

Emeritus Attorney Pro Bono
Participation Program Rules --
Request to Release Proposed
Revisions for Public Comment

DATE: April 15, 2008

TO: Members of the Board Committee on Stakeholder Relations

FROM: Patricia Lee, Director, Office of Legal Services, Access & Fairness
Programs;
Sharon Ngim, Program Developer, Office of Legal Services, Access &
Fairness Programs, and Staff Liaison to the Standing Committee on
the Delivery of Legal Services;

SUBJECT: Emeritus Attorney Pro Bono Participation Program Rules -- Request to
Release Proposed Revisions for Public Comment

EXECUTIVE SUMMARY

The Board of Governors established the Emeritus Attorney Pro Bono Participation Program Rules in June 1987 to encourage attorneys who otherwise would be retired from the active practice of law to do pro bono work. [Title 3, Division 2, Chapter 8 of the State Bar Rules and Regulations.] Since then, an increasing number of younger attorneys have been leaving the profession on a temporary or permanent basis. They have sufficient legal experience to make a valuable pro bono contribution but may not have been in practice for the minimum ten years required under the current rules. The attached proposed rules would make the pro bono program available to these attorneys and not just those who meet current emeritus qualifications. The Standing Committee on the Delivery of Legal Services and the Program Development staff of the Office of Legal Services, Access & Fairness Programs recommend the proposals and request that the Board Committee on Stakeholder Relations release the proposals for a 45-day public comment period, from May 16, 2008 through June 30, 2008.

BACKGROUND:

The Board of Governors adopted the Emeritus Attorney Pro Bono Participation Program ("EA Program") Rules in June 1987. The rules originally were created to encourage retired attorneys who otherwise would become inactive to represent low-income individuals on a pro bono basis. The retired attorney would become active for the purpose of doing pro bono work with a qualified legal services provider or certified lawyer referral service and the State Bar would waive the active membership fee. In the nearly twenty-one years since the EA Program was established, there have been three amendments

with respect to eligibility—adding judges (June 1991), reducing the number of years of active practice from five out of last ten years to three out of the last eight years (December 1992), and reducing the total number of years admitted to practice law in a United States jurisdiction from fifteen to ten (September 1996). Despite the previous changes to the EA Program Rules, the total number of enrolled attorneys has remained relatively constant. Currently there are eighty-three Emeritus Attorneys located at twenty-six different programs providing a range of direct legal services to low-income Californians.

In addition to California, there are twenty-four states (Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Maine, Maryland, Massachusetts, Mississippi, Montana, New Hampshire, New York, North Carolina, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington and West Virginia) plus the District of Columbia that offer an emeritus or pro bono practice rule, though the rules vary from state-to-state. In recent years, the national trend is for states to broaden the traditional target audience of retired attorneys to otherwise qualified and experienced younger attorneys who are not in active practice but who are interested in pro bono work, such as Colorado, Mississippi and North Carolina in 2007, and South Dakota in 2008.

While important gains in terms of overall resources have been made in California, the 100 qualified legal services providers are able to assist fewer than 35% of the poor in need of civil legal services. The number of volunteer hours contributed by pro bono attorneys (as reported by IOLTA funded programs in their grant application) has remained relatively unchanged over the past five years, as has the number of attorneys enrolled in the Emeritus Attorney Program. While 21% of the State Bar membership is comprised of inactive attorneys (45,630 as of April 11, 2008), and half of the inactive membership reside outside California, the majority of new applicants to the EA Program paid the active membership fee but did not practice law on a regular basis. Yet it is projected that a significant number of attorneys are planning to take a temporary or permanent leave from the active practice of law within the first five to ten years of practice, for instance to have children, care for elderly relatives or pursue other interests. This information is supported by the results of the April 2007 membership survey conducted by the California Young Lawyers Association (CYLA). Of the 1,820 members aged 36 or younger who responded, 70% had been in practice one to four years; 15% said they would probably do something else other than practice law as a professional career; and 25% indicated they would continue to practice law but probably do other work as well. Altogether, 28% said they would probably continue to practice law for another five years or less.

Under the existing EA Program Rules that require admission to the practice of law for ten years and active practice for three, attorneys such as those who responded to the CYLA survey would be ineligible to participate in the program. Modest changes to the current rules could significantly increase the number of pro bono participants by opening the pro bono program to attorneys who might otherwise leave the legal profession.

