



# The State Bar *of California*

---

**OPEN SESSION  
AGENDA ITEM  
SEPTEMBER 2020  
REGULATION AND DISCIPLINE COMMITTEE II.A**

**DATE:** September 24, 2020

**TO:** Members, Regulation and Discipline Committee

**FROM:** Marc Shapp, Assistant General Counsel, Office of General Counsel

**SUBJECT:** Amendment to Lawyer Referral Service Proposed Rules of Procedure  
Governing the Review Process for Certification, Revocation and Suspension  
Decisions: Request to Circulate for Public Comment

---

## **EXECUTIVE SUMMARY**

At its January 2020 meeting, the State Bar Board of Trustees adopted new proposed Rules of Procedure of the State Bar of California (Rules of Procedure), rules 4201 through 4208, to provide for review in the State Bar Court of the denial, suspension, or revocation of any certification by the State Bar of a Lawyer Referral Service (LRS), and directed staff to submit proposed Rules of Procedure 4201 through 4208 to the California Supreme Court for approval.

While the request for approval was pending, State Bar staff determined that the Rules of Procedure adopted by the Board of Trustees contained a drafting error that would limit the availability of hearings in LRS proceedings to only those cases where both a party requests one and the State Bar Court determines it would materially contribute to the court's consideration of the matter. Staff's intention had been to recommend that the Board of Trustees adopt rules requiring a hearing (1) upon a party's timely request, or (2) at the discretion of the State Bar Court. The narrower avenue for a hearing presented to and adopted by the Board of Trustees arose from an early drafting error that was not discovered until the request for approval had been filed with the Supreme Court.

Because the availability of a hearing under the proposed rules has important constitutional due process implications, and because State Bar staff did not intend to recommend the language ultimately adopted by the Board of Trustees, State Bar staff requested the Supreme Court to

grant leave to withdraw the proposed rules in order to present an amended version to the Board of Trustees granting parties the right to a hearing upon timely request.

Accordingly, proposed amended Rules of Procedure 4201 through 4208 amends proposed rule 4204(B) to provide that the State Bar Court will hold a hearing if (1) timely requested by a party or (2) the court determines that a hearing will materially contribute to the court's consideration of the petition for review. The full text of the amended proposed rules is provided as Attachment A, and a redline version showing the recommended amendment is provided as Attachment B.

As shown in Attachment B, the recommended amendment changes a single word—"and" to "or"—in proposed rule 4204(B). However, because this alteration materially changes the nature of the proceedings, further public comment is warranted. This item requests that the proposed rules be circulated for public comment for a period of 30 days, and that comments be limited to amended proposed rule 4204(B).

---

## **BACKGROUND**

The background of the original proposed Rules of Procedure 4201 through 4208 was addressed at the November 2019 meeting of the State Bar Regulation and Discipline Committee, and the January 2020 meeting of the Board of Trustees. (See Attachment C.) Briefly, in 2014, the Supreme Court approved rules 3.803 and 3.806 of the Rules of the State Bar, which provide for review in the State Bar Court of determinations by State Bar staff to deny, suspend, or revoke the certification of an LRS. However, no new Rules of Procedure were promulgated to specifically address this review process. In April 2019, the Supreme Court directed State Bar staff to formulate those Rules of Procedure, and to submit them to the Supreme Court for its consideration and approval.

On January 24, 2020, the Board of Trustees adopted Rules of Procedure 4201 through 4208, and directed staff to submit the proposed rules to the California Supreme Court for approval. The request was filed with the Supreme Court on May 8, 2020. On August 5, 2020, the State Bar filed a notice of withdrawal of the request, which the Supreme Court granted the following day.

## **DISCUSSION**

### **The Version of Proposed Rules of Procedure 4201 through 4208 Adopted by the Board of Trustees Does Not Reflect Staff's Intended Recommendation**

As adopted by the Board of Trustees, proposed rule 4204 provides, in relevant part:

The court will hold a hearing if timely requested by either party **and** the court determines that a hearing will materially contribute to the court's consideration of the petition for review.

(Rules of Procedure, proposed rule 4204(B) [emphasis added].) In other words, proposed Rules of Procedure 4201 through 4208 allow a party to request a hearing, but the decision whether to hold one is ultimately up to the State Bar Court. After the request for approval was filed in the Supreme Court, staff again reviewed internal communications and drafts of the proposed rules. Staff determined that the “and” in proposed rule 4204(B) was the result of an early drafting error that was unfortunately carried throughout the drafting and approval process. The drafters of the proposed rules and the State Bar Court had intended to recommend to the Board of Trustees to adopt the following language for proposed rule 4204(B):

The court will hold a hearing if timely requested by either party **or** the court determines that a hearing will materially contribute to the court’s consideration of the petition for review.

(Emphasis added.)

Several existing Rules of Procedure grant the State Bar Court some measure of discretion to hold a hearing when the court finds it will “materially contribute” to its determination of the issue before it. Some of these rules leave the decision to hold a hearing entirely with the court. (Rules of Procedure, rules 5.130, 5.131, 5.133, 5.191, and 5.208.) Others require hearings either upon request of a party or in the court’s discretion. (Rules of Procedure, rules 5.218, 5.229, 5.261, 5.274, and 5.314.) Only one existing rule uses the “and” formulation also present in the version of proposed rule 4204(B) that was mistakenly presented to the Board of Trustees. (Rules of Procedure, rule 5.300(F)(2) [The State Bar Court “will hold a hearing if timely requested by either party and it determines that hearing will materially contribute to the Court’s consideration of” a motion for modification or early termination of probation.].)

Although the types of proceedings these rules cover vary, it is generally the case that proceedings which may directly impact an attorney’s license status provide for hearings upon request, while hearings are held at the State Bar Court’s discretion for issues which are preliminary or subsequent to such proceedings. For example, an attorney facing involuntary transfer to inactive status for posing a substantial threat of harm to the attorney’s clients or the public may request a hearing. (Rules of Procedure, rule 5.229.) However, no hearing is required where an attorney who already has resigned or been disciplined files a motion for relief from complying or extension of time to comply with an assessment of costs. (Rules of Procedure, rule 5.130.)

The drafters of proposed rule 4204(B) intended to recommend proceedings more similar to those described in Rules of Procedure, rules 5.218, 5.229, 5.261, 5.274, and 5.314, by allowing an applicant for certification or an existing LRS seeking renewal of its certification the opportunity to be heard in the State Bar Court upon timely request. As discussed below, adopting a version of rule 4204(B) consistent with this intention provides the highest level of procedural due process because it offers the opportunity for a hearing as of right. It also expands the discretion of the State Bar Court to order a hearing any time the court determines that a hearing will materially contribute to the court’s consideration of the matter before it,

rather than limiting the court's discretion to only allow hearings after a party requests one. Staff has confirmed that the State Bar Court continues to recommend this procedure.

### **Amending Proposed Rule 4204(B) Eliminates Any Procedural Due Process Concerns**

LRS certification determinations arguably implicate a person's livelihood, and therefore procedural due process may necessitate proper notice and a reasonable opportunity to be heard. (*Willner v. Committee on Character and Fitness* (1963) 373 U.S. 96, 103.) "Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved." (*Rodriguez v. Department of Real Estate* (1996) 51 Cal.App.4th 1289, 1297.)

Based on this weighing of the relevant factors, it is staff's opinion is that the version of proposed Rules of Procedure 4201 through 4208 as already adopted by the Board of Trustees provides a reasonable opportunity to be heard. This is because the current proposed rules provide multiple opportunities for an applicant or existing LRS to challenge an adverse certification determination—first to State Bar staff and then to the State Bar Court—including the opportunity to request a hearing. As such, the risk of an erroneous adverse determination is relatively remote, while the added benefit of providing for a hearing as of right is speculative.

