



The State Bar of California

OPEN SESSION AGENDA ITEM 706 NOVEMBER 2023

DATE: November 16, 2023

TO: Members, Board of Trustees

FROM: Elizabeth Hom, Program Director, Office of Access & Inclusion
Danielle MacRae, Lead Program Analyst, Office of Access & Inclusion

SUBJECT: Proposed Amendments to Rules Governing Pro Bono Practice Program (Rules 3.325–3.330): Request to Circulate for Public Comment

EXECUTIVE SUMMARY

The State Bar administers a Pro Bono Practice Program (PBPP) which allows attorneys who would otherwise be inactive to maintain an active attorney license, with waived license fees, to exclusively provide pro bono legal services in partnership with specific legal services providers. Staff seek to update the State Bar Rules governing the program to streamline requirements for attorneys, to expand the number of eligible organizations, and to increase access to justice for low- and moderate-income Californians. Specifically, the revisions include removing current years of practice requirements, allowing additional nonprofit organizations to be served by pro bono practice attorneys, and requiring data collection to better assess program's impact.

BACKGROUND

INCREASING PRO BONO AS PART OF STATE BAR'S STRATEGIC PLAN

Since at least 2003, the State Bar of California has formally sought to support and expand pro bono legal services in the state. In 2003, the then Board of Governors passed a resolution which, in part, "(1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice[.]"

More recently, the State Bar's 2022-2027 Strategic Plan includes Goal 2 to "Protect the Public by Enhancing Access to and Inclusion in the Legal System." Work toward that goal includes increasing access to the legal system through "public outreach and education, improved access to legal advice and services, and a legal profession that reflects the diversity of California's communities." One identified strategy under Goal 2 is to "[i]ncrease representation through the State Bar's existing regulatory and oversight authority including special admissions and pro bono practice programs."

In support of the strategic plan, the State Bar's current Strategic Operational Plan includes an implementation step to "incentivize and support licensees and law firms to increase the number of pro bono hours provided to underserved groups," and corresponding operational activities include "[i]dentify[ing] strategies for increasing the number of pro bono hours provided by CA attorneys[.]" One such strategy for increasing pro bono hours is expanding the Pro Bono Practice Program to additional attorneys.¹

CALIFORNIA'S PRO BONO PRACTICE PROGRAM

In 2007, the State Bar launched an emeritus pro bono program that allowed retired attorneys to maintain an active license, free of fees, to provide pro bono legal services exclusively. In an effort to increase program participation and pro bono service in the state, the State Bar Rules governing the program were amended in 2011 to rename the program and allow additional otherwise inactive attorneys—not just those who are retired—to participate.

Currently, attorneys may apply for the Pro Bono Practice Program (PBPP) if they:

- are in good standing with no pending disciplinary charges;
- have been admitted to practice law in California for at least three years;
- have practiced law or served as a judge in California for at least three of the last five years; and
- have no record of public discipline during the prior three years.²

If certified as a pro bono practice attorney, the licensee must provide free legal assistance for a qualified legal services provider, the no-fee panel or pro bono clinic of a certified lawyer referral service, and/or a court-based self-help center, and not otherwise engage in activities that require active status. The attorney cannot provide any legal services for pay. See State Bar Rule 3.329. The legal services provider, pro bono clinic, or self-help center with which the attorney volunteers must indicate whether it will accept the attorney as a volunteer if approved as a pro bono practice attorney, provide "adequate support and supervision" to the attorney, provide no compensation to the attorney except for reimbursement of expenses, and agree with the

¹ State Bar staff are also investigating other methods of expanding pro bono service in the state, including requiring pro bono hours reporting, increasing public education about pro bono opportunities, and supporting pro bono services for specific client populations like veterans and disaster survivors. Staff may return to the Board of Trustees at a later date with a proposal related to reporting on pro bono hours.

² State Bar Rule 3.328 allows the State Bar to waive a pro bono practice attorney requirement for good cause such as the need for pro bono services in a particular area or the extent to which the licensee otherwise meets program requirements.

attorney to provide a minimum number of pro bono legal services hours annually. Currently, State Bar Rules recommend a minimum of 100 hours. See State Bar Rule 3.330.³

The State Bar licenses more than 266,000 attorneys to practice law in California, with about 190,000 attorneys on active status and about 76,000 on inactive status. In the last five years, an average of just 112 attorneys participated in the Pro Bono Practice Program annually. Staff therefore propose several revisions to the State Bar rules aimed at expanding access to the PBPP for both attorneys and the organizations with which they seek to volunteer.

DISCUSSION

EXPANDING THE PROGRAM TO ADDITIONAL ATTORNEYS

Given the relatively small number of attorneys participating in California’s PBPP (approximately 110 annually), staff proposes removing certain practice requirements to make the program available to a larger number of licensees.

