

Date: July 9, 2004

To: Board Committee on Planning, Programming Development and Budget

From: Office of Certification

Subject: Proposed Amendments to California Rules of Court, rule 983 [Counsel Pro Hac Vice], and new Counsel Pro Hac Vice Program Rules and Regulations – Request for Public Comment

Attachments:

1. California Rules of Court, rule 983 [Counsel Pro Hac Vice]
2. Proposed amendments to rule 983 [Counsel Pro Hac Vice]
3. Proposed new Counsel Pro Hac Vice Program Rules and Regulations
4. Proposed Application of Non-Resident Attorney to Appear Pro Hac Vice in a Specific Case

EXECUTIVE SUMMARY

The Office of Certification (OC) requests that the Board Committee authorize publication of proposed amendments to rule 983, California Rules of Court [Counsel Pro Hac Vice] (“rule 983”), and proposed new Counsel Pro Hac Vice Program Rules and Regulations (“Rules”), as set forth in Attachments 2 and 3, for a 45 day public comment period.

The Pro Hac Vice program is one of two OC programs where *all* provisions for the program are contained in the rule of court. In 1994, three other Bar programs administered by OC per rule of court were revised as part of a plan to streamline and make more efficient the administration of the programs in OC. Enabling rules of court for those programs were approved by the Supreme Court and individual program rules and regulations for the administration of the programs were adopted by the Board of Governors. The combination of an enabling rule of court and Bar administrative rules and regulations has proven flexible and efficient by allowing administrative rules that do not go to the core of the program to be amended from time to time by the Board of Governors without the necessity of seeking the Supreme Court’s approval.

Accordingly, proposed amended rule 983 would turn current rule 983 to an enabling rule of court and new detailed State Bar rules and regulations would be created for the day-to-day administration of the Pro Hac Vice program.

To encourage compliance, the OC has developed a proposed application form for both programs and proposed changes in both the Pro Hac Vice program and the OSAAC program to require that applications must be filed with the State Bar for review prior to filing with the court or arbitral forum.

In addition, effective November 15, 2004, four new Rules of Court and program rules will take effect, authorizing multijurisdictional (MJP) practice. Specifically, Rule 966 allows out-of-state attorneys to practice in California on pre-litigation matters. However, if an out-of-state attorney wishes to appear in a California court or arbitral forum, he or she is required to file a Pro Hac Vice or OSAAC application. This will increase telephone, paper and e-mail inquiries from out-of-state attorneys, California members and the public regarding the limitations of rule 966. The OC anticipates that additional staff time and resources will be required to handle such inquiries. Thus a suggested fee increase from \$50 to \$250 has been proposed.

Because the MJP program must become effective on November 15, 2004 and the MJP program will have an impact on Pro-Hac Vice admissions, a shortened public comment period is requested so that the new rules will become effective simultaneously with the implementation of the MJP Program.

Any questions about this agenda item should be directed to Phyllis Culp at (415) 538-2118 or at phyllis.culp@calbar.ca.gov.

BACKGROUND

In March 1991, OC was organized to administer certification programs and to begin the implementation of MCLE. In 1994, in order to improve the efficiency of administration, rules for the Practical Training of Law Students program, Legal Specialization program, and Registered Foreign Legal Consultant program, were amended and/or new rules and regulations were adopted under a regulatory scheme that uses an enabling rule of court and Board of Governors approval of detailed program rules and regulations. This new format improved the State Bar's ability to respond to practice and legal changes quickly and also removed the burden of going to the Supreme Court for minor and administrative changes.

The Pro Hac Vice Program rules have not yet been conformed to the same format. Therefore, OC recommends that public comment be authorized for an amended rule 983 and new rules and regulations for the Pro Hac Vice program. In order to enable OC to administer more effectively a Pro Hac Vice program that provides an information and screening function for the courts of California, the proposal also would clarify the process out-of-state attorneys must follow and would utilize an application form to be adopted by the Judicial Council for the Bar to provide to Pro Hac Vice applicants (see sample at Attachment 4.) To encourage compliance, OC is proposing changes to the Pro Hac Vice program to require that applications must be filed with the State Bar for review prior to filing with the court.

In addition, effective November 15, 2004, four new Rules of Court and program rules will take effect authorizing multijurisdictional (MJP) practice. Specifically, rule 966 allows out-of-state attorneys to practice in California on pre-litigation matters. However, if an out-of-state attorney wishes to appear in a California court or arbitral forum, he or she is required to file a Pro Hac Vice or OSAAC application. This will increase telephone, paper and e-mail inquiries from out-of-state attorneys, California members and the public regarding the limitations of rule 966. The OC anticipates that additional staff time and resources will be required to handle such inquiries. Thus a suggested fee increase from \$50 to \$250 has been proposed.