Even so, amending proposed rule 4204(B) to change "and" to "or" removes any doubt. That is because granting a hearing upon timely request allows a party to offer oral testimony and to confront and cross-examine witnesses, providing what courts have described as the "full range" of due process rights. (See, e.g., *Rodriguez, supra*, 51 Cal.App.4th, at p. 1299.) Since this additional process is what staff and the State Bar Court intended to recommend at the outset, staff determined that the appropriate course of action would be to bring the issue back to RAD and the Board of Trustees.

### **The Proposed Amendment Warrants Additional Public Comment**

Although the proposed amendment only changes one word, it is a substantive change to the procedures being proposed. Since the proposed amendment does not merely correct a clerical error, it warrants further public comment under the Board of Trustees' policy for public comment on rules.

However, staff requests limiting the comment only to the amendment to rule 4204(B) recommended here. Proposed Rules of Procedure 4201 through 4208 already were circulated for public comment for 45 days, from November 18, 2019 to January 2, 2020. The State Bar received no comments. Since the amendment recommended here changes only one word in one section of the proposed rules, there is no need to reopen any of the other rules for comment. For the same reasons, staff further requests that the circulation period for public comment be 30 days.



## **FISCAL/PERSONNEL IMPACT**

This proposal has the potential to increase caseloads for State Bar Court and the Office of Chief Trial Counsel. However, based on the small number of LRS applications that have received adverse determinations from staff, it is anticipated that any impact will be minimal.

## **AMENDMENTS TO RULES OF THE STATE BAR**

Title III, Division V, Chapter 2 of the Rules of Procedure of the State Bar of California

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 4. Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: c. By December 31, 2018, review Lawyer Referral Services certification rules with a goal of increasing access to justice.

## **RECOMMENDATIONS**

**Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Regulation and Discipline Committee directs staff to make available for a 30-day public comment period proposed State Bar Rules of Procedure 4201 through 4208, attached hereto as Attachment A; and it is

**FURTHER RESOLVED**, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new Rules of Procedure.

## **ATTACHMENT(S) LIST**

- A.** Proposed language of new State Bar Rules of Procedure, rules 4201 through 4208
- B.** Redline version reflecting revision to previously adopted State Bar Rules of Procedure, rules 4201 through 4208

**C. January 24, 2020 Regulation and Discipline Committee Agenda Item II.C**

### **Rule 4201 Scope**

The rules of this chapter apply to proceedings before the State Bar Court pursuant to Rules of the State Bar, title 3, division 5, chapter 3, rules 3.803 and 3.806, wherein an applicant for certification as a lawyer referral service or an existing certified lawyer referral service (collectively, lawyer referral service) may seek review of the denial, suspension, or revocation of certification by the State Bar. The State Bar Court will independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the State Bar.

### **Rule 4202 Beginning Proceeding; Time for Filing; Appearance by Counsel**

If the State Bar denies, suspends, or revokes certification of a lawyer referral service, the lawyer referral service may file a petition for review under this chapter within 30 days pursuant to rule 5.28. Such petition must be served under rule 5.25 and filed in the Hearing Department, accompanied by supporting documents, including but not limited to a copy of the notice of denial, suspension, or revocation, and proof of service upon the State Bar Office of Professional Competence and the Office of Chief Trial Counsel. A lawyer referral service filing and serving a petition for review under this chapter that is an organization shall be represented by counsel.

### **Rule 4203 Response to Petition for Review**

- (A) Timing of Response.** Within 30 days after the filing and service of a petition for review under this chapter, the Office of Chief Trial Counsel will file with the Court, and serve upon the Lawyer Referral Service or its attorney, a response to the petition.
- (B) Contents of Response.** The response may be accompanied by declarations, exhibits, and requests for judicial notice. The response will:

  - (1) oppose the petition;
  - (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
  - (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

### **Rule 4204 Hearing Procedure**

- (A)** A lawyer referral service may file and serve a written request for a hearing when filing the petition for review or within 10 days of service of the response. The Office of Chief Trial Counsel may request a hearing; such request must be filed with the response. Failure to request a hearing is a waiver of hearing.
- (B)** The court will hold a hearing if timely requested by either party or the court determines that a hearing will materially contribute to the court's consideration of

the petition for review.

#### **Rule 4205 Burden of Proof; Discovery; Evidence**

- (A) **Burden of Proof.** The lawyer referral service must prove by a preponderance of the evidence that it satisfies the minimum standards for certification or recertification as provided in the Rules of the State Bar, title 3, division 5, chapter 3, article 2.
- (B) **Discovery.** The State Bar Court will allow discovery only if good cause is shown.
- (C) **Objections to a Petition for Review.** Written objections to the declarations offered in support of and in response to the petition for review must be filed and served by a party within 10 days after the response is filed. If no hearing is held, the court will receive the declarations in evidence, subject to its rulings on any objections.
- (D) **Hearing.** If a hearing is held, the submitted declarations will be admitted in evidence, subject to appropriate objection, as the direct testimony of the respective declarants.
- (E) **Cross-Examination.** In a pleading, a party may request that a declarant be produced for cross-examination at the hearing. If the request is filed and served at least 10 days before the hearing or within five court days after the declaration was served, whichever time is later, the party that filed the declaration must produce the declarant as requested. If such a declarant does not appear for cross-examination at the hearing, the Court may decline to admit in evidence the declaration or any portion thereof, including exhibits.

#### **Rule 4206 Review**

A ruling by the hearing judge under this chapter is reviewable only under rule 5.150.

#### **Rule 4207 Effect of State Bar Court Decision**

The decision of the hearing judge, or (if review is requested) the decision of the Review Department, is the final State Bar Court decision in a proceeding under this chapter. Unless the California Supreme Court grants a petition for review, the decision is binding on the lawyer referral service, the Office of Chief Trial Counsel, and the State Bar.

#### **Rule 4208 Applicable Rules**

- (A) **Inapplicable Rules.** The following rules do not apply in a proceeding pursuant to this chapter:
  - (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings; and
  - (2) rules 5.50 (abatement); rules 5.80-5.102 (defaults; obligation to appear at trial; pretrial; notice of trial); rule 5.103 (burden of proof); rules 5.151-5.158 (review).
- (B) **Conditionally Applicable.** The following rules apply in a proceeding pursuant to this

chapter in certain circumstances:

(1) rules 5.60-5.71 (subpoenas and discovery) apply only if and to the extent that the court permits discovery.

- (C)** In such applicable rules, reference to “attorney” shall apply to a lawyer referral service as appropriate.

### **Rule 4201 Scope**

The rules of this chapter apply to proceedings before the State Bar Court pursuant to Rules of the State Bar, title 3, division 5, chapter 3, rules 3.803 and 3.806, wherein an applicant for certification as a lawyer referral service or an existing certified lawyer referral service (collectively, lawyer referral service) may seek review of the denial, suspension, or revocation of certification by the State Bar. The State Bar Court will independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the State Bar.

### **Rule 4202 Beginning Proceeding; Time for Filing; Appearance by Counsel**

If the State Bar denies, suspends, or revokes certification of a lawyer referral service, the lawyer referral service may file a petition for review under this chapter within 30 days pursuant to rule 5.28. Such petition must be served under rule 5.25 and filed in the Hearing Department, accompanied by supporting documents, including but not limited to a copy of the notice of denial, suspension, or revocation, and proof of service upon the State Bar Office of Professional Competence and the Office of Chief Trial Counsel. A lawyer referral service filing and serving a petition for review under this chapter that is an organization shall be represented by counsel.

