

AGENDA ITEM

133 MAR 7 2014

DATE: February 27, 2014

TO: Members, Member Oversight Committee
Members, Board of Trustees

FROM: Dina DiLoreto, Managing Director, Member Records and Compliance

SUBJECT: State Bar Rules, Title 7, Division 2, Special Masters;
Return from Public Comment

EXECUTIVE SUMMARY

State Bar rules have been undergoing revision since 2005. The revised Rules of the State Bar are organized into a single structure, observe common stylistic conventions, and use clear and simple language. At its November 2013 meeting, MOC approved a 45-day public comment period on proposed revisions to the rules for attorneys listed by the State Bar as eligible for special master appointment. The proposals make no substantive changes to the existing rules.

The public comment period expired with no comments submitted. Accordingly, this item returns the proposal for consideration of whether the board committee and the Board wish to adopt the proposed revisions to the rules regarding special master eligibility.

If ultimately adopted by the Board of Trustees, the current special masters rules in Title 7, Division 2 of the Rules of the State Bar would be repealed and replaced by the proposed rules.

Any question regarding the proposal may be addressed to: Dina DiLoreto at dina.diloreto@calbar.ca.gov or (415) 538-2121.

BACKGROUND

The Rules of the State Bar provide one structure for more than two dozen sets of rules that formerly had their own organizational schemes and stylistic conventions. In July 2007, the Board of Governors adopted a single 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

The basic principles for all State Bar rules are set forth in Title 1. This title establishes the scope of the rules and includes rules on public comment; construction and usage conventions; definitions of common terms; and computation of 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 these organizational and stylistic improvements, the rules revision project has simplified language 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).

Rules for attorneys listed by the State Bar as eligible for special master appointment by a court are in Title 7 (Miscellaneous Provisions) since the State Bar's role is simply to maintain a list of attorneys eligible for appointment. The proposed rules begin with the number "7" to signify the Title in which the rules are placed. The "7" is followed by a period, then by the number of the rule. For example, the first proposed rule is number 7.100.

Copies of the current and proposed rules are attached. To enable readers to compare those rules, the proposed rules in Attachment B identify any related current rule in a footnote that cites the current rule in italics. Upon adoption by the board, such drafting devices are deleted; footnotes in Roman type are retained, however, because they are citations or cross-references that are part of a rule. The global provision in State Bar rule 1.20(K), Construction, states that "If a rule cites the authority for the rule, the citation is part of the rule." A clean version of the proposed rules (without drafter's footnotes) is provided as Attachment A.

ISSUE

Whether to approve the proposed revisions to the rules for attorneys listed by the State Bar as eligible for special master appointment.

DISCUSSION

Penal Code section 1524 concerns search warrants. Under Penal Code section 1524, subdivision (c), no search warrant may be issued for documentary evidence in the possession or control of a lawyer, physician, psychotherapist or clergy member who is not suspected of criminal activity related to the documentary evidence, unless the court appoints a special master to accompany the person who will serve the warrant. Penal Code section 1524, subdivision (d) states that a "special master", as referenced in the statute, is an attorney in good standing of the State Bar and who is selected from a list of qualified attorneys that the State Bar maintains particularly for the purposes of

conducting the searches. The statute specifies a procedure for conducting searches. The role of the State Bar, however, is restricted to maintaining the list of attorneys qualified for appointment by the court to serve as a special master. A special master is responsible to the appointing court.

The State Bar rules regarding the list of attorneys qualified for appointment as a special master are the last set of rules to be revised under the rules revision process that began in 2005. Highlights of the revisions are summarized below.

Focus sharpened

The purpose of the State Bar's program for special masters is explained in the first of the current rules:

1.0 PURPOSE The purpose of the Special Masters Program Rules and Regulations is to establish a program to implement the State Bar of California's responsibilities under Penal Code section 1524 by which qualified attorneys serve as Special Masters to balance the interest of professionals (e.g., attorneys, physicians, psychotherapists, and the clergy) and their clients in protecting privileged materials with the interest of prosecutors in securing evidence of suspected criminal activity. Special Masters are appointed by and responsible to the appointing court. The role of the State Bar is restricted to maintaining the list of Special Masters for the use of the court.

Instead of beginning with a rule on *why*, the first of the proposed rules focuses on *who* and *what*.

Rule 7.100 Special masters

Special masters are court-appointed attorneys who without compensation accompany peace officers to serve search warrants and conduct searches for evidence in the possession or under the control of attorneys or other specified professionals.¹ Courts appoint special masters to balance the interests of the professionals and their clients in protecting privileged materials with the interests of prosecutors in securing evidence of suspected criminal activity. Attorneys who meet the requirements of these rules are listed by the State Bar as qualified for court appointment as special masters. The only role of the State Bar is to maintain the list. The State Bar cannot offer advice regarding the appointment of a special master.

This focus is consistent with the framework for all State Bar rules that is delineated in Title 1:

¹ Penal Code § 1524(c) and (d). (*This Penal Code citation to governing authority is a formal part of the proposed rule and will be retained in the final version.*)

Rule 1.3 Scope

The rules of the State Bar of California concern

- (A) the rights and responsibilities of its members and prospective members;
- (B) its programs and services and the requirements for participating in or using them;
- (C) its governance; and
- (D) its relationships with other entities or individuals.

Rule 1.4 Exclusions

The rules of the State Bar do not include

- (A) Rules of the Supreme Court of California or California Rules of Court that apply to the State Bar, its members, services, or programs;
- (B) statutes or case law applicable to the State Bar, its members, services, or programs; or
- (C) policies and procedures that relate to the internal management or operations of the State Bar.

