

AGENDA ITEM

March 133

State Bar Rules, Title 3 –
Programs and Services,
Individuals not Members of
State Bar, Proposed
Amendments, Return from
Public Comment

DATE: February 8, 2010

TO: Members of the Board of Governors
Members of the Board Committee on Regulation and Admissions

FROM: Gayle E. Murphy, Senior Executive, Admissions

SUBJECT: **State Bar Rules, Title 3 – Programs and Services, Individuals not Members of State Bar, Proposed Amendments, Return from Public Comment**

Executive Summary

State Bar programs for the practical training of law students, out-of-state arbitration attorneys, foreign legal consultants, registered legal services attorneys, and registered in-house counsel implement Rules of Court in Title 9, Division 4 that apply to appearances and practice by individuals who are not members of The State Bar of California. As part of an ongoing effort to clarify the organization and language of State Bar rules, proposed revisions of the rules for these programs were prepared by staff.

The proposed revised State Bar rules were drafted to complement the Rules of Court. The revisions are organizational and stylistic, with a few exceptions noted below, and are not intended to substantially modify existing State Bar programs. Drafted by State Bar rules revision staff working closely with program staff, the revised rules will be, if adopted, in Title 3, Programs and Services.

The Board Committee on Regulation and Admissions approved the request to circulate the proposed revised rules for a forty-five day public comment period. Only one comment was received, and it raises an issue related to the Supreme Court's rules governing the Practical Training of Law Students' Program. This issue raised may be one the Board Committee would like to pursue, but it does not specifically relate to the revised rules that were circulated for public comment. If the Board of Governors adopts the revised rules, they would replace the current State Bar rules for each of these programs.

BACKGROUND

In 2006 the State Bar undertook a rules revision project to integrate the organization's more than two dozen sets of rules into a comprehensive structure of seven titles and to make the rules simpler, clearer, and more uniform. This package of proposed rules revisions continues with that effort.

Rules Governing the Practical Training of Law Students (PTLS) were adopted in 1970 and revised in 1997. The Out-of-State Attorney Arbitration Counsel (OSAAC) Program Rules were adopted in 1995 and revised in 1997. The Registered Foreign Legal Consultants Rules and Regulations were adopted in 1987 and repealed in 1993, when a new Rule of Court and new State Bar rules were adopted. Since 1993, the State Bar Rules for foreign legal consultants have been revised in 1996, 1997, and 2006. The Multijurisdictional ["MJP"] Practice Program Rules, which apply to Registered Legal Services Attorneys and Registered In-House Counsel, were adopted in 2004 and have not been revised.

Footnotes in the revised rules are citations or cross-references to other rules and are intended to be part of a Board-adopted version. Copies of the current and the proposed rules are attached.

GLOBAL CHANGES

Global changes are those characteristic of all or nearly all the rules proposed for programs governing appearances and practice by nonmembers.

Economy and Sharpened Focus

Rule 1.4 states that State Bar rules do not include Rules of the Supreme Court of California or California Rules of Court that apply to the State Bar, its members, services, or programs; statutes or case law applicable to the State Bar, its members, services, or programs; or policies and procedures that relate to the internal management or operations of the State Bar. These exclusions are intended to preclude restatements that introduce potentially problematic variations and to focus on information essential to compliance with a rule. A prevalent problem is that State Bar rules that complement Rules of Court too often reiterate those rules but with variations. Rule of Court 9.42 and its companion State Bar rule illustrate this problem.

Rule of Court 9.42(d) lists in detail permissible activities of a law student who is "certified"—that is, a participant in the State Bar's program for Practical Training of Law Students. Because current rule 5 of the State Bar's program rules restates what the Rule of Court says, the proposed rule on this topic simply refers to the Rule of Court: "A certified law student may engage only in the activities permitted by Rule of Court 9.42(d)

under the conditions prescribed by that rule.” The proposed language is about 500 words shorter than that currently in effect.

Rule of Court 9.46(d)(2) and the complementary State Bar rule also illustrate the problem. The identical words in each rule are highlighted below.