### **Rule 4203 Response to Petition for Review**

- (A) **Timing of Response.** Within 30 days after the filing and service of a petition for review under this chapter, the Office of Chief Trial Counsel will file with the Court, and serve upon the Lawyer Referral Service or its attorney, a response to the petition.
- (B) **Contents of Response.** The response may be accompanied by declarations, exhibits, and requests for judicial notice. The response will:
  - (1) oppose the petition;
  - (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
  - (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

### **Rule 4204 Hearing Procedure**

- (A) A lawyer referral service may file and serve a written request for a hearing when filing the petition for review or within 10 days of service of the response. The Office of Chief Trial Counsel may request a hearing; such request must be filed with the response. Failure to request a hearing is a waiver of hearing.
- (B) The court will hold a hearing if timely requested by either party ~~and/or~~ the court determines that a hearing will materially contribute to the court's consideration of

the petition for review.

#### **Rule 4205 Burden of Proof; Discovery; Evidence**

- (A) **Burden of Proof.** The lawyer referral service must prove by a preponderance of the evidence that it satisfies the minimum standards for certification or recertification as provided in the Rules of the State Bar, title 3, division 5, chapter 3, article 2.
- (B) **Discovery.** The State Bar Court will allow discovery only if good cause is shown.
- (C) **Objections to a Petition for Review.** Written objections to the declarations offered in support of and in response to the petition for review must be filed and served by a party within 10 days after the response is filed. If no hearing is held, the court will receive the declarations in evidence, subject to its rulings on any objections.
- (D) **Hearing.** If a hearing is held, the submitted declarations will be admitted in evidence, subject to appropriate objection, as the direct testimony of the respective declarants.
- (E) **Cross-Examination.** In a pleading, a party may request that a declarant be produced for cross-examination at the hearing. If the request is filed and served at least 10 days before the hearing or within five court days after the declaration was served, whichever time is later, the party that filed the declaration must produce the declarant as requested. If such a declarant does not appear for cross-examination at the hearing, the Court may decline to admit in evidence the declaration or any portion thereof, including exhibits.

#### **Rule 4206 Review**

A ruling by the hearing judge under this chapter is reviewable only under rule 5.150.

#### **Rule 4207 Effect of State Bar Court Decision**

The decision of the hearing judge, or (if review is requested) the decision of the Review Department, is the final State Bar Court decision in a proceeding under this chapter. Unless the California Supreme Court grants a petition for review, the decision is binding on the lawyer referral service, the Office of Chief Trial Counsel, and the State Bar.

#### **Rule 4208 Applicable Rules**

- (A) **Inapplicable Rules.** The following rules do not apply in a proceeding pursuant to this chapter:
  - (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings; and
  - (2) rules 5.50 (abatement); rules 5.80-5.102 (defaults; obligation to appear at trial; pretrial; notice of trial); rule 5.103 (burden of proof); rules 5.151-5.158 (review).
- (B) **Conditionally Applicable.** The following rules apply in a proceeding pursuant to this

chapter in certain circumstances:

(1) rules 5.60-5.71 (subpoenas and discovery) apply only if and to the extent that the court permits discovery.

- (C)** In such applicable rules, reference to “attorney” shall apply to a lawyer referral service as appropriate.





# The State Bar of California

---

## **OPEN SESSION**

### **AGENDA ITEM**

**54-123 JANUARY 2020**

### **REGULATION AND DISCIPLINE COMMITTEE II.C**

**DATE:** January 24, 2020

**TO:** Members, Regulation and Discipline Committee  
Members, Board of Trustees

**FROM:** Marc Shapp, Assistant General Counsel, Office of General Counsel

**SUBJECT:** Lawyer Referral Service Proposed Rules of Procedure Governing the Review Process for Certification, Revocation and Suspension Decisions – Return from Public Comment and Request for Adoption by the Board for Approval by the Supreme Court

---

### **EXECUTIVE SUMMARY**

At its November 2019 meeting, the State Bar Regulation and Discipline Committee (RAD) authorized a 45-day public comment period for proposed new Rules of Procedure of the State Bar of California (Rules of Procedure) to provide for review in the State Bar Court of the denial, suspension, or revocation of any certification by the State Bar of a Lawyer Referral Service (LRS). The State Bar received no public comments during the 45-day public comment period. As such, staff recommends approval of the proposed new Rules of Procedure, rules 4201 through 4208, for submission to the California Supreme Court.

---

### **BACKGROUND**

The background of this item was addressed at RAD's November 2019 meeting. (See Attachment C.)

Briefly, in 2014, the California Supreme Court approved rules 3.803 and 3.806 of the Rules of the State Bar, which provide for review in the State Bar Court of determinations by State Bar staff to deny, suspend, or revoke the certification of an LRS. However, no new Rules of Procedure were promulgated to specifically address this review process. In April 2019, the Court directed State Bar staff to formulate those Rules of Procedure, and to submit them to the Court for its consideration and approval.

## **DISCUSSION**

At its November 2019 meeting, RAD authorized a 45-day public comment period for proposed new Rules of Procedure to provide for review in the State Bar Court of the denial, suspension, or revocation of any certification by the State Bar of a LRS. The public comment period ran from November 18, 2019 through January 2, 2020. The State Bar received no public comments during the 45-day public comment period.

However, one nonsubstantive and one minor substantive change have been made to the draft circulated for public comment. First, the reference to the Office of Access and Inclusion in proposed new rule 4202 has been revised to reference the Office of Professional Competence, as the latter office will assume responsibility for initial certification determinations by the State Bar as of February 2020. Second, proposed new rule 4205(C) now imposes a 10-day deadline to file objections to declarations offered in support of or in response to the petition for review, to correspond to the 10-day deadline provided in rule 4204(A) for a party to request a hearing in the State Bar Court after pleadings have been filed. A redline of the proposed rules showing these changes is provided as Attachment B.

Based on the foregoing, staff recommends approval of the proposed new Rules of Procedure, rules 4201 through 4208, for submission to the California Supreme Court. The full text of the proposed rules is provided as Attachment A.

## **FISCAL/PERSONNEL IMPACT**

This proposal has the potential to increase caseloads for State Bar Court and the Office of Chief Trial Counsel. However, because State Bar staff has a policy and practice to work with LRS applicants until the application is complete or it is clear that the applicant does not qualify for certification, it is anticipated that any impact will be minimal.

## **AMENDMENTS TO RULES OF THE STATE BAR**

Title III, Division V, Chapter 2 of the Rules of Procedure of the State Bar of California

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 4. Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: c. By December 31, 2018, review Lawyer Referral Services certification rules with a goal of increasing access to justice.

## **RECOMMENDATIONS**

**Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Regulation and Discipline Committee recommends that the Board of Trustees direct staff to submit to the California Supreme Court for approval proposed State Bar Rules of Procedure 4201 through 4208, attached hereto as Attachment A.

**Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee direct staff to submit to the California Supreme Court for approval proposed State Bar Rules of Procedure 4201 through 4208, attached hereto as Attachment A.

## **ATTACHMENT(S) LIST**

- A.** Proposed language of new State Bar Rules of Procedure 4201 through 4208
- B.** Redline reflecting revision to previously circulated proposed State Bar Rules of Procedure 4201 through 4208
- C.** November 14, 2019 RAD Agenda Item III.B

### **Rule 4201 Scope**

The rules of this chapter apply to proceedings before the State Bar Court pursuant to Rules of the State Bar, title 3, division 5, chapter 3, rules 3.803 and 3.806, wherein an applicant for certification as a lawyer referral service or an existing certified lawyer referral service (collectively, lawyer referral service) may seek review of the denial, suspension, or revocation of certification by the State Bar. The State Bar Court will independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the State Bar.

### **Rule 4202 Beginning Proceeding; Time for Filing; Appearance by Counsel**

If the State Bar denies, suspends, or revokes certification of a lawyer referral service, the lawyer referral service may file a petition for review under this chapter within 30 days pursuant to rule 5.28. Such petition must be served under rule 5.25 and filed in the Hearing Department, accompanied by supporting documents, including but not limited to a copy of the notice of denial, suspension, or revocation, and proof of service upon the State Bar Office of Professional Competence and the Office of Chief Trial Counsel. A lawyer referral service filing and serving a petition for review under this chapter that is an organization shall be represented by counsel.

