

AGENDA ITEM

JULY

State Bar Rule, Title 3
Division 4, Chapter 3,
Lawyer Referral
Services, Request for
Approval for Public
Comment

DATE: June 29, 2010

TO: Board Committee, Legal Services, Pro Bono & Equal Access

FROM: Robert Hawley, Deputy Executive Director
Carol Madeja, Director, Bar Relations Outreach

SUBJECT: State Bar Rule, Title 3, Division 4, Chapter 3, Lawyer Referral Services,
Request for approval for Public Comment

EXECUTIVE SUMMARY

State Bar rules for lawyer referral services have been revised as part of an ongoing effort to clarify the organization and language of State Bar rules. The proposed revised rules streamline the procedures for denial or continuation of certification but otherwise do not modify current requirements, which include minimum standards for lawyer referral services.

This memorandum requests that the committee authorize publication of the proposed revised rules for a forty-five day public comment period. If the Board of Governors subsequently adopts the proposals as part of Title 3 of the Rules of the State Bar, which deals with Programs and Services, and repeals the current rules, the proposed new rules will be transmitted to the Supreme Court for approval in accordance with Business and Professions Code section 6155(f).

BACKGROUND

Revising all State Bar rules requires the collaboration of many subject matter experts and is being undertaken in stages. As of March 2010, the board has adopted four of the seven titles.

Title 1: Global Provisions
Title 2: Member Rights and Responsibilities
Title 4: Admissions and Educational Standards
Title 7: Miscellaneous (Judicial Nominees Evaluation)

The board has adopted two titles in part.

Title 3: Programs and Services

Title 6: Governance

The revised rules for lawyer referral services would complete Title 3 except for revision of the rules on fee arbitration. Proposed rules for Title 5, Discipline, have been released for public comment. The few rules required to complete Title 6, Governance, are scheduled for completion this year.

The nineteen Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services Including Minimum Standards for a Lawyer Referral Service in California were effective January 1, 1997 and have not been amended since then. The rules cover two broad topics: the role of the State Bar in certification of a lawyer referral service and the minimum standards required of a lawyer referral service. Rules 10 through 15 and rule 17 apply to operation of a lawyer referral service, and rules 1 through 9 and rules 16, 18, and 19 deal with the role of the State Bar. The draft reorganizes the rules as two discrete articles: requirements for State Bar certification and the minimum standards a certified service must meet.

The streamlining principles being applied to all State Bar rules—using the State Bar Web site and forms rather than rules for broad policy statements; for operational and administrative specifics; and for examples and other program information—have been applied to the proposed rules for lawyer referral services.

Proposed rules reference current rules by use of italicized footnotes. Such footnotes are drafting devices to assist reviewers in comparing the attached two sets of rules. Italicized footnotes will be deleted in a board-adopted version. Footnotes in Roman type are citations or cross-references to other rules; such footnotes would be retained.

The proposed rules have been circulated to lawyer referral services for informal preview and input. No input has been received.

Reorganization

Perhaps the most conspicuous change in the proposed rules is their reorganization. Current rules cover two broad topics: the role of the State Bar in certification of a lawyer referral service and the minimum standards required of a lawyer referral service. Rules 10 through 15 and rule 17 apply to operation of a lawyer referral service, and rules 1 through 9 and rules 16, 18, and 19 deal with the role of the State Bar. The revised rules clearly distinguish the topics as two articles: requirements for State Bar certification and the minimum standards a certified service must meet.

The revisions also attempt to focus rule topics more clearly. Proposed rules on records and panels are illustrative. Current rule 15 deals with records a service must keep and

the annual report the governing committee must submit to the State Bar. The proposed rules separate this material into two rules, one of which relates to operations (3.727 on records) and the other to governance (3.728 on the annual report). Current rules 11 and 12—Eligibility and Approval of Panel Attorneys and Organization of Panels—have been reorganized as three rules on panels that proceed from the general to the particular: panel structure (3.723), eligibility for panel membership (3.724), and panel membership fees (3.725).

Focus on duties

The current rules for lawyer referral services contain two policy statements, the most explicit of which is Rule 3, Policy of the State Bar Regarding Lawyer Referral Services:

3.1 It is the policy of the State Bar of California that every community be served by one or more certified Lawyer Referral Service. Where the size of the community or the number of lawyers serving it make the establishment of a separate Lawyer Referral Service impractical, the State Bar encourages the establishment of a regional Lawyer Referral Service embracing two or more such communities, subject to Rule 8.2 which requires separate certification for each county in which a Lawyer Referral Service operates.

3.2 It is also the policy of the State Bar of California that activities in violation of these Rules, the Business & Professions Code, or other authorities pertaining to Lawyer Referral Services, be curtailed.

