

AGENDA ITEM

MOC IIIB

Proposed Amendments to Legal Specialization Program Rules and Standards B Request for Public Comment

DATE: April 11, 2007

TO: Members of the Board Committee on Member Oversight

FROM: Myron S. Greenberg, Chair, Board of Legal Specialization

SUBJECT: Proposed Amendments to Legal Specialization Program Rules and Standards- Request for Public Comment

ATTACHMENTS: Amendments, shown in legislative style, and explanation of amendments to the following:

- Attachment 1: Rules Governing the State Bar of California Program for Certifying Legal Specialists (Rules)
 - a. Explanation of Proposed Revisions to Program Rules
- Attachment 2: Standards for Certification and Recertification (Standards) in the following specialty areas:
 - a. Appellate Law
 - b. Criminal Law
 - c. Taxation Law
 - d. Workers' Compensation Law

EXECUTIVE SUMMARY

The Board of Legal Specialization (BLS) requests that this Board Committee publish proposed amendments to the Legal Specialization Rules and Standards, as set forth in Attachments 1 and 2, for a 90-day public comment period.

From time to time, the BLS and its Advisory Commissions review the requirements of the Legal Specialization program. The Rules are reviewed with an eye toward incorporating administrative practices that have evolved over time, streamlining the certification process to make the program as efficient and cost-effective as possible, and making other necessary changes based on the experience of the BLS in administering the program. The Standards are also reviewed to insure that the requirements reflect current practice and terminology in each specialty area.

While most of the proposed revisions are "housekeeping" changes, one significant change to the Rules, which is discussed in detail below, is an alternative to the written exam, which would allow certification applicants, during the first two years of a new specialty only, the option of satisfying additional requirements in lieu of passing a written exam. Another is to allow tolling of the certification of specialists who become administrative law judges, or for compelling medical or other reasons.

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

BACKGROUND

In 1970, based on a proposal by the Committee on Legal Specialization, the Board of Governors adopted a pilot program to develop an attorney certification program to identify for the public attorneys who have demonstrated their experience and proficiency in specific areas of law. The pilot program, which certified specialists in criminal law, taxation law, and workers' compensation law, was approved by the Supreme Court of California in 1972.

In 1985, the Supreme Court of California approved a permanent legal specialization program. Currently, there are nine specialty areas: Appellate Law; Bankruptcy Law; Criminal Law; Estate Planning, Trust and Probate Law; Family Law; Franchise and Distribution Law; Immigration and Nationality Law; Taxation Law; and Workers' Compensation Law.

The program is staffed by the Office of Special Admissions and Specialization and administered by the BLS with the assistance of nine Advisory Commissions corresponding to the nine specialty areas. At present there are approximately 4,200 certified specialists, including approximately 150 on judicial service. 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. The program is completely self-funded by fees collected from applicants, certified specialists, education providers, and accredited private certifiers. It draws no monies from the State Bar's general fund and, in fact, pays into the general fund for infrastructure costs such as space, equipment, computer services, and other administrative functions.

The program rules are reviewed on an ongoing basis with an eye toward incorporating administrative practices that have evolved over time, streamlining the certification process to make the program as efficient and cost-effective as possible, and making other necessary changes based on the experience of the BLS in administering the program. The standards for certification and recertification are also reviewed to insure that the requirements reflect current practice and terminology in each specialty area.

Substantive Changes

The two significant changes to the Rules that are being proposed are described below. Additional changes to the Rules and changes to the Standards are described in the *Explanation of Proposed Revisions* in attachments 1 and 2, which also include the full text of the revisions. If the changes to the Standards were global only, those Standards are not included here but will be available at your meeting.

1. Alternative to Written Examination

Based upon a national review of certification by the ABA when it began accrediting specialty certification programs following the Peel decision in 1991, the ABA determined that all accredited programs should contain an exam component. However, the ABA is continuing to review alternative methods of evaluating a specialist's proficiency. That, and the creation of a new specialty in franchise and distribution law, has prompted the BLS to revisit the issue of an alternative to the exam requirement.

Until 1996, applicants in the State Bar of California certification program had the option of satisfying additional requirements in lieu of passing a written exam. During an extensive overhaul of the program's regulatory scheme and rules, the BLS determined that applicants should be held to a uniform standard and determined to delete the alternative.

Adding a new specialty area, however, has highlighted the dilemma of those attorneys closely involved in developing and administering the new specialty. Attorneys appointed to the Advisory Commission of any new specialty area are immediately given the task of developing a written exam for that area, which then precludes them from taking the first exam. After spending a great deal of time and energy in bringing a new specialty to fruition, the specialists most interested in certification are faced with the prospect of either putting off certification for several years or removing themselves from the exam development process even though they are usually among the best candidates for that task. The BLS would like to provide those specialists with another way of qualifying for certification and also believes that an alternative to the exam would encourage greater participation in a new area by those persons who are recognized in a specialty area because of their extensive experience, which is instrumental in getting a new specialty established.

At its December 8, 2006, meeting, the BLS determined to recommend that the Rules be amended to allow an alternative to the exam requirement for new specialty areas only, and that the alternative be available only for the first two years of a new specialty. Proposed new section 8.6 sets forth the parameters for an alternative to the exam. If adopted, the specific alternative requirements will be developed by the Advisory Commissions for their respective specialty areas and will be included in the standards for each specialty area.

2. Tolling of Administrative Law Judges and for Compelling Medical/Other Reasons

The current Rules allow certified specialists on judicial service to have their certification tolled for the time that they are engaged in judicial service. Tolling waives the five-year recertification requirement and the annual legal specialist fee. Judicial service is defined as “serving as a judge of a court of record and [who] therefore is not a member of the State Bar on active status . . . or has been granted a judicial service waiver of his or her annual State Bar membership fee.”

Administrative law judges (ALJ's) do not meet the above criteria and we have found that they are often forced out of the program because of it. If they go on inactive status with the State Bar, which many ALJ's do, they must continue to pay their annual legal specialist fee and recertify every five years in order to maintain their certification. However, while they may use their judicial service to satisfy the task and experience requirement for recertification, when it comes time to recertify, the rules require that they be able to say that they have been engaged in the practice of law during the previous five-year certification term. Even if they have remained on active status, they have not been practicing law, so they find themselves in a Catch-22 situation and many reluctantly drop their certification. The BLS proposes revising the rules to include ALJ's in the definition of judicial service.

The BLS has also found that certified specialists on occasion are faced with medical or other life situations (such as losing their homes or practices in a natural disaster) that temporarily severely limit their ability to practice law and therefore qualify for recertification. To allow specialists to “catch up” with their education and task/experience requirements in such situations, the BLS is proposing that the Rules be revised to allow certification to be tolled for up to three years for compelling medical or other reasons.

FISCAL AND PERSONNEL IMPACT

There is no fiscal and personnel impact on the general fund as the Legal Specialization Program is a special 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 revisions to the Rules Governing the California Program for Certifying Legal Specialists and the Standards for Certification and Recertification, 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.