### **Rule 4203 Response to Petition for Review**

- (A)      **Timing of Response.** Within 30 days after the filing and service of a petition for review under this chapter, the Office of Chief Trial Counsel will file with the Court, and serve upon the Lawyer Referral Service or its attorney, a response to the petition.
- (B)      **Contents of Response.** The response may be accompanied by declarations, exhibits, and requests for judicial notice. The response will:

  - (1)      oppose the petition;
  - (2)      state that the Office of the Chief Trial Counsel does not oppose the petition; or
  - (3)      state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

### **Rule 4204 Hearing Procedure**

- (A)      A lawyer referral service may file and serve a written request for a hearing when filing the petition for review or within 10 days of service of the response. The Office of Chief Trial Counsel may request a hearing; such request must be filed with the response. Failure to request a hearing is a waiver of hearing.
- (B)      The court will hold a hearing if timely requested by either party and the court determines that a hearing will materially contribute to the court's consideration of

the petition for review.

#### **Rule 4205 Burden of Proof; Discovery; Evidence**

- (A) **Burden of Proof.** The lawyer referral service must prove by a preponderance of the evidence that it satisfies the minimum standards for certification or recertification as provided in the Rules of the State Bar, title 3, division 5, chapter 3, article 2.
- (B) **Discovery.** The State Bar Court will allow discovery only if good cause is shown.
- (C) **Objections to a Petition for Review.** Written objections to the declarations offered in support of and in response to the petition for review must be filed and served by a party within 10 days after the response is filed. If no hearing is held, the court will receive the declarations in evidence, subject to its rulings on any objections.
- (D) **Hearing.** If a hearing is held, the submitted declarations will be admitted in evidence, subject to appropriate objection, as the direct testimony of the respective declarants.
- (E) **Cross-Examination.** In a pleading, a party may request that a declarant be produced for cross-examination at the hearing. If the request is filed and served at least 10 days before the hearing or within five court days after the declaration was served, whichever time is later, the party that filed the declaration must produce the declarant as requested. If such a declarant does not appear for cross-examination at the hearing, the Court may decline to admit in evidence the declaration or any portion thereof, including exhibits.

#### **Rule 4206 Review**

A ruling by the hearing judge under this chapter is reviewable only under rule 5.150.

#### **Rule 4207 Effect of State Bar Court Decision**

The decision of the hearing judge, or (if review is requested) the decision of the Review Department, is the final State Bar Court decision in a proceeding under this chapter. Unless the California Supreme Court grants a petition for review, the decision is binding on the lawyer referral service, the Office of Chief Trial Counsel, and the State Bar.

#### **Rule 4208 Applicable Rules**

- (A) **Inapplicable Rules.** The following rules do not apply in a proceeding pursuant to this chapter:
  - (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings; and
  - (2) rules 5.50 (abatement); rules 5.80-5.102 (defaults; obligation to appear at trial; pretrial; notice of trial); rule 5.103 (burden of proof); rules 5.151-5.158 (review).
- (B) **Conditionally Applicable.** The following rules apply in a proceeding pursuant to this

chapter in certain circumstances:

(1) rules 5.60-5.71 (subpoenas and discovery) apply only if and to the extent that the court permits discovery.

- (C)** In such applicable rules, reference to “attorney” shall apply to a lawyer referral service as appropriate.

### **Rule 4201 Scope**

The rules of this chapter apply to proceedings before the State Bar Court pursuant to Rules of the State Bar, title 3, division 5, chapter 3, rules 3.803 and 3.806, wherein an applicant for certification as a lawyer referral service or an existing certified lawyer referral service (collectively, lawyer referral service) may seek review of the denial, suspension, or revocation of certification by the State Bar. The State Bar Court will independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the State Bar.

### **Rule 4202 Beginning Proceeding; Time for Filing; Appearance by Counsel**

If the State Bar denies, suspends, or revokes certification of a lawyer referral service, the lawyer referral service may file a petition for review under this chapter within 30 days pursuant to rule 5.28. Such petition must be served under rule 5.25 and filed in the Hearing Department, accompanied by supporting documents, including but not limited to a copy of the notice of denial, suspension, or revocation, and proof of service upon the State Bar Office of ~~Access and Inclusion~~Professional Competence and the Office of Chief Trial Counsel. A lawyer referral service filing and serving a petition for review under this chapter that is an organization shall be represented by counsel.

### **Rule 4203 Response to Petition for Review**

- (A) **Timing of Response.** Within 30 days after the filing and service of a petition for review under this chapter, the Office of Chief Trial Counsel will file with the Court, and serve upon the Lawyer Referral Service or its attorney, a response to the petition.
- (B) **Contents of Response.** The response may be accompanied by declarations, exhibits, and requests for judicial notice. The response will:

  - (1) oppose the petition;
  - (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
  - (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

### **Rule 4204 Hearing Procedure**

- (A) A lawyer referral service may file and serve a written request for a hearing when filing the petition for review or within 10 days of service of the response. The Office of Chief Trial Counsel may request a hearing; such request must be filed with the response. Failure to request a hearing is a waiver of hearing.
- (B) The court will hold a hearing if timely requested by either party and the court determines that a hearing will materially contribute to the court's consideration of

the petition for review.

#### **Rule 4205 Burden of Proof; Discovery; Evidence**

- (A) **Burden of Proof.** The lawyer referral service must prove by a preponderance of the evidence that it satisfies the minimum standards for certification or recertification as provided in the Rules of the State Bar, title 3, division 5, chapter 3, article 2.
- (B) **Discovery.** The State Bar Court will allow discovery only if good cause is shown.
- (C) **Objections to a Petition for Review.** Written objections to the declarations offered in support of and in response to the petition for review must be filed and served by a party within ~~15~~10 days after the response is filed. If no hearing is held, the court will receive the declarations in evidence, subject to its rulings on any objections.
- (D) **Hearing.** If a hearing is held, the submitted declarations will be admitted in evidence, subject to appropriate objection, as the direct testimony of the respective declarants.
- (E) **Cross-Examination.** In a pleading, a party may request that a declarant be produced for cross-examination at the hearing. If the request is filed and served at least 10 days before the hearing or within five court days after the declaration was served, whichever time is later, the party that filed the declaration must produce the declarant as requested. If such a declarant does not appear for cross-examination at the hearing, the Court may decline to admit in evidence the declaration or any portion thereof, including exhibits.

#### **Rule 4206 Review**

A ruling by the hearing judge under this chapter is reviewable only under rule 5.150.

#### **Rule 4207 Effect of State Bar Court Decision**

The decision of the hearing judge, or (if review is requested) the decision of the Review Department, is the final State Bar Court decision in a proceeding under this chapter. Unless the California Supreme Court grants a petition for review, the decision is binding on the lawyer referral service, the Office of Chief Trial Counsel, and the State Bar.

#### **Rule 4208 Applicable Rules**

- (A) **Inapplicable Rules.** The following rules do not apply in a proceeding pursuant to this chapter:
  - (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings; and
  - (2) rules 5.50 (abatement); rules 5.80-5.102 (defaults; obligation to appear at trial; pretrial; notice of trial); rule 5.103 (burden of proof); rules 5.151-5.158 (review).
- (B) **Conditionally Applicable.** The following rules apply in a proceeding pursuant to this



chapter in certain circumstances:

(1) rules 5.60-5.71 (subpoenas and discovery) apply only if and to the extent that the court permits discovery.

- (C)** In such applicable rules, reference to “attorney” shall apply to a lawyer referral service as appropriate.



