

Hon. Rebecca Berch (ret.)  
1501 W. Washington St., Ste. 410  
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO ADOPT RULE 44 ) Supreme Court No. R-16-\_\_\_\_  
AND TO AMEND RULE 32 )  
OF THE RULES OF THE )  
SUPREME COURT OF ARIZONA )  
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Petitioner served as chair of the Supreme Court’s Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona (hereinafter the “Mission and Governance Task Force” or “Task Force”). The Task Force submitted a report to the Supreme Court on September 1, 2015. Petitioner now requests the adoption of a new Rule 44 and an amendment of existing Rule 32 of the Rules of the Supreme Court of Arizona, as shown in the appendix, regarding the Board of Legal Specialization.

**Part I: Background.** Supreme Court Administrative Order number 2014-79 established the Mission and Governance Task Force. The Order directed the Task Force to review the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona (“SBA”) and to make

recommendations concerning the SBA's mission and governance. The Task Force submitted its final report to the Court on September 1, 2015. The final report also was posted on the Task Force webpage, and it may be found [by clicking here](#).

During the term of this Task Force, the United States Supreme Court issued *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. \_\_\_, 135 S. Ct. 1101 (February 25, 2015). The Court held that a state regulatory board composed of regulated member who are active market participants, and which lacks adequate state supervision, was not immune from anti-trust claims for denying others an opportunity to participate in the marketplace.

**II. The Board of Legal Specialization.** The State Bar's Board of Legal Specialization ("BLS") administers a program for certifying attorneys as specialists in particular fields of law. The Task Force was not specifically directed to review SBA programs, but for reasons noted in its report, the Task Force discussed the BLS. The Task Force was concerned that no specific Supreme Court rule directly establishes or authorizes the BLS. The existence of the BLS is acknowledged in Supreme Court Rule 42, ER 7.4(a), but the SBA board, not the Court, currently designates specialty areas of practice. The members of the BLS are appointed by the SBA president. The rules and regulations of the BLS specify that it is "created

by and subject to the continuing jurisdiction of the Board of Governors” rather than created by and subject to the continuing jurisdiction of the Court.

In response to its concerns that adequate Supreme Court oversight is lacking, the Task Force proposed an amendment to Rule 32(d), which specifies the powers of the SBA board. This amendment, shown in the appendix, would provide the SBA Board of Governors with the Court’s expressed authorization to “administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 44.” Proposed Rule 44 is also contained in the appendix. (Rule 44 is in Subpart D of the Supreme Court Rules, which is entitled “Lawyer Obligations.” Rule 44 is currently “reserved.”)

Rule 44 would establish Supreme Court supervision of the BLS in the following ways:

- a. It would require the Court to appoint members of the BLS.
- b. It would require Court approval of BLS rules, which would include rules concerning the designated practice areas of specialization and the qualifications for specialization.
- c. It would provide an attorney aggrieved by a decision of the BLS the opportunity to seek judicial review.

**III. Pre-Petition Comments.** The Task Force submitted a draft of its report, which included a section on the proposed BLS rules, to members of the State Bar via e-mail. This e-mail invited members to submit comments concerning the report, but there were no comments on the proposed BLS provisions.

The Board of Governors received the final report of the M&G Task Force in early September 2015. Near that time, the State Bar established its own committee to examine potential impacts of the *North Carolina State Dental Board* opinion, which committee thereafter reported its recommendations to the SBA's Board of Governors.

With regard to the BLS proposal, the Board of Governors generally supported the amendments proposed by the Mission and Governance Task Force. However, it made the following recommendations:

1. Because the proposed rule contemplates the availability of judicial review by way of a special action, the Board suggested eliminating the additional time-consuming and duplicative step of full review by the Board of Governors following a final determination by the BLS.
2. The Board recommended that BLS subject-matter committees, which recommend candidates for specialization, continue to be appointed by the State Bar.
3. If Rule 44 is adopted, the Board recognized the need to revise the SBA's BLS rules and the potential need to amend Rule 42, Ethical Rule 7.4.

Petitioner modified Rule 44(f), as proposed by the Task Force report, to incorporate the first recommendation of the Board of Governors. A modification to proposed Rule 44(d) acknowledges the second recommendation, although this is

a matter that should be specifically addressed in the Board of Legal Specialization's own rules, which are subject to future approval by the Court. As to the third recommendation, Petitioner would defer to the State Bar to propose amendments to ER 7.4 that it might deem appropriate.

**Part IV. Conclusion.** Petitioner requests that the Court open this petition for comments and, subject to any modifications deemed appropriate, adopt the proposed amendments to Rule 32 and new Rule 44.

RESPECTFULLY SUBMITTED this \_\_ day of January, 2016

By \_\_\_\_\_  
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## Appendix

Proposed amendment to Rule 32(d). (Additions are shown by underline.)

### **Rule 32. Organization of the State Bar of Arizona**

(d) Powers of Board. The ~~state bar~~ State Bar shall be governed by the Board of Governors, which shall have the powers and duties prescribed by this ~~court~~ Court. The board shall:

1 through 10 [no change. However, if the Court adopts Petitioner’s proposed amendments to Rule 32 as set out in another rule petition filed during the current rules cycle, this would be “1 through 9: no change.”]

11 [or 10 if the Court adopts the amendments to Rule 32 requested by the other rule petition]. Administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 44.

### **Rule 44. Legal Specialization [new]**

- a. **Purpose.** A legal specialization program will identify to the public and members of the bar those attorneys who have demonstrated a high degree of competence in a specific field of law. Identifying attorneys in this fashion will increase the quality of legal services and will allow members of the public to more closely match their needs with attorneys who have specialized in a field of law.
- b. **Board.** The State Bar of Arizona will administer an attorney specialization program through a Board of Legal Specialization (“BLS”).
- c. **Board members.** The Board of Legal Specialization will consist of thirteen members, as follows: eight practicing attorneys, four of whom are not specialists and four of whom are certified specialists; one representative from an ABA-accredited law school in Arizona; and four members of the public. Members of the BLS and a BLS chair will be nominated by the Board of Governors and appointed by the Supreme Court. BLS members

will serve four-year terms, with a limit of two terms. The BLS chair will serve a two-year term and may be appointed to a second term.

- d. **Board rules.** The Board of Governors must establish rules of procedure for the Board of Legal Specialization, which rules must assure due process to all applicants. Those rules may designate, among other things, practice areas of specialization and objective qualifications for specialization in a particular practice area. The rules may also provide for subject matter committees for particular practice areas, whose members may be appointed by the Board of Governors. Those rules, and any amendments to those rules, must be submitted to and approved by the Supreme Court.
- e. **Limitations.** No BLS rule may limit the right of a specialist to practice in other fields of law or limit the right of a specialist to associate with attorneys who are not specialists, and no rule may require an attorney to be a specialist before practicing in any particular field.
- f. **Review.** An attorney aggrieved by a decision of the BLS may file a verified petition for review with this Court within 20 days after the decision becomes final. The attorney must succinctly state the facts that form the basis of the petition, and the attorney's reasons why this Court should review the BLS decision. The attorney must promptly serve the BLS with a copy of the petition. The BLS will have 30 days after service to file a response and to transmit the attorney's file to this Court. The Court will then consider and decide the matter.