

Rules of the State Bar of California

Title 3. Programs and Services

Division 2. Attorney members

Chapter 2. Legal Specialization

(for public comment, July 2013)

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## Article 1. General provisions

### Rule 3.90 California Board of Legal Specialization

- (A) The California Board of Legal Specialization (“board”) is appointed by the Board of Trustees of the State Bar of California to establish and administer a program to encourage attorney competence by certifying as legal specialists attorneys who have demonstrated proficiency in specified areas of law.<sup>1</sup> This chapter sets forth the rules for those certified specialists.
- (B) The board consists of the following members, including a chair, vice-chair, and the immediate past chair, each entitled to vote:
  - (1) twelve attorney members, up to two of whom need not be certified specialists; and
  - (2) three non-attorneys.
- (C) The board may recommend that the Board of Trustees approve additional areas of legal specialization and their related certification standards.
- (D) The board may recommend that the Board of Trustees authorize other entities to grant certification. The rules applicable to such entities are set forth elsewhere in this title.<sup>2</sup>

### Rule 3.91 Certification standards

The Board of Trustees adopts certification standards for each specialty to supplement these rules.

### Rule 3.92 Advisory commissions<sup>3</sup>

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<sup>1</sup> See Rule of Court 9.35. *That provision states that “The State Bar must establish and administer a program for certifying legal specialists and may establish a program for certifying entities that certify legal specialists under rules adopted by the Board of Governors of the State Bar.” And see current rule 22.1: “The California Board of Legal Specialization shall be established and appointed by the Board of Governors. It shall be composed of 12 members, including the Chair, Vice-Chair, one advisor, and at least three non-lawyers. In addition, the chairs of the Advisory Commissions shall be appointed as voting members. All lawyer members of the Board must be certified specialists, except where certification in the field of law practiced by the lawyer has been available for less than six years or certification is not available in the field of law or subfield of law in which the lawyer practices. If a member of the Board misses more than three meetings of the Board, the member is subject to removal.” Note that State Bar Rule 1.20(K) provides that “If a rule cites the authority for the rule, the citation is part of the rule.”*

<sup>2</sup> Title 3, Division 5, Chapter 4, Authorization to certify legal specialists, Rules 3.900 et seq.

<sup>3</sup> *See current rule 22.4, which has three subparts: “22.4.1 Advisory Commissions to the Board shall be established and appointed by the Board of Governors for each field of law in which specialists are to be certified. They shall be composed of nine members, including the Chair, Vice-Chair, and one non-lawyer member. All lawyer members of the Commission must be certified specialists in the Commission’s field of law, except where certification is not available in the field of law in which the lawyer practices or certification in the Commission’s field of law has been available for fewer than six years. If a member of the Commission misses more than three meetings of the Commission, the member is subject to removal. 22.4.2 The Chair of each Commission or his or her designee must attend all meetings of the Board. If the Chair misses more than three meetings of the Board, the Chair is subject to*

An advisory commission (“commission”) is appointed by the Board of Trustees to recommend and apply certification standards for each area of legal specialization.<sup>4</sup> A commission consists of an even number of attorney members, but no more than eight, and a non-attorney member. One of the attorney members need not be a certified specialist.

#### Rule 3.93 Terms

- (A) Each board and commission member is appointed for a term of four years. A member whose four-year term is expiring may serve an additional year as chair, vice-chair, or immediate past chair. An immediate past chair may also serve an additional year.
- (B) A vacancy on the board or a commission occurs when a member dies, resigns, or an attorney member ceases to be an active member of the State Bar. A vacancy must be filled by the Board of Trustees.

#### Rule 3.94 Meetings

Meetings of the board and its advisory commissions are governed by the Rules of the State Bar.<sup>5</sup>

#### Rule 3.95 Conflicts of interest<sup>6</sup>

- (A) To avoid a conflict of interest that may interfere or appear to interfere with impartial evaluation of an applicant for certification, a board or commission member considering an Application for Certification must immediately disclose to the chair of the board or commission any significant past or present relationship with the applicant, whether familial, professional, political, social, or financial.
- (B) A board or commission member who believes that the length or nature of a relationship would unduly influence or appear to influence evaluation of an applicant may in no way participate in or attempt to influence the evaluation. Representing opposing parties in a legal matter does not necessarily require recusal.

