

AGENDA ITEM

NOVEMBER 135

Proposed Standards for
Certification and Recertification
in Legal Malpractice Law –
Return from Public Comment

DATE: October 28, 2008

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

FROM: Lester Friedman, Chair, Board of Legal Specialization
Phyllis J. Culp, Director, Office of Special Admissions and Specialization

SUBJECT: Proposed Standards for Certification and Recertification in Legal Malpractice Law

ATTACHMENTS: 1. Standards for a New Specialty in Certification and Recertification in Legal Malpractice Law within the Legal Specialization Program – Proposed Approval Following Public Comment
2. Public Comments Received

EXECUTIVE SUMMARY

The Board of Legal Specialization (BLS) requests that the Board Committee on Member Oversight recommend that the Board of Governors approve the Standards for Certification and Recertification in Legal Malpractice Law (Standards) as set forth in the attachment to this memorandum.

The BLS, which administers the Legal Specialization program, is charged with proposing additional fields of law in which attorneys may be certified. One purpose of the program is to help the public identify attorneys who are proficient in a particular area of law by providing a method of certification based on objective criteria. Another is to encourage attorney competence by providing attorneys with the means of obtaining a professional credential that recognizes their proficiency in a specific area of law. Certification also serves to regulate claims of special skills by attorneys to assure that such claims are not made in a manner that misleads the public. The program is completely self-funded.

The BLS decided to consider a certification program in Legal Malpractice Law after being approached in May of this year by Mr. James A. Murphy on behalf of himself and several recognized leaders in the field of legal malpractice with the request that the BLS consider certification in that specialty field. Mr. Murphy's letter states that certification in the area of legal malpractice would enhance attorney competence and provide a higher degree of consumer protection, noting that "[w]ithin the last 15 years there has been an explosion in legal malpractice cases, and the general public, as well as the Bar, would be greatly served through the engagement of lawyers certified as specialists in California legal malpractice claims."

The proposed Standards were circulated for public comment in October 2008. As of the time of drafting of this item, six favorable comments had been received. The comment period ends November 14, 2008. Therefore, any additional comments will be provided at the meeting. After reviewing the comments received, the Legal Malpractice Law Consulting Group recommended no changes to the Standards.

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.

CONSULTING GROUP

At the request of the BLS, the Board of Governors created a consulting group at its July 2008 meeting to examine the feasibility of, and develop standards for, certifying legal specialists in the area of legal malpractice law. The Consulting Group is comprised of 10 of the top practitioners in the State in the field of legal malpractice law. The Consulting Group is chaired by James Murphy who initiated the process with a letter to the BLS and includes former President of the State Bar of California James Towery, a legal ethics professor and former chair and member of the State Bar's Committee on Professional Conduct, Richard Zitrin, and practitioners with years of experience in defending and bringing legal malpractice cases. The Consulting Group recommended that the BLS go forward with the proposed specialty and developed the attached Standards for which we are now seeking approval.

Mr. Murphy's letter to the BLS referenced the fact that the State Bar has accredited the American Board of Professional Liability Attorneys' certification program in legal malpractice and noted that he is certified by that entity. However, he believes that it is important for the State Bar to establish its own certification program, stating:

California's Rules of Professional Conduct, while similar in many respects to the American Bar Association's Rules of Professional Responsibility, are distinguishable in many significant and sometimes subtle respects. While our California rules state they are not intended to create civil causes of action, in legal malpractice cases experts routinely rely on these rules in opining on the standards of practice for

attorneys. In addition, in its Business and Professions Code, Civil Code, and Code of Civil Procedure California has numerous statutes related to these rules and to the practice of law in this state. It is important for any attorney representing a claimant or a lawyer in a legal malpractice case to be extremely conversant with California's own rules and statutes.

Mr. Murphy's letter goes on to say that certification in the area of legal malpractice would enhance attorney competence and provide a higher degree of consumer protection, noting that "[w]ithin the last 15 years there has been an explosion in legal malpractice cases, and the general public, as well as the Bar, would be greatly served through the engagement of lawyers certified as specialists in California legal malpractice claims." He also notes that several judges who have presided over legal malpractice suits have discussed the idea of a legal malpractice specialty with him and other recognized practitioners in the field and "are unanimous in endorsing this specialization."

PUBLIC COMMENT

At its September 2008 meeting, the Board Committee on Operations authorized the publication of the proposed amendments for a 45-day public comment period, which will end on November 14, 2008. The proposed amendments were published on the State Bar website.

Six comments were received at the time of the drafting of this item. Two appear to be from consumers and four from attorneys. All six are in support of the creation of a legal malpractice specialty certification. One commenter who "spent [his] entire 30-year legal career specializing in legal malpractice matters" wrote that "he...welcome[s] the Board's ...adding this area of practice to its specialty certifications program...as [he has] experienced far too many cases involving practitioners who either had no or very little experience in the field, thus making the litigation and trial/arbitration of the case far more costly, time-consuming and cumbersome than was either necessary or appropriate." A Superior Court judge stated he would "urge the Board of Legal Specialization to create a new specialty for those involved in legal malpractice. Such a designation would aid the public in seeking out someone to review with them whether they have a case worth pursuing. It would aid the attorney, who finds himself or herself as a defendant...in a legal mal[practice] case." One commenter suggested that those who "actually tried numerous legal malpractice cases to verdict or judgment (say 5) be grandfathered into the certification." However, the standards as written provide for an alternative to written exam that takes into account an applicant's experience and therefore determined not to make changes to the Standards as published for public comment. *(The full texts of the written comments are attached.)*

FISCAL AND PERSONNEL IMPACT:

The Board of Legal Specialization is a self-funded program. Its budget includes funds for the development of new specialties. There are adequate funds in the budget to cover the costs of the program.

BOARD BOOK IMPACT:

None.

RULE AMENDMENT IMPACT:

Addition to the Legal Specialization Program with the adoption of Standards for Certification and Recertification in Legal Malpractice Law.

PROPOSED BOARD COMMITTEE RECOMMENDATION:

Should the Board Committee agree with the recommendation, it would be appropriate to adopt the following resolution:

RESOLVED, that the Board Committee on Member Oversight recommends that the Board of Governors establishes a new specialty in Legal Malpractice Law and recommends adoption of the Standards for Certification and Recertification in Legal Malpractice Law as attached.

PROPOSED BOARD RECOMMENDATION:

Should the Board of Governors agree with the recommendation of the Board Committee on Member Oversight, it would be appropriate to adopt the following resolution:

RESOLVED, following public comment period and consideration of comments received, and upon recommendation of the Board Committee on Member Oversight, that the Board of Governors hereby approves the establishment of Legal Malpractice Law as a new certified legal specialty and adopts the Standards for Certification and Recertification in Legal Malpractice Law as attached.