Current rule 5.1, Purposes of a Lawyer Referral Service, is a list of aspirations more akin to policy than prescription:

5.1 The purposes of a Lawyer Referral Service shall be:

- (a) To provide a way in which any person may be referred to a qualified, insured lawyer who is able to render and is interested in rendering needed legal services;
- (b) To provide information about lawyers and the availability of legal services, which will aid the public in their selection of a lawyer;
- (c) To inform the public when and where to seek legal and dispute resolutions services;
- (d) To provide general, legal and dispute resolution information needed by the public;
- (e) To improve the quality of legal services available to the public; and
- (f) To provide access to affordable legal services to the public.

Proposed provision 3.720(C) distills these aspirations as an obligation of a lawyer referral service and focuses on compliance, requiring a lawyer referral service to “serve its community and improve the quality and affordability of legal services by (1) assisting those in need of legal services to find a qualified, insured lawyer or other appropriate

legal services, including dispute resolution; and (2) providing the public with general information about appropriate legal services” The new provision presents policy objectives as fundamental obligations of a lawyer referral service. The State Bar Web site and program brochures are more appropriate vehicles for detailed statements and illustrations of policies and aspirations.

Forms used for procedures

Detailed procedural steps in current rules have been eliminated in the proposed rules, which use forms for procedural specifics. Current rule 6, Applications for certification, offers a good illustration. Rule 6 states that applications “shall be made on a form supplied by the State Bar which from time to time may be amended by the State Bar,” “signed and verified by the owner or duly authorized agent of the Lawyer Referral Service and filed at the State Bar’s Lawyer Referral Services Certification Program in San Francisco, California,” “filed at any time during the year,” and be “deemed submitted when actually delivered to the State Bar’s Lawyer Referral Services Certification Program in San Francisco or when deposited in the United States mail, first class postage prepaid, addressed to the Lawyer Referral Services Certification Program, State Bar of California in San Francisco.” The rule states further that “The Chief Executive Officer of the State Bar or a person or persons designated by the Chief Executive Officer shall review each application and within a reasonable time thereafter approve or deny the application and notify the applicant of the reasons therefore, or seek additional information regarding an incomplete or insufficient application. If the application is determined to be complete and in compliance with these Rules and other applicable authorities, a certificate of compliance shall be issued.” If an application is incomplete or deficient, the rule provides that “The applicant shall be notified in writing” and “If an applicant fails to complete the application or correct any deficiency within sixty (60) days of written notification, the application shall be deemed withdrawn without a refund of the fee except as provided in Rule 9.”

Proposed rule 3.701, Application for certification, which would replace rule 6, states that an application must be made on a State Bar form. Specifics requirements regarding signatures, addressee, postage, the nominal role of the Executive Director, and the like are no longer stated in the rule but are integral to the form and its instructions. Such requirements are mandatory because of State Bar rule 1.24: “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.” Offloading procedural steps to the form and its instructions shortens the proposed rule to about half the length of the current one: 168 words versus 354. Similarly, denial of an application is handled in 169 words in proposed rule 3.703, versus 497 words in current rule 7.

Substantive changes

Though the proposed revisions are primarily stylistic and organizational, the revisions include several substantive changes.

Denial of certification

Current rule 7 states why certification may be denied and specifies the requirements for notice of denial, and provides for review of denial. Review must be done by an ad hoc committee of the Board of Governors or “another committee appointed by the Board of Governors for this purpose.” The committee may hold hearings and must issue a written determination. An unfavorable determination may be further reviewed by “the Board Committee on Legal Services or another committee appointed by the Board of Governors for this purpose.” Again, hearings are optional and a written determination mandatory. A second unfavorable determination may be appealed to the California Supreme Court.

Proposed rule 3.703 would streamline the process for denial of certification due to failure to comply with the rules. Denial of an initial application for certification does not preclude an applicant from submitting a new application. Denial of an application for continued certification would subject a lawyer referral service to suspension or revocation under rule 3.706, which provides two levels of State Bar review—the first by program staff and the second by the State Bar Court. The change eliminates any need for ad hoc committees unlikely to be familiar with lawyer referral services issues in favor of first-level reconsideration by staff conversant with such issues and second-level review in accordance with established review procedures for regulatory matters.

Panels

Current rule 12.2 requires that a lawyer referral service establish subject matter panels; encourages establishment of panels that “respond to the referral needs of the consumer public”; and permits establishment of a general panel. Subject matter panels are necessary because they require the LRS to establish minimum objective experience criteria that would qualify attorneys for membership in these panels. This is desirable because the client is then placed with an attorney who has the relevant experience for the client’s issues. General panels are permitted to capture cases that do not fit neatly into a specific category of law. Rule 3.723(A) identifies panels as specific (required) and general (permitted). The obligation of a lawyer referral service to meet the needs of its community and improve the quality and affordability of legal services is now included in the rule on general duties (3.720) rather than the rule on panel types.

