

CALIFORNIA BOARD OF LEGAL SPECIALIZATION
OF THE STATE BAR OF CALIFORNIA

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DATE: February 1, 2006

TO: Members of the Board Committee on Member Oversight

FROM: J. Scott Bovitz, Chair, Board of Legal Specialization
Phyllis J. Culp, Director, Office of Certification & Membership Records

SUBJECT: Proposed Standards for Certification and Recertification in Franchise and Distribution Law – Request for Public Comment

ATTACHMENT: Proposed Standards for Certification and Recertification in Franchise and Distribution Law

EXECUTIVE SUMMARY

The Board of Legal Specialization (BLS) requests that the Board Committee authorize publication of proposed Standards for Certification and Recertification in Franchise and Distribution Law (Standards), as set forth in the attachment to this memorandum, for a 90-day public comment period.

The BLS, which administers the Legal Specialization program, is charged with proposing additional fields of law in which attorneys may be certified. One purpose of the program is to help the public identify attorneys who are proficient in a particular area of law by providing a method of certification based on objective criteria. Another is to encourage attorney competence by providing attorneys with the means of obtaining a professional credential that recognizes their proficiency. Certification also serves to regulate claims of special skills by attorneys to assure that such claims are not made in a manner that misleads the public. The program is completely self-funded.

The BLS decided to consider a franchise and distribution law certified specialty following discussions with the Franchise Law Committee of the Business Law Section of the State Bar. The experience of the members of the Committee has been that both franchisors and franchisees benefit from extensively experienced counsel in preparing and reviewing franchise documents and in the ongoing transactions involved in franchising and other distribution relationships. There are a number of California statutes, including the California Franchise Investment Law and the California Franchise Relations Act and related federal laws, applicable to such transactions that require a high degree of specialization. In particular, franchisees and distributors may be small business owners without a high level of sophistication or ability to find competent legal counsel in this field. The creation of a franchise and distribution law specialty would assist the public by making legal specialists in this field easier and more reliable to locate. The Department of Corporations has also noted that experienced counsel help smooth the process of preparing and filing the statutorily required documentation since filings prepared by inexperienced counsel can raise significant compliance issues which may require 'repair' or lead to litigation.

At the request of the BLS, the Board of Governors created a consulting group at its October 2005 meeting to examine the feasibility of, and develop standards for, certifying legal specialists in the area of franchise law. The Consulting Group is comprised of 10 of the top practitioners in the State in the field of franchise and distribution law, including seven current or former co-chairs of the Franchise Law

Committee of the Business Law Section of the California State Bar, the Chairman of the American Association of Franchisees and Dealers, and including partners specializing in the discipline from the California offices of Morrison & Foerster, Sonnenschein Nath & Rosenthal, Jenkins & Gilchrist and other prominent firms. The Consulting Group recommends that the BLS go forward with the proposed specialty and that the area be expanded to include distribution law as a natural component of the specialty, and the Consulting Group has developed the attached Standards to be circulated for public comment.

Board members with questions on this item may contact Phyllis Culp at (415) 538-2118 or phyllis.culp@calbar.ca.gov.

BACKGROUND

The Legal Specialization program was first approved by the Supreme Court of California in 1972 as a pilot attorney certification program to identify for the public attorneys who have demonstrated their experience and proficiency in specific areas of law, and to encourage attorney competence. The program was made permanent by the Supreme Court in 1985 and currently certifies approximately 4200 attorneys, including approximately 150 who are on judicial service, in eight specialty areas: Appellate Law; Bankruptcy Law; Criminal Law; Estate Planning, Trust and Probate Law; Family Law; Immigration and Nationality Law; Taxation Law; and Workers' Compensation Law.

To be certified as a specialist, an attorney must pass a written examination, demonstrate experience based on performance of a variety of activities related to the specialty area, complete continuing education in the specialty area, and be favorably evaluated by other attorneys and judges familiar with the attorney's work.

DISCUSSION

California was the first state to adopt a law regulating the sale of franchises. The California Franchise Investment Law is roughly modeled on securities law. A franchisor must apply to the Department of Corporations and register their franchise registration and disclosure documents with the state. There are a number of technical exemptions and other requirements under these laws. Changes to these documents must also be registered with the state. The Federal Trade Commission has also adopted similar federal rules for franchisors. Moreover there are specialized franchise laws which apply to a certain specific industries, such as petroleum and motor vehicles, and separate state rules applying to seller assisted marketing programs.

In addition the California Franchise Relations Act, enacted in 1980, separately governs the ongoing franchise relationship and affects the rights of the parties to terminate or transfer interests in the enterprise. Other state laws, such as the Cartwright Act and comparable federal rules, also impact transactions involving the franchising or distribution of goods or services in the state.

Because of the complexity of franchise and distribution relationships and the rules governing the agreements and other terms of these relationships, there is a need for experienced counsel to provide a range of expert legal services both to the franchisors and to franchisees or their counterparts in other distribution transactions seeking legal counsel and assistance. In particular, franchisees and distributors may be small business owners without a high level of sophistication or ability to find the competent legal counsel required in this area.

The Franchise Law Committee of the Business Law Section has been in existence for more than 20 years. There are two major national conferences held each year; the American Bar Association's (ABA) Franchise Forum and the International Franchise Association's Legal Symposium, with regular attendance approaching 1,000 attorneys. The 170 members of the ABA's Franchise Forum who practice law in California are potential specialists. The Franchise Law Committee estimates that approximately 250 California attorneys would seek certification as a Franchise and Distribution Law Specialist; allowing the specialty to support itself financially.

There are currently no other states offering certification in Franchise and Distribution Law, although such certification is clearly warranted. It seems fitting that California should lead the way in developing a legal specialization in Franchise and Distribution Law just as California was the first state to adopt comprehensive franchise law legislation.

The percentage of California lawyers with substantial franchising and distribution experience is small but growing. However, the industries requiring this experience are growing very rapidly. As a consequence, the demand for legal counsel has grown as well and the need to identify those practitioners who are qualified in the field has become more urgent. The creation of a Franchise and Distribution Law specialty would provide franchisees and franchisors with more ability to find experienced legal counsel.

The Franchise Law Consulting Group met a number of times in all day sessions, during which it developed the attached Standards that we are now requesting be published for public comment. The Consulting Group is recommending that the BLS go forward with the proposed specialty in Franchise and Distribution Law.

FISCAL AND PERSONNEL IMPACT

There is no fiscal and personnel impact on the general fund. The Legal Specialization Program is a restricted fund program that pays all its direct and indirect (interfunded) costs.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

PROPOSED BOARD COMMITTEE ACTION

Should the Board Committee determine to adopt the recommendation of the BLS, it would be appropriate to adopt the following resolution:

RESOLVED, that the Board Committee on Member Oversight directs the publication of proposed Standards for Certification and Recertification in Franchise and Distribution Law, in the form attached to these minutes and made a part hereof, for a 90-day comment period; and it is

FURTHER RESOLVED that publication of the foregoing is not, and shall not be construed as, a recommendation by the Board Committee.