Expanding the Emeritus Attorney Program in California to include the growing number of attorneys “retiring” from the active practice of law at a younger age is consistent with the pro bono objectives of the “Action Plan for Justice,” the April 2007 report to the California Assembly Judiciary Committee by the California Commission on Access to Justice. This

report is available online at http://calbar.ca.gov/calbar/pdfs/reports/2007_Action-Plan-Justice.pdf. The expansion is also consistent with the ongoing efforts of the American Bar Association's Second Season of Service initiative. The ABA estimates over the next several years that nationally 40,000 lawyers a year will begin to retire, consider retiring, or significantly alter their work environment. The Second Season of Service initiative focuses on supporting lawyers as they are transitioning from full-time practice of law to pursue other interests by keeping them engaged in the profession and connecting them with public service opportunities (more information is available at <http://www.abanet.org/dch/committee.cfm?com=BG110800>).

As part of the State Bar's rules revision project to integrate the bar's more than two dozen sets of rules into one comprehensive structure and to make the rules simpler, cleaner and more uniform, proposed changes to the Emeritus Attorney Rules (formerly Article I, Section 12 of the State Bar Rules and Regulations) aimed at improving organization and style were distributed for a 90-day public comment from April 25, 2007 through July 3, 2007 as the new Title 3, Division 2, Chapter 8. The only comments submitted were from the Standing Committee on the Delivery of Legal Services and the Program Development staff. These comments are primarily substantive and have been incorporated into this agenda item. The proposed rule changes to rename, update, and expand the Emeritus Attorney Program Rules would have no impact on the attorneys currently enrolled in the program. However, attorneys or judges who retire from the active practice of law after the proposed rules changes become effective would need to apply to the program within the first two years after changing from active to inactive status. At this time, no opposition to the proposed rule changes is anticipated. A description of how the State Bar will promote the changed program is included below in the Proposed Implementation Schedule.

SUMMARY OF KEY PROPOSED CHANGES:

1. Change title of program from Emeritus Attorney Pro Bono Participation Program to "Pro Bono Practice Program."
2. Replace "Emeritus Attorney" with "Pro Bono Practice" and delete references to "emeritus" and "retired."
3. Rule 3.327: Retain 3 years of practice of law or service as a judge in California, but reduce from ten to five the total number of years admitted to the practice of law in a United States jurisdiction and the number of years of no record of public discipline.
4. Rule 3.329: Add a recommended minimum number of hours of pro bono legal services to be performed by the pro bono practice attorney annually, 100 hours being the recommended minimum, though the attorney and the qualified legal services provider or certified lawyer referral service can agree on a different number of hours.
5. Rule 3.300: Add a provision that the qualified legal services provider or the certified lawyer referral service must provide adequate support and supervision.

LENGTH OF PUBLIC COMMENT PERIOD & REASON:

The forty-five-day comment period would run from May 16, 2008 through June 30, 2008. This period of time is adequate to collect comments and feedback from approximately 100 qualified legal services providers and 60 certified lawyer referral services that will be impacted by the proposed rule change, as well as from other interested stakeholders. No opposition to the rule change is anticipated at this time. The final public comment report and recommendations will be submitted for review and approval by the Board Committee on Stakeholder Relations and the full Board of Governors at the July 2008 Board Meeting. Implementation of the rule change will begin immediately to coincide with the 2009 billing cycle.

FISCAL AND PERSONNEL IMPACT:

It is projected that enrollment in the updated and expanded program could potentially double from 83 attorneys to 166 attorneys, and the maximum value of the total amount of active membership fees to be waived would double. No additional staff resources are anticipated at this time.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT:

The Board Book will not be impacted. The Administrative Manual topics affected by the proposed rule changes will be updated accordingly.

RULE AMENDMENTS:

The proposed changes to the current Emeritus Attorney Program Rules would replace the existing Title 3, Division 2, Chapter 8 of the Rules and Regulations of the State Bar.

ALIGNMENT WITH STRATEGIC PLAN:

The measurable desired outcome listed under Strategy 3.1 (Pro Bono Representation. Encourage increased numbers of practitioners and amounts of time contributed through pro bono representation provided by individual private and public attorneys) would be changed from "The number of Emeritus attorneys involved in pro bono activities increases." to "The number of attorneys enrolled in the Pro Bono Practice Program increases."

