

AGENDA ITEM

MAY 54-133

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

DATE: April 15, 2008

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

FROM: Alice W. O'Sullivan, Chair, Board of Legal Specialization
Phyllis J. Culp, Director, Office of Special Admissions and Specialization

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

ATTACHMENTS:

1. Explanation of amendments to Rules Governing the State Bar of California Program for Certifying Legal Specialists (Rules)
2. Rules showing amendments in legislative style
3. Explanation of amendments to Standards for Certification and Recertification (Standards)
4. 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 the Board Committee on Member Oversight recommend that the Board of Governors approve amendments to the Legal Specialization Rules and Standards, as set forth in Attachments 2 and 4 to this memorandum.

From time to time, the BLS and its Advisory Commissions review the requirements of the Legal Specialization program. The Rules are reviewed for the purpose of 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 ensure 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.

The proposed changes were published for public comment in May 2007 and distributed to all

certified specialists. Seven comments were received on the proposed changes to the Rules and one on the proposed changes to the Appellate Standards. Those commenting on the alternative to the exam were evenly split with three in favor, three opposed. The comment on tolling certification was favorable. A full discussion of the comment received appears below.

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.

The program rules are reviewed on an ongoing basis for the purpose of 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 ensure that the requirements reflect current practice and terminology in each specialty area.

PUBLIC COMMENT

At its May 2007 meeting, the Board Committee on Member Oversight authorized the publication of the proposed amendments for a 90-day public comment period, which ended on August 9, 2007. The proposed amendments were published in the *California Bar Journal* and on the State Bar website. In addition, notice of the public comment opportunity was mailed to all certified specialists.

Seven comments were received from certified specialists. Seven commented on the Rules and, one on the Appellate Standards. Those commenting on the Rules limited their comments to the alternative to the exam and the tolling of certification for administrative law judges or for compelling medical or other reasons. *(The full text of the written comment will be available at the Board Committee's meeting or in advance from Lorna Maynard at 415-538-2115 or lorna.maynard@calbar.ca.gov.)*

PROPOSED 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 Amendments* in attachments 1 and 3, which also include the full text of the amendments. If the changes to the Standards were global only (see *Explanation*), those Standards are not included here but will be available at the Board Committee's meeting.

It should be noted that the one comment received on the Appellate Standards suggested changes to the points awarded for certain tasks listed in the Task Requirement section. The Appellate Law Advisory Commission will take this into consideration as part of a larger review of the point system that it expects to undertake this year.

1. Alternative to Written Examination (new section 8.6)

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.

Summary of Comment: Six comments were received, three in favor and three opposed. Of those in favor, one supported the proposed change as written, one thought it should be limited to "those attorneys who are actually involved in the preparation of the exam," and one wanted to expand the idea to existing specialties to allow

“grandfathering” of attorneys who are “recognized as leaders in their specialty” for a short period of time.

Of those opposed, one gave no specific reason and one commented that only a written exam “assures non-biased admission to specialization.” The third felt that requiring an exam (as opposed to grandfathering, which is not being proposed here) led to a more qualified group of applicants.

BLS Recommendation: Approve new section 8.6 as published for public comment. The BLS does not recommend grandfathering or waiving attorneys into existing specialties based on reputation. For one thing, the existing specialties (with the exception of Franchise and Distribution Law, which still falls within the two-year window) are already well established. For another, certification is based on meeting objective criteria and the BLS believes that this standard best serves the public. To be certified as a specialist currently, 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. If the proposed amendment is approved, applicants will still have to satisfy all of those requirements with the exception of the written exam. In lieu of the exam, they must meet additional objective criteria as set forth in the Standards.

2. Tolling of Administrative Law Judges and for Compelling Medical/Other Reasons (revised section 12.7.2 and new section 12.8)

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 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 confirm 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.

Summary of Comment: Four comments were received, all favorable. One comment from a Workers' Compensation Appeals Board judges noted that tolling would “allow ALJs to more assuredly retain certification which may, in turn, enhance the practice of

law as a whole. Attorneys who practice before ALJs who retain certification may be encouraged by said fact to become certified specialists.”

BLS Recommendation: Approve revised section 12.7.2 and new section 12.8 as published for public comment.

ADDITIONAL CONFORMING CHANGES

Subsequent to the publication of the proposed changes to the Rules for public comment, new rules concerning providers of continuing legal education (Title 3, Division 5, Rules of the State Bar of California) went into effect on January 1, 2008. The new rules changed the terminology used for providers (for example, Approved Providers are now referred to as Multiple Activity Providers). As a result, additional changes have been made to section 7.0 of the Rules (Approval of Educational Activities) to conform the language to that used in the new provider rules. Because these are conforming changes and not material changes, the Procedure for Adoption, Amendment or Repeal of State Bar Regulations does not require an additional public comment period.

FISCAL AND PERSONNEL IMPACT

The Legal Specialization program fund has sufficient revenue to cover any administrative costs. There is no fiscal and personnel impact on the general fund.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

RULE AMENDMENTS IMPACT

The proposed changes impact the Rules Governing the State Bar of California Program for Certifying Legal Specialists and the Standards for Certification and Recertification in Appellate Law, Bankruptcy Law, Criminal Law, Estate Planning, Trust and Probate Law, Family Law, Franchise and Distribution Law, Immigration Law, Taxation Law, and Workers' Compensation Law.

PROPOSED BOARD COMMITTEE AND BOARD ACTION

Should the Board Committee determine to adopt the recommendation of the BLS, it would be appropriate to adopt the following resolution:

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 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, to be effective immediately.

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 the form attached to these minutes and made a part hereof, to be effective immediately.