# The State Bar of California

---

## **OPEN SESSION**

## **AGENDA ITEM**

**NOVEMBER 2019**

## **REGULATION AND DISCIPLINE COMMITTEE III.B**

**DATE:** November 14, 2019

**TO:** Members, Regulation and Discipline Committee

**FROM:** Marc Shapp, Assistant General Counsel, Office of General Counsel

**SUBJECT:** Lawyer Referral Service Proposed Rules of Procedure Governing the Review Process for Certification, Revocation, and Suspension Decisions: Request to Circulate for Public Comment

---

### **EXECUTIVE SUMMARY**

The Rules of the State Bar governing the certification and oversight of Lawyer Referral Services (LRSs)<sup>1</sup> provide for review in the State Bar Court of the denial, suspension, or revocation of an LRS certification by the State Bar. However, no Rules of Procedure of the State Bar of California (Rules of Procedure) specifically address this review process. On April 29, 2019, the Supreme Court directed the State Bar to “formulate State Bar Court Rules of Procedure governing review proceedings contemplated under [Rules of the State Bar of California,] rules 3.803(A)(2) and 3.806(E), and to submit those Rules of Procedure to this court for its consideration and approval.”

Proposed Rules of Procedure 4201 through 4208 respond to the Court’s directive, and provide an avenue for independent review of any adverse State Bar decisions regarding the certification of an LRS.

This item requests that these proposed rules be circulated for public comment for a period of 45 days.

---

<sup>1</sup> (Rules of the State Bar of California, rules 3.800-3.829, available at [http://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title3\\_Div5-Ch3-LRS.pdf](http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title3_Div5-Ch3-LRS.pdf).)

## BACKGROUND

Business and Professions Code, section 6155, provides for certification of LRSs by the State Bar. Subdivision (f) states, in relevant part, “With the approval of the Supreme Court, the State Bar shall formulate and enforce rules and regulations for carrying out this section, including rules and regulations that do the following: (1) Establish minimum standards for lawyer referral services. . . . (2) Require that the certificate may be obtained, maintained, suspended, or revoked pursuant to procedures set forth in the rules and regulations.” (Bus. & Prof. Code, § 6155, subd. (f).)

Prior to 1996, State Bar staff determined whether applicants for certification or recertification did not meet the minimum standards under Rules of Procedure, former rules 4201 through 4204. Adverse decisions were then subject to review in State Bar Court under Rules of Procedure, former rules 4205 through 4207. After the Supreme Court approved revisions to Rules of the State Bar in 1996, the authority to review staff decisions was vested with the Board of Trustees (then the Board of Governors), which created a two-tier review process conducted first by a designated Board subcommittee, and second by the Board’s Committee on Legal Services. Rules of Procedure, former rules 4201 through 4207 were repealed, effective January 1, 1997.

In 2014, the Supreme Court approved the State Bar’s request to revest review authority with the State Bar Court. This authority is reflected in Rules of the State Bar, rules 3.803 and 3.806.<sup>2</sup> However, no new Rules of Procedure were promulgated to specifically address this review process.

In January 2019, the Board of Trustees approved and adopted proposed amendments to the Rules of the State Bar regarding the certification and oversight of LRSs, including rules 3.803 and 3.806, and further requested that the Supreme Court review and approve those amendments. The proposed amendments were generally intended to increase public access to the justice system by (1) allowing for the application of technology to produce automated referrals, and (2) strengthening the requirement to provide access to legal services for persons of limited means. The proposed amendments to rules 3.803 and 3.806 were intended to streamline the procedures to obtain review of any adverse State Bar decision regarding LRS certification by moving that review from State Bar Court to the Office of the Executive Director.

In March 2019, State Bar staff filed the request to approve the proposed amendments in the Supreme Court. On April 29, 2019, the Court approved all of the proposed amendments intended to increase public access to the justice system. (See Attachment B.) However, the Court denied approval of the proposed revisions to rules 3.803 and 3.806. (*Ibid.*) Instead, the Court directed the State Bar to “formulate State Bar Court Rules of Procedure governing review proceedings contemplated under rules 3.803(A)(2) and 3.806(E), and to submit those Rules of Procedure to this court for its consideration and approval.” (Attachment C.)

---

<sup>2</sup> The initial determination to deny, suspend, or revoke an LRS’ certification still is made by State Bar staff. (Rules of the State Bar, rules 3.803(A)(1)-(2) and 3.806(A)-(D).) Accordingly, the new Rules of Procedure proposed here only address the review to be conducted by the State Bar Court.

## **DISCUSSION**

Under Rules of the State Bar, rules 3.803 and 3.806, the State Bar must provide written notice to an applicant being denied initial certification (rule 3.803(A)), or to an existing LRS whose certification is to be suspended or revoked (rule 3.806(B)). In either case, the applicant/LRS must first request reconsideration by the State Bar. (Rules of the State Bar, rules 3.803(A)(1) and 3.806(C).) When requesting reconsideration, applicants/LRSs must provide a written explanation of their position that is “supported by any relevant evidence.” (*Ibid.*)

If the State Bar confirms the adverse determination, the applicant/LRS thereafter may “submit a petition for review to the State Bar Court in accordance with its rules.” (Rules of the State Bar, rules 3.803(A)(2) and 3.806(E).)

The Supreme Court’s April 29, 2019 letter states that review in the State Bar Court should “develop an adequate evidentiary record and make impartial factual findings to facilitate this court’s review if and when such a matter arises to this level.” (Attachment B.) Therefore, proposed Rules of Procedure 4201 through 4208 establish a process for an independent review by the State Bar Court of any adverse State Bar determination regarding LRS certification. Because applicants/LRSs are required to support their requests for reconsideration of an adverse State Bar determination by “any relevant evidence,” the proposed Rules of Procedure generally do not permit discovery, except for good cause.

## **FISCAL/PERSONNEL IMPACT**

This proposal has the potential to increase caseloads for State Bar Court and the Office of Chief Trial Counsel. However, because State Bar staff has a policy and practice to work with LRS applicants until the application is complete or it is clear that the applicant does not qualify for certification, it is anticipated that any impact will be minimal.

## **RULE AMENDMENTS**

Title III, Division V, Chapter 2 of the Rules of Procedure of the State Bar of California

## **BOARD OF TRUSTEES POLICY MANUAL AMENDMENTS**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: None

## **RECOMMENDATIONS**

**It is recommended that the Regulation and Discipline Committee approve the following resolution:**

**RESOLVED**, that staff is authorized to make available for a 45-day public comment period proposed State Bar Rules of Procedure 4201 through 4208, attached hereto as Attachment A; and it is

**FURTHER RESOLVED**, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new Rules of Procedure.

## **ATTACHMENT(S) LIST**

- A.** Proposed language of new State Bar Rules of Procedure 4201 through 4208
- B.** April 29, 2019 letter from Jorge E. Navarrete to Leah T. Wilson
- C.** April 29, 2019 Supreme Court Administrative Order 2019-04-24-010

### **Rule 4201 Scope**

The rules of this chapter apply to proceedings before the State Bar Court pursuant to Rules of the State Bar, title 3, division 5, chapter 3, rules 3.803 and 3.806, wherein an applicant for certification as a lawyer referral service or an existing certified lawyer referral service (collectively, lawyer referral service) may seek review of the denial, suspension, or revocation of certification by the State Bar. The State Bar Court will independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the State Bar.

### **Rule 4202 Beginning Proceeding; Time for Filing; Appearance by Counsel**

If the State Bar denies, suspends, or revokes certification of a lawyer referral service, the lawyer referral service may file a petition for review under this chapter within 30 days pursuant to rule 5.28. Such petition must be served under rule 5.25 and filed in the Hearing Department, accompanied by supporting documents, including but not limited to a copy of the notice of denial, suspension, or revocation, and proof of service upon the State Bar Office of Access and Inclusion and the Office of Chief Trial Counsel. A lawyer referral service filing and serving a petition for review under this chapter that is an organization shall be represented by counsel.