RECOMMENDATIONS:

See Attachment A for a complete list of recommendations for renaming, updating and expanding the rewritten Emeritus Attorney Program Rules and the proposed revisions.

PROPOSED IMPLEMENTATION SCHEDULE:

The following timetable is being recommended to ensure that the proposed revisions to the current Emeritus Attorney Pro Bono Program be adopted and implemented by the 2009 State Bar billing cycle:

May 15, 2008: This proposal submitted to the Board Committee on Stakeholder Relations to be approved for public comment.

May 16, 2008: Release proposed changes for forty-five-day public comment period.

June 30, 2008: Deadline for public comment.

July 2008: The report on public comment and proposed recommendations will be submitted to the Board Committee on Stakeholder Relations and to the Board of Governors for review and approval.

July 2008 through January 2009: State Bar staff and the Standing Committee on the Delivery of Legal Services will promote and publicize the revised program rules, including but not limited to an article on the State Bar Web site, in the Cal Bar Journal, other State Bar communication outlets, and the Legal Aid Association of California newsletter; individualized notices to all qualified legal services providers, certified lawyer referral services and local, specialty, minority and women's bar associations; and notices to all attorneys enrolled in the current Emeritus Attorney Program. Program Development staff will share information with existing and potential qualified legal services programs and certified lawyer referral services about ways to incorporate attorneys in transition and inactive attorneys in the delivery of legal services. Program Development staff will also coordinate with appropriate State Bar staff to notify attorneys about the Pro Bono Practice Program when they change from active to inactive status, and explore the feasibility of including information about the program in the annual member fee statement to all attorneys.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Board Committee on Stakeholder Relations agree to release for public comment the proposed revisions to the Emeritus Attorney Program Rules, the following resolution would be in order:

RESOLVED that the Board Committee on Stakeholder Relations approves the request to release the proposed revisions to the newly rewritten Emeritus Attorney Program Rules in the form attached for a forty-five-day public comment period from May 16, 2008 through June 30, 2008; and it is

FURTHER RESOLVED that authorization for public comment is not, and shall not be construed as, a statement or recommendation of approval by the Board Committee.

Attachment A

Recommendations, Comments and Proposed Revisions to Title 3, Division 2, Chapter 8 of the State Bar Rules and Regulations

Recommendation 1

Change title of Chapter 8 from Emeritus Attorneys to “Pro Bono Practice Attorneys”; globally replace “Emeritus Attorney” or “emeritus” with “Pro Bono Practice” and delete “retired” and “retirement”.

Comment: Renaming the program is necessary to adequately reflect the rule changes. The words “emeritus” and “retired” are associated with age and/or retirement status due to age. Removing them will help broaden the pool of applicants to include younger attorneys taking an early or mid-career break from the active practice of law and attorneys transitioning to alternative careers.

Recommendation 2

Rule 3.325, Definitions (C): delete “certified by the State Bar as meeting the statutory criteria for” and replace with “receives or is eligible to receive funds from the Legal Services Trust Fund Program as . . .”

Comment: The proposed replacement language appeared in the original version of the Emeritus Attorney Program Rules and should be retained as the language is the most recognized definition of “qualified legal services providers” both within and outside the State Bar.

Recommendation 3

Rule 3.325, Definitions (D): add “panel or” between “pro bono” and “clinic.”

The word “panel” is the correct terminology when referencing lawyer referral services.

Recommendation 4

Rule 3.327, Eligibility requirements (A): delete “retirement” and replace with “application to the Pro Bono Practice Program.”

Comment: All of the eligibility requirements would be effective from the time the attorney files an application to enroll in the program.

Recommendation 5

Rule 3.327, Eligibility requirements (B) and (D): Reduce the number of years admitted to the practice of law in a United States jurisdiction and no record of public discipline from ten to five.

Comment: On the basis of their experience with the Emeritus Program, the Standing Committee on the Delivery of Legal Services and the Program Development staff of the Office of Legal Services, Access & Fairness Programs believe that being admitted to the practice of law for five years in any jurisdiction (with three of those years as a judge or practicing attorney in California) plus no record of public discipline during the five years are sufficient requirements for an attorney to provide valuable pro bono contributions and to overcome any concerns about protecting the public and the profession.

