



# The State Bar of California

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## OPEN SESSION AGENDA ITEM 50-6 NOVEMBER 2023

**DATE:** November 16, 2023

**TO:** Members, Board of Trustees

**FROM:** Donna S. Hershkowitz, Chief of Programs/Legislative Director

**SUBJECT:** Proposed Changes to California Rules of Court Relating to Fees for Pro Hac Vice (Rule 9.40) and Out-of-State Attorney Arbitration Counsel (Rule 9.43): Request to Circulate for Public Comment

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### EXECUTIVE SUMMARY

The Board of Trustees, at its September 2023 meeting, adopted increases to Admissions fees to address a significant structural deficit in the Admissions Fund. Among the fee increases adopted were increases for the Pro Hac Vice (PHV) and Out-of-State Attorney Arbitration Counsel (OSAAC) programs. Following two rounds of public comment on the package of fee increases, the Board approved increasing these fees from \$50 to \$500. The September agenda item noted that the amount of the PHV and OSAAC fees were set in the California Rules of Court and that staff would return in November with the language of the rule change to effectuate the Board's action. This agenda item proposes amending rules 9.40 and 9.43 of the California Rules of Court to strike the \$50 fee and provide, consistent with other special admissions programs, that the State Bar set appropriate application fees. The agenda item recommends that the proposed language be circulated for a 30-day public comment period.

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### BACKGROUND

In [September 2023](#), after consideration of the public comment received, the Board adopted fee increases for pro hac vice and out-of-state attorney arbitration counsel applications. As part of the corresponding Board agenda item staff noted that these particular fees could not be implemented without a change to the California Rules of Court (CRC), as the specific dollar amount of the current fee is set forth in those rules.

## DISCUSSION

California Rules of Court (CRC) rule 9.40 provides that an applicant seeking to appear as counsel pro hac vice must pay a reasonable fee of up to \$50, with the precise amount to be set by the Board of Trustees. The rule provides that the amount set by the Board is intended to cover the expenses and incidental consequences of administering this rule and to partially cover the expenses and incidental consequences of administering the Board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services.

CRC rule 9.43 provides that out of-state attorney arbitration counsel must pay a reasonable fee not exceeding \$50 to the State Bar of California.

Rules of Court regarding other special admissions programs do not cap the amount of the fee in statute, but rather direct the State Bar to set the appropriate fee. See:

- Rule 9.41.1(e): "The State Bar of California may set appropriate application fees and initial and annual registration fees to be paid by registered military spouse attorney [sic]."
- Rule 9.42(f): "The State Bar has the authority to set and collect appropriate fees and penalties for" the Practical Training of Law Students Program.
- Rule 9.44(f): "The State Bar has the authority to set and collect appropriate fees and penalties for" foreign legal consultants.
- Rule 9.45(f): "The State Bar of California may set appropriate application fees and initial and annual registration fees to be paid by registered legal aid attorneys."
- Rule 9.46(f): "The State Bar of California may set appropriate application fees and initial and annual registration fees to be paid by registered in-house counsel."

CRC rules 9.49 and 9.49.1, relating to the temporary provisional licensure program, specify the application fee in the body of the rule.

The proposed amendments allow the Board of Trustees to implement the change to the application fee for appearing Pro Hac Vice and as Out-of-State Arbitration Counsel at the level previously approved by the Board, i.e., \$500 for each application. In addition, the proposed amendments align the language of rule 9.40(e) and 9.43(f) with the language of rules of court governing other special admissions program to provide direction to the State Bar to set the fee, but not capping the amount set forth in the rule. This change will standardize special admissions fee language across most rules of court and provide the State Bar with the flexibility to adjust the fees by the CPI annually and reevaluate the fees every three years, as directed by the Board in September<sup>1</sup>. A change only to the dollar amount in the rule would require the

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<sup>1</sup> Rule 9.40(e) currently contains provisions that appear to be unique as compared to other special admissions and State Bar fee related rules. Specifically, the rule expressly authorizes the State Bar to use excess program-related revenue for delineated purposes. Staff's proposed rule revisions strike this language, instead aligning the fee language in this rule with other special admissions rules as discussed. The State Bar has consistently used excess revenue across various program areas to support regulatory, admissions, and disciplinary functions as authorized under existing law; as such, express authorization in this particular rule is an unnecessary anomaly that can appropriately be addressed in the present revision cycle.

