

AGENDA ITEM

January 161

DATE: December 10, 2010

TO: Members, Stakeholder Relations Committee
Members, Board of Governors

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

SUBJECT: State Bar Rules, Title 3 (Programs & Services), Division 4
(Consumers), Chapter 3 – Lawyer Referral Services – Return
from 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 and make several other substantive revisions but otherwise do not modify current requirements, which include minimum standards for lawyer referral services.

In July, the Board Committee on Legal Services, Pro Bono & Equal Access authorized a 45-day public comment period for proposed rules in Title 3, Division 4, as Chapter 3 rules 3.700-3.729. This agenda item brings the proposal back from public comment. Three comments were received. Three modifications have been made to respond to comments. The modifications are non-substantive or reasonably implicit in the proposal; therefore no additional comment period is needed.

It is recommended that the Board Committee on Stakeholder Relations recommend that the Board approve proposed rules for Title 3, Division 4, Chapter 3 and instruct staff to transmit the proposed rules to the Supreme Court for consideration and approval, as required by law.

Questions may be directed to Carol Madeja at carol.madeja@calbar.ca.gov or (213) 765-1329, or to Rodney Low at Rodney.low@calbar.ca.gov or (415) 538-2219.

BACKGROUND

Business and Professions Code § 6155 provides for certification of lawyer referral services by the State Bar of California. Subpart (f) states that “With the approval of the

Supreme Court, the State Bar shall formulate and enforce rules and regulations for carrying out this section, including rules and regulations that do the following: (1) establish minimum standards for lawyer referral services. ...”

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. In July, the Board Committee on Legal Services, Pro Bono and Equal Access authorized a 45-day public comment period for the proposed LRS rules revisions. This agenda item summarizes the comments received and recommends that the Board approve the Title 3 rules and instruct staff to transmit the rules to the Supreme Court for approval. Three modifications have been made to respond to comments. These modifications are non-substantive or reasonably implicit in the proposal; therefore no additional comment period is needed.¹

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.

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. Current 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 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

¹ State Bar Rule 1.10 [Public Comment] states, in relevant part:

(A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Governors...Proposals are circulated for a forty-five day period, which can be shortened to a minimum of 30 days or extended to a maximum of 90 days, as designated by the board.

(B) Public comment is not required:

- (1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;
- (2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal; or
- (3) to add modify an appendix to these rules.

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, and will be transferred to 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. Specific 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 in the form and its instructions 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 rule.

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 for 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 focuses not on a particular technology but on the principle underlying the current prohibition. The revision also distinguishes lawyer referral services from other 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 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.”² Likewise, sparing use of the passive makes the proposed rule on application fees, rule 3.702, shorter than its counterpart, rule 9.

PUBLIC COMMENT RECEIVED AND RESPONSE TO COMMENTS

Three comments were received from the American Bar Association, the Santa Clara County Bar Association and the Alameda County Bar Association. The comments are summarized below and are also at Attachment D.

1. Alameda County Bar Association: The bar association agrees and supports the proposed revised rules, but suggests eliminating proposed rule 3.720(F), which provides that the lawyer referral service must “if non-profit use its income only to pay reasonable operating expenses and to fund its pro bono, legal services, and other service programs.”
2. Santa Clara County Bar Association: Rule 3.726(C)(4) provides that a referral may not “be made exclusively by technological means without staff evaluation of client needs and panel members’ qualifications.” The bar association strongly encourages modifying proposed rule 3.726(C) to reflect B&P Code § 6155h.2 language that says a lawyer referral service must not be principally operated by a telephone answering service or device. The bar association’s reason is that the proposed revision seems to be directed at precluding services from automating the referral process online by mandating that a staff person screen all referrals.
3. American Bar Association:
 - a. The ABA generally supports the newly formatted, simplified rules. Specific comments follow.
 - b. The ABA recommends including a confidentiality statement that disclosure of information to the LRS is deemed a privileged lawyer-client communication. Neither the current rules nor the proposed rules have such a statement.

