

**DATE:** February 14, 2012

**TO:** Members, Member Oversight Committee

**FROM:** Mary Lavery Flynn, Director, Office of Legal Services  
Sharon Ngim, Program Developer, Office of Legal Services

**SUBJECT:** Pro Bono Practice Program: Discussion of Possible Modifications [\(Title 3, Division 2, Chapter 6 of the State Bar Rules and Regulations\)](#)

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### **EXECUTIVE SUMMARY**

Board Member Samson Elsbernd, the CYLA Representative, has requested that the requirements for participation in the Pro Bono Practice Program (PBPP) be re-examined to see if we could increase the number of younger lawyers who could qualify for the program. Because the Standing Committee on the Delivery of Legal Services (SCDLS) is already looking at possible modifications to the PBPP, Mr. Elsbernd's request was referred for preliminary discussion to the March MOC meeting. SCDLS will follow up and make recommendations to MOC in May. If proposed rule amendments are recommended, they could return as early as July after Public Comment.

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### **BACKGROUND**

The Pro Bono Practice Program (PBPP) waives the active State Bar membership fee for attorneys, who otherwise would be transitioning out of the profession, for the sole purpose of doing pro bono work with a qualified legal services provider (one who receives or is eligible to receive funds from the Legal Services Trust Fund Program or a no-fee panel of a State Bar certified lawyer referral service). In 2008, the PBPP was updated and expanded from the Emeritus Attorney Pro Bono Program for senior attorneys to also apply to younger "retirees". The intent was to capture the growing number of attorneys leaving the active practice of law within the first ten years of admittance who want to make a pro bono contribution. Specifically, rule 3.327 was amended to reduce the required number of years that a lawyer must be admitted to practice with no record of public discipline from ten to five (but retained the requirement for three of those years as a judge or practicing attorney in California). There are 35 jurisdictions, including California, that offer an emeritus attorney or pro bono practice rule. Though the rules vary from state-to-state, 19 jurisdictions require a specified number of years of practice and/or have an age requirement. [\(Source: ABA State Emeritus Pro Bono Practice Rules, April 4, 2011.\)](#)

Attorneys participating in the PBPP bring valuable legal experience from a wide range of practice areas and settings. They typically provide a level of service that is comparable to that of a paid staff attorney. Currently there are 80 PBPP attorneys placed at 30 different qualified legal services providers in California. More than half of the attorneys in the PBPP have been enrolled for more than five consecutive years.

## **DISCUSSION**

Mr. Elsbernd proposes reconsidering the requirements for participation in the Program to open the program up to more of the young lawyer population. A California young lawyer is defined as a member in good standing of the State Bar of California who is in his or her first five years of practice in California or who is age 36 or under.

Mr. Elsbernd correctly states that in this economy, more and more young lawyers seem unable to begin their legal careers or are ending the legal careers early. He feels they should not be excluded from the PBPP and that the five-year experience requirement should be reduced. The rule change in 2008 that reduced the years of experience from ten to five recognized the increasing number of younger attorneys leaving the profession, either on a permanent or temporary basis, and as a result opened the program up to more young lawyers. The five-year requirement reflects the State Bar's duty to the public to assure that attorneys offer competent services, especially when benefitting from a State Bar licensing fee waiver. This Program involves a lower level of supervision by the legal services program that is host to the Program participant than is expected of younger volunteers working with a Program either through their main pro bono program, or earlier, through the Practical Training of Law Students Program. (See the PTLs rules at: Title 3, Division 1, Chapter 1 of the State Bar Rules and Regulations.)

Both SCDLS and staff have concerns about lowering the experience requirement any further than the five-year requirement established in 2008. The PBPP is not intended to be a training program for young lawyers, but a program that reinvests the legal skills and experience of retired and non-practicing attorneys to serve the legal needs of low-income and other underrepresented individuals. Reports from the field indicate that training and supervising brand new attorneys take much more time than training and supervising attorneys with some legal experience, even if working outside their usual area of practice. The resources of legal services programs are stretched to the limit, and they lack the capacity to offer the level of training and supervision that would be required. In fact, many of the PBPP participants have been in a position to help train and supervise other legal aid attorneys, which has provided substantial assistance to the programs and their clients.

It also should be noted that there are many other opportunities for young lawyers to obtain training and gain legal experience with any number of organized pro bono programs throughout the state. A list of pro bono programs by county and legal areas can be found at [www.californiaprobono.org](http://www.californiaprobono.org).

Mr. Elsbernd has indicated that, alternative to this proposal, if the years of service for Program participants are not reduced, then perhaps the Board should consider requiring participating attorneys to provide pro bono service only in their area of practice. Most attorneys engaged in pro bono work do so outside of their area of legal practice, especially those from government, corporate, mid-size and large firm settings, because they do not have expertise in poverty law. This is the case for all pro bono attorneys regardless of their participation in the PBPP. Pro bono programs routinely offer free training and support in a variety of poverty law areas in exchange for a specific number of pro bono hours and/or cases. Without this widely accepted recruitment method, there would be a dearth of pro bono attorneys. If the first part of Mr. Elsbernd's request were to be implemented, staff projects that the pool of potential PBPP attorneys would drop dramatically.

## **NEXT STEPS**

SCDLS will follow up and make recommendations to MOC in May. If proposed rule amendments are recommended, they could return as early as July after Public Comment. Study may be necessary to determine whether some modifications might be appropriate to expand participation in the PBPP, but at the same time not to put undue burdens on already under-staffed legal services programs. The ultimate goal of any modifications is expanding the resources available to legal services programs and their clients by utilizing the legal skills and expertise of attorneys who would not otherwise be engaged in the active practice of law. SCDLS is well-positioned to work with staff to study the issue and report back to MOC at the May meeting.