

AGENDA ITEM

54-134 JUNE 2013

DATE: July 03, 2013

TO: Members, Member Oversight Committee

FROM: Gayle Murphy, Senior Director, Admissions
Natalie Leonard, Director, Legal Specialization

SUBJECT: State Bar Rules, Title 3, Division 2, Chapter 2, Legal Specialization;
Title 3, Division 5, Chapter 4, Legal Specialization Certification Entities;
Request for Public Comment

EXECUTIVE SUMMARY

The rules for State Bar programs have been undergoing revision since 2005. Revised rules are organized into a single structure called the Rules of the State Bar, following shared basic principles and using clear and simple language. While some program changes and updates are being recommended, the primary focus of the new version of the rules is to conform them to the improved format.

This agenda item requests a forty-five day period of public comment on proposed revisions to the rules governing the Legal Specialization program for certifying members and the program for certifying outside entities to certify legal specialists¹. The California Board of Legal Specialization has reviewed and provided input on the revisions. These rules are among the last of the State Bar's rules to be revised.

The revised rules are proposed for placement in the State Bar Rules as follows: Legal Specialization Programs in Title 3, Programs and Services, Division 2, Chapter 2; Legal Specialization Certification Entities in Title 3, Division 5, Chapter 4.

Board members with questions may contact:

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¹ The Legal Specialization program certifies specialists in eleven areas of law and works with authorizing entities to certify legal specialists in eleven additional areas of law.

BACKGROUND

The Rules of the State Bar provide one structure for more than two dozen sets of program rules that formerly had their own organizational scheme and stylistic conventions. In July 2007, the Board of Trustees adopted a new unified structure consisting of seven Titles:

- Title 1. Global provisions
- Title 2. Rights and responsibilities of members
- Title 3. Programs and services
- Title 4. Admissions and educational standards
- Title 5. Discipline
- Title 6. Governance
- Title 7. Miscellaneous provisions

Title 1 provides basic principles for all State Bar rules, including scope of the rules; the public comment rule; principles of construction and usage conventions; definition of common terms; and explanation of how to compute dates. All State Bar rules must be read in the context of the global provisions of Title 1, absent a provision to the contrary.

In addition to making organizational improvements, the rules revision project has aimed to simplify the language of the rules by following the current edition of the *California Style Manual* and Bryan A. Garner's *A Dictionary of Legal Usage* (3d ed. 2011) and his *Guidelines for Drafting and Editing Court Rules* (1996).²

ISSUE

Whether to authorize a forty-five day public comment period on the proposed revisions to the rules governing Legal Specialization (Attachment A) and Legal Specialization Certification Entities (Attachment B).

DISCUSSION

State Bar rule 1.10 (Public comment) requires public comment before State Bar rules can be adopted, amended, or repealed. The standard public comment period of forty-five days can be shortened to a minimum of thirty days or extended to a maximum of ninety days. Authorization for public comment implies no position on the proposals by any board committee or the Board of Trustees.

The proposed rules to be sent out for public comment are attached in footnote format, rather than redline format. Because the rules are recast into a new organization with simplified, clear language, a redlined legislative edit of the current rules would be virtually illegible and impossible to follow. In place of a legislative style edit of the current

² Mr. Garner's resumé includes experience as a consultant to the Judicial Council of California for the Rules of Court and to the federal Judicial Conference for the federal Rules of Practice and Procedure. Further information about Mr. Garner is available at <http://www.lawprose.org/>.

rules, footnotes appearing in italics are drafters notes used to explain a revision or to indicate the current rule that is the source of a revised rule. (See, e.g., footnote 40, which explains a revision in revised rule 3.513.) Italicized drafters' endnotes will not appear in the final revised rules.

Footnotes appearing in Roman type are proposed to be in the final revised rules. Roman type footnotes cite to governing authority for a rule, such as a governing Business and Professions Code statute, or cross-reference a related revised rule. Authority cited in a footnote is part of the rules, in accordance with global rule 1.20(K) (Construction): "If a rule cites the authority for the rule, the citation is part of the rule."

Rule of Court 9.35(b) provides that "the State Bar must establish and administer a program for certifying legal specialists and may establish a program for certifying entities that certify legal specialists under rules adopted by the Board of Governors of the State Bar." The proposed rules address both a program for certifying legal specialists, proposed at Title 3, Division 2, Chapter 2 and a program for authorizing outside entities to certify legal specialists, proposed at under Title 3, Division 5, Chapter 4.