Recommendation 6

Rule 3.327, Eligibility requirements (E): add “annually” after “application.”

Comment: Adding the word “annually” clarifies that enrollment in the program is not renewed automatically.

Recommendation 7

Rule 3.328, Waiver of an eligibility requirement: delete “for any reason” and add “or for other good cause” at the end of the rule.

Comment: Waiving an eligibility requirement for good cause is consistent with State Bar policy.

Recommendation 8

Rule 3.329, Responsibilities of a pro bono practice attorney (B): delete “project, qualified legal support center, or the no-fee panel or pro bono clinic of a . . .” and replace with “provider or a . . .”

Comment: This change is consistent with the definition of “qualified legal services provider” at Rule 3.325 Definitions (C).

Recommendation 9

Rule 3.329, Responsibilities of a pro bono practice attorney (D): delete “these rules and relevant law” and replace with “State Bar Rules on Minimum Continuing Legal Education and all other rules and laws applicable to active State Bar members.”

Comment: It is important to state in the rules that program participants must comply with MCLE requirements as many assume they are exempt from MCLE.

Recommendation 10

Rule 3.329, Responsibilities of a pro bono practice attorney : add “(F) agree with the qualified legal services provider or certified lawyer referral service to provide a minimum number of hours of pro bono legal services annually, 100 hours being the recommended minimum; and.”

Comment: The current Emeritus Attorney Program Rules are silent regarding a recommended minimum number of pro bono hours to contribute per year. As pro bono resolutions adopted by the Board of Governors in December 1989 and revised in June 2002 urge all attorneys to provide at least 50 hours of pro bono legal services each year, it would be consistent to recommend a minimum number of pro bono hours. 100 hours represents a little less than two hours of pro bono service per week per year, and the committee believes this number is reasonable and attainable. Please note that the recommended number of 100 hours is voluntary and not mandatory, and that the qualified legal services provider or certified lawyer referral services and the pro bono practice attorney can agree on a different number of hours.

Recommendation 11

Rule 3.329, Responsibilities of a pro bono practice attorney: add “(G) submit application annually; and.”

Comment: This language is consistent with Rule 3.327 Eligibility requirements (E).

Recommendation 12

Rule 3.329, Responsibilities of a pro bono practice attorney : add “(H) disclose any disciplinary charges to the qualified legal services provider or certified lawyer referral service as part of the attorney’s continuing duty.”

Comment: This language is consistent with State Bar policy.

Recommendation 13

Rule 3.330, Responsibilities of a qualified legal services provider or certified lawyer referral service: Replace “qualified” with “certified” in the rule title and first sentence.

Comment: “Certified” is the correct terminology when referencing lawyer referral services.

Recommendation 14

Rule 3.330, Responsibilities of a qualified legal services provider or certified lawyer referral service : add “(E) provide adequate support and supervision to each pro bono practice attorney . . .”

Comment: Adding this responsibility for support and supervision helps ensure quality assurance and is not unduly burdensome.

Recommendation 15

Rule 3.330, Responsibilities of a qualified legal services provider or certified lawyer referral service : add “(F) agree with the pro bono practice attorney to provide a minimum number of hours of pro bono legal services annually, 100 hours being the recommended minimum; and.”

Comment: This change is consistent with text proposed above for Rule 3.329 Responsibilities of a pro bono practice attorney (F).

Recommendation 16

Rule 3.330, Responsibilities of a qualified legal services provider or certified lawyer referral service : add “(G) submit application annually for each pro bono practice attorney.”

Comments: This change is consistent with text proposed above for Rule 3.327 Eligibility requirements (E).