California’s PBPP currently requires that an attorney be admitted to practice law in California for at least three years and “have practiced law” or served as a judge in California for at least three of the prior five years. The proposed rules remove these two requirements. Such practice requirements are relatively uncommon in other states. The American Bar Association’s Center for Pro Bono provides summary information on each state’s emeritus and/or pro bono practice programs⁴; at least 31 states’ pro bono programs do not have a years of practice requirement. Often the programs with years of practice requirements are emeritus programs targeted toward retired attorneys.

In addition to being uncommon in other states, the years of practice requirements, as currently written, are difficult to apply. The requirement that an attorney “have practiced law” in at least three of the prior five years is unclear, confusing, and unnecessarily prohibits some attorneys from participating in the program without a waiver. There are several careers—law professor, politician, compliance officer, etc.—where an individual may not “practice law” but uses their legal knowledge and skills in their day-to-day work. Each year, the State Bar issues waivers for attorneys in positions like these who wish to participate in the program and for attorneys who do not yet have three years of practice. In the last two annual application cycles, at least four attorneys were issued such waivers.

³ A pro bono practice program attorney may choose to provide free legal services on behalf of more than one organization; however, each organization must indicate that it will accept the attorney as a volunteer if approved and must follow all program requirements as outlined in State Bar Rule 3.330.

⁴ See June 2023 *State Emeritus Pro Bono Practice Rules Chart*, at https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-emeritus-probono-practice-rules.pdf

EXPANDING THE PROGRAM TO ADDITIONAL ORGANIZATIONS

Expanding the program so that participating attorneys can volunteer with additional nonprofit organizations providing legal services in California may also increase pro bono opportunities and increase access to justice for low- and moderate-income Californians. The program currently requires attorneys to work with a qualified legal services provider eligible to receive funds from the Legal Services Trust Fund Program,⁵ the pro bono or no-fee panel of a lawyer referral service, or a court-based self-help center. While this includes more than 125 organizations, it excludes legal aid organizations that do not wish to seek State Bar funding and national organizations like the American Civil Liberties Union (ACLU) that are not traditional legal aid providers but provide free legal services to and lobby on behalf of disadvantaged clients in California.

California is not unique in limiting its program to these types of organizations. Nearly all states' pro bono practice programs require attorneys to work with a "certified legal services provider," according to the ABA. How an organization becomes certified varies by state, but they are often organizations that either receive IOLTA grant funds or petition the relevant state's supreme court to affirm they provide free legal services to indigent clients.

The proposed rules would allow additional nonprofits that can demonstrate compliance with a set of client protection criteria to participate in the program.⁶ Expanding the types of organizations attorneys may serve through California's PBPP would more closely align the program requirements with the aim of the 2003 Pro Bono Resolution, which urges attorneys to provide services to "indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice." It would also potentially increase pro bono legal services provided by California attorneys, as the State Bar's strategic plan aims, since there may be attorneys who would participate in the PBPP for the opportunity to work with a nonprofit that does not currently qualify.

Pro bono practice attorneys would be able to provide free legal services to additional nonprofit organizations that can annually provide:

- the organization's mission statement;
- an active Certificate of Status from the California Secretary of State as a nonprofit corporation;
- the organization's retainer agreement(s) that outlines for clients the scope of representation provided, confirms that services will be provided at no cost, and indicates services may be provided by a pro bono attorney;
- a list of all current California-licensed attorneys employed at the organization; and

⁵ For the purposes of the Pro Bono Practice Program, qualified legal services providers include qualified legal services projects and support centers, as defined in Business and Professions Code section 6213. These organizations are eligible to receive Interest on Lawyer Trust Account (IOLTA) grant funds.

⁶ Arizona and Colorado's pro bono practice programs both have review processes by which they certify organizations' qualifications to participate. The State Bar may wish to replicate aspects of these models.

- proof of malpractice insurance coverage.

COLLECTING DATA

The State Bar does not currently collect data on the number of pro bono hours provided by California attorneys, either in the PBPP or generally. According to the ABA, nine states require all licensed attorneys—not just those in the pro bono program—to report pro bono hours, and 13 other states have voluntary reporting systems. To better understand the scope and reach of California’s PBPP, the proposed rule would require pro bono legal services providers to report the number of hours provided annually by PBPP attorneys.⁷ Most legal services providers already track or collect hours provided by pro bono attorneys; requiring providers to provide this information to the State Bar will allow the State Bar to measure, over time, the impact of the program on access to justice in the state.

ADDITIONAL REVISIONS

In addition to changes to expand attorney and organization access and to require reporting of pro bono hours, several minor revisions are recommended so that State Bar rules more accurately reflect current practice.