Rule of Court 9.46(d)(2) requires an attorney applying for the Registered In-House Counsel program to “Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than on behalf of the qualifying institution during the time he or she is registered in-house counsel in California, except that if so qualified, the attorney may, while practicing under this rule, simultaneously practice law as a registered legal services attorney.”

Current State Bar rule 4 for registered in-house counsel requires the applicant to submit “A declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will only practice law in California for a single Qualifying Institution during the time he or she practices law as Registered In-House Counsel, except that if so qualified, the attorney may, while practicing under this rule, simultaneously practice law as a Registered Legal Services Attorney.

As the highlighted text indicates, these provisions are practically identical. Proposed rule 3.371(A)(2), which would replace current rule 4, simply states that an applicant must “submit an Application for Registered In-House Counsel with the fee set forth in the Schedule of Charges and Deadlines,” and a footnote references Rule of Court 9.46(d). State Bar Rule 1.24 provides that such a form and its instructions are obligatory: “When a rule refers to a form, the State Bar reserves the right to reject a form that is altered in language or structure or that is not completed and submitted according to instructions.” By eliminating repetition and offloading application details to a form and its instructions, the proposed rule is reduced to half the length of the current one. Eliminating the redundancy also forecloses the possibility of arguing that the variations introduce significant inconsistencies with the Rules of Court. Changes such as these have shortened all the proposed rules.

Application for Registration

State Bar Rule 4.16(A) provides that an Application for Admission consists of an Application for Registration, an Application for Determination of Moral Character, and an application for any required examination. As the threshold requirement of a candidate for admission, the Application for Registration establishes a record for the applicant in

the Admissions system. Currently the Application for Registration is required only of candidates for admission. This requirement is proposed as an addition to the rules for certified law students, foreign legal consultants, registered legal services attorneys, and registered in-house counsel in order to create a basic Admissions record for participants in these programs, as many of those in those programs seek admission to the practice of law. For example, the Application for Registration would be required by proposed rules 3.361 for Registered Legal Services Attorney and 3.371 for Registered In-House Counsel.

Current E-mail Address

The proposed rules require maintenance of a current e-mail address by certified law students [proposed rule 3.5(C)]; Foreign Legal Consultants [3.402(G)]; Registered Legal Services Attorneys [3.362(G)]; and Registered In-House Counsel [3.372(E)]. Rule of Court 9.7 and State Bar Rule 2.3(A) impose a similar requirement on members.

Termination

The proposed rules for foreign legal consultants [at rule 3.409(C)], Registered Legal Services Attorneys [at 3.365(C)], and Registered In-House Counsel [at 3.375(C)] terminate program participation upon admission to the State Bar. Although current rules contain no such provisions, the proposed changes follow past administrative practice: a member cannot participate in a program designed for non-members.

Proposed rule 3.381(H) would terminate the certificate of an out-of-state attorney temporarily permitted to act as counsel in arbitration upon the request of the attorney. Current rules do not include this possibility.

Public information

State Bar records would be public to the same extent as member records under new provisions in the proposed rules for out-of-state arbitration attorneys [rule 3.382], foreign legal consultants [rule 3.411], Registered Legal Services Attorneys [3.367], and Registered In-House Counsel [3.377].

CHANGES SPECIFIC TO PROGRAMS

Certified Law Students

Proposed rule 3.2(B) excludes from eligibility a person licensed to practice law in any jurisdiction. Current rules do not mention this exclusion, but it has been administrative practice. Current rule 8.5 makes failure to take the first California Bar Examination for

which he or she is eligible a triggering event for termination of certification. Proposed rule 3.2(B) also makes such a failure grounds for ineligibility.

A certified law student who takes the first California Bar Examination for which he or she is eligible may ask to continue in the program until the release of examination results, even if the Notice of Certification indicates an earlier date. Proposed rule 3.8(B) eliminates the need for a request: "A student who graduates from law school during the period stated in the Notice of Law Student Certification and then takes the first California Bar Examination for which he or she is eligible may participate in the program until he or she has passed the examination and been enrolled as an active member of the State Bar."