Proposed Revisions to Title 3, Division 2, Chapter 8

TITLE 3. PROGRAMS AND SERVICES

Division 1. Prospective Members

Division 2. Attorney Members

Division 3. Other Attorneys

Division 4. Consumers

Division 5. Vendors of Programs and Services

Division 2. Attorney Members

CHAPTER 8. ~~EMERITUS~~ **PRO BONO PRACTICE** ATTORNEYS

Rule 3.325 Definitions

- (A) The “~~Emeritus Attorney~~ **Pro Bono Practice** Program” is a program for active members of the State Bar who would otherwise be ~~retired or~~ inactive to provide free legal services exclusively for a qualified legal services provider or for the no-fee panel or pro bono clinic of a certified lawyer referral service.
- (B) An “~~emeritus~~ **pro bono practice** attorney” is an active member of the State Bar who would otherwise be ~~retired or~~ inactive but who provides free legal services exclusively for the ~~Emeritus~~ **Pro Bono Practice** Attorney Program and engages in no other activities that require active status.
- (C) A “qualified legal services provider” is ~~certified by the State Bar as meeting the statutory criteria for~~ **receives or is eligible to receive funds from the Legal Services Trust Fund Program as** either
 - (1) a “qualified legal services project,” which provides legal services in civil matters without charge to indigent persons;¹ or
 - (2) a “qualified legal services support center,” which provides legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects.²
- (D) A “certified lawyer referral service” is, for the purposes of the ~~Emeritus~~ **Pro Bono Practice** Attorney Program, the no-fee panel or pro bono **panel or** clinic of a lawyer referral service certified by the State Bar as meeting statutory criteria.³

¹ Business & Professions Code §§ 6213 – 6214.5.

² Business and Professions Code §§ 6213 and 6215.

³ Business & Professions Code § 6155.

Rule 3.326 Waiver of annual membership fees

The State Bar waives annual active membership fees for members who act exclusively as emeritus **pro bono practice** attorneys for an entire calendar year. Members who are emeritus **pro bono practice** attorneys for less than a calendar year must pay annual membership fees.

Rule 3.327 Eligibility requirements

To serve as an emeritus **pro bono practice** attorney, a member must

- (A) be in good standing with no disciplinary charges pending at the time of retirement **application to the Pro Bono Practice Program**;
- (B) at the time of application have been admitted to the practice of law in a United States jurisdiction for at least ~~ten~~ **five** years preceding the application;
- (C) have practiced law or served as a judge in California for at least three of those years;
- (D) have no record of public discipline during the ~~ten~~ **five** years;
- (E) submit an application **annually** for the Emeritus Attorney **Pro Bono Practice** Program; and
- (F) be certified by the State Bar as an emeritus **pro bono practice** attorney.

Rule 3.328 Waiver of an eligibility requirement

The Secretary may waive an emeritus **pro bono practice** attorney requirement for any reason, such as the extent to which a member otherwise meets the requirements, the need for legal services in a particular place, or a member's experience in providing pro bono legal services **or for other good cause**.

Rule 3.329 Responsibilities of an emeritus **pro bono practice** attorney

An emeritus **pro bono practice** attorney must

- (A) provide legal services exclusively as an Emeritus **Pro Bono Practice** Attorney and not otherwise engage in activities that require active status;
- (B) provide legal services for a qualified legal services **provider or a project**, ~~qualified legal support center, or the no-fee panel or pro bono clinic of a~~ qualified lawyer referral service;
- (C) accept no compensation for legal services, except for reimbursement of expenses incurred while rendering services under these rules;
- (D) comply with **State Bar Rules on Minimum Continuing Legal Education**

and all other rules and laws applicable to active State Bar members;
~~these rules and relevant law~~

- (E) notify the State Bar within thirty days of withdrawing from the program;
- (F) agree with the qualified legal services provider or certified lawyer referral service to provide a minimum number of hours of pro bono legal services annually, 100 hours being the recommended minimum;
- (G) submit an application annually; and
- (H) disclose any disciplinary charges to the qualified legal services provider or certified lawyer referral service as part of the attorney's continuing duty.

Rule 3.330 Responsibilities of a qualified legal services provider or ~~qualified~~ certified lawyer referral service

A qualified legal services provider or ~~qualified~~ certified lawyer referral service that uses the services of an ~~emeritus~~ pro bono practice attorney must

- (A) notify the State Bar that a member has applied to serve as an emeritus attorney for the provider or service;
- (B) indicate whether the application will be accepted if the State Bar certifies the member as an ~~emeritus~~ pro bono practice attorney;
- (C) provide no compensation to the ~~emeritus~~ pro bono practice attorney, except for reimbursement of expenses; ~~and~~
- (D) notify the State Bar within thirty days of ceasing to use the services of the ~~emeritus~~ pro bono practice attorney;
- (E) provide adequate support and supervision to each pro bono practice attorney; and
- (F) agree with the pro bono practice attorney to provide a minimum number of hours of pro bono legal services annually, 100 hours being the recommended minimum; and
- (G) submit application annually for each pro bono practice attorney.