State Bar Rule 3.326 allows the State Bar to waive annual active license fees for pro bono practice attorneys. Revisions to rule 3.326 would clarify that a licensee must apply before the annual fee cycle deadline to receive the fee waiver and that any fees already paid by the licensee will not be refunded. The proposed rule also includes a revision to affirm that the State Bar will waive the difference in licensing fees that an inactive attorney must pay to transfer to active status in order to serve as a pro bono practice attorney.

State Bar Rule 3.329 indicates that the “Secretary” may waive a pro bono practice eligibility requirement for good cause. In practice, such waivers are approved by a director in the State Bar’s Office of Access & Inclusion. The proposed rule reflects non-substantive revisions to clarify language on who can approve waivers and recommend an additional sentence requiring that an applicant seeking a waiver under rule 3.328 indicate the request upon application.

Finally, State Bar Rule 3.330 outlines the requirements for the organizations at which pro bono attorneys provide their services. The current rule requires the organization to “[n]otify the State Bar that a licensee has applied to serve as a pro bono practice attorney” and “[i]ndicate whether the application will be accepted if the State Bar certifies the licensee as a pro bono practice attorney.” Current practice requires the organization to sign a declaration as part of the licensee’s application affirming the attorney will provide services at their organization if approved by the State Bar. The proposed rules streamline the requirements in rule 3.330 to reflect this practice. All proposed revisions to the PBPP rules are provided in Attachment A.

⁷ Separate from these revisions to the Pro Bono Practice Program, staff are evaluating whether to recommend required pro bono reporting for all California licensees.

FISCAL/PERSONNEL IMPACT

If adopted, the proposed revisions would likely result in the State Bar receiving additional PBPP applications. An increase in applications would require more staff time to review applications and administer the program, but the increased demand on staff time would likely be marginal. Currently, the State Bar does not expect to need more staffing or financial resources to respond to an increase in applications. An increase in program participation would result in the State Bar waiving more attorneys' active license fees, resulting in slightly lower fee income; however, the benefits of increased pro bono participation are in line with State Bar strategic goals.

While collecting data from pro bono attorneys and providers would result in increased personnel time, staff does not anticipate it to be overly burdensome in the near term and will evaluate fiscal/personnel impact regularly.

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 3, Division 2, Chapter 6, Rules 3.325–3.330

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 2. Protect the Public by Enhancing Access to and Inclusion in the Legal System

- a. 3. Incentivize and support licensees and law firms to increase the number of pro bono hours provided to underserved groups.

RECOMMENDATIONS

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

RESOLVED, that the Board of Trustees authorizes staff to make available the proposed revisions to State Bar Rules related to the Pro Bono Practice Program for a public comment period of 45 days; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be, construed as a recommendation of approval by the Board of Trustees of the proposal.

ATTACHMENT LIST

- A. Proposed Revisions to State Bar Rules Title 3, Division 2, Chapter 6. Pro Bono Practice Attorneys – Redline

Chapter 6. Pro Bono Practice Attorneys

Rule 3.325 Definitions

- (A) The “Pro Bono Practice Program” is a program for active licensees of the State Bar who would otherwise be inactive to provide free legal assistance exclusively for a pro bono legal services provider~~a qualified legal services provider, for the no-fee panel or pro bono clinic of a certified lawyer referral service or for a court-based self-help center.~~
- (B) A “pro bono practice attorney” is an active licensee of the State Bar who would otherwise be inactive but who provides free legal assistance exclusively for the Pro Bono Practice Attorney Program and engages in no other activities that require active status.
- (C) For the purposes of the Pro Bono Practice Program, a “pro bono legal services provider” may be a qualified legal services provider; the no-fee panel or pro bono clinic of a certified lawyer referral service; a court-based self-help center; or a nonprofit that provides free legal services to indigent or disadvantaged Californians and has been approved by the State Bar as a pro bono legal services provider for the purposes of the Pro Bono Practice Program. To be approved by the State Bar, a nonprofit must annually provide to the State Bar for review:
- a. The organization’s mission statement;
 - b. An active Certificate of Status from the California Secretary of State as a nonprofit corporation;
 - c. The organization’s retainer agreement(s) that outlines for clients the scope of representation provided, confirms that the services will be provided at no cost, and indicates services may be provided by a pro bono attorney;
 - d. A list of all current California-licensed attorneys employed at the organization; and
 - e. Proof of malpractice insurance coverage.
- The organization’s mission statement must include or relate to providing legal services to underserved client groups in California. The State Bar shall public on its website a list of nonprofits approved as pro bono legal services providers for purposes of the Pro Bono Practice Program.
- ~~(C)~~(D) A “qualified legal services provider” receives or is eligible to receive funds from the Legal Services Trust Fund Program as either
- (1) A “qualified legal services project,” which provides legal services in civil matters without charge to indigent periods; or
 - (2) A “qualified legal services support center,” which provides legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects.
- ~~(D)~~(E) A “certified lawyer referral service” is, for the purposes of the Pro Bono Practice Program, the no-fee panel or pro bono panel or clinic of a lawyer referral service certified by the State Bar as meeting statutory criteria.
- ~~(E)~~(F) A “court-based self-help center” is, for the purposes of the Pro Bono Practice Program, a self-help program that is in compliance with California Rule of Court 10.960.