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*removal. 22.4.3 The appropriate Commission shall assist the Board in administering the Program, including advising the Board regarding the standards for certification and recertification. The Commissions shall be responsible for constructing and administering the examinations, subject to the approval of the Board. Except by specific authorization of the Board, no Commission shall take an official public position on behalf of the program or the Commission.”*

<sup>4</sup> Current rule 22.1 provides that the Board of Governors appoint commission members. Proposed rule 3.92 gives the authority to appoint commissioners to the Board of Legal Specialization, which by reason of its active and ongoing role in certification is more familiar with specialists and the needs of advisory commissions.

<sup>5</sup> See State Bar Rules 6.60 et seq.

<sup>6</sup> Cf. current rule 24.1, *Circumstances requiring recusal*.

- (C) If a board or commission member believes recusal is not required and the chair disagrees, the determination of the chair prevails. Factors the chair is to consider in making the determination include the date of the relationship, its duration, and whether it is more than casual or incidental.
- (D) A board or commission member may in no way participate in or attempt to influence board or commission consideration of his or her own application for certification.<sup>7</sup>

#### Rule 3.96 Confidentiality

- (A) A certified specialist's certification is public information, but all applications, tests, references, and other records are confidential and the property of the State Bar, unless otherwise provided by these rules or by law. Hearings and informal conferences of the board and the commissions are confidential.
- (B) This rule does not preclude disclosure of information of alleged professional misconduct by an applicant or certified specialist to the State Bar's Office of the Chief Trial Counsel or Office of General Counsel to fulfill their regulatory and disciplinary responsibilities.
- (C) A board or commission member may be removed by the Board of Trustees for a breach of confidentiality.<sup>8</sup>

#### Article 2. Certified specialists

##### Rule 3.110 Certification requirements in general

- (A) An applicant for certification or recertification must
  - (1) be an active member of the State Bar;

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<sup>7</sup> See current rule 24.5: "An application for certification or recertification of a member of the Board or Commission may be considered by the Board or Commission, so long as such member of the Board or Commission withdraws from the room at the time that his or her application is considered, does not vote on his or her own application and does not attempt to influence another member of the Board or Commission with respect to his or her own application."

<sup>8</sup> See current rule 23.3.1 Upon a claim of breach of confidentiality, a three-member special committee shall be appointed by the Board from among its members or the members of the Commissions to investigate and determine such claim. In the conduct of investigations, the special committee may, among other things, administer oaths and affirmations, compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the alleged breach of confidentiality. Any claim of breach of confidentiality shall be investigated fully, including but not limited to, the confronting of the member of the Board or Commission against whom the claim has been made; and if the claim is found to have merit, a report shall be made to the Board. The report shall include a recommendation as to whether the Board shall request the Board of Governors to remove the person(s) from the Board or Commission. The special committee shall also report the failure of any person to cooperate in the investigation of the claim. No person against whom a claim of breach of confidentiality is brought shall serve on a special committee investigating said claim."

- (2) submit an Application for Certification with an application fee; and
  - (3) meet the requirements of these rules and any relevant standards regarding
    - (a) eligibility;
    - (b) education;
    - (c) practice and tasks;
    - (d) an examination; and
    - (e) references.
- (B) An applicant must submit the application within eighteen months of the date on which the applicant took the examination. The applicant may request an extension of up to eighteen months for completion of all requirements. Requests are granted for good cause shown at the discretion of the board.

#### Rule 3.111 Eligibility

- (A) To be eligible for certification or recertification as a legal specialist, a member of the State Bar who meets the requirements of these rules must maintain active status.
- (B) An applicant may be ineligible for certification or recertification because of
- (1) a material fact affecting standing to practice law wherever licensed or otherwise authorized to practice law, such as transfer to inactive status, disciplinary actions, suspension, resignation, or disbarment;
  - (2) disciplinary charges filed in the State Bar Court or being formally considered by a body that has licensed or is authorized to impose professional discipline on the applicant;
  - (3) a finding of contempt made or sanction imposed, other than a discovery sanction, by any court or body before whom the applicant or specialist appears; or
  - (4) information the applicant is required to report to the State Bar<sup>9</sup> and to the board<sup>10</sup> indicating a lack of proficiency in the specialty area of law for which certification is sought or granted.

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<sup>9</sup> For example, see Business and Professions Code sections 6068(o)(1)-(7) and 6086.8(c). *B&P 6068 requires at (o)(1)-(7):*

*(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:*

*(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.*

### Rule 3.112 Fees and deadlines

- (A) These rules refer to fees and deadlines that are set forth in the Schedule of Charges and Deadlines.<sup>11</sup>
- (B) A certified specialist who fails to make timely payment of a required fee is notified of the delinquency and may be assessed a late charge. Certification is suspended for failure to pay the annual fee or late charge within thirty days of imposition of the late charge.