² Proposed rule 3.706(F).

c. In Rule 3.700, the ABA suggests using the language of B&P Code § 6155(a) to describe who must be certified in place of the shortened language of the rule.

d. Rule 3.701(A) requires a service to submit a certification application and a separate application fee for each county in which it operates, but permits waiver of the separate application for a service operating in more than one county on written request supported by evidence and for good cause. Rule 3.701(B) qualifies provision (A) by saying that a service operating in two or more underserved counties as defined by the State Bar may submit only one application and one application fee. The ABA asks whether waiver of a separate application for an LRS operating in more than one county also waives a separate application fee, and whether an application fee should be waived altogether for an LRS that operates in a threshold number of underserved counties.

e. Rule 3.702(D) permits waiver or reduction of an application or late fee for continued certification because of demonstrated financial necessity as evidenced by gross annual revenues, panel size, geographic area served, length of time in operation, or the like. The ABA suggests an additional factor be added to the examples of hardship factors.

f. Rule 3.720(C)(3) requires that an LRS establish services for persons of limited means unless it demonstrates that doing so is unreasonable or impractical given the community needs; its financial resources, staff size, or panel membership; the fees charged by its panel members; or the availability of pro bono or other legal services for persons of limited means. The ABA is concerned that circumstances listed as allowing an LRS to not establish services for persons of limited means could engulf the general requirement of establishing such services and may be interpreted as a diminished emphasis on providing legal services to persons of limited means.

g. Rule 3.720(F) requires that a non-profit LRS “use its income only to pay reasonable operating expenses and to fund its pro bono, legal services, and other service programs.” The ABA supports this provision and suggests adding that any income of the LRS be used to pay reasonable operating expenses of the LRS and that the phrase “other service programs” be modified to read “other public service programs.” (Suggested additions are in italics.) Part of this suggestion is accepted, as explained below.

h. Rule 3.722(B)(4) requires a governing committee to annually survey a random sample of clients of the service to determine their satisfaction with services and fees. The ABA is concerned that the new rule seemingly only requires a single annual survey without also requiring review of the data collected.

i. Rule 3.723(A), as circulated for comment, provides that “A lawyer referral service must establish panels of attorney members qualified to provide legal services to the public. The panels must be organized by subject matter but may include a general panel. “The ABA suggests adding a statement that is not carried over from the current rule, which is that an LRS is encouraged to establish, among others, moderate and no

fee panels, lest it appears that the State Bar is intending to diminish the public service focus of the current rules. This suggestion is accepted, as noted below.

j. Rule 3.723(B), as circulated for comment, provides that “At least twenty attorney members, ten of whom are from separate and independent law firms, are required for all lawyer referral services, and each panel must have at least four members. The State Bar may waive these minimum requirements if a lawyer referral service provides written evidence that the size of the community or the number of its attorneys warrants a lesser number.” The ABA suggests amending the second sentence to say “The State Bar may waive these minimum [panel size] requirements if a lawyer referral service operates in an underserved county or provides written evidence that the size of the community ... warrants a lesser number.” (Suggested additions are in italics.) This suggestion is accepted, as noted below.

k. Rule 3.726(A) provides that “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.” The ABA opposes dropping language in the current rule requiring that referrals be made on a rotational basis and changing to language requiring that referrals be allocated equitably to panel members. The ABA is concerned that removing the rotational referral mechanism would create the potential for significant abuse.

l. Rule 3.726(C)(4) provides that a referral may not “be made exclusively by technological means without staff evaluation of client needs and panel members’ qualifications.” The ABA supports the new technology provision as a strong positive statement making it clear that technology without human assessment is not permitted and that requiring staff evaluation of client needs helps ensure the most appropriate referral and is a cornerstone to providing the consumer with a value added service.

m. Rule 3.729(A) requires that the annual report of an LRS must detailed accounting information and statistics on services provided. The ABA would add a new requirement that publicity identify whether the LRS is non-profit or for-profit.