Rule 3.326 Waiver of annual license fees

The State Bar waives annual active license fees for licensees who act exclusively as pro bono practice attorneys for an entire fee cycle pursuant to this chapter. Licensees who are pro bono practice attorneys for less than a ~~calendar year~~fee cycle must pay annual license fees. To be eligible for fee waiver in an upcoming fee cycle, the attorney must apply to the pro bono practice program on or before the annual fee deadline. If an attorney has already paid inactive fees, the State Bar waives any fees associated with transferring to active status as part of the pro bono practice program application process. Any fees already paid by the licensee will not be refunded.

Rule 3.327 Eligibility requirements

To serve as a pro bono practice attorney, a licensee must

- ~~(A)~~ Be a licensee in good standing with no disciplinary charges pending at the time of application to the Pro Bono Practice Program;
- ~~(B)~~ ~~At the time of application have been admitted to the practice of law in California for at least three years preceding the application;~~
- ~~(C)~~(A) Have practiced law or served as a judge in California for at least three of the last five years;
- ~~(D)~~(B) _____ Have no record of public discipline during the three years preceding the application;
- ~~(E)~~(C) Submit an application annually for the Pro Bono Practice Program; and
- ~~(F)~~(D) Be certified by the State Bar as a pro bono practice attorney.

Rule 3.328 Waiver of an eligibility requirement

The ~~Secretary~~Program Director may waive a pro bono practice attorney program eligibility requirement for good cause, with good cause determined based on factors including but not limited to, the extent to which a licensee otherwise meets the requirements, the need for legal assistance in a particular place, or a licensee's experience in providing pro bono legal assistance ~~or for other good cause~~. An applicant seeking an eligibility requirement waiver must indicate the request upon application.

Rule 3.329 Responsibilities of a pro bono practice attorney

A pro bono practice attorney must

- (A) Provide legal assistance exclusively as a Pro Bono Practice Attorney and not otherwise engage in activities that require active status;
- (B) Provide legal assistance for a pro bono legal services provider~~qualified legal services provider, a certified lawyer referral service or court-based self-help center~~;

- (C) Accept no compensation for legal services, except for reimbursement of expenses incurred while rendering services under these rules;
- (D) Comply with State Bar Rules on Minimum Continuing Legal Education and all other rules and laws applicable to active State Bar licensees;
- (E) Notify the State Bar within thirty days of withdrawing from the program;
- ~~(F)~~ Agree with the ~~qualified legal services provider, certified lawyer referral service or court-based self-help center~~ pro bono legal services provider to provide a minimum number of pro bono legal services annually, 100 hours being the recommended minimum;

~~(G)~~ (F) Submit an application annually; and

~~(H)~~ (G) Disclose any disciplinary charges to the ~~qualified legal services provider, certified lawyer referral service or court-based self-help center~~ pro bono legal services provider as part of the attorney's continuing duty.

Rule 3.330 Responsibilities of a ~~qualified legal services provider or certified lawyer referral service or court-based self-help center~~ pro bono legal services provider

A ~~qualified legal services provider, certified lawyer referral service or court-based self-help center~~ that ~~uses the services of a pro bono practice attorney~~ pro bono legal services provider must

~~(A)~~ Notify the State bar that a licensee has applied to serve as a pro bono practice attorney for the provider, service or center;

~~(B)~~ (A) Indicate whether the application will be accepted if the State Bar certifies the licensee as a pro bono practice attorney. Confirm that a licensee applying to serve as a pro bono practice attorney for the provider will be accepted as a volunteer if the State Bar certifies the licensee as a pro bono practice attorney;

~~(C)~~ (B) Provide no compensation to the pro bono practice attorney, except for reimbursement of expenses; ~~and~~

~~(D)~~ (C) Notify the State Bar within thirty days of the pro bono practice attorney withdrawing from the program;

~~(E)~~ Provide adequate support and supervision to each pro bono practice attorney;

~~(D)~~

~~(F)~~ ~~(E)~~ Agree with the pro bono practice attorney to provide a minimum number of hours of pro bono legal services annually, 100 hours being the recommended minimum; and

~~(E)~~

~~(F)~~ (E) Annually report the number of hours of pro bono legal services provided by the pro bono practice attorney. Submit application annually for each pro bono practice attorney.

~~(G)~~ An organization that does not meet these responsibilities may be deemed by the State Bar to no longer be a pro bono legal services provider to which pro bono practice attorneys may provide services under these rules.