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Board of Legal Specialization
The State Bar of California
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Re: Re: Opposition to Certification-Legal Malpractice Law as presently proposed

Dear Board of Legal Specialization Members, Advisors and CA. Board of Bar Governors:

Legal malpractice has been a recognized legal specialty for some time. [1] BLS's consulting group's proposed "275 point-16 task" pre-requisite to taking and passing an examination reflects a great deal of work and thought. As presently promulgated it will mislead the public into believing unqualified lawyers are indeed competent specialists. BLS's consulting group's present proposal to establish an independent BLS administered program is for that reason premature, redundant, and will confuse the public.

Because people were concerned with their health long before they resolved disputes by rule of law, the medical profession remains the role model for our profession. Attorney malpractice is characterized as a "growth industry". Historically economic "down-turns" have tended to increase activity in this specialty. California, with almost a quarter of the nation's lawyers is an inspirational pace-setter. [2]

The medical profession, like the legal profession, licenses practitioners in each state. The legal profession, like the medical profession, recognizes that the standard of care and competence required of its licensees does not vary by crossing a border even though discipline does vary. Patient or client entitlement and expectations are universally substantially identical. Methods used to keep professionals "in line", on the other hand, vary widely based on different discipline and penalty policies. Differing jurisdictional discipline practice does not directly relate to the standard of care for attorneys. [3]

Legal *negligence or malpractice* deals with the attorney's LIABILITY to a particular client. Professional RESPONSIBILITY, on the other hand, deals with ethical constraints and duties the lawyer owes to society, the profession and the judicial process. [4]

The standard of care and competency required for lawyers to avoid legal malpractice are not based on jurisdictional or locality differences. Separation of powers takes away from the legislative and executive branches of government much say so on lawyer's duties. They are generally determined by the courts as "a matter of law". The common law of England is the

primary source of precedent which yielded stare decisis in these United States. In its simplest terms, legal malpractice is the negligence of a lawyer everywhere. As defined and as applied, all states including California pretty much follow the same "rules" for determining when and how a lawyer is actually liable to his or her client. [5]

California's modification of the ABA's rules of professional conduct (Model Rules) are not sufficiently relevant to legal malpractice, in contrast to discipline, to merit local duplicity. All states except Maine, NY and California have presently adopted the Model Rules. [6]

Redundancy serves the beneficial purpose of "back-up". On the other hand having local as well as national certifiers adds to professional and public confusion. Local certification is not needed to protect the public since California does not routinely accredit national organizations for their specialty certification programs and may reject or terminate any. What the state "giveth" the state may take away. California Rule of Professional Conduct 1-400 (D) (6) prohibits any communication which states a lawyer is a "certified specialist unless the (lawyer) holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors ----". For this reason, existing checks and balances adequately insure BOG's ultimate control of "accredited entities". As a practical matter, the present sole certifying national entity has offered its full cooperation in having California's BLS participate in its national testing and certification process. This year's national test was drafted by a California lawyer who is VP of the accredited national certifying entity and edited primarily by another California lawyer. Local duplicity ought be reserved for use when needed and pertinent. [7]

California and the nation share a disdain of unqualified lawyers flooding the courts with low damage, questionable liability, poorly tried cases for a quick settlement by plaintiff or fee build-up by defense. A superficial or inexperienced practice approach to this specialty yields such result. Although legal malpractice is legal negligence, therefore a tort, it is the closest thing we have in law to a true hybrid. Cross-overs" or multifaceted aspects of diverse legal specialties are always present in resolving a particular client's legal problem, prosecuting or defending a legal malpractice matter. [8]

Causation ("case within a case") is usually the critical issue in legal malpractice matters. California and other states only requires that the conduct of the erring lawyer be a substantial factor in causing the injury. Lawyers who have never practiced diverse areas of law are often not suited to prosecute or defend a matter arising out of the "underlying case or transaction" which resulted in the lawyer's negligence in the first place. For example, the differences between an attorney who fails to do due diligence for a commercial client closing a buy-sell agreement doesn't look at all like a lawyer who tries a medical malpractice case without medical experts. They are both "underlying cases" which form the basis of a legal malpractice action. Nothing in present proposal suggests this critical issue was considered. [9]

Whether prosecuting a claim on behalf of a client alleging lawyer negligence or defending

the attorney, a "specialist" can't predict the underlying transaction or litigation next involved at all. Neither the lay client nor the attorney being provided with panel defense counsel would have a valid basis to believe they are getting competence and experience, because a lawyer passed a test, unless pre-requisites to sitting for the test are abundance of skill, experience and competence in the specialty of legal malpractice.

