TO: Supreme Court of Arizona
FR: Mark I. Harrison
RE: Comments on Proposed Changes to Rules Governing Specialization Certification R-18-0025
DA: March 23, 2018

Introductory Comment

As the Court is aware, before the proposed rules governing the specialization process were submitted to the Court, they were submitted to and considered by the Board of Governors (hereinafter "the BOG"). On November 22, 2017, I submitted a memo to the BOG commenting on the proposed rules and on December 8, 2017, I appeared before the Board and expanded orally on the points in my memo and answered questions posed to me by various Board members. My memo prompted the BOG to make some changes in the rules now pending before the Court but the proposed rules continue to perpetuate several untenable and Constitutionally unacceptable provisions. The present memo reiterates portions of the memo submitted to the BOG and in addition, responds to this Court's Order dated March 5, 2018 (No. R-18-0025) and provides comments on those provisions that should be rejected by the Court.

As the Court is aware, in 2015, the Supreme Court of the United States decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101. The *North Carolina Dental Board* case had profound implications for our State Bar and for a myriad of bar-related entities in Arizona and elsewhere. The bar-related entities in question, like the North Carolina Dental Board, are typically comprised of individuals who are competitors of the members of the profession or occupation subject to the decisions of the entities in question.

Until the decision in the *North Carolina Dental Board* case, the entities taking action affecting the professional and business lives of the members of the various occupations were not subject to any oversight or supervision by any court or state agency. It was, therefore, apparent to this Court and the Board of Governors that the decision in the *North Carolina Dental Board* case affected the operation of the Board of Legal Specialization ("BLS") which had the *unsupervised and unregulated* power to certify lawyers -- competitors of the members of the BLS and its subordinate Commissions -- in various practice-area specialties.

After examining the issues carefully, former Chief Justice Rebecca Berch, on behalf of this Court, filed a rule petition in January, 2016, and proposed a new rule -- designated as Rule 44 -- confirming the Court's authority over the specialization certification process and requiring that applicants for certification be "assured due process" and requiring that "objective" criteria be applied to determine whether an applicant is qualified for certification. On December 23, 2016, Chief Justice Scott Bales signed Administrative Order 2016-151 and adopted Rule 44. Accordingly, Rule 44 has governed the entire specialization certification process since January 1, 2017. The focus of my comments is on subparagraph (d) of Rule 44 which specifically governs the content of "BLS Rules" and provides as follows:

> The BLS will be governed by rules approved by this Court. Such rules will designate, among other things, recognized areas of specialization, *objective criteria* for qualifying as a certified specialist, and the procedures for attorneys to obtain certification. The rules *shall assure due process* to all applicants. The BLS will grant certification to those applicants who meet *the objective criteria* designated in the rules. (Emphasis added.)

Administrative Order 2016-151 also included, in an appendix, "proposed BLS rules and regulations" submitted by the State Bar. The Order stated that the proposed rules "are adopted on a transitional basis" and directed the State Bar to submit its final recommendations regarding BLS rules by January 1, 2018. Those recommendations have now been submitted and are the subject of these comments.

The rules currently proposed by the BLS include provisions which are in direct conflict with certain key requirements in Rule 44. Specifically, proposed rules VI(E) (2), (3); VI(I)(2), and VI(L)(1) provide for a procedure which is unnecessarily based on confidentiality and anonymity and as a result, violates basic principles governing procedural due process. Equally troubling, Rule V(F) and (F)(2) rely on a criterion that is "subjective", not "objective" as specifically required by the Rule 44(d). These issues will be addressed separately in these comments.

The Due Process Issues

From its inception, the specialist certification process has been premised on and governed by confidentiality and the anonymity of those providing comments about the qualifications of the applicant, in what are known as "peer reviews".[1] The justification used to enable lawyers responding to questions about an applicant to hide behind the cloak of anonymity is without merit. The only justification ever offered for confidentiality is that if the responding lawyer were required to identify himself or herself, the response would be less than candid because the lawyer responding would be concerned about the possibility of retaliatory action by the applicant. That rationalization is meritless if one examines the competing values at stake. If a lawyer responding to a questionnaire about the qualifications of a competitor can do so anonymously, the respondent is essentially free to say anything about the applicant without regard to its context, accuracy or veracity. And experience has demonstrated that the cloak of anonymity has prompted and enabled those commenting on the qualifications of an applicant to say damn near anything – typically without any factual context and often without any basis in fact. As a practical matter, this confidential, anonymous "peer review" process has effectively prevented

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[1] Undersigned counsel has represented more than 15 clients in certification proceedings over the past 24 years and in each case complained to the Commissions and the BLS that the confidentiality provisions of the process precluded the applicant from responding to anonymous allegations in a meaningful way and more fundamentally, denied the applicant due process. Those complaints consistently "fell on deaf ears" – the BLS and its Commissions (*comprised of the applicant's competitors*) always relied on the "confidentiality" provisions which the BLS seeks to perpetuate in its pending rule proposals.

applicants from refuting the comments and charges submitted by those responding to questionnaires about the applicant. And in starker terms, the process unquestionably has denied the applicant due process in direct violation of Rule 44(d) in which the Court directed the BLS "to assure due process to all applicants". Which is more important? Allowing the lawyer-competitor responding to the questionnaire to provide unverifiable, typically subjective comments about the applicant under a cloak of anonymity or, as required by Supreme Court Rule 44(d), "assuring the applicant due process"?