DISCUSSION

1. Rule 983

Rule 983 was adopted by the California Supreme Court in 1972 for out-of-state attorneys who appear in California superior, municipal or justice courts on a particular matter. Current rule 983 defines who may appear and in which courts, sets forth eligibility criteria, requires the filing of an application and notice of hearing and service of the application and notice of hearing upon the State Bar, states what information must be contained in the application, specifies a fee not to exceed \$50 to the State Bar, and provides contempt and other court sanctions, including discipline. In order to modify any of the administrative requirements, it is necessary to seek an amendment of the rule by the Supreme Court.

Ordinarily, the proposed amendments to rule 983 would be shown in legislative style to assist the Board Committee in focusing on the proposed amendments. However, since the proposed change in the structure and content of the rule is significant, a legislative style version would be difficult to comprehend. Instead, the following summary of the major proposed revisions to existing rule 983 has been prepared to aid in your review:

- To make rule 983 consistent with the other court rules governing programs administered by the State Bar, administrative detail is removed and enabling language added to authorize the State Bar to administer a Pro Hac Vice program under rules adopted by the Board of Governors.
- Clarifying language is added to remove any ambiguity about the eligibility of attorneys admitted in the District of Columbia to apply under this rule.
- The words "superior, municipal, or justice" are replaced by the word "trial" before "court" to reflect recent court unification changes.
- Notification to the State Bar will be required if an applicant is denied an appearance. In 1999, when the Supreme Court approved Rule of Court 983.4 (Out-Of-State Attorney Arbitration Counsel), the order requested specific information to be reported back to the Court, including the number of applications denied. Currently there is no such requirement for out-of-state attorneys

who make appearances under rule 983. In order to provide this information to the Supreme Court, a requirement is added to the rules and regulations for the applicant to provide the State Bar with the information. This is not an unusual request as a review of some other state's pro hac vice rules revealed that Montana requires the "court or agency [to] enter an order granting or refusing the application and, if the applicant is refused, the court or agency shall state its reasons. A copy of the court's order shall be mailed to the applicant, counsel of record and the State Bar of Montana." Making a reporting requirement mandatory provides authority for the State Bar to obtain the information and make it available to the Court upon request.

- Language from Business and Professions Code section 6068(o)(6) was added to the Eligibility section to make it consistent with a duty required of members of the State Bar to disclose discipline by courts, professional or occupational disciplinary agencies, or licensing boards in California or elsewhere.
- The \$50 maximum fee provision is replaced by an enabling provision. Since the purpose of the Pro Hac Vice application fee is to allow the Board of Governors to fix a reasonable amount to defray the expenses of administering the program and partially to defray the expenses of administering the Board's other responsibilities relating to the competent delivery of legal services in California, it would be appropriate to delete the maximum amount of \$50 specified in existing rule 983 and provide in its place for the State Bar to have the authority to set and collect appropriate fees and penalties for the program. This replacement would bring the Pro Hac Vice program in alignment with other programs administered by OC under rule of court. Programs with this type of enabling provision in the rule of court include Certifying Law Students for practical training (rule 983.2), Certifying Legal Specialists (rule 983.5), and Registered Foreign Legal Consultants (rule 988).

2. Summary of Proposed Amended Rule 983

Proposed amended rule 983 is structured as follows:

- Definition:** Sets forth the minimum requirement for appearance by an attorney who is not a member of the State Bar of California but is a member in another U.S. jurisdiction.
- Authority:** Authorizes the State Bar to create a program for non-member out-of-state attorneys who appear in a court of California.
- Eligibility:** Sets forth the criteria with which an applicant must comply in order to appear in a court of California. *(Adds language from the Business & Professions Code requiring applicants to disclose discipline to the same extent as required of a member of the State Bar of California. Adds provisions for filing an application with the State Bar for review by the Bar prior to filing the application with the court.)*
- Enforcement Mechanism:** Grants the State Bar authority to discipline the non-State Bar of California attorney.
- Denial Mechanism:** Provides for denial of the application by the court in its discretion.
- Fee Authority:** Authorizes the State Bar to set and collect fees.
- Non-Preclusion:** Retains a provision for the Supreme Court or a Court of Appeal to permit argument in a particular case from an attorney licensed to practice in another jurisdiction and who possesses special expertise.
- Reservation of Power by the Supreme Court:** Reserves the inherent power of the Supreme Court over the practice of law in California.