Rule of Court 9.42(c)(2) states that the State Bar can certify those who "have graduated from law school, subject to the time period limitations specified in the rules adopted by the Board of Governors." Current rules 3.2 and 8.0 implement this provision, 8.6 providing for such graduates obliquely in allowing participation until "the July 31 following the first General Bar Examination for which the Certified Student is eligible if the exam occurs in winter, or the Dec. 31 following the first General Bar Examination for which the Certified Student is eligible if the exam occurs in summer." Proposed rule 3.2(A)(2) considers an applicant eligible for the program if he or she has graduated from law school within six months of applying and has registered for the next California Bar Examination.

There are two new requirements in the proposed rules. Proposed 3.5(E) provides that a certified law student may not claim to be a member of the State Bar, a requirement also imposed on nonmember attorneys who may practice under limited circumstances. And proposed 3.3(A)(2)(b) and 3.5(C) require that an applicant submit a current e-mail address and then maintain it. This requirement provides staff an alternative means of reaching participants, who have changed mailing addresses with relative frequency.

Multijurisdictional Practice

Reporting Requirements

The reporting requirements for Registered Legal Services Attorneys and Registered In-House Counsel have been broadened to require a participant to provide not only the reports required of a member by the State Bar Act but by "any legal authority." Current rules require an MJP attorney to comply with reporting requirements "imposed upon members of the State Bar of California under the State Bar Act, including, but not limited to, those required under California Business and Professions Code, sections 6068(o) and 6086.8(c)." The proposed rules require a participant to report "any information required by the State Bar Act, such as that required by sections 6068(o) and 6086.8(c) of the California Business and Professions Code, or by other legal authority."

Moral Character

Rules of Court 9.45(c)(2) and 9.46(c)(2) require that those applying to be Registered Legal Services Attorneys and Registered In-House Counsel “Register with the State Bar of California and file an Application for Determination of Moral Character.” The State Bar’s current companion rule states that “The moral character review will be conducted by the Committee of Bar Examiners pursuant to the provisions of Rule X of the Rules Regulating Admission to Practice Law in California.” Because Rule X has been repealed and superseded by a revised State Bar rule, the proposed rules simply state that an applicant must “meet State Bar requirements for acceptable moral character.”

Suspension

Rules of Court 9.45(f) and 9.46(g) provide that the State Bar may set initial and annual registration fees for Registered Legal Services Attorneys and Registered In-House Counsel. Current rule 11 for each State Bar program provides that registration is revoked and reinstatement not permitted upon failure to submit an annual report and renewal fee. Proposed 3.364(B) for Registered Legal Services Attorneys and 3.374(B) for Registered In-House Counsel suspend registration for noncompliance but allow reinstatement upon compliance. This provision also allows Registered In-House Counsel suspended for failure to meet an annual MCLE requirement to be reinstated upon compliance. (Registered Legal Services Attorneys do not have an annual MCLE requirement. Rule of Court 9.45(e) permits them to practice no more than three years, and 9.45(c)(8) requires that they satisfy an MCLE requirement in their first year in the program.)

Appeal of Suspension

The proposed rules for Registered Legal Services Attorneys and Registered In-House Counsel provide that “Appeal of a suspension is subject to the disciplinary procedures of the State Bar.” Current rules do not include a provision for appeal.

Foreign Legal Consultants

Proposed 3.403(C) provides that evidence of security for claims arising from errors or omissions “may be a certificate of insurance, a letter of credit, a written guarantee, or a written agreement executed by the applicant.” Although current 4.2 allows for a self-guarantee as part of the application, current 6.0 fails to include the self-guarantee as one of the means of proving security. The proposals clarify that a self-guarantee, “a written agreement executed by the applicant,” is an acceptable way to provide evidence of security.