Mere test proficiency without a great deal of practical experience in the law won't prepare an attorney for this specialty. Proposal's emphasis on "paper" and quantity ought be shifted to performance and quality.

The concept of a "point" system has the advantages of simplicity in grading and assurance of objectivity. It's principal disadvantage is that the prevailing concept of "equivalency" or permitting limited substitution of certain experience and skills in place of others deemed most important, requires dynamic, qualitative analysis by objective peers in order to assure the public is not misled. BLS's presently proposed "Task Requirement for Certification" is 275 points which may satisfy multiple "tasks". Sixteen "tasks" are enumerated. Conspicuous by its absence in the sixteen tasks are pragmatism.

It is one thing to compensate for reduction in jury trials, sitting as the "first seat" based on alternative dispute resolution's reduction. It is quite another for a State agency such as BLS and the California State Bar to suggest, without any substantiation at all, **THAT A LAWYER WHO HAS NEVER TAKE A SINGLE DEPOSITION IN HIS/HER LIFE AND HAS NEVER TRIED A SINGLE MATTER OF ANY TYPE TO A JURY is competent to hold themselves out to the public as "specialists" in legal malpractice.**

Proposed certification standards unequivocally equated demurrers to preparing or opposing a motion for summary judgment. No one who has ever done either in a legal malpractice or any other matter would likely agree. Demurrers and their opposition are frequently "pro forma" in most firms based on repetitive standard means of advising a court that a particular pleading, on its face, as a matter of law, does or does not state a cause of action or otherwise deprives the case of an "at issue" status. Most lawyers who have filed California demurrers in legal malpractice matters, even without the aid of "pulling it off the computer" can likely do the demurrer in an hour or two after analyzing the pleading. Summary judgment or adjudication, on the other hand, requires declarations or affidavits which in turn require a great deal of time and effort in any matter, and even more in a legal malpractice ("case within a case") matter. Since the latter is evidentiary, it is not unusual for exhibits to the (usually) page limited "briefing" to run into "pounds and feet".

Whether or not test-writers ought be "grand-fathered" in without first establishing their own proficiency, as proposed by BLS committee, may seem like a "Which comes first, the chicken or egg" conundrum but equitably, it flunks the "smell test". Present "points and tasks" are precisely what former L.A. County Bar President's communication to BLS a few years ago referred to when he wrote: "*certification of a specialty that is based on quantify, rather than*

quality of experience, is likely to mislead the public because quantitative standards do not measure proficiency." [10]

Board of Governors of the State Bar of California ought determine that: Legal Malpractice is indeed a highly specialized tort, with enough hybrid areas transcending all aspects of transactional law and litigation to eventually require many sub-specialties. Present proposal will mislead and confuse the public. In addition BOG's admonition to "*Eliminate and avoid unnecessary differences between California and other states*", is a fortiori pertinent here. [11]

Sincerely,


Phillip Feldman [12]

[1] Many national organizations, primarily consisting of attorneys, are in the full time business of legal malpractice. Twice a year, two hundred to three hundred persons attend continuing education, accepted by California. ABA's Standing Committee on Professional Liability has assembled leaders in the field for its National Legal Malpractice Conferences. Present chair is California's own Edith Mathai, esq., an eminently qualified legal malpractice lawyer. Many California attorneys lecture and attend these conferences. Some who attend have obtained their ABA certifications as specialists in legal malpractice through the American Board of Professional Liability Attorneys. ABPLA is a quarter century old group of experienced lawyers who likewise do continuing legal education in the field of legal malpractice. The American Bar Association's Standing Committee on Legal Specialization selected and monitors ABPLA as the national testing and certifying group for the specialty of legal malpractice. California granted ABPLA its accreditation in that specialty some time ago. Professional Liability Underwriting Society (PLUS) is an international organization primarily active in the U.S. with multiple California chapters.