### Rule 3.113 Application for Certification

- (A) An Application for Certification must be submitted with an application fee.
- (B) An application is deemed abandoned and ineligible for a refund of the application fee if
  - (1) the application is not complete within sixty days of receipt by the State Bar, unless an extension has been granted;
  - (2) the application is complete but the applicant fails to provide additional information requested by the State Bar within ninety days of the request; or
  - (3) an applicant fails to complete any other certification application requirement.
- (C) Certification requirements completed for an abandoned application may be used for a subsequent application.
- (D) An applicant may apply for certification in more than one specialty.<sup>12</sup>

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*(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.*

*(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).*

*(4) The bringing of an indictment or information charging a felony against the attorney.*

*(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.*

*(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.*

*(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.*

<sup>10</sup> State Bar Rule 3.114, Reporting requirement.

<sup>11</sup> See State Bar Rule 1.20(L). That provision states that “If a rule refers to the Schedule of Charges and Deadlines, the referenced date or amount is part of the rule.”

### Rule 3.114 Reporting requirement

Every applicant and certified specialist has an ongoing duty to comply with these rules and any relevant standards and to promptly disclose to the board any information that might affect eligibility for certification<sup>13</sup> or that the State Bar Act requires the member to report to the State Bar.<sup>14</sup>

### Rule 3.115 Education

- (A) Board-approved education or board-approved education alternative must be completed in the specialty area of law as follows:
- (1) by applicants for initial certification: at least forty-five hours in the three years immediately preceding the application; and
  - (2) by certified specialists: at least thirty-six hours during the specialist's Minimum Continuing Legal Education (MCLE) compliance period. The specialist must report specialty education compliance to the board when reporting MCLE compliance.<sup>15</sup>
- (B) A provider intending to offer specialty education must be approved by the State Bar as a Multiple Activity Provider in a specialty area of law<sup>16</sup> or must file an application to the board or a designated commission for approval of a single education activity designed to attain or maintain proficiency in a specialty area of law.
- (C) The board may grant specialty education credit for education that meets certification requirements,<sup>17</sup> inclusive of activities approved for MCLE credit<sup>18</sup> as well as credit for MCLE requirements for legal ethics, elimination of bias, and competence issues.<sup>19</sup>

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<sup>12</sup> See current rule 19.0: "There shall be no limitation placed on the number of specialty areas in which an attorney may participate (subject to the limitations in sections 4.1 and 12.1)."

<sup>13</sup> Rule State Bar Rule 3.111, Eligibility.

<sup>14</sup> Business and Professions Code section 6060(o).

<sup>15</sup> State Bar Rules 2.70, Compliance groups, and 2.71, Compliance periods.

<sup>16</sup> See State Bar Rules 2.52 and 3.600 et seq. Rule 2.52 governs the standards for continuing legal education activities and Rules 3.600 et seq. govern State Bar approved MCLE providers.

<sup>17</sup> Rule 2.84, Legal specialization. This rule provides that "A member may claim MCLE credit for educational activities that the Board of Legal Specialization approves for certification or recertification."

<sup>18</sup> See State Bar Rule 2.51, Definitions; Rule 2.80, Attending programs and classes; Rule 2.81, Speaking; Rule 2.82, Teaching; and Rule 2.83, Self-study.

<sup>19</sup> State Bar Rule 2.72, Requirements.

- (D) The board may grant specialty education credit to a certified specialist who mentors an applicant or a prospective applicant for certification as well as to the mentored applicant or prospective applicant, provided the specialty education is documented to the satisfaction of the board and otherwise meets the requirements of these rules.<sup>20</sup> [*NOTE: Current rules contain no comparable provision. This substantive addition would encourage specialists to serve as mentors and provide applicants with practical experience.*]

#### Rule 3.116 Practice and task requirements

In the five years immediately preceding the Application for Certification, an applicant must complete the tasks prescribed by the relevant standards with proficiency; demonstrate current substantial involvement in the practice; and spend at least twenty-five percent of the time given to occupational endeavors practicing law in the specialty in which certification is sought.<sup>21</sup> The board's acceptance or rejection of the computation is final.

#### Rule 3.117 Examination

- (A) An applicant must pay an examination registration fee and take and pass a written examination that tests knowledge of the substantive law and procedures of a legal specialty. The board determines the scope, format, topics, grading process, and passing score of the examination.
- (B) Results reported to applicants are final. Applicants are not entitled to receive their examination answers or to see their scores.
- (C) Upon approval of a new area of legal specialization by the Board of Trustees, the board may approve for a period of no more than two years satisfactory completion of one or more alternative tasks in lieu of a written examination.