PUBLIC COMMENT

Only one comment was received in response to publication of the proposed revised rules for a 45-day public comment period, which is attached as Appendix G. In the letter and comment submitted by Oren Sellstrom and Laura Hurtado, Lawyers' Committee for Civil Rights, they ask that Rule 9.42 of the California Rules of Court be amended so that certified law students could no longer prosecute infractions on their own. They believe that allowing ". . . law students to appear in court without the personal appearance of their supervising attorneys compromises the integrity of our criminal justice system." They indicate in their comments that their proposal is supported by numerous other entities. While amendments to the California Rules of Court were not part of the original package of proposed revisions, which included proposed revisions to the State Bar rules regarding the practical training of law students, that were circulated for public comment, their proposal to amend the California Rules of Court could be explored further if the Board Committee is interested in doing so.

No modifications to the proposed amendments that were circulated for public comment are proposed.

EFFECTIVE DATE OF PROPOSAL

So that the appropriate arrangements can be made to coordinate and communicate the changes contained in the proposed revised rules, it is recommended that the proposed revised rules become effective July 1, 2010.

FISCAL IMPACT

Minimal. The Office of Admissions, most likely, will collect revenue from those who would not have otherwise registered as law students or attorney applicants. The 2010 fees for registration are: \$97.00 (law student) and \$175.00 (attorneys). The fees for "special admissions" programs have not been increased for some time, so any additional income received will assist in paying for the cost of administering the programs.

BOARD BOOK IMPACT

None at this time.

RULE AMENDMENTS

Proposed revisions to Title 3, Programs and Services of the *Rules of the State Bar of California*.

SCHEDULE OF CHARGES AND DEADLINES:

N/A

PROPOSED BOARD COMMITTEE ACTION

If the Board Committee on Regulation and Admissions agrees the proposed revised rules should be adopted, the following resolution is recommended:

RESOLVED, following publication for public comment and review of the one public comment received, that the Board Committee on Regulation and Admissions recommends that the Board of Governors of The State Bar of California adopt the proposed Rules of the State Bar of California, Title 3 – Programs and Services, Individuals not Members of State Bar regarding the State Bar programs for the practical training of law students, out-of-state arbitration attorneys, foreign legal consultants, registered legal services attorneys, and registered in-house counsel, which will replace the current State Bar rules for these programs, in the form attached hereto, to be effective July 1, 2010.

And, if the Board Committee would like to explore further the matter raised by the one public comment received, the following additional resolution would be in order:

FURTHER RESOLVED, that the concept of proposing revisions to the California Rules of Court, Rule 9.42, which permits law students to prosecute infractions without the appearance of their supervising attorneys, be further explored and a report prepared for review by the Board Committee no later than its July 2010 meeting.

PROPOSED BOARD ACTION

Should the Board of Governors agree with the Board Committee on Regulation and Admissions' recommendation regarding the proposed revised rules (if adopted by the Board Committee), the following resolution would be in order:

RESOLVED, following publication for comment and review of the one comment that was received, and upon recommendation of the Board Committee on Regulation and Admissions, that the Board of Governors of The State Bar of California hereby adopts the proposed Rules of the State Bar of California, Title 3 – Programs and Services, Individuals not Members of State Bar regarding the State Bar programs for the practical training of law students, out-of-state arbitration attorneys, foreign legal consultants, registered legal services attorneys, and registered in-house

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counsel, which will replace the current State Bar rules for these programs, in the form attached hereto, to be effective July 1, 2010.

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Attachments:

- A: Proposed and current rules for Practical Training of Law Students
- B: Proposed and current rules for Out-of-State Attorney Arbitration Counsel
- C: Proposed and current rules for Foreign Legal Consultants
- D: Proposed and current rules for Registered Legal Services Attorneys
- E: Proposed and current rules for Registered In-House Counsel
- F: Rules of Court 9.42 (Certified law students);
9.43 (Out-of-state attorney arbitration counsel);
9.44 (Registered foreign legal consultant);
9.45 (Registered legal services attorneys);
9.46 (Registered in-house counsel)
- G: Public Comment dated January 14, 2010 from Oren Sellstrom and Laura Hurtado, Lawyers' Committee for Civil Rights