### **Rule 4203 Response to Petition for Review**

- (A) Timing of Response.** Within 30 days after the filing and service of a petition for review under this chapter, the Office of Chief Trial Counsel will file with the Court, and serve upon the Lawyer Referral Service or its attorney, a response to the petition.
- (B) Contents of Response.** The response may be accompanied by declarations, exhibits, and requests for judicial notice. The response will:

  - (1) oppose the petition;
  - (2) state that the Office of the Chief Trial Counsel does not oppose the petition; or
  - (3) state that the Office of the Chief Trial Counsel does not possess sufficient facts to determine whether or not it opposes the petition.

### **Rule 4204 Hearing Procedure**

- (A)** A lawyer referral service may file and serve a written request for a hearing when filing the petition for review or within 10 days of service of the response. The Office of Chief Trial Counsel may request a hearing; such request must be filed with the response. Failure to request a hearing is a waiver of hearing.
- (B)** The court will hold a hearing if timely requested by either party and the court determines that a hearing will materially contribute to the court's consideration of

the petition for review.

#### **Rule 4205 Burden of Proof; Discovery; Evidence**

- (A) **Burden of Proof.** The lawyer referral service must prove by a preponderance of the evidence that it satisfies the minimum standards for certification or recertification as provided in the Rules of the State Bar, title 3, division 5, chapter 3, article 2.
- (B) **Discovery.** The State Bar Court will allow discovery only if good cause is shown.
- (C) **Objections to a Petition for Review.** Written objections to the declarations offered in support of and in response to the petition for review must be filed and served by a party within 15 days after the response is filed. If no hearing is held, the court will receive the declarations in evidence, subject to its rulings on any objections.
- (D) **Hearing.** If a hearing is held, the submitted declarations will be admitted in evidence, subject to appropriate objection, as the direct testimony of the respective declarants.
- (E) **Cross-Examination.** In a pleading, a party may request that a declarant be produced for cross-examination at the hearing. If the request is filed and served at least 10 days before the hearing or within five court days after the declaration was served, whichever time is later, the party that filed the declaration must produce the declarant as requested. If such a declarant does not appear for cross-examination at the hearing, the Court may decline to admit in evidence the declaration or any portion thereof, including exhibits.

#### **Rule 4206 Review**

A ruling by the hearing judge under this chapter is reviewable only under rule 5.150.

#### **Rule 4207 Effect of State Bar Court Decision**

The decision of the hearing judge, or (if review is requested) the decision of the Review Department, is the final State Bar Court decision in a proceeding under this chapter. Unless the California Supreme Court grants a petition for review, the decision is binding on the lawyer referral service, the Office of Chief Trial Counsel, and the State Bar.

#### **Rule 4208 Applicable Rules**

- (A) **Inapplicable Rules.** The following rules do not apply in a proceeding pursuant to this chapter:
  - (1) rules that by their terms apply only to disciplinary proceedings or to other specific proceedings; and
  - (2) rules 5.50 (abatement); rules 5.80-5.102 (defaults; obligation to appear at trial; pretrial; notice of trial); rule 5.103 (burden of proof); rules 5.151-5.158 (review).
- (B) **Conditionally Applicable.** The following rules apply in a proceeding pursuant to this

chapter in certain circumstances:

(1) rules 5.60-5.71 (subpoenas and discovery) apply only if and to the extent that the court permits discovery.

- (C)** In such applicable rules, reference to “attorney” shall apply to a lawyer referral service as appropriate.





# Supreme Court of California

350 McALLISTER STREET  
SAN FRANCISCO, CA 94102-4797

JORGE E. NAVARRETE  
CLERK AND EXECUTIVE OFFICER  
OF THE SUPREME COURT

(415) 865-7002  
jorge.navarrete@jud.ca.gov

April 29, 2019

Leah T. Wilson, Executive Director  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Request to Approve Amendments to State Bar Rules re Lawyer Referral Services

Dear Ms. Wilson:

By this letter we acknowledge receipt of the State Bar's request dated March 6, 2019, seeking the court's approval of proposed amendments to State Bar Rules governing certification of lawyer referral services (LRS). Business & Professions Code section 6155<sup>1</sup> requires all LRSs in California to be registered and certified according to general parameters set forth in the statute as well as minimum standards formulated by the State Bar and approved by the court. (§ 6155, subd. (f).) The court approved the first set of LRS rules in 1989 and has periodically approved various revisions to these rules over the years. The most recent set of revisions approved by the court became effective January 21, 2014.

After careful consideration of this current request, the court has decided to approve the proposed rule revisions with two exceptions. The court denies approval of revisions to rules 3.803 and 3.806. These specific revisions were intended to remove State Bar Court as the forum for review of adverse decisions regarding initial certifications, recertifications, and revocations or suspensions of existing certifications, and sought instead to vest this authority with the State Bar's Chief Executive Officer (CEO) with final review authority remaining with this court pursuant to California Rules of Court, rule 9.13(d). The State Bar contends this review process has rarely been invoked because State Bar staff has a policy and practice of working collaboratively with applicants and certified LRSs facing suspension or revocation to work through any issues as they arise. In fact, it is unaware of any proceeding in State Bar Court initiated under the current rules and notes that there are currently no State Bar Court Rules of Procedure to follow even if an aggrieved first-time applicant or a certified LRS facing revocation or suspension wishes to pursue formal review.

---

<sup>1</sup> All further statutory references are to the Business and Professions Code.

To understand the court's decision to deny approval of these rule revisions, it may be helpful to review briefly the history of prior changes to this review procedure, including the most recent set of changes approved in 2014. Before 1996, State Bar staff determined whether applicants for certification or recertification met the minimum LRS requirements and the authority to withdraw or impose conditions on the operation of an LRS was vested with State Bar Court as determined in proceedings under its Rules of Procedure, rules 4205 through 4207. Effective January 1, 1997, the court approved new rules that authorized the CEO to review each LRS application initially and provide written notification if denied. (Former rules 6.5 and 6.6.) Former rules 7.3 through 7.5 permitted a first-level review of an adverse determination by a designated subcommittee of the Board of Governors (now the Board of Trustees), a second-level review by the Board's Committee on Legal Services, and final review by this court under former rule 952(d) of the Rules of Court (predecessor to rule 9.13(d)). After this new process was set in place in 1997, State Bar Court Rules of Procedure, rules 4205 through 4207, were repealed.

This two-tiered Board review structure remained in place until 2014 when the court approved the State Bar's request to re-vest review authority with the State Bar Court. In its request to approve these rule revisions dated April 30, 2013, the State Bar observed that this change was necessary because the State Bar had generally moved away from Board involvement in certification reviews and that "review is seldom sought because of a policy and practice of State Bar staff to work with an LRS applicant until the application is complete or it is clear that the applicant does not qualify for certification." (2013 request at p. 15.) It was also noted that State Bar Court already serves similar review functions in the other non-disciplinary settings, such as review of adverse decisions regarding legal specialization certificates (State Bar Rule 3.125; State Bar Court Rules of Procedure 5.390-5.399), and of grant application denials or complaints about a grant recipient's qualifications as initially determined by the Legal Services Trust Fund Commission. (State Bar Rules 3.691(C) and 3.692(G); State Bar Court Rules of Procedure 4301-4304.) Thus, the State Bar contended at the time, the State Bar Court could serve as the most appropriate forum for review of adverse decisions regarding LRS certifications, suspensions, and revocations. The court agreed and approved these changes to rules 3.803 and 3.806.