#### Rule 3.118 References

An applicant must provide references from attorneys or judges whom the applicant has identified as familiar with the applicant's proficiency in performing the tasks required for certification.<sup>22</sup> At

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<sup>20</sup> State Bar Rule 2.86, Member credit request. *This rule provides that "A member may apply for credit for an activity directly relevant to the member's practice but not otherwise approved if the activity substantially meets State Bar standards. The application must be submitted with the appropriate fee."*

<sup>21</sup> See current rule 12.1.

<sup>22</sup> See current rule 9.1, which deals with references: *"Each applicant shall be required to submit the names of three attorneys or judges to serve as references who are familiar with the tasks upon which the applicant has relied to satisfy the task requirement, except where the number and type of references are set forth in the individual specialty standards. Each reference shall be asked to submit the names of two additional references familiar with the applicant's proficiency. The Commission may seek additional references from other persons familiar with the tasks described in the individual standards. The references shall be sent a questionnaire. The references shall not include any attorney who is associated with the applicant, including clients, relatives, current partners, associates, employers or employees of the applicant."*

least three references must be provided unless the relevant standards require more. A commission may seek additional references.

#### Rule 3.119 Waivers and modifications

(A) A certified specialist who serves full-time in a state or federal court of record as a judge, magistrate, commissioner, or referee or as an administrative law judge is exempt during the period of service from the annual fee required of a certified specialist and from recertification requirements. The specialist is not eligible for the fee waiver until the service officially begins; any fee paid prior to that time is not refundable.

(B) The board may waive or permit modification of a certification requirement.

#### Rule 3.120 Commission action on application<sup>23</sup>

(A) Within 180 days of receipt of an Application for Certification,<sup>24</sup> a commission must recommend that the board grant or deny certification or advise the applicant that

- (1) it requires additional time or information to consider the application; or
- (2) because of substantial and credible concerns regarding the applicant's qualifications, it is allowing the applicant to withdraw the application or to request an informal conference to address the concerns.<sup>25</sup>

(B) A commission must recommend that the board grant or deny certification no later than 180 days after

- (1) an informal conference with an applicant;
- (2) the date of a scheduled conference at which the applicant failed to appear; or,
- (3) if an applicant did not request a conference, the date of the notice regarding the commission's concerns.

#### Rule 3.121 Informal conference

(A) An applicant notified of a commission's concerns regarding his or her application may request an informal conference within thirty days of the date of the notice. The conference must be held within one year of the State Bar's receipt of the request. The applicant's failure to attend the conference entails no negative inference.

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<sup>23</sup> Cf. Rule 10.0, Commission action on application.

<sup>24</sup> See State Bar Rule 3.110, Certification requirements in general.

<sup>25</sup> See State Bar Rule 3.121, Informal conference.

- (B) An informal conference may be recorded as the commission deems appropriate. The applicant may attend with counsel; make a written or oral statement; and present documentary evidence. Counsel is limited to observation and may not participate. The commission may require the applicant to provide further documentation or information after the conference.

Rule 3.122 Board action on application

- (A) Within 120 days of receiving a commission's recommendation to grant or deny certification, the board must make a determination to
  - (1) grant certification;
  - (2) direct the commission to further consider the application and report back within 100 days; or
  - (3) deny certification.
- (B) If the board intends to deny certification, it must notify the applicant of its reasons for doing so and allow the applicant thirty days to withdraw the application, provide further support for it, or request a hearing.
- (C) Within thirty days of deciding to grant certification, the board must notify the applicant that certification begins on a specified date for a five-year period. Certification may be terminated sooner as provided by these rules or upon the request of a certified specialist. Certification remains in effect pending final action on a timely application for recertification.<sup>26</sup>
- (D) The board may postpone commission or board action on an application
  - (1) pending final action on a disciplinary proceeding in the State Bar Court or by another body that has licensed or is authorized to impose professional discipline on the applicant; or
  - (2) upon an applicant's suspension, resignation, disbarment or another status change not entitling the specialist to practice law in any jurisdiction where admitted to practice law.