The answer to this rhetorical question is obvious. The avowed excuse for confidentiality and anonymity is the unjustified fear that if a competitor responding to an inquiry about an applicant makes unfavorable comments, the respondent will be subject to retaliation. This "excuse" or rationalization for confidentiality and anonymity is baseless. The fear of retaliation is groundless because the BLS rules already assure members of the BLS, the Commissions and *everyone else involved in the certification process* with complete immunity from civil liability, thereby eliminating a legitimate risk of retaliatory action by the applicant. See Rule VI(E)(4).[2]

In addition to depriving the applicant for specialization certification of due process, the current and proposed BLS rules which provide confidentiality and anonymity to those who provide comments about applicants is truly anomalous. Think about it: lawyers and clients who are willing to complain about lawyer misconduct in the State Bar disciplinary process – *which involves the potential loss of the lawyer's license to practice* – are not granted such anonymity, yet have far more at stake than those who honestly believe an applicant for specialization certification is unworthy of certification but are unwilling to say so despite their immunity from retaliatory civil action by the applicant.

The current and proposed rules prevent an applicant for certification from becoming aware of the *source* of negative comment and *the factual context* which gives rise to the negative comments. As a matter of law, the proposed rules are not only in direct conflict with Rule 44(d), Rules of the Supreme Court, but the reliance of the BLS and the Commissions upon undisclosed information violate an applicant's right to procedural due process guaranteed by the United States and Arizona Constitutions. *See* U.S. Const. Amends. V, XIV; Ariz. Const. art. 2, § 4. Specialist certification is a protected property interest. *See State Bar of Texas v. Leighton*, 956 S.W.2d 667, 671-72 (Tex. Ct. App. 1997) (suggesting that lawyer certification is a property interest entitled to due process protection). In addition, a denial of an applicant's application for certification or recertification impairs his or her right to practice law, a right which has long been recognized as a protected property interest. *See Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 102 (1963); *Application of Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205 (1964). Although denial of certification or re-certification would not completely eliminate an applicant's ability to practice law, it is more than a "*de minimis*" impairment, and therefore would be a "deprivation" for due process purposes. *E.g., Goss v. Lopez*, 419 U.S. 565, 576 (1975) ("[A]s long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."); *see also*

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[2] As the Court is aware, a comparable rule has immunized everyone associated with the lawyer disciplinary process for decades. [Rule 48(l), Rules of the Supreme Court]

The Arizona Supreme Court has encountered this issue twice before in the context of lawyer admission and regulation. In both cases it held that reliance upon secret and undisclosed information is improper. *See In re Application of Burke*, 87 Ariz. 336, 340, 351 P.2d 169, 172 (1960) ("We hold therefore that denial of admission to the practice of law cannot be solely based upon secret reports not revealed to the applicant."); *Levine*, 97 Ariz. at 92, 397 P.2d at 208 (reliance upon undisclosed testimony in bar admission proceeding "would, of course, be hearsay and a denial of due process"); *cf. Bock v. John C. Lincoln Hospital*, 145 Ariz. 432, 702 P.2d 253, 255-257 (App. 1985) (failure of peer review committee to provide evidence to doctor a denial of due process). Reliance upon undisclosed information is equally improper in specialization certification proceedings. As this Court observed in *Burke*, *supra*,

> If respectable persons have derogatory information or bona fide charges to level against an applicant, they should not hesitate to come out into the open and speak the truth. If they insist on hiding behind a cloak of secrecy, then their evidence cannot be used to impeach the character of a man whose only apparent fault has been to acquire a few devious secret enemies.

In view of the fact that those who comment about applicants for specialty certification are competitors who are assured complete immunity from civil liability, there is no legitimate justification for permitting them to submit their comments anonymously and thereby deny the applicant the procedural due process required by Rule 44(d), our Constitution and our case law. Therefore, to the extent that the proposed rules [(VI(E), (2), (3), VI(I)(2), and VI(L)] permit anonymous comments, they would deny applicants for certification and recertification procedural due process and therefore must be rejected by the Court.

The "Objective" Criteria Issues

The Supreme Court in Rule 44(d) also confirms that one's qualifications for specialization certification must be based on "objective" criteria.[3] Yet, despite that unambiguous mandate, the BLS has relied heavily for years on obviously "subjective" criteria – namely, the applicant's "ethics" and/or "professionalism". [See Rule V(F).][4] The use of these criteria is not only demonstrably "subjective", but under the circumstances, it makes no sense. The use of these criteria calls to mind the famous observation of Justice Potter Stewart about pornography in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) when he said "I know it when I see it" -- a quote which has been described as a colloquial expression by which a speaker attempts to categorize an observable fact or event, although the category is subjective or lacks clearly defined parameters. Courts have recognized in other contexts that professionalism is a "subjective" term. *See Tuma v. Bd. of Nursing,* 593 P.2d 711, 717 (Idaho 1979) (finding that

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[3] According to the Cambridge Dictionary, "objective" is defined as "a condition or fact used as a standard by which something can be judged or considered."

