall be served and filed with the Board and served on all parties to the appeal within fifteen30 days after of the date on the notice issued by the Board stating thatthe record on appeal has beenis filed with the Board. The reply brief shall be served and filed with the Board and served on all parties within fifteen20 days after the filing date of the opening brief with the Board is served. ~~The~~Any closing brief shall be served and filed with the Board and served on all parties within fiveseven days after the filing date of the reply brief with the Board is served. An extension of time within which to file a brief will be granted only upon a showing of good cause. A proof of service shall be included with each brief indicating the date it was served.~~

(c) A party to the appeal may request an extension of time to file a brief. Any objections to an extension request may be filed with the Board within three days of the request. The extension request will be decided by the Board, or its executive director if so authorized, without hearing and will be granted only upon a showing of good cause.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 194

§ 194. ~~Briefs by Other Interested Persons.~~~~[Repealed]~~ Requirements for Briefs.

(a) All briefs shall be double-spaced on paper 8 1/2 x 11 inches in size. Only one side of the paper shall be used, and the margins shall be at least one inch on all sides of the page. Headings shall be capitalized, in bold, or underlined. If typed, a minimum of size 12 font shall be used.

(b) Briefs shall comply with the following length restrictions:

(1) Opening briefs shall be no more than 20 pages in length.

(2) Reply briefs shall be no more than 15 pages in length.

(3) Closing briefs shall be no more than 10 pages in length.

(c) The page limitations set forth in subsection (b) do not include exhibits, appendices, tables of contents, or cover or title pages.

(d) Any party to the appeal may request a waiver of the page length restrictions in subsection (b). The waiver request will be decided by the Board, or its executive director if so authorized, without hearing and will only be granted upon a showing of good cause.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 § CCR 195

§ 195. Motions.

~~The provisions of Section 193(a) as to form and filing of briefs shall apply to a motion filed with the Board. Any showing in opposition to the motion of a party shall be served and filed within ten days after the date on the notice by the Board providing therefor. The Board may place any motion on the calendar for hearing or the Board may otherwise dispose of the motion.~~

(a) A party may file a motion with the Board as follows:

(1) A motion shall follow the same formatting requirements for briefs set forth in section 194(a).

(2) A motion shall be no more than 10 pages in length unless accompanied by a declaration showing good cause for additional pages, but in no case shall be more than 15 pages in length.

(3) A motion filed ~~to~~with the Board shall include proof of service that the motion was served on all parties to the appeal.

(b) Any party opposing a motion may file a written opposition with the Board within seven days of service of the initial motion. The opposition shall follow the same requirements described in subsections (a)(1) through (3).

(c) The Board may place any motion on the calendar for a hearing or may ~~otherwise~~ elect to rule on the motion without oral argument.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 196

§ 196. Hearing.

(a) After the Record of Appeal is filed with the Board, the Board shall set a hearing date and time, and serve notice to all parties.

(b) Any party wishing to present oral argument before the Board shall notify the Board and all parties in writing at least 21 days before the scheduled hearing date. Failure to timely request oral argument may result in submission of the appeal on the pleadings. However, failure to timely request oral argument does not preclude a party from seeking a continuance of the hearing in accordance with subsections (d) and (e).

(c) Notwithstanding subsection (b), the Board may direct for oral argument to be conducted on the appeal even if no party requests it. If oral argument is directed by the Board, a separate notice shall be sent by the Board to all parties.

(d) A party seeking a continuance of the hearing shall first attempt to stipulate to an alternative hearing date with all other parties to the appeal, and then make a request to the Board to reschedule. If any other party will not stipulate to continuance, the requesting party can submit a request to the Board to continue the hearing. A party may object to the continuance request within five days of such request.

(e) Requests by any party for a continuance of oral argument may be granted by the Board, or its executive director if so authorized, without a hearing and upon a showing of good cause.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081 and 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 197

§ 197. Oral Argument.

(a) In the event oral argument is requested or ordered:

~~(a) Unless otherwise ordered by the Board: (1) A party. Each side. The appellants, collectively, and respondents, collectively, shall each be allowed a maximum of 30~~15 minutes for oral argument;

~~(2) not more than~~only one person ~~on a side for a party need~~may ~~shall~~ be heard;

~~(3) the appellant, or moving party, shall have the right to open and close; however, both statements shall count towards the 15-minute total limit;~~

~~(4) No evidence, other than what is contained in the administrative record, shall be referenced by any party.~~

~~(b) Continuances. Requests for continuances of oral argument will~~Additional time for oral argument shall be granted upon a showing of good cause.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23083, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 197.1

§ 197.1. Quorum.

(a) The Board may decide an appeal so long as there is a quorum of at least two members present for:

(1) oral argument and deliberation in closed session, or;

(2) deliberation in closed session where an appeal has been submitted on the pleadings.

(b) In the event there are three members appointed to the Board, and a two-member quorum cannot reach a unanimous decision, oral argument and deliberation in closed session will be continued ~~for~~ to a time when the third member can be present.

(c) In the event there are only two members appointed to the Board, and the Board cannot reach a unanimous decision, the Department's decision shall stand.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Section 23077, Business and Professions Code; Article XX, Section 22, California Constitution; Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, 1176 [56 Cal.Rptr.2d 223]; Lopez v. Imperial County Sheriff's Office (2008) 165 Cal.App.4th 1, 4 [80 Cal.Rptr.3d 557, 559].

4 CCR § 198

§ 198. ~~Nature of New Evidence and Showing.~~

(a) When the Board is requested to remand the case to the Department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the Department, the party making such request must, in the form of a declaration or affidavit, set forth:

(1) The substance of the newly-discovered evidence;

(2) Its relevancy and that part of the record to which it pertains;

(3) Names of witnesses to be produced and their expected testimony;

(4) Nature of any exhibits to be introduced;

(5) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the Department.

(b) Merely cumulative evidence ~~or the exclusion of evidence~~ shall not constitute a valid ground for remand.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23084 and 23085, Business and Professions Code; and Article XX, Section 22, California Constitution.

4 CCR § 199

§ 199. Dismissal of Appeal.

The Board ~~may~~ shall issue an order dismissing an appeal:

(a) Upon appellant filing a request to dismiss the appeal with the Board ~~with the Board a request to dismiss the appeal;~~

(b) Upon motion of a party, or ~~the Board itself~~ upon the Board's own notice to the parties, that appellant has failed to timely file the Notice of Appeal or pay for the record on appeal as set forth in sections 183 and 187 ~~perfect his appeal by failure to timely file same or to pay the amount specified pursuant to Sections 187 and 190 of these rules;~~

(c) Upon certification by the Department that reconsideration has been granted ~~in the case,~~ after the Notice of Appeal has been filed, and dismissal on this ground shall be without prejudice to the submission of a subsequent appeal in the same case; ~~said dismissal to be without prejudice to the filing of a subsequent appeal;~~
~~or~~

(d) Upon a motion by ~~the Department or other~~ any party, or upon the Board's own ~~motion~~ notice to the parties, where sufficient cause exists for dismissal. In such an instance, the Board's order shall set forth the sufficient cause for the dismissal;
or,

(e) Upon stipulation of the parties.

Note: Authority cited: Section 23077, Business and Professions Code; and Article XX, Section 22, California Constitution. Reference: Sections 23081, 23083 and 23087, Business and Professions Code; Section 11521, Government Code; and Article XX, Section 22, California Constitution.