After considering all of the comments, Rule 3.720(F) and Rule 3.723(A) and (B) were modified in response to ABA suggestions. In Rule 3.720(F), the clause now reads “other public service programs” to avoid potential misapplication of non-profit LRS funds to general revenue uses of a sponsoring organization. With this modification, the ABA’s other suggestion for Rule 3.720(F) is unnecessary. In Rule 3.723 (A) and (B), the ABA’s suggested language modifications are made to correct the unintended perception that the revised rules diminish emphasis on the public service focus of the current rules. These modifications are shown at Attachment B, the proposed revised rules in legislative style with modifications to the public comment version.

None of the ABA’s other comments required modifications to the proposed rules. The ABA’s suggestion in item (b) regarding a new confidentiality statement is beyond the

scope of the LRS rules. The ABA does not have to contend with a statutory attorney-client privilege where as in California the attorney-client privilege is governed by law. Some ABA comments concern operational issues, and other comments express concerns that have not been problems in California or would add unnecessary verbiage to the rule. Regarding Rule 3.726(A), staff has found that a requirement of referrals by rotation has become too mechanical, whereas a requirement that referrals are allocated equitably among panel members is responsive to consumers who want more input on the selection of the attorney to whom they will be referred. Finally, regarding the publicity requirements in Rule 3.729(A), the comment appears to have a negative implication regarding for-profit LRSs. Whether an LRS is for-profit or non-profit is not relevant since all certified LRSs must meet the same requirements.

It may be noted that the suggestions made by the Alameda County Bar Association (Rule 3.720(F)) and the Santa Clara County Bar Association (Rule 3.726(C)) have not received support from any other certified LRSs or bar association. The restriction in Rule 3.720(F) is from current rule 17.2, which guards against potential misuse of non-profit LRS funds by the sponsoring organization. As noted above, Rule 3.720(F) has been modified to require that a non-profit LRS use its income only to pay reasonable operating expenses and to fund its pro bono, legal services, and other public service programs. The language in Rule 3.726(C) is updated to account for technological developments since 1997, and requiring staff evaluation of client needs ensures the most appropriate referral, is a cornerstone to providing valuable services to consumers, and is a general duty of a certified LRS.

Effective date of proposal

The effective date of the proposed rules will be determined by the Supreme Court.

FISCAL / PERSONNEL IMPACT:

None

RULE AMENDMENTS:

Upon approval of the Supreme Court, the rules will be added to the Rules of the State Bar in Title 3, Division 4, as Chapter 3, Lawyer Referral Services.

BOARD BOOK IMPACT:

None

RECOMMENDATION

Staff recommends that the Board Committee on Stakeholder Relations recommend that the Board approve the proposed revised lawyer referral services rules for Title 3, Division 4, as Chapter 3 of the Rules of the State Bar, in the form attached as

Attachment A, and instruct staff to transmit the rules to the Supreme Court for consideration and action.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Stakeholder Relations Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of comments received, that the Stakeholder Relations Committee recommends that the Board approve proposed revised lawyer referral service rules for Title 3, Division 4, Chapter 3 of the Rules of the State Bar, in the form attached as Attachment A, and instruct staff to transmit the rules to the Supreme Court for consideration and approval.

PROPOSED BOARD RESOLUTION:

Should the Board concur with the Stakeholder Relations Committee's recommendation to approve the proposed revised lawyer referral service rules for Title 3, Division 4, Chapter 3 of the Rules of the State Bar and instruct staff to transmit the rules to the Supreme Court for consideration and action, adoption of the following resolution would be in order:

RESOLVED, following publication for comment and consideration of comments received, that upon the recommendation of the Stakeholder Relations Committee, the Board hereby approves the proposed revised lawyer referral service rules for Title 3, Division 4, as Chapter 3, in the form attached as Attachment A, and instruct staff to transmit the rules to the Supreme Court for consideration and approval.

Attachments

Attachment A: Proposed Rules for Lawyer Referral Services, clean version

Attachment B: Proposed Rules for Lawyer Referral Services, legislative style with modifications to the public comment version

Attachment C: 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

Attachment D: Public Comments received