Board to seek a rule change every time the Board determined that a fee adjustment was appropriate.

Although the Board has approved the amount to which it intends to raise the fee, and the amount has been the subject of two rounds of public comment, the language of the rule change itself has not yet had the benefit of input from the public. This item therefore recommends circulation of the proposed language for a 30-day public comment period. Thirty days is appropriate in light of the significant public comment opportunities already provided on the amount of the increase.

## **FISCAL/PERSONNEL IMPACT**

PHV and OSAAC fee increases are projected to generate \$2.4 million in increased revenue annually.

## **AMENDMENTS TO RULES OF COURT**

Title 9, Division 4, of the California Rules of Court

## **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. 1. Increase the number of attorneys admitted through special admissions programs.

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- c. 5. Continue the Mindsets in Legal Education Initiative and evaluate the merits of expanding the program.

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- c. 6. Conduct an equity and cost focused analysis of the impact of various options for administration of the bar exam on exam pass rates, including remote and open-book formats.

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- c. 7. Provide implicit bias trainings for bar exam proctors and graders to reduce any potential bias.

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- c. 8. Continue to diversify the exam development and grading pool.

## **RECOMMENDATIONS**

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

**RESOLVED**, that the Board of Trustees approves circulating for a 30-day public comment period the proposed amendments to California Rules of Court rules 9.40 and 9.43 set forth in Attachment A.

## **ATTACHMENT LIST**

- A.** Proposed Amendments to California Rules of Court rules 9.40 and 9.43

## **Proposed Amendments to California Rules of Court rules 9.40 and 9.43**

### **Rule 9.40. Counsel pro hac vice**

#### **(a) Eligibility**

A person who is not a licensee of the State Bar of California but who is an attorney in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active licensee of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel *pro hac vice* under this rule if the person is:

- (1) A resident of the State of California;
- (2) Regularly employed in the State of California; or
- (3) Regularly engaged in substantial business, professional, or other activities in the State of California.

*(Subd (a) amended effective January 1, 2019; previously amended effective January 1, 2007.)*

#### **(b) Repeated appearances as a cause for denial**

Absent special circumstances, repeated appearances by any person under this rule is a cause for denial of an application.

*(Subd (b) lettered effective January 1, 2007; adopted as part of subd (a) effective September 13, 1972.)*

#### **(c) Application**

##### *(1) Application in superior court*

A person desiring to appear as counsel *pro hac vice* in a superior court must file with the court a verified application together with proof of service by mail in accordance with Code of Civil Procedure section 1013a of a copy of the application and of the notice of hearing of the application on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office. The notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005 unless the court has prescribed a shorter period.

##### *(2) Application in Supreme Court or Court of Appeal*

An application to appear as counsel *pro hac vice* in the Supreme Court or a Court of Appeal must be made as provided in rule 8.54, with proof of service on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office.

*(Subd (c) amended and relettered effective January 1, 2007; adopted as part of subd (b) effective September 13, 1972; subd (b) previously amended effective October 3, 1973, September 3, 1986, January 17, 1991, and March 15, 1991.)*

**(d) Contents of application**

The application must state:

- (1) The applicant's residence and office address;
- (2) The courts to which the applicant has been admitted to practice and the dates of admission;
- (3) That the applicant is a licensee in good standing in those courts;
- (4) That the applicant is not currently suspended or disbarred in any court;
- (5) The title of each court and cause in which the applicant has filed an application to appear as counsel *pro hac vice* in this state in the preceding two years, the date of each application, and whether or not it was granted; and
- (6) The name, address, and telephone number of the active licensee of the State Bar of California who is attorney of record.

*(Subd (d) amended effective January 1, 2019; adopted as part of subd (b) effective September 13, 1972; subd (b) previously amended effective October 3, 1973, September 3, 1986, January 17, 1991, and March 15, 1991; previously amended and lettered effective January 1, 2007.)*

**(e) Fee for application**

~~The State Bar may set an appropriate application fee that counsel seeking permission to appear as counsel *pro hac vice* under this rule must pay a reasonable fee not exceeding \$50 to the State Bar of California with the copy of the application and the notice of hearing that is served on the State Bar. The Board of Trustees of the State Bar of California will fix the amount of the fee:~~

- ~~(1) To defray the expenses of administering the provisions of this rule that are applicable to the State Bar and the incidental consequences resulting from such provisions; and~~
- ~~(2) Partially to defray the expenses of administering the Board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom.~~