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<sup>26</sup> Cf. 12.6 Duration of Recertification

*Recertification by the Board shall commence on the date indicated on the Certificate of Specialization and shall remain in effect for the period specified on the notice of recertification unless sooner terminated by the Board pursuant to sections 14.0 and 15.0. If timely application for recertification is made, certification shall continue in effect until final action is taken on the application for recertification.*

- (E) The board may deny an application because the applicant has made a material false representation or misstatement of material fact to a commission or the board.<sup>27</sup>

#### Rule 3.123 Designation as certified specialist<sup>28</sup>

Certification may be indicated by “Certified by The State Bar of California Board of Legal Specialization,” the logo of the certified specialization program, or both. Certification is individual and may not be attributed to a firm.<sup>29</sup> An attorney whose certification has been revoked may not claim to be a certified specialist.

#### Rule 3.124 Recertification

- (A) To be recertified, a certified specialist must comply with the requirements of these rules and any relevant standards and pay an annual fee. A specialist who fails make timely payment of an annual fee may be assessed a late charge. Certification is suspended for failure to pay the fee and any late charge within thirty days of imposition of the late charge.
- (B) If permitted by the relevant standards, education or tasks completed in the last six months of certification that exceed recertification requirements may be applied to the next certification period.<sup>30</sup>
- (C) Action on an application for recertification is governed by the rules applicable to action on an initial application.<sup>31</sup>

#### Rule 3.125 Suspension or revocation of certification<sup>32</sup>

- (A) Certification may be suspended by the board

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<sup>27</sup> Cf. current 13.2 in rule 13.0, *Denial of Certification or Recertification*.

<sup>28</sup> This rule is comparable to two current rules. Current rule 17.0, *Designation as Certified Specialist*, states that “A certified specialist shall, when identifying himself or herself as such or when offering legal services pursuant to this program, refer to himself or herself as certified by The State Bar of California Board of Legal Specialization either by the use of text, the program logo, or both.” Current rule 18.0, *Rights and Benefits of Certification Are Individual*, states that “All requirements for and all benefits to be derived from certification as a certified specialist are individual and may not be fulfilled by or attributed to the law firm of which the specialist may be a member.

<sup>29</sup> See current rule 18.0: “All requirements for and all benefits to be derived from certification as a certified specialist are individual and may not be fulfilled by or attributed to the law firm of which the specialist may be a member.”

<sup>30</sup> See current rule 12.2.3: “Tasks that satisfy the individual standards which occur within the last six months of a certification period and are in excess of the number of tasks necessary for recertification may be applied to the next certification period.” The current rule applies only to tasks, not education. Compare State Bar Rule 2.72(D): “Excess credit hours [for MCLE] may not be applied to the next compliance period.”

<sup>31</sup> State Bar Rules 3.120, Commission action on application, and 3.122, Board action on application.

<sup>32</sup> Cf. current 14.0 *Suspension and Revocation of Certification*.

- (1) pending final action on a disciplinary proceeding in the State Bar Court or by another body that has licensed or is authorized to impose professional discipline on the applicant;
- (2) upon an applicant's suspension, resignation, disbarment or another status change not entitling the specialist to practice law in any jurisdiction where admitted to practice law; or
- (3) for failure to comply with these rules or any relevant standards.<sup>33</sup>

(B) Certification may be revoked by the board

- (1) when the California Supreme Court disbars or accepts the resignation of a certified specialist, in which case the revocation is final; or
- (2) for failure to comply with a material requirement of these rules or a relevant standard.

(C) The board must provide a certified specialist with thirty days' written notice of its intent to suspend or revoke certification. Within thirty days of the date of the notice of intent to suspend or revoke certification, a certified specialist may respond in writing to the board that suspension or revocation would be inappropriate. The response must be supported by any additional relevant evidence. Suspension or revocation of certification is final if the specialist fails to provide a timely written response.

(D) The board must consider a timely response to a notice of intent to suspend or revoke certification of a certified specialist within ninety days of receiving the response. The board may then continue certification with or without conditions, or suspend or revoke certification. The certified specialist must be provided with written notice of the reasons for the board's action. A decision to continue certification with conditions is final.

Rule 3.126 Appeal of certification denial, suspension, or revocation<sup>34</sup>

An applicant or a certified specialist may file a petition for hearing on his or her denial, suspension or revocation in the State Bar Court in accordance with the rules of that court no later than sixty days of the date of the notice of denial, suspension or revocation. A copy of the petition must be served on the board and the Office of the Chief Trial Counsel at the San Francisco office of the State Bar. Upon receipt of service, the board must promptly transmit all files related to the application, suspension or revocation to the Office of the Chief Trial Counsel.

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<sup>33</sup> Rule of Court 9.35(d).

<sup>34</sup> *Cf. current 15.0 Hearing on Denial of Application for Certification or Recertification and Suspension and Revocation of Certification or Recertification.*