

# AGENDA ITEM

**JULY 54-134**  
Legal Specialization Rules and Standards  
– Return from Public Comment

**DATE:** July 23-24, 2004

**TO:** Members of the Board of Governors  
Members of the Board Committee on Member Oversight

**FROM:** John W. Munsill, Chair, Board of Legal Specialization

**SUBJECT:** Proposed Amendments to Legal Specialization Program Rules and Standards  
– Return from Public Comment

**ATTACHMENTS:** Amendments, shown in legislative style

1. Rules Governing the State Bar of California Program for Certifying Legal Specialists (Rules)
  - a. Section 14.0
  - b. Section 22.1
  - c. Section 23.1 (*revised following public comment*)
2. Standards for Certification and Recertification in Appellate Law
3. Standards for Certification and Recertification in Personal and Small Business Bankruptcy Law (*revised following public comment*)

## EXECUTIVE SUMMARY

The Board of Legal Specialization (BLS) requests that the Board Committee on Member Oversight (1) recommend that the Board approve amendments to the Legal Specialization Rules and the Standards for Certification and Recertification in Appellate Law, as set forth in attachments 1 and 2 to this memorandum; and (2) publish proposed further amendments to the Standards for Certification and Recertification in Personal and Small Business Bankruptcy Law, as set forth in attachment 3 to this memorandum, for a 45-day public comment period.

The Legal Specialization program is governed by the Rules Governing the State Bar of California Program for Certifying Legal Specialists (Rules) and Standards for Certification and Recertification (Standards) in each specialty area. The amendments to the Rules are intended to enhance the ease of administration of the Legal Specialization program by (1) allowing suspension and revocation of certification based on non-disciplinary regulatory actions; (2) giving voting rights on the Board of Legal Specialization to all Advisory Commission chairs (at present, only six of the eight chairs vote on a rotating basis); and (3) allowing release of confidential information on an applicant's file to the Office of Chief Trial Counsel without first having to request approval from the Board of Governors.

The amendments to the Appellate Law Standards are intended to clarify changes to the education requirement that were approved by the Board of Governors in July 2002, effective 1/1/03.

The amendments to the Personal and Small Business Bankruptcy Law Standards come at the request of the Advisory Commission for that specialty, which recommends adding representation of corporate or partnership debtors under chapter 11 of the Bankruptcy Code and changing the name of the specialty to Bankruptcy Law. The specialty was established in 1993 with a focus on personal and small business (chapter 7) bankruptcy. It has since become evident that the name is not user-friendly to consumers trying to find a bankruptcy specialist. It also erroneously suggests that certified personal and small business bankruptcy specialists are not capable of handling other than small business matters and, as a result, discourages bankruptcy specialists who handle chapter 11 matters from seeking certification.

The public comment received on the proposed change to the name of the specialty was favorable. However, in reviewing it, the Personal and Small Business Bankruptcy Law Advisory Commission realized that some additional changes needed to be made to the task and experience requirements in order to accommodate chapter 11 practitioners. The BLS is therefore asking that these additional changes be circulated for a shortened public comment period of 45 days.

The proposed changes are discussed in detail below. Board members with questions on this item may contact Phyllis Culp at (415) 538-2118 or [phyllis.culp@calbar.ca.gov](mailto: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 4100 attorneys, including approximately 190 who are on judicial service, in eight specialty areas: Appellate Law; Criminal Law; Estate Planning, Trust and Probate Law; Family Law; Immigration and Nationality Law; Personal and Small Business Bankruptcy 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. 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 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 Board of Legal Specialization in administering the program. The Standards are also reviewed to insure that the requirements reflect current practice and terminology in each specialty area.

## PUBLIC COMMENT

At its December 2003 meeting, the Board Committee on Member Oversight published the proposed amendments for a 90-day public comment period, which ended on March 4, 2004. Notice of the Board Committee's action was transmitted to the Office of Media and Information Services and published in the *California Bar Journal* and on the State Bar website. In addition, notice of public comment was mailed to all appellate and personal and small business bankruptcy law specialists.