[2] A few decades ago the skyrocketing costs of malpractice insurance for physicians was the focus of the media and the state legislature. Congressman Waxman, then Assemblyman and chair of California's Select Committee on Medical Malpractice surveyed the public. The overwhelming majority split into two equal camps, about the same as they do today. One either believed the cause of increased medical malpractice was negligent physicians or greedy lawyers. The ultimate resolution was MJCRA, emergency provisions which set limits on damage recoveries and attorney fees and otherwise discouraged litigation. The jury is still out on whether or not people pay less for medical care because of this innovation, still gaining national acceptance.

The minority view on the etiology of medical malpractice his committee considered was that increased professional negligence was primarily caused by societal need for and increase in professional specialization. The rationale was straight forward. People didn't sue family doctors who made house-calls because they enjoyed a close, personal and friendly relationship. Specialists, on the other hand, would sometimes see the patient for the first time, on the operating table under anesthesia. It's the same with lawyers. (1 Legal Malpractice 267, Mallen & Smith)

Human nature being what it is, persons and entities dissatisfied with the outcome of their particular assignments are no longer reticent about blaming bad results on the professional they hired. The need for specialties and sub-specialties may not be as acute for lawyers as for physicians but reliance on "word of mouth" alone to locate an experienced attorney in any particular field of law is not adequate in populations such as ours. (Mallen, supra @ 264 et seq.)

[3] Just as the Medical Board and Attorney General in California, not the courts, handle physician discipline, except for Supreme Court ultimate authority, the State Bar Court and Office of Chief Trial Counsel alone, deal with lawyer discipline.

[4] The Board of Bar Governors established a Standing Committee for Professional Responsibility and Conduct (COPRAC). Its primary purpose is to issue "advisory ethics opinions" and advise the board on ethics. No part of their charter or practice includes dealing with "legal malpractice" or professional liability of lawyers. The largest local bar in the country is Los Angeles County. Their Professional Responsibility & Ethics Committee (PREC) fastidiously avoids any issue of professional negligence and like COPRAC, remains within its charter of advisory ethics opinions and advising their board on ethics. Nationally ABA's Center for Professional Responsibility's mission statement is "promoting and encouraging high ethical conduct and professionalism by lawyers and judges". The Association of Professional Responsibility Lawyers (APRL) "is an organization of lawyers with interests in lawyer professional responsibility matters."

[5] Throughout the country it is universally accepted that it has the same elements of ordinary negligence, that is duty, breach, causation and damages. "The elements of a cause of action for legal malpractice are: (1) the attorney-client relationship or other basis for duty; (2) a negligent act or omission; (3) causation; and (4) damages." *Slovensky v Friedman* (2006) 132 Cal. App. 4th 1518 (Rev. Den.)

While the Restatement was still in its proposal stage, assembling the majority views in the United States, local courts cited the national proposal with approval pointing out "California law - is generally consistent with the Model Rules and the Restatement." *Dieter v The Regents of the University of California* (1997) 963 P. Supp. 908.

The Restatement of the Law -The Law Governing Lawyers, like all Restatements sets forth the majority view of all jurisdictions in the United States. It is often cited with approval by California and most Supreme Courts. *People ex rel Dept. Of Corporations v. SpecDee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135; 980 P. 2d 371; *Flatt v Superior Court* (1994) 9 Cal. 4th 275; 885 P. 2d 950; *Fletcher v Davis* (2004) 33 Cal. 4th 61; 90 P. 3d 1216; *Ferguson v Lief, Cabraser et al* (2003) 30 Cal. 4th 1037; 69 P. 3d 965; *Fletcher v Davis* (2004) 33 Cal. 4th 61; *Ferguson v Lief* (2003) 30 Cal. 4th 1037; *Birbrower et al v Superior Court* (1998) 17 Cal. 4th 119.

Restatement § 48 states that "a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care - - if the lawyer fails to exercise care - - -and if that failure is a legal cause of injury - - -."

The tort of legal malpractice is generic throughout the United States and California is not following a different drummer since California courts innovated much of the tort.

[6] "(T)he courts usually agree that the violation of an ethics rule alone does not create a cause of action, constitute legal malpractice per se, - - or necessarily create a duty." 2 Legal Malpractice 669 (2008) Mallen & Smith. CA Rule of Professional Conduct 1-100 reads in part: "These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." (emphasis added). ABA Preamble and Scope [20] likewise reads: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create a presumption in such case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, - -"

California courts have cited ABA's Rules of professional conduct with approval for generations. Originally, ABA's rules were called the "Model Code of Professional Responsibility". People v Guerrero (1975) 47 Cal. App. 3d 441. There are over a hundred Lexis citations to the present Model Rules. Flatt v Superior Court (1994) 9 Cal. 4th 275; 885 P. 2d 950; In re Lawley (2008) 42 Cal. 4th 1231; 179 P. 3d 891.