Staff has discussed the proposed rules revisions with the California Board of Legal Specialization (CBLS) over a period of several years. This review included a CBLS rules committee that was charged with considering the proposed revisions and providing input. Several of the comments from the CBLS have been incorporated into the final version of the rules before the Board Committee today. During its June 2013 meeting, the CBLS reviewed the nearly final version of the proposed revised rules and provided comments. Overall, the CBLS is supportive of the proposed changes, and the clarity and efficiency the revised rules will bring. The one area where a consensus was not reached, however, was with the proposed reorganization of the board to make it smaller by eliminating the advisory commission chairs as one-year members. A few of the advisory commission chairs voiced their concerns, saying that the input from the advisory commissions at the board level was critical and that the proposed change would limit the opportunity for meaningful communication between CBLS and the advisory commissions.

The principal proposed changes and their benefits are discussed below.

Principal Revisions to Legal Specialization Rules

Reorganization

The proposed changes intend to improve the logical flow of the legal specialization rules. The current rules can be complicated. For example, applications for certification are first discussed in the current rule 3.0 before the discussion of eligibility to apply for certification. The proposed organization places related topics in an order that is easier to follow, grouping topics under two headings. The first heading addresses governing boards and commissions.

The second heading addresses certified specialists, providing a prefatory summary and then proceeding in loosely chronological order as to how an applicant would apply and be evaluated.

Duplication between the legal specialization rules and other State Bar rules has been eliminated in areas relating to responsibilities of educational providers,³ resolution of conflicts of interests, and appeals to the State Bar court.

California Board of Legal Specialization

The proposed rules reduce the size of the California Board of Legal Specialization (CBLS) to twelve attorney members, up to two of whom need not be certified legal specialists, and three public members. Membership would no longer include the chairs of each of the advisory commissions to the CBLS. Members of the CBLS and the Commissions would serve four-year terms instead of three-year terms, with the option to request an extension of one year or more to serve as an officer.

These changes reflect recent past discussions and actions of the Board of Trustees regarding the composition and terms of State Bar committees and commissions. Among other things, those discussions suggested that a smaller board is more efficient and effective.

The current CBLS is composed of twenty-six members; consisting of nine attorney members and three public members, all of whom serve three-years terms; eleven chairs of advisory commissions to the CBLS who serve one-year terms; and three non-voting past chairs, who serve one-year terms.

The proposed changes remove the advisory commission chairs from board membership. Having advisory commission chairs as voting members can result in conflicts of interest. These proposed changes ensure that the CBLS is acting as a board dedicated to public protection and for the greater good of the legal specialization program as a whole. It also ensures that as the program grows, the advisers with one-year terms will not outnumber at-large members. This change also frees advisory commission chairs to focus on the work of the advisory commissions, which require many hours of volunteer service.

The proposed longer terms ensure a continuity of knowledge in special skill areas, such as the development and grading of examinations, and conform to the policies used for appointments to the Committee of Bar Examiners.

³ For example, the current legal specialization rules served as a model for the updated rules adopted for providers of continuing legal education. Therefore, it was possible to refer to those updated rules, rather than restate them within the proposed rules for legal specialization.

The possibility of appointing to the CBLS up to two attorneys who are not certified legal specialists provides the opportunity for participation by individuals with special relevant skills, such as law professors, or those who practices in an area of law that may be a potential area of certification.

Advisory Commissions to the CBLS

Advisory commissions are still proposed to consist of up to eight attorneys plus one public member, but one of the attorney members can now be a non-specialist in order to allow academic advisers or other non-specialists the opportunity to provide valuable expertise, if needed.

Education

The two principal changes in the proposed educational rules involve conforming the reporting cycle to the MCLE rules and encouraging mentorship of new certified specialists.

First, completion of legal specialist continuing education needed for certification or recertification would be reported when a member reports his/her compliance with general MCLE, rather than with the recertification application filed every five years. This creates a single reporting cycle for all required education as a convenience to certified specialists and would be much easier to manage and monitor. The overall level of specialist education required will not change.

Second, a certified specialist would be able to obtain MCLE and legal specialist education credit towards recertification through the mentoring of an applicant or prospective applicant for certification. The possibility of providing more mentoring opportunities for applicants by those considered experts in specialization areas was recently discussed and supported by the Board of Trustees. Interaction of this kind would also provide the opportunity for encouraging those who are recently admitted to the State Bar to become interested in applying for legal specialization certification in the future. MCLE and legal specialist educational credit for teaching or providing guidance to those just entering the practice of law also benefits the mentor, as it is often through mentoring that one enhances his or her own knowledge of a particular subject.

Fees and Deadlines

Current rule 20.0, Specialization fees, has eight subparts that use more than 500 words to describe a range of fees. In contrast, proposed rule 3.112 directs applicants and entities to the Schedule of Charges and Deadlines. This ensures that fees and deadlines can be found in a single location. There are no changes requested to the fees currently charged; therefore, public comment is not requested regarding the fees that will be transferred to the Schedule of Charges and Deadlines.