3. Proposed New Rules

The proposed new Rules and Regulations for the program contain administrative detail removed from the court rule and provide for the State Bar to review the eligibility of prospective Counsel Pro Hac Vice as a preliminary step to filing for such status prior to in California courts. A summary of the Rules by section appears below:

SECTION	EXPLANATION
Global	Gender specific terminology in rule 983 is replaced with gender neutral terms. The words “superior, municipal, or justice court” are replaced by “trial court. “
1.0 Purpose	Explanation of the purpose of the program, which is for non-member out-of-state attorneys who appear in courts of California.
2.0 Definitions	Defines terms used in the Rules. Language at section 2.4 defining a “member” of the State Bar is taken from B&P Code section 6002.
3.0 Eligibility	Sets forth criteria that would preclude an attorney from eligibility [based upon current rule 983(a)].
4.0 Application	Details information that must be included in the application to the court [currently in rule 983(b)]. Substantive changes: Section 4.2.4 requires an applicant to provide the court with the same information that State Bar of California members must provide to the State Bar under B&P Code section 6068(o)(6), which is discipline by any professional or occupational disciplinary agency or licensing board in or out of California. Rule 983 currently requires the applicant to be “a member in good standing” and make a statement in the application that the applicant is not currently suspended or disbarred [see current rule (b)(4)]. Section 4.3 requires the application to be filed with the state bar before being filed with the Court.
5.0 Use of Title	Included to clarify that being admitted as Counsel Pro Hac Vice does not grant the applicant status as a member of the State Bar of California.
6.0 Duration	Included to clarify the time period during which the attorney may make an appearance.
7.0 Denial of Application	States cause for denial [currently in rule 983(a)]. Substantive change: Language added requiring the applicant to submit to the State Bar a copy of the court order denying the application.
8.0 Contempt and other Court Sanctions; Discipline	Requires attorneys appearing as Counsel Pro Hac Vice to be subject to the same laws governing the conduct of attorneys as California bar members and the disciplinary jurisdiction of the State Bar [currently in rule 983(d)].
9.0 Public Nature of Records	Memorializes past practice that the information submitted to the State Bar is public.

It may be noted that OC considered and rejected recommendation of a Pro Hac Vice program that would authorize the State Bar to *approve* applications rather than merely screen them for information. OC determined that an approval program would require creation of mechanisms for increased interaction with the courts and for review of decisions denying to approve applications. OC believes the court is the appropriate body for dealing with the ramification of applicants who do not meet all of the requirements of eligibility on the particular cause pending.

FISCAL AND PERSONNEL IMPACT

The proposed information and screening function that OC staff would perform for the courts is expected to result in more aggressive checking of applicants' eligibility, and in a greater number of applications for Pro Hac Vice permission being submitted to OC than currently takes place. In 2002, OC received 2,436 applications. In 2003, OC was served with 2,639 copies of applications filed in California courts for Pro Hac Vice status. It is suspected that not all applications for Pro Hac Vice status have been served on the State Bar. Thus, the new process should also enable the State Bar to collect data on the number of Pro Hac Vice applicants in California courts. The more aggressive checking called for by an information and screening function, increased number of submissions and data collection, are expected to have a workload and personnel impact for which a fee increase would be required. As of May 30th, OC had received 1,153 applications and expects to receive 2,800 applications by the end of 2004. There has been a growth trend in pro hac vice submissions which we expect to increase once the MJP program has been implemented. Most of the out-of-state attorneys practicing in California pursuant to California Rule of Court 966 (as part of litigation) will be required to file a pro hac vice application if the matter is filed in a California court. The current fee of \$50 is recommended to be increased to no less than \$ 250. The rationale for this fee increase will be presented when this item returns from public comment.

PRIOR BOARD AND BOARD COMMITTEE ACTION

In 2001, a similar proposal was recommended to the Board Committee on Regulation and Discipline. One public comment was received and reviewed by the Board Committee. Thereafter, the Board Committee recommended that the Board adopt the new Counsel Pro Hac Vice Program Rules and Regulations and request the Supreme Court to amend rule 983. After the Board of Governors approved the recommendation, discovery of an unintended omission caused the proposal to not be transmitted to the Supreme Court.

The current proposal is essentially the 2001 proposal with the omission reinserted, and addition of specific provisions for filing of the Pro Hac Vice application with the State Bar as a prerequisite as well as addition of a specific provision authorizing courts to deny an application.

RESOLUTION

If the Board Committee on Planning, Program Development and Budget concurs with OC's request for authorization to send the proposal out for public comment, it would be appropriate to adopt the following resolution:

Resolved; The Board Committee on Planning, Program Development and Budget directs the publication of the proposed amendments to Rule 983, California Rules of Court and the proposed new Pro Hac Vice Rules and Regulations for a 45 day public comment period in the form attached to these minutes and made a part hereof; and it is

Further Resolved that the publication of said proposed rules for public comment is not at this time to be construed as a final recommendation by the Board on this subject.