Six comments were received from certified specialists. Four commented on the bankruptcy Standards, one commented on the appellate Standards and the amendment to section 22.1 of the Rules, and one commented on section 23.1. (*The full text of the written comment will be available at your meeting or in advance from Lorna Maynard at 415-538-2115, [lorna.maynard@calbar.ca.gov](mailto:lorna.maynard@calbar.ca.gov).*)

## PROPOSED CHANGES

### RULES

#### SECTION 14.3

Section 14.3 of the rules provides for suspension of certification only when the specialist has been subject to final disciplinary action. However, there are a number of non-disciplinary actions that cause an attorney to be placed on "Not Entitled" status, i.e., the attorney may not practice law in California. Examples are felony convictions, which result in interim suspension, failure to pay bar dues, failure to comply with the MCLE requirement, B&P Code section 6007 matters (an attorney has been ordered inactive, e.g., due to mental incompetence, or causing substantial harm to his/her clients or the public), and failure to pay child support.

While a certified specialist on Not Entitled status is effectively removed from the practice of law and, presumably, from holding him or herself out as a certified specialist, the BLS cannot under the current Rules suspend or revoke the attorney's certification based on non-disciplinary actions. Procedurally, this results in the attorney remaining on the role of certified specialists and the attorney's file remaining open until he or she fails to comply with one of the program requirements, such as applying for recertification or paying the annual specialist fee. The proposed change to section 14.3 as set forth in attachment 1-a will give the BLS authority to take a more proactive role by immediately suspending an attorney who has been subject

to non-disciplinary regulatory action that results in the attorney being prohibited from practicing law and, if appropriate, revoking the attorney's certification.

**Summary of Comment:** None received.

**BLS Recommendation:** Approve amendments as published for public comment.

### **SECTION 22.1**

Section 22.1 describes the composition of the BLS, which is composed of 18 members, including six of the eight Advisory Commission chairs, who are appointed as voting members on a rotating basis. The BLS is recommending that section 22.1 be revised as set forth in attachment 1-b to give all Commission chairs voting rights in order to encourage the chairs' full participation in BLS meetings and insure that all specialties are represented.

**Summary of Comment:** One comment was received in favor of the change, stating that it would prevent Advisory Commissions from being disenfranchised on a rotating basis. The comment went on to suggest adding language to allow for increasing the total number of members of the BLS by one each time a new specialty is added to the program.

**BLS Recommendation:** Approve amendment as published for public comment. The BLS believes that the additional language proposed would eventually result in the BLS becoming unwieldy, with Advisory Commission chairs outnumbering the BLS members. The BLS plans to revisit the role of the Commission chairs and the composition of the BLS before additional specialties are added to the program.

### **SECTION 23.1**

Section 23.1 refers to the confidentiality of applications for certification and recertification. In cases of denial of certification or recertification, the applicant is entitled to a hearing before the State Bar Court, at which the BLS is represented by the Office of Trial Counsel (OTC). In order to prepare for the State Bar Court hearing, the OTC will request that all information relating to the application be released to them. Under section 23.1 as currently written, information relating to applications may not be released except upon prior order of the Board of Governors. This puts the BLS in the position of having to ask the Board of Governors for permission to release applicant information to its own counsel.

Because section 15.5 of the Rules requires that a hearing take place in 110 days from the date of receipt of a request from an applicant, this can also result in the administrative burden of having to arrange for an emergency Board item in order for the OTC to receive the materials in time to prepare for the hearing.

The proposed change to section 23.1 as set forth in attachment 1-c allows for release of information relating to an application to counsel appointed under section 15.7 of the Rules without prior approval of the Board.

**Summary of Comment:** One comment was received, noting that it is not apparent from the rule what defines the relationship between "appointed counsel" and the Office of Chief Trial Counsel and recommending the addition of clarifying language. The comment also suggested that the rule should provide more protection to the specialist because, as it stands, anyone falling within the definition of "appointed counsel" can have access to confidential documents without showing a need or notifying the specialist.

**BLS Recommendation:** Further amend section 23.1 to define "appointed counsel" by incorporating the language of section 15.7 instead of simply referring to it. *(Note: Because this change is of a non-substantive technical nature, it is not necessary to republish the proposed amendment for public comment.)* As for providing more protection, the BLS believes that, because counsel is appointed under section 15.7, which is specific to hearings on denials of applications, or suspensions and revocations, no further protection is necessary.