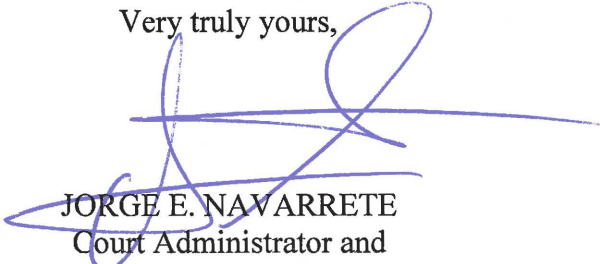
The State Bar now seeks to change this review structure again in an effort to "streamline the process," while also acknowledging that the process is rarely, if ever, used and there are no rules of procedure in place to facilitate review even if an aggrieved applicant or certified LRS wished to invoke the process by filing a petition. The court does not view these as compelling reasons to change the locus of initial review authority once again. The Board, not the State Bar Court, must formulate and obtain court approval of rules of procedures governing the review process for LRS certification, revocation, and suspension decisions. (§ 6155, subd. (f)(3).) Following approval of the 2014 rule revisions, the Board apparently did not promulgate and submit rules of procedure on this subject for this court's consideration and approval. The court requests that the Board do so now.

Additionally, while it is commendable that State Bar staff has been able work collaboratively with LRSs to avoid a petition for review of an adverse decision in State Bar Court, such collaboration does not obviate the need to provide an appropriate avenue for independent review in the event it is needed some day, especially given the potentially anticompetitive nature of the underlying decision. The State Bar Court is likely better positioned than the CEO to develop

an adequate evidentiary record and make impartial factual findings to facilitate this court's review if and when such a matter arises to this level.

Accordingly, the court urges the State Bar's staff to work closely with the State Bar Court to draft appropriate rules of procedure to implement the review process contemplated under State Bar Rules 3.803 and 3.806, seek public comment on them, and submit them to the Board for consideration and adoption for eventual submission to this court for approval.

Very truly yours,



JORGE E. NAVARRETE  
Court Administrator and  
Clerk of the Supreme Court

cc: Rec.

SUPREME COURT  
**FILED**

APR 29 2019

Jorge Navarrete Clerk

JORGE NAVARRETE

Deputy

S254489

ADMINISTRATIVE ORDER 2019-04-24-010

## IN THE SUPREME COURT OF CALIFORNIA

EN BANC

---

### ORDER RE REQUEST FOR APPROVAL OF PROPOSED AMENDMENTS TO STATE BAR RULES REGARDING LAWYER REFERRAL SERVICES.

---

On March 6, 2019, pursuant to Business and Professions Code section 6155, subdivision (f), the Board of Trustees of the State Bar of California filed a request for approval of amendments to certain Rules of the State Bar of California, entitled "Lawyer Referral Services" (appearing in title 3, division 5, chapter 3 of the Rules of the State Bar of California). The request is granted in part and denied in part.

The amendments to rules 3.801, 3.802, 3.807, 3.820, 3.822, 3.823, 3.824, 3.826, 3.827, and 3.828, and to Appendix A: Schedule of Charges and Deadlines are approved as submitted. The approved versions of these rules and the amended portion of Appendix A are set forth in Attachment 1, and are effective June 1, 2019.

The request to approve amendments to rules 3.803 and 3.806 is denied. Pursuant to Business and Professions Code section 6155, subdivision (f)(3), the court directs the State Bar to formulate State Bar Court Rules of Procedure governing review proceedings contemplated under rules 3.803(A)(2) and 3.806(E), and to submit those Rules of Procedure to this court for its consideration and approval.

It is so ordered.

---

CANTIL-SAKAUYE

*Chief Justice*

---

LIU

*Associate Justice*

---

CUÉLLAR

*Associate Justice*

---

KRUGER

*Associate Justice*

---

GROBAN

*Associate Justice*

---

*Associate Justice*

---

*Associate Justice*



## ATTACHMENT 1

### Article 1. Certification

...

#### **Rule 3.801 Application for certification**

- (A) To initiate or continue certification, a lawyer referral service must submit an Application for Certification as a Lawyer Referral Service that identifies each county in which it operates.
- (B) Every application must include panel membership criteria, including criteria for suspension and removal that provide for written notice and review with an opportunity to respond.
- (C) An application for initial certification may be submitted at any time. An application for continuance of certification must be submitted with the annual report required by Rule 3.828. Within a reasonable time, the State Bar will notify an applicant that certification has been granted or denied or that an application is incomplete or noncompliant.
- (D) An application must be completed in accordance with application instructions and filed with any required fee.

#### **Rule 3.802 Application fees**

- (A) Application fees for initial and continued certification are set forth in the Schedule of Charges and Deadlines.<sup>1</sup>
- (B) An application fee not received by the deadline is subject to the late penalty set forth in the Schedule of Charges and Deadlines. If the fee and penalty are not received within thirty days of the deadline, certification may be suspended and the lawyer referral service must cease any activity subject to these rules.
- (C) Application fees will be refunded upon written withdrawal of the application by the service. An application may not be withdrawn after certification has been granted. An application fee is otherwise not refundable.
- (D) An application or late fee for continued certification may be waived or reduced. Any request for a waiver or reduction will be reviewed based on demonstrated financial necessity.

---

<sup>1</sup> Bus. & Prof. Code, § 6155, subd. (f)(4).

...

### **Rule 3.807 Complaints about a lawyer referral service**

The State Bar must review a complaint about a lawyer referral service submitted pursuant to these rules<sup>1</sup> within a reasonable time; and

- (A) if the complaint demonstrates an apparent violation of these rules or other authority provide the service written notice of the complaint and an opportunity to respond; and
- (B) provide written notice to the complainant regarding what action, if any, it deems appropriate.

---

<sup>1</sup> Rule 3.820(E)

...

## **Article 2. Minimum standards for lawyer referral services**

### **Rule 3.820 General duties of a lawyer referral service**

A lawyer referral service must:

- (A) have a governing committee; one or more panels of attorneys to provide legal services; staff to evaluate and process requests for legal assistance; and, if engaging in automated referrals as described in rule 3.826(C), appropriate technology and safeguards to ensure accurate referrals;
- (B) encourage widespread attorney membership;<sup>1</sup>
- (C) serve its community and improve the quality and affordability of legal services by:
  - (1) assisting those in need of legal services to find a qualified, insured attorney or other appropriate legal services, including dispute resolution;
  - (2) providing the public with general information about appropriate legal services;

- (3) establishing services for persons of limited means, such as a modest means panel, a limited scope panel, flat fee panels, providing a free referral for a 30 minute consultation by an attorney panel member, or providing for services on sliding fee scales or payment schedules; and
- (D) ensure the combined charges to the potential client by the referral service and the attorney to whom the potential client is referred do not exceed the total cost that the client would normally pay if no referral service were involved;<sup>2</sup>
- (E) tell each client how to submit a complaint about the service or one of its panel members and inform the client that an unresolved complaint may be submitted to the State Bar, provided it is in writing and supported by factual information that demonstrates a violation of these rules or other applicable authority;
- (F) if it is a non-profit, use its income only to pay reasonable operating expenses and to fund its pro bono, legal services, and other public service programs;
- (G) fully cooperate with any State Bar audit;<sup>3</sup>
- (H) provide each panel member a copy of these rules; and
- (I) at all times comply with these rules and applicable law.

---

<sup>1</sup> Bus. & Prof. Code, § 6155(f)(1).

<sup>2</sup> Bus. & Prof. Code, § 6155(a)(2).

<sup>3</sup> See Rule 3.805.

...

### **Rule 3.822 Governing committee**

- (A) A lawyer referral service must be supervised by a governing committee of three or more members. A majority of the governing committee must be active licensees of the State Bar. No more than half the members of the governing committee may receive referrals from the lawyer referral service.
- (B) The governing committee must
  - (1) establish criteria for subject matter and general panel membership and use the criteria to evaluate panel members at least once every two years;



- (2) establish and assess compliance with the referral procedures required by these rules;<sup>1</sup>
- (3) review and submit the annual report required by these rules;<sup>2</sup>
- (4) annually survey a random sample of at least ten percent of the clients of the service to determine client satisfaction with services and fees;
- (5) on the basis of the annual survey, make any operational changes it deems necessary;
- (6) provide to the State Bar the information required to be collected under rule 3.826; and
- (7) meet at least quarterly.