[4] Based on the experience of undersigned counsel, virtually all of the cases in which an applicant for certification or recertification has been rejected are attributable to comments about the applicant's "ethics and professionalism" and come from anonymous sources, without an identified source or factual context which might enable the applicant to respond.

statute prohibiting "unprofessional conduct" did not adequately warn nurse that she was engaging in prohibited conduct); *Lester v. Dep't of Prof'l & Occupational Regulations,* 348 So.2d 923, 925-26 (Fla.Dist.Ct.App.1977) (finding that statute prohibiting "unprofessional conduct" did not adequately warn doctor that he was engaging in prohibited conduct); *see also Cioffi v. Habberstad et al*, 869 N.Y.S.2d 321, 322-323 (2008); *Satchell v. FEDEX Corporation*, 2005 WL 2397522 (N.D. Cal. 2005); *Corpus Christi Firefighters Assn. v. City of Corpus Christi*, 10 S.W.3d 723, 728 (1999); *Blow v. Virginia College*, 2014 WL 4197400 (N.D. Ala. 2014); *Nofsinger v. Virginia Commonwealth University*, 2012 WL 2878608 (E.D. Va. 2012).

The use of "ethics and professionalism" has invited the competitors responding to the BLS and Commission questionnaires concerning the applicant to respond in predictably *subjective* terms – in direct violation of the Supreme Court's requirement that qualifications must be based only on "objective" criteria. Not only does the use of these troublingly subjective criteria exacerbate the due process issues discussed above, it is clearly unnecessary. The opportunity for responding *competitors* to disparage applicants in obviously subjective terms has been irresistible. The use of "ethics and professionalism" as criteria has been especially troublesome in view of the fact that applicants can be required by the Commissions to disclose their disciplinary history when applying for certification. [See Rule VI(G)(4)].[5] Moreover, if the BLS and Commissions have any reason to believe an applicant has not disclosed his or her disciplinary history, they can independently learn about it by simply checking the State Bar and Supreme Court websites.

Finally, since the Supreme Court amended Rule 31, lawyers are already subject to discipline if they have engaged in "substantial or repeated violations of the Oath of Admission or the Lawyer's Creed of Professionalism . . . ." [See Rule 31(a)(2)(E) and Rules 41(g) and 54(i), Rules of the Supreme Court]. As a result, if an applicant for certification or recertification has been disciplined for "substantial or repeated violations the Oath of Admission or the Lawyer's Creed of Professionalism" that information will provide the required "objective" basis for determining whether an applicant is qualified vis-à-vis "professionalism" -- for certification or recertification. The anonymous, typically *ad hominem* comments permitted under the current and proposed rules are in direct conflict with the Court's mandate that the criteria used to qualify an applicant for certification must be "objective". The proposed rules which include "ethics and professionalism" as criteria must, therefore, be rejected.

Miscellaneous Comments

1. In Section IV(B), the third sentence should be revised to make clear that this Court, not the BLS, has the final authority to ratify and approve the standards for certification. At present, the sentence reads as follows: "However, the BLS shall have final authority to ratify and approve the standards for certification in each specialty field." The sentence should be revised as follows: "However, ***subject to the approval of the Supreme Court***, the BLS shall have FINAL authority to ratify and approve the standards for certification in each specialty field." (italicized and bold language added; capitalized language deleted).

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[5] Rule VI(G)(4) should be amended by adding after the reference to Rule 60, "and as defined in Rule 46(f)(10)."

2. In the introductory paragraph of Section V, "he or she" should be substituted for "they"; and "meets" should replace "meet".

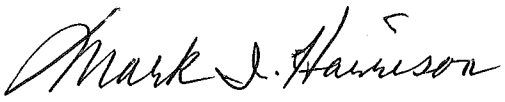
Summary

In order to fulfill the Supreme Court's direction in Rule 44(d) to assure due process to all applicants, current and proposed BLS Rules [(VI(E)(2), (3), VI(I)(2) and VI(L)], to the extent they enable those responding to Commission questionnaires about an applicant to respond confidentially and anonymously, should be rejected and eliminated from the specialization certification process.

In order to fulfill the Supreme Court's direction in Rule 44(d) to determine the qualifications of applicants for specialty certification using only "objective" criteria, the use of "ethics and/or professionalism" as now permitted by current and proposed rules [V(F) and (F)(2) and VI(G)(4)], should be rejected and eliminated as criteria in the specialization certification process.

It is my hope that these comments are helpful in enabling this Court to improve the specialization certification process and to achieve the mandate of this Court in Rule 44. I would be pleased to appear before the Court to discuss these issues and my recommendations if requested to do so.

Respectfully submitted,



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