Examination

The timing of the examinations is removed from the rules to be set as a matter of administrative policy. The proposed rules also eliminate the Requirement of a Committee of Reappraisers in favor of more updated methods of grading that still allow for appropriate review. Finally, candidates who do not pass the examination will no longer be able to review their answers, in order to increase examination security, and permit the re-use of examination questions as may be appropriate.

References

Current rule 9.1 requires an applicant to submit the names of three attorneys or judges as references, and each of these references is asked “to submit the names of two additional references familiar with the applicant’s proficiency.” In addition, “[t]he Commission may seek additional references from other persons familiar with the tasks described in the individual standards.” Proposed rule 3.118 retains the three reference requirement, “unless the relevant standards require more,” and does not require the mandatory collection of secondary references, which can often be too distant to provide relevant facts for evaluation.

Although current rule 9.1 provides that “The references shall not include any attorney who is associated with the applicant, including clients, relatives, current partners, associates, employers or employees of the applicant,” the proposed rule removes this restriction so that those who are most familiar with an attorney’s work may provide comment. Relatively new attorneys or attorneys in transactional practices would thus not be precluded from naming the persons who might be best qualified to speak to the applicant’s qualifications. If such a relationship exists, the reference form can require that it be acknowledged so that the commission can consider it accordingly.

In addition, current rule 9.4 sets forth a process for a commission member’s investigation of a negative reference. The proposed rules detail no such process because such an investigation is an operational matter outside the scope of the rules.

Waiver and modification

As does current rule 12.7, proposed 3.119 exempts certified specialists from the annual fee and from recertification requirements during a period of judicial service. The current rule also allows the board to “toll a specialist’s certification for a period of up to three years when the specialist is unable to practice law for compelling medical or other reasons.” Proposed 3.119 allows the board to address exceptions flexibly by waiving or modifying a certification requirement in the rare instance when this is appropriate.

Commission action on application

The proposed rule on commission action on an application, 3.120, establishes a timeframe for timely notice of status to an applicant.

If two references are negative or the commission has a serious concern about proficiency, current 9.4 requires the commission chair to appoint a commission member to investigate. The proposed rules provide for no such investigation, since checking references and obtaining further information are routine staff work.

Board action on application

Like current provision 11.1.2, proposed 3.122, Board action on Application allows the option of a meeting with an applicant if there are concerns about the application. Like the proposed rule on commission processing of an application, the proposed rule on board action adds timeframes for action and notice. If the board grants certification, it notifies the applicant that certification begins on a specified date for a five-year period. There is no standard certification period in current 11.2, Duration of Certification. Adding a standard term offers specialists the benefit of being able to plan recertification compliance.

Recertification

Detailed current provisions for recertification essentially recapitulate, in about 900 words, the initial requirements for certification. Proposed 3.124(A), Recertification, simply states “To be recertified, a certified specialist must comply with the requirements of these rules and any relevant standards and pay an annual fee.” To the extent that recertification requirements differ from initial requirements, the differences are to be stated in the standards. This approach provides a standard core of requirements for each specialty and reduces the size of the rule by over 80%.

Suspension or revocation

In contrast to current 14.0, Suspension and revocation of certification, proposed rule 3.125 distinguishes the grounds for suspension, which is temporary, and revocation, which is final. In either case, the revised rule requires that the board notify a certified specialist of its intent to suspend or revoke certification and afford the specialist an opportunity to respond. If the specialist fails to respond to the notice on time, suspension or revocation is final. If the specialist does respond on time but the board decides to do anything other than to continue certification without conditions, the board must notify the specialist of the reasons for its decision. Although such a statement of reasons is not required by current 14.0, it has been provided in practice.

The current rules provide a detailed description of the nature and structure of an appeal in the State Bar Court. Proposed 3.126, Appeal of certification denial, suspension, or revocation, eliminates this procedural detail and simply says that “An applicant denied certification by the board or a certified specialist whose certification is suspended or revoked by the board may file a petition for hearing on the denial in the State Bar Court in accordance with the rules of the court” Replacing program-specific procedures with standard ones that achieve the same end reduces the original by about 90%.

Current provision 15.10 states that “An applicant and the Board may request review by the California Supreme Court of any State Bar action pursuant to rule 9.13(d) of the California Rules of Court only after final action by the State Bar Court.” Although the option of Supreme Court review may be available, the proposed rule does not cite it because State Bar rules do not include “Rules of the Supreme Court of California or California Rules of Court that apply to the State Bar, its members, services, or programs”⁴ and because, as a matter of policy, the objective of the State Bar is to resolve disputes regarding its programs and services whenever possible, rather than to flag the extraordinary possibility of Supreme Court review.