---

<sup>1</sup> Rule 3.826.

<sup>2</sup> Rule 3.828.

#### **Rule 3.823 Panels**

- (A) A lawyer referral service must establish panels of attorney members qualified to provide legal services to the public. The panels must be organized by subject matter but may include a general panel. A lawyer referral service is encouraged to establish moderate and no-fee panels and other special panels that respond to the needs of the public, in order to provide services that serve persons of limited means as required under rule 3.820(C)(3).<sup>1</sup>
- (B) At least twenty attorney members, ten of whom are from separate and independent law firms, are required for all lawyer referral services, and each panel must have at least four members. The State Bar may waive these minimum requirements if a lawyer referral service operates in an underserved county, provides written evidence that the size of the community or the number of its attorneys warrants a lesser number, or the service otherwise demonstrates the ability to meet the needs of its service area with a smaller panel.
- (C) A lawyer referral service must require that each panel member
  - (1) have errors and omissions insurance in the amounts set forth in the Schedule of Charges and Deadlines and provide proof of insurance to the State Bar upon request;<sup>2</sup>
  - (2) not receive referrals evaluated and processed by a lawyer referral service

staff member employed or otherwise compensated by the panel attorney;

- (3) if the service operates in more than one county, identify each county the member agrees to take referrals from.
- (D) A lawyer referral service may disclose a panel member's past performance when the information is accurate, complete, and not misleading.

<sup>1</sup> Bus. & Prof. Code, § 6155, subd. (f)(5).

<sup>2</sup> Bus. & Prof. Code, § 6155, subd. (f)(6).

### **Rule 3.824 Eligibility for Membership**

Only an active licensee of the State Bar practicing in the community served by the lawyer referral service may be a member of the service. A member of any service that operates in more than one county may take referrals from any of the counties in which the service operates; provided, however, that the member must agree to travel to each county as reasonably necessary to perform legal services (such as client meetings), and must either maintain a place of business in each county or be able to offer an otherwise suitable location or method for the performance of such services. Remote services may be provided if they are adequate to meet a client's needs. To serve on a subject matter panel, such a member must meet the experience and other substantial and objective criteria of the lawyer referral service. Certification as a legal specialist qualifies an attorney to service on a panel that deals with the area of certification, provided the attorney meets other criteria for panel membership.

...

### **Rule 3.826 Referrals**

- (A) The governing committee of a lawyer referral service must establish fair and impartial procedures to assure that referrals are allocated equitably to panel members and respond insofar as possible to clients' legal needs and other circumstances, such as geographic convenience and language issues.
- (B) All referrals in a geographical area may not be made to a single attorney or law firm. The State Bar may deny certification or recertification, or suspend or revoke certification, for failure to make referrals fairly and impartially to panel members or to maintain current and complete records of referrals.
- (C) If a lawyer referral service makes any referrals using purely technological means, the service must:

- (1) for a minimum of twelve (12) months immediately following the implementation of any automated referral system, establish quality control and assurance measures that, at a minimum:
  - (a) make reasonable efforts to follow up within two (2) business days of each automated referral to evaluate whether the client's needs were adequately met; and
  - (b) allow for electronic feedback from clients regarding whether the automated referral was successful or failed to meet client's needs.

After twelve (12) months, the service may reduce its quality control and assurance efforts to follow up with twenty-five percent (25%) of automated referrals if it demonstrates to the State Bar that the automated referral system results in successful referrals at a rate as high or higher than traditional referral methods. The service may make such a demonstration with customer satisfaction surveys, or other appropriate methods. The requirements of this subsection also apply after the adoption of a new technological platform, but do not otherwise apply to incremental software updates or similar improvements to an existing automated referral system;

- (2) ensure that any client who encounters a technical problem or any other difficulty or delay in using service's automated referral system is provided with information to contact an appropriate service staff member during regular business hours;
- (3) forgo any fee if a referral is made that does not accurately reflect the needs of the client, unless the fee is applied to further referral efforts in the same matter that are successful;
- (4) regularly analyze the efficiency and accuracy of the automated referrals and make adjustments to the technological platforms as needed; and
- (5) provide data to the State Bar enumerating how many requests for referrals were made in a calendar year through the service's automated referral system, and how many such referrals were made using purely technological means.

(D) A referral may not

- (1) discriminate on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic

information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;<sup>1</sup>

- (2) violate restrictions against unlawful solicitation and false and misleading advertising or otherwise violate the Rules of Professional Conduct or law applicable to a member of the State Bar; or
- (3) be made directly or indirectly by a person employed or otherwise compensated by an attorney or firm to whom the referral is made.

---

<sup>1</sup> See Rules of Professional Conduct, rule 8.4.1(c)(1).

### **Rule 3.827 Records**

- (A) A lawyer referral service must maintain and provide to the State Bar upon request current records
  - (1) for each panel member that include
    - (a) name, contact information, and qualifications;
    - (b) number and type of referrals, including whether referrals were made using purely technological means; and
    - (c) fees remitted for membership, referrals or consultations, advertising; or any other reason; and
  - (2) for each referral that include
    - (a) the client's name and contact information;
    - (b) type of matter, date of referral, and whether each referral was made using purely technological means; and
    - (c) panel member to whom the referral was made; and
  - (3) sufficient to demonstrate compliance with section (C) of Rule 3.826.
- (B) Any record in the possession of the State Bar pertaining to a lawyer referral service is the property of the State Bar and confidential unless authorized for disclosure by these rules, order of the Board of Trustees, or consent of the

lawyer referral service.

### **Rule 3.828 Annual report**

- (A) The governing committee of a lawyer referral service must submit an annual report of its activities and those of the lawyer referral service. The report must at a minimum
- (1) provide a detailed accounting of
    - (a) all sources and amounts of income, expenses, and reserves during the reporting period;
    - (b) the disposition of any reserves or surpluses derived from activities of the service during the reporting period and the immediately preceding reporting period;
  - (2) include statistics derived from the records the service is required to maintain, including information about the proportion of referrals made through an automated referral system;<sup>1</sup> and
  - (3) summarize the annual client survey and any operational changes it prompted.<sup>2</sup>
- (B) Failure to submit an annual report on time suspends certification unless the State Bar extends the report deadline for good cause.

<sup>1</sup> See Rule 3.826(C).

<sup>2</sup> Rule 3.822(B)(4) and (5).

...

## **APPENDIXES**

### **APPENDIX A. SCHEDULE OF CHARGES AND DEADLINES**

#### ANNUAL FEES

...

<i>Rule</i>	<i>Description</i>	<i>Amount</i>	<i>Deadline</i>
3.802(A)	Application Fee: <sup>1</sup>		

<i>Rule</i>	<i>Description</i>	<i>Amount</i>	<i>Deadline</i>
	1. Non-profit services.	<p>\$1,000 for a service that operates in one county only. \$500 for the second county in which the service will operate, if any. \$250 for each additional county in which the service will operate, if any.</p> <p>For continued certification and regardless of the number of counties in which the service operates, one percent (1%) of gross revenue up to maximum of \$10,000. No application fee, either for initial or continued certification, shall exceed \$10,000.</p>	Upon filing of application for certification or continued certification.
	2. For-profit services.	<p>\$5,000 for a service that operates in one county only. \$2,500 for the second county in which the service will operate, if any. \$1,250 for each additional county in which the service will operate, if any.</p> <p>For continued certification and regardless of the number of counties in which the service operates, one percent (1%) of gross revenue up to maximum of \$10,000</p>	Upon filing of application for certification or continued certification.

...  
<sup>1</sup> Business & Professions Code § 6155(f)(4) provides that the application fee and renewal fees be determined by a combination of factors including for-profit or non-profit status

and that the fees do not exceed \$10,000 or 1 percent of gross annual revenues, whichever is less.