



# The State Bar of California

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## OPEN SESSION AGENDA ITEM 50-4 JANUARY 2024

**DATE:** January 18, 2024

**TO:** Members, Board of Trustees

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

**SUBJECT:** Proposed Amendments 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); Return from Public Comment and Request for Approval and Transmission to the Supreme Court for Adoption

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### EXECUTIVE SUMMARY

The Board of Trustees, at its September 2023 meeting, adopted increases to Admissions fees to achieve the goal of a self-supporting Admissions Fund. Among the fee increases adopted were increases for the Pro Hac Vice (PHV) and Out-of-State Attorney Arbitration Counsel (OSAAC) programs. Because the current language of rules 9.40 and 9.43 of the California Rules of Court (CRC) includes the maximum amount of the PHV and OSAAC fees, respectively, the Board subsequently approved circulating for public comment rule amendments that would enable the State Bar to implement the approved fee increases. No public comments were received. This agenda item requests the Board to approve the rule amendments as circulated for public comment, with minor, nonsubstantive grammatical changes. The item also requests the Board to direct staff to transmit the amendments to the Supreme Court for adoption; given that the Board has already approved the substance of the proposed rule changes and that no comments were received pursuant to the public comment period, this item has been placed on the Board's consent calendar.

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### BACKGROUND

In [September](#) 2023, after consideration of public comment received following two separate public comment opportunities, the Board adopted increases to Admissions fees to address the need for the Admissions Fund to be self-supporting. Among the fee increases adopted were fees for PHV and OSAAC applications, increasing the fee from \$50 to \$500 for each. As part of the Board agenda item staff noted that these particular fees could not be implemented without

a change to the CRCs, as the rules currently identify \$50 as the maximum fee for both application types.

In [November](#) 2023, the Board approved circulating for a 30-day public comment period, revisions to rules 9.40 and 9.43 to eliminate the \$50 maximum fee for PHV and OSAAC applications and instead provide, consistent with other special admissions programs, that the State Bar would set the appropriate application fees.

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."

## **DISCUSSION**

The proposed amendments to CRC rules 9.40 and 9.43 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.

The amendments to CRC rules 9.40 and 9.43 were posted for 30-days on the State Bar website and an invitation to submit comment was circulated to all those who have signed up on the State Bar's website to receive notice of public comment opportunities. No comments were received.

Staff therefore recommends adoption of the rule amendments circulated for public comment, with minor, nonsubstantive grammatical amendments reflected in the versions attached as Attachments A and B.

## **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, Rules 9.40 and 9.43

## **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.

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

- 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 the amendments to CRC rules 9.40 and 9.43 set forth in Attachments A (redline) and B (clean); and it is

**FURTHER RESOLVED**, that the Board of Trustees directs staff to transmit a petition to the Supreme Court seeking adoption of these amendments to CRC rules 9.40 and 9.43.

## **ATTACHMENTS LIST**

- A.** Proposed Amendments to California Rules of Court rules 9.40 and 9.43 (redline)
- B.** Proposed Amendments to California Rules of Court rules 9.40 and 9.43 (clean)

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

### **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 fee to be paid. An applicant for 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 to be paid. 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.*

**Proposed Amendments to California Rules of Court rules 9.40 and 9.43 (Clean)****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.)*

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**(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.

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- (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
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**(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.

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*(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.)*

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

**(a) Definition**

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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 to be paid 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.*