

# CALIFORNIA BOARD OF LEGAL SPECIALIZATION OF THE STATE BAR OF CALIFORNIA



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**DATE:** November 19, 2003

**TO:** 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 – Request for 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
2. Standards for Certification and Recertification (Standards) in the following specialty areas:
  - a. Personal and Small Business Bankruptcy Law
  - b. Appellate 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 the attachments to this memorandum, for a 90-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 proposed changes 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 proposed changes 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. In that ten years, it has 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 proposed changes 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 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.

## 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.

#### 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.

#### 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.

## **Standards**

### **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, suggest that certified personal and small business bankruptcy specialists are not capable of handling other than small business matters, which is not true in that there is no difference in difficulty between doing a chapter 11 for an individual or a chapter 11 for a business. 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 as set forth in attachment 2-a to redefine the specialty by adding a reference to chapter 11 when referring to corporate or partnership debtors and rename the specialty Bankruptcy Law.

### **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-b).

## **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 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 Appellate Law and Personal and Small Business Bankruptcy 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.