ABA's Rules are no stranger to California attorneys since all state bar examinees are required to take and pass the "Multi-state" which are professional responsibility questions based on ABA's Model Rules!

[7] Presently, California's specialization programs have three examples of local as well as a national speciality certification entities. BLS presently certifies the speciality of Family Law and concurrently accredits the National Board of Trial Advocacy for the speciality of Family Law Trial Advocacy. Although equitable concepts permeate that speciality, there are enough substantive (ic/ community property), procedural, policy and conceptual differences between different jurisdictions, to make California's distinct, local certification mandatory for public protection. With the rise of a sub-speciality in "collaborative law", the need for a more adversarial based national organization as well as a jurisdictionally intelligent local entity, appears justified. The titles of each certification suggest their own distinguishing aspects.

BLS presently certifies the speciality of Criminal Law and accredits the National Board of Trial Advocacy for the speciality of Criminal Law Trial Advocacy. Unlike civil law, where it is at least theoretically possible for a practitioner to resolve all disputes without litigation, criminal law, because of heightened need for public protection, will seldom see non-trial lawyers in its mist. Since both boards more than adequately screen their candidates for certification there is no public harm. Because of its nature, criminal law is precisely bound by statutes and procedures. For that reason, the common law of each jurisdiction does offer distinct approaches to particular aspects of criminal justice. As criminal prosecution and defense take place in Federal as well as state courts within California, the need for two distinct boards seems patent.

BLS presently certifies the speciality of Personal and Small Business Bankruptcy and concurrently accredits the American Board of Certification in the specialities of Business Bankruptcy and Consumer Bankruptcy inter alia. Although bankruptcy issues permeate many aspects of transactional law, their rules emanate from the Bankruptcy Code and federal procedures whether filed in California or elsewhere. As an exclusive creation of national origin which preempts the field, there are in fact, few local penneations. So long as the standards of both organizations remain at their present high level, perhaps public confusion is minimized. Only the specialists within that field can best explain to California's Board of Bar Governors whether other basis exists for duplication.

[8] The practical differences between lay negligence and professional negligence are more critical than any technical distinction. Both are based on absence of due care or careless conduct. The distinction lies in that lawyers are held to a tighter and less known standard than the average reasonable person.

Duty is generally a matter of law determined by courts and not juries. Weirum v. RKO General, Inc. (1975) 15 Cal. 3d 40. No jurisdiction disputes that lawyers owe duties to their clients. In modern times, (for lawyers, started in California borrowing from Justice Cardozo's opinions in MacPherson v Buick Motor Co. 217 N.Y. 382; 111 N.E. 1050 (1916) and Glanzer v Shepard 233 N.Y. 236; 134 N.E. 275 (1922) "privity" is no longer the rationale for a lawyer's duty. Issues of whether or not lawyers owe duties to particular non-clients are universally determined as a matter of law and public policy. Most of the country refers to the universal public policy as "the California balancing test" or "the balance of factors test". The universal precedent is Biakanja v Irving (1958) 49 Cal. 2d 647; 320 P. 2d 1621. The analysis instructs courts to analyze enumerated public policy factors in order to determine the presence or absence of duty. Rowland v Christian (1968) 69 Cal 2d 108. Where the analysis involves lawyers, burden on the profession is an added factor. Lucas v. Hamm (1961) 56 Cal 2d 583

Breach of duty, universally is a question of fact juries determine based almost exclusively on expert testimony since very few things fit the category of common knowledge laypersons have of any legal issue. California's "plain English" jury instruction CACI 600 defines the "standard of care" to which lawyers are held this way:

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public being protected are attorneys. All of his clients are presently attorneys. He knows better than to assume that just because a lawyer went to law school and practiced a while it does not justify the assumption that the lawyer won't be misled by the "board certified specialization" rubric in the marketing of insufficiently experienced and competent lawyers. The lay client will surely be misled. (See "Professional Specialization, A Primer" and "The Law Protects Us From Professionals Who Mislead The Public" ExpertLAW -2004)