Providers of Legal Certification Programs

As noted above, Rule of Court 9.35(b) provides that “The State Bar must establish and administer a program for certifying legal specialists and may establish a program for certifying entities that certify legal specialists under rules adopted by the Board of Governors of the State Bar.” The State Bar has currently authorized the following entities to certify specialists in certain areas, and these entities pay a fee to the program in order to cover the cost of the oversight of the partnership: the American Board of Professional Liability Attorneys; the National Association of Counsel for Children; the National Board of Legal Specialty Certification; the American Board of Certification; and the National Elder Law Foundation. Current rules governing certification by such entities are in Title 3, Division 5, Providers of Programs and Services.

“Approved” replaces “accredited”

The current Rules Governing Accreditation of Specialty Certification Programs for Attorneys use “accredit” and “accreditation” in connection with board approval. These words are commonly used in educational contexts. A form of “accredit” is used in State Bar Rules only in the Title 4 rules on accredited and unaccredited law schools overseen by the Committee of Bar Examiners. The proposed rules replace “accredited” with “approved,” reserving forms of “accredit” for the rules applicable to law schools. In any event, “approval” seems to more accurately characterize the process of officially recognizing non-bar programs.

Reorganization

The proposed rules reduce the current twenty-one rules to six by 1) focusing the proposed rules on obtaining and maintaining board approval for a certification program; and 2) applying, with some flexibility, the same standards for any certification, whether by the board or board approved entity. Proposed 3.903, Requirements of approved programs, is the keystone in this structure. It mandates that an approved program “have requirements that are clear, not arbitrary, consistently applied, and comparable to those

⁴ State Bar Rule 1.4(A).

required for board certification.” In short, the same broad criteria govern any certification, whether administered by the CBLIS or another entity.

Use of forms and Schedule of Charges and Deadlines

Like other revised rules, the revised rules applicable to board-approved entities reference forms rather than incorporate form instructions in the rules. Because of this, the proposed application rule, 3.902, is about one-third the length of current application rule. A form for renewal of approval produces a similar result.

Similarly, use of the Schedule of Charges and Deadlines in proposed 3.901, Fees, eliminates operational detail—and verbiage.

Definitions

The proposed rules sharpen and streamline definitions. Current rule 2.0 defines many specific terms, but the proposed rules delete these definitions because the terms are either clear in context or defined elsewhere.

Review and approval of applications for State Bar approval

The current rules mandate a complex and inflexible process for review and approval of applications. Initially 9.0 requires that applications be reviewed by an ad hoc “evaluation subcommittee,” the chair of which is appointed by the Board of Trustees committee charged with oversight of the legal specialization program. The subcommittee’s possible courses of action are laid out in current 10.0. Ultimately, its recommendation regarding the application goes to the California Board of Legal Specialization (11.0). The board is to approve the subcommittee’s recommendation “absent an abuse of discretion.” Things do not end here. The board’s recommendation next goes to the committee of the Board of Trustees with oversight responsibility or to the committee’s designee (12.0). Things *do* end here, if the application is approved. If the application is denied, the applicant can request review by the Board of Trustees or its designee.

Instead, proposed 3.900 states that the California Board of Legal Specialization may recommend that the Board of Trustees approve entities to certify legal specialists, and proposed 3.903(B) states that the Board of Trustees “has sole discretion to determine whether an applicant for approval or an approved entity has certification requirements that are clear, not arbitrary, consistently applied, and comparable to those required for board certification.”

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

If approved following public comment, the revised rules for certification of members for

Legal Specialization will be placed in Title 3, Division 2, at Chapter 2 and the Revised Rules for Legal Specialization Certification Entities will be place in Title 3, Division 5, at Chapter 4.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

It is recommended that the Member Oversight Committee authorize a forty-five day public comment period for the attached proposed revisions to the rules (Attachments A and B). The comment period would begin July 22, 2013 and run through September 5, 2013.

PROPOSED RESOLUTION OF THE REGULATION, ADMISSIONS AND DISCIPLINE OVERSIGHT COMMITTEE:

Should the Member Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, the Board Committee on Member Oversight authorizes for publication, for a forty-five day public comment period from July 22, 2013 through September 5, 2013 the proposed revised State Bar rules (Attachment A) for the program for Legal Specialization for certification of members and (Attachment B) for the program for Legal Specialization Certification Entities and it is

FURTHER RESOLVED, that this authorization to release for public comment is not, and is not to be construed as, an approval of the proposed rules.

ATTACHMENTS:

- A. Proposed revised rules governing the State Bar's Legal Specialization Program
- B. Proposed revised rules governing the State Bar's Legal Specialization Certification Entities