*(Subd (e) amended effective January 1, 2019; adopted as subd (c) effective September 3, 1986; previously amended and relettered effective January 1, 2007.)*

**(f) Counsel *pro hac vice* subject to jurisdiction of courts and State Bar**

A person permitted to appear as counsel *pro hac vice* under this rule is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a licensee of the State Bar of California. The counsel *pro hac vice* must familiarize himself or herself and comply with the standards of professional conduct required of licensees of the State Bar of California and will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance. Article 5 of chapter 4, division 3 of the Business and Professions Code and the Rules of Procedure of the State Bar govern in any investigation or proceeding conducted by the State Bar under this rule.

*(Subd (f) amended effective January 1, 2019; previously relettered as subd (d) effective September 3, 1986; previously amended and relettered effective January 1, 2007.)*

**(g) Representation in cases governed by the Indian Child Welfare Act (25 U.S.C. § 1903 et seq.)**

- (1) The requirement in (a) that the applicant associate with an active licensee of the State Bar of California does not apply to an applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act; and
- (2) An applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act constitutes a special circumstance for the purposes of the restriction in (b) that an application may be denied because of repeated appearances.

*(Subd (g) adopted effective January 1, 2019.)*

**(h) Supreme Court and Court of Appeal not precluded from permitting argument in a particular case**

This rule does not preclude the Supreme Court or a Court of Appeal from permitting argument in a particular case from a person who is not a licensee of the State Bar, but who is licensed to practice in another jurisdiction and who possesses special expertise in the particular field affected by the proceeding.

*(Subd (h) amended and relettered effective January 1, 2007; previously relettered as subd (e) effective September 3, 1986; previously amended and relettered as subd (g) effective January 1, 2007.)*

*Rule 9.40 amended effective January 1, 2019; adopted as rule 983 by the Supreme Court effective September 13, 1972; previously amended and renumbered effective January 1, 2007;*

*previously amended effective October 3, 1973, September 3, 1986, January 17, 1991, and March 15, 1991.*

#### **Rule 9.43. Out-of-state attorney arbitration counsel**

##### **(a) Definition**

An "out-of-state attorney arbitration counsel" is an attorney who is:

- (1) Not a licensee of the State Bar of California but who is an attorney in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration proceeding in this state;
- (2) Has served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, the arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney; and
- (3) Whose appearance has been approved by the arbitrator, the arbitrators, or the arbitral forum.

*(Subd (a) amended effective January 1, 2019; previously amended effective January 1, 2007.)*

##### **(b) State Bar out-of-state attorney arbitration counsel program**

The State Bar of California must establish and administer a program to implement the State Bar of California's responsibilities under Code of Civil Procedure section 1282.4. The State Bar of California's program may be operative only as long as the applicable provisions of Code of Civil Procedure section 1282.4 remain in effect.

*(Subd (b) amended effective January 1, 2007.)*

##### **(c) Eligibility to appear as an out-of-state attorney arbitration counsel**

To be eligible to appear as an out-of-state attorney arbitration counsel, an attorney must comply with all of the applicable provisions of Code of Civil Procedure section 1282.4 and the requirements of this rule and the related rules and regulations adopted by the State Bar of California.

*(Subd (c) amended effective January 1, 2007.)*

##### **(d) Discipline**

An out-of-state attorney arbitration counsel who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct



required of licensees of the State Bar of California is subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of the arbitration.

*(Subd (d) amended effective January 1, 2019; previously amended effective January 1, 2007.)*

**(e) Disqualification**

Failure to timely file and serve a certificate or, absent special circumstances, appearances in multiple separate arbitration matters are grounds for disqualification from serving in the arbitration in which the certificate was filed.

*(Subd (e) amended effective January 1, 2007.)*

**(f) Fee**

The State Bar may set an appropriate fee that ~~Out out-~~of-state attorney arbitration counsel must pay ~~a reasonable fee not exceeding \$50~~ to the State Bar of California with the copy of the certificate that is served on the State Bar.

*(Subd (f) amended effective January 1, 2007.)*

**(g) Inherent power of Supreme Court**

Nothing in these rules may be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California.

*(Subd (g) amended effective January 1, 2007.)*

*Rule 9.43 amended effective January 1, 2019; adopted as rule 983.4 by the Supreme Court effective July 1, 1999; previously amended and renumbered effective January 1, 2007.*