## **STANDARDS**

### **APPELLATE LAW STANDARDS**

Revisions to the education standards for certification and recertification in the Appellate Law Standards were approved by the Board in July 2002, effective January 1, 2003. After the revised requirements were made available to certified appellate law specialists, applicants, and providers of education in appellate law, it became apparent from the questions directed to staff that the cap on education in trial procedure was too limiting and confusing. The Appellate Law Advisory Commission revisited the requirements and determined to remove the cap in order to give specialists and applicants more flexibility in complying with the education requirement (see attachment 2).

**Summary of Comment:** One comment in favor was received.

**BLS Recommendation:** Approve amendments as published for public comment.

### **PERSONAL AND SMALL BUSINESS BANKRUPTCY LAW**

In 1993, the Board of Governors approved the creation of a specialty in Personal and Small Business Bankruptcy Law. The Advisory Commission for the specialty area believes that the Standards as currently written, which include only chapter 7 of the Bankruptcy Code when referring to corporate or partnership debtors, erroneously suggest that certified personal and small business bankruptcy specialists are not capable of handling other than small business matters. The Commission believes that this discourages bankruptcy specialists who handle chapter 11 matters from seeking certification. It should be noted that the written exam that attorneys must pass in order to be certified covers both chapter 7 and chapter 11 issues.

It has also been the Commission's experience that the current specialty name is awkward and not particularly descriptive in that consumers looking for help with bankruptcy matters are looking for the word "bankruptcy," which tends to get lost in the current name of the specialty, especially if listed alphabetically.

The Commission feels strongly, and the BLS agrees, that, in order to make it easier for consumers to find certified specialists in bankruptcy law and encourage more bankruptcy specialists to seek certification, the Standards should be revised to redefine the specialty by adding a reference to chapter 11 when referring to corporate or partnership debtors and rename the specialty Bankruptcy Law.

**Summary of Comment:** Four comments were received in support of the proposed name change, noting that the current title is cumbersome, discourages bankruptcy specialists from seeking certification, is misleading to the public, and results in underutilization of the program. One comment also suggested that the current task requirement for certification, which requires that the applicant be involved in 100 or more bankruptcy cases over a five-year period, is unrealistic for chapter 11 practitioners and would exclude many lawyers from participating in the program. The comment noted that it would be unusual for a lawyer handling chapter 11 matters and/or larger matters to be involved in 20 different cases in a year, and that either more weight should be given to chapter 11 representation or an alternative method of satisfying the task requirement should be provided.

**BLS Recommendation:** Further amend the Standards as proposed in attachment 3 and request that they be republished for a shortened 45-day public comment period. After reviewing the public comment, the Personal and Small Business Bankruptcy Law Advisory Commission made additional amendments to the Standards to (1) broaden the specialty definition by eliminating references to specific chapters of the Bankruptcy Code and instead making the language more generic to reflect the inclusion of all bankruptcy practice, and (2) change the task requirement from 100 cases to 100 cases, contested matters, and/or adversary proceedings to reflect actual practice in that a small number of business bankruptcy cases may generate a large volume of work.

## **FISCAL AND PERSONNEL IMPACT**

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

## **PROPOSED BOARD COMMITTEE AND BOARD ACTION**

Should the Board Committee on Member Oversight concur with the recommendation of the Board of Legal Specialization, adoption of the following resolutions would be appropriate:

**RESOLVED**, following publication for comment and consideration of the comment received, that the Board Committee on Member Oversight recommends that the Board of Governors of the State Bar of California adopt amendments to the Rules Governing the State Bar of California Program for Certifying Legal Specialists and the Standards for Certification and Recertification in Appellate Law, in the form attached to these minutes and made a part hereof, to be effective immediately; and it is

**FURTHER RESOLVED**, that the Board Committee on Member Oversight authorizes the publication of proposed amendments to the Standards for Certification and Recertification in Personal and Small Business Bankruptcy Law, in the form attached to these minutes and made a part hereof, for a 45-day comment period; and it is

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

Should the Board of Governors concur with the recommendation of the Board Committee on Member Oversight, adoption of the following resolution would be appropriate:

**RESOLVED**, following publication for comment and consideration of the comment received, and upon the recommendation of the Board Committee on Member Oversight, that the Board of Governors of the State Bar of California hereby adopts amendments to the Rules Governing the State Bar of California Program for Certifying Legal Specialists and the Standards for Certification and Recertification in Appellate Law, in the form attached to these minutes and made a part hereof, to be effective immediately.