

AGENDA ITEM

MOC III-C July 18 2013

DATE: June 27, 2013

TO: Members, Member Oversight Committee

**FROM: Pam Wilson, Interim Senior Director, Office of Education
Gayle Murphy, Senior Director, Admissions
Dina DiLoreto, Managing Director, Member Records and Compliance**

**SUBJECT: Request for Public Comment – Rules of the State Bar, Title 2,
and Title 3, and Rule of Court 9.31**

EXECUTIVE SUMMARY

The Member Oversight Committee (“MOC”) recently conducted a series of public hearings to examine all aspects of the Minimum Continuing Legal Education (“MCLE”) requirements for California attorneys. The hearings covered four MCLE subjects: the mission, requirements, providers, and modes of delivery.

This agenda item requests a 45-day public comment period on proposed amendments to the MCLE rules in Title 2 and 3 of the Rules of the State Bar and proposed changes to Rule of Court 9.31, the MCLE Rule of Court. Title 2 governs MCLE rules as it pertains to members and Title 3 governs requirements of MCLE providers. Proposed changes to the State Bar’s MCLE rules are intended to clarify member requirements, expand specialty requirement definitions, and raise provider standards. Rule of Court 9.31 provides a framework for the MCLE program and authorizes the Board of Trustees to adopt more detailed rules. Proposed changes to the Rule of Court include the number of required hours and the addition of a law practice management option as part of the legal ethics requirement.

The 45-day public comment period will allow Title 2 and Title 3 to return in October 2013 for action by MOC and the Board.

Proposed changes to Rule of Court 9.31 will be sent out for public comment for purposes of gathering additional information. Any comments received will be analyzed and staff will develop a detailed proposal for consideration by MOC and the Board.

Board members with any questions may contact:

Pam Wilson at (415) 538-2395 pam.wilson@calbar.ca.gov,
Gayle Murphy at (415) 538-2233 gayle.murphy@calbar.ca.gov , or
Dina DiLoreto (415) 538-2121 dina.diloreto@calbar.ca.gov .

BACKGROUND

California's MCLE program dates back to 1989 when Governor George Deukmejian signed Senate Bill 905, known as the continuing legal education bill, to enact Section 6070 of the Business and Professions Code. The statute required the State Bar to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer an MCLE program. On December 7, 1990, the Court adopted Rule of Court 958 (now referred to as Rule of Court 9.31). The State Bar's MCLE Rules were approved in December of the following year and the program began on February 1, 1992.

The Rule of Court provides a skeletal outline of an MCLE program and authorizes the State Bar Board of Trustees to adopt more detailed rules. The Rule sets the number of required MCLE hours and as a part of those hours, required hours in legal ethics. Rule of Court 9.31 also gives the State Bar authority to require legal education in other specified areas within the total requirement.

The 1990 Judicial Council Advisory Committee report on *Gender Bias in the Courts* found that bias existed in the legal profession and recommended education as a means of eliminating it. In response, the State Bar mandated one-hour of required education address the elimination of bias in the legal profession. The State Bar also added a one-hour requirement for education in detection, prevention and treatment of substance abuse or emotional distress recognizing that substance abuse is often a factor in attorney discipline cases.

The Legislature amended Section 6070 of the Business Professions Code in 1999. The amendments reduced the total number of MCLE hours required every three years from 36 to 25 and reduced the 8 hour legal ethics/law practice management requirement to 4 hours of legal ethics. The Rule of Court was amended consistent with the statutory changes.

At its 2012 Planning Meeting, the Board discussed reviewing the current rules and regulations governing MCLE and raising the bar for lawyer education. The areas of discussion included the following:

- A. Enhance MCLE Requirements for Lawyers
 - Raising the number of required hours of MCLE per compliance period
 - Increasing the number of required hours of ethics education
 - Including law practice management as a mandatory MCLE subject
- B. Enhance MCLE Requirements for MCLE Providers
 - Reviewing the current criteria for certifying providers to determine whether certification requirements should be enhanced
 - Enhancing the audit of MCLE programs provided by certified providers
- C. Enhance and Automate the MCLE Compliance Self-Reporting Process for Attorneys

MOC was tasked to further explore these areas of discussion and held two public hearings on the matter. The hearings took place on April 18, 2013, and May 8, 2013, and covered four topics:

1. Mission of MCLE
2. MCLE requirements - number of hours and specialty areas
3. MCLE providers
4. Modes of MCLE delivery - online and in-person

Subject matter experts were invited to speak on the topics and public comment testimony was solicited. At the conclusion of the hearings, MOC discussed potential changes to the rules governing MCLE, including the requirements for lawyers and the criteria for providers certified by the State Bar. The proposed changes to the State Bar Rules and Rule of Court 9.31 are a result of MOC's discussion.

ISSUE

Whether to authorize a 45-day public comment period, commencing on July 23, 2013, and ending on September 9, 2013, for proposed amendments to State Bar MCLE rules in Title 2 and Title 3 (MCLE member compliance rules and MCLE provider rules) and Rule of Court 9.31, in the form attached.

The 45-day public comment period will allow the MCLE rules in Title 2 and Title 3 to return in October 2013 for action by MOC and the Board.

Simultaneously, proposed changes to Rule of Court 9.31 will be sent out for public comment for purposes of gathering additional information. Any comments received will be analyzed and staff will develop a detailed proposal for consideration by MOC and the Board.

DISCUSSION

At the conclusion of the MCLE public hearings, MOC discussed possible changes to the MCLE requirements. That discussion influenced the following proposals:

MCLE Attorney Requirements

Number of Hours

Proposal: Return to the original MCLE requirement of 36 hours every 3 years.

California has one of the lowest MCLE hour requirement in the country among the 45 states with a mandatory CLE requirement, second only to Alaska and Hawaii, which both

require 3 hours of classes a year. In contrast, North Dakota, Oregon and Washington