Referrals

Current rule 13.1, which mandates referral procedures, is somewhat contradictory. On the one hand, it requires a governing committee to “establish rotational procedures to assure that each referral is made in a fair and impartial manner” and provides that failure to rotate referrals sequentially to all panel members is grounds for denial of certification or for decertification. On the other hand, it requires that referral procedures respond to all the circumstances of a client “to the extent feasible.” Proposed rule 3.726(A) reconciles these objectives by requiring fair and impartial referral procedures and equitable allocation of referrals: “The governing committee of a lawyer referral

service must establish fair and impartial procedures to assure that referrals are allocated equitably to panel members and respond insofar as possible to clients' legal needs and other circumstances, such as geographic convenience and language issues."

Current rule 13.4 states that "The staff persons making the referrals and processing the requests for legal assistance may not be employees of any attorney to whom referrals are made." Prohibited referrals are limited to staff employed by attorneys receiving referrals. The rule does not preclude a staffer who is not an attorney's employee from receiving compensation from the attorney as a non-employee. Proposed rule 3.726 at provision (C)(3) closes the loophole. It states that a referral may not "be made directly or indirectly by a person employed or otherwise compensated by an attorney or firm to whom the referral is made."

Current rule 13.5 states that "A Lawyer Referral Service shall not be principally operated by a telephone answering service or device." Proposed rule 3.726 recasts the prohibition to capture an essential element of an electronic lawyer referral service operations and to distinguish them from other forms of technological business models such as online directories or attorney search services that do not involve personal evaluation of client needs. Rule 3.726(C)(4) states that a referral may not "be made exclusively by technological means without staff evaluation of client needs and panel members' qualifications."

Supplemental information

Besides offloading procedural steps to forms, revised State Bar rules eliminate explanations and illustrations not intrinsic to an obligation. The change focuses rules on duties. The State Bar Web site and other certification program materials are better vehicles for explanations that can be current and, if necessary, discursive. For instance, rule 11.1(a) states that

The factors which may be considered in evaluating the reasonableness of membership fees include, but are not limited to, the following:

- (1) The number of attorneys in the geographic service area as well as the number of attorneys applying to be members of the Lawyer Referral Service who are accepted and who are rejected;
- (2) The cost of advertising, operations and member services;
- (3) The panel membership fees of other certified Lawyer Referral Services operating in the same area;
- (4) The number of attorneys who are members of the Lawyer Referral Service and the number of clients served by members of the Lawyer Referral Service;
- (5) The nature and extent of programs for persons of limited means pursuant to Rule 12.5 undertaken by the Lawyer Referral Service.

Since these factors are illustrative rather than mandatory, proposed rule 3.725(A) simply says that “Panel membership fees must be reasonable, encourage widespread panel membership, and otherwise comply with these rules and applicable law.” The Web site can be used to illustrate—and easily update—various ways of achieving these objectives.

Simplified language

Revised State Bar rules are also being streamlined by eliminating surplus words. Unwarranted use of the passive voice, for instance, makes language indirect and wordy. Current rule 8.3, for instance, uses the passive to explain the status of certification during the period between timely submission and State Bar approval: “If an application for recertification is timely completed and filed, the existing certification shall continue in effect until recertification is issued or denied, or until the existing certification is suspended or revoked pursuant to Rule 19.” The sentence does not identify who completes and files the application or who suspends or revokes certification. Recasting the sentence to eliminate the passive shortens the explanation: “Pending review of a denial to continue certification, certification remains in effect unless the State Bar suspends or revokes it.”¹ Likewise, sparing use of the passive makes the proposed rule on application fees, rule 3.702, shorter than its counterpart, rule 9.

Length of comment period

Staff requests a forty-five day comment period that would begin July 27, 2010 and run through September 10, 2010.

Effective date of proposal

If comments do not require substantive changes necessitating another comment period, the board will be asked to adopt the proposals at its November 2010 meeting and instruct that the proposed rules be forwarded to the Supreme Court for approval. The effective date of the proposed rules will be determined by the Court.

FISCAL / PERSONNEL IMPACT:

None

BOARD BOOK/ ADMINISTRATIVE MANUAL IMPACT:

None

RECOMMENDATION

Staff recommends that the Board Committee on Legal Services, Pro Bono, and Equal Access authorize publication of the proposed rules for lawyer referral services for a

¹ Proposed rule 3.70 6(F).

forty-five day public comment period. If the committee agrees, adoption of the following resolution would be appropriate.

RESOLVED, that the Board Committee on Legal Services, Pro Bono, and Equal Access authorizes for publication, in the form attached, for a forty-five day comment period from July 27, 2010 through September 10, 2010, the proposed rules for lawyer referral services that would replace the current Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services, Including Minimum Standards for a Lawyer Referral Service in California.

FURTHER RESOLVED, that this authorization to release for public comment is not, and is not to be construed as, an approval of the proposed rules.

Attachments:

Attachment A: Proposed Rules for Lawyer Referral Services

Attachment B: Current Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services, Including Minimum Standards for a Lawyer Referral Service in California