Definitions rule eliminated

Current rule 2.0 defines “special master,” “rules,” “State Bar,” and “Board of Governors.” The proposed rules do not include a separate rule for definitions, because the first sentence of proposed rule 7.100 defines “special master,” and Title 1 of the Rules of the State Bar define “rules,” “State Bar,” and “Board of Trustees.”

Eligibility reorganized

Current rule 3.0, Eligibility, lists six requirements a special master must meet in addition to being an active member. Three requirements pertaining to eligibility at the time of application are intermixed with three requirements pertaining to eligibility during the period of time when an attorney is on the list.

Proposed rule 7.101, Eligibility, is structured to more clearly distinguish these requirements. Proposed rule 7.101(B) lists eligibility requirements “at the time of application,” and rule 7.101(C) lists the ongoing requirements “during the period when listed as qualified for appointment.”

Duties clarified

Current rule 4.0, “Duties,” is essentially a paraphrase of Penal Code §§ 1524(d) and (e). As a matter of policy, whenever possible the revised State Bar rules do not paraphrase legal authority. Paraphrasing entails two risks: arbitrary selection and misinterpretation or misconstruction. The preferred practice in the revised rules is to incorporate an authority by citation rather by paraphrase. State Bar rule 1.20(K) clearly indicates that such a citation is an inherent part of a rule, not an explanation: “If a rule cites the authority for the rule, the citation is part of the rule.” This approach allows replacement of the 363 words in current rule on duties (4.0) with a rule of 21 words in proposed rule

7.102, Duties of a special master: “In acting as a special master, an attorney must conduct searches and otherwise act in compliance with Penal Code section 1524.”

Term clarified

Current rule 5.0, Duration, states that “An attorney shall be a Special Master from the date of placement on the list and shall be required to reapply every five (5) years. A special master shall remain on the list for the specified period unless sooner terminated” for specified reasons. The rule could be read to include the possibility of appointment for less than five years while requiring reapplication every five years. Proposed 7.104, Term, eliminates the ambiguity. In section (A), the proposal indicates that the term of appointment is flexible, as long as it does not exceed five years. At the end of the appointment, for whatever the term has been, reapplication is required by proposed 7.104(A):

An attorney may be listed by the State Bar as eligible for special master appointment for five years. At the end of the term of appointment, an attorney who wishes to continue eligibility must submit a new Special Master Application.

Termination relocated

The current rules cover termination of an appointment in two rules. In rule 5.0, subpart 5.1 states that termination occurs upon a change from active status, and subpart 5.2 states that an appointment may be terminated without consent pursuant to rule 6.0. That rule, Involuntary termination, says an appointment is terminated for any of three reasons: for suspension or final disciplinary action; for a material misrepresentation in the application; or upon order of the appointing court.

Proposed rule 7.104, Term, deals with all issues related to the term of an attorney who is on the State Bar list. Proposed rule 7.104(A) covers the standard term of five year, and subpart (B) covers reasons for earlier termination. In addition to the three reasons for early termination now stated in rule 6.0, the proposal adds early termination upon request of the attorney (now in 5.3) or because of failure to comply with a requirement of the State Bar’s rules for special masters.

Language simplified

The current rules are approximately 900 words. The proposed rules are approximately 659 words, a reduction of about 25%. The proposed rules have been shortened by eliminating redundancies, consolidating related topics, and updating usage (e.g., by using “must” rather than the ambiguous “shall” to express obligation).

PUBLIC COMMENT

No public comment was received. At the November meeting, however, Trustee David Pasternak expressed that he has a concern with a current eligibility requirement that an attorney must “not have been disciplined in any court or jurisdiction during the preceding five years” and that he expects to raise this issue for further discussion when the item is presented for approval following public comment. This requirement is in proposed rule 7.101(B)(2).

FISCAL / PERSONNEL IMPACT

None.

RULE AMENDMENTS

If approved following public comment, rules 7.100 – 7.105 will be placed in Title 7, Miscellaneous Provisions, Division 2, Special Masters, of the State Bar Rules.

BOARD BOOK IMPACT

None known.

RECOMMENDATION

Staff recommends that the Board adopt proposed revised State Bar rules 7.100 – 7.105 for attorneys listed by the State Bar as eligible for special master appointment and repeal the existing Special Master Program Rules And Regulations. The proposed revised rules are set forth in Attachment A (clean version) and Attachment B (with drafter’s editorial footnotes included to aid in review), and the current rules are in Attachment C.

PROPOSED MEMBER OVERSIGHT COMMITTEE RESOLUTION

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

RESOLVED, following publication for public comment and no comments being received, that the Board Committee on Member Oversight recommends that the Board of Trustees adopt State Bar rules 7.100 – 7.105 for attorneys listed by the State Bar as eligible for special master appointment, as set forth in the attached, and repeal the existing Special Master Program Rules And Regulations, effective immediately.

PROPOSED BOARD OF TRUSTEES RESOLUTION

Should the Board concur with the Member Oversight Committee's recommendation, the following resolution would be in order:

RESOLVED, following publication for public comment and no comments being received, and upon the recommendation of the Member Oversight Committee, that the Board of Trustees hereby adopts State Bar rules 7.100-7.105 for attorneys listed by the State Bar as eligible for special master appointment, as set forth in the attached, and repeals the existing Special Master Program Rules And Regulations, effective immediately.

ATTACHMENTS

- A. Proposed revised State Bar rules 7.100 – 7.105 for attorneys listed by the State Bar as eligible for special master appointment (clean version)
- B. Proposed revised State Bar rules 7.100 – 7.105 for attorneys listed by the State Bar as eligible for special master appointment, including drafter's footnotes
- C. Current State Bar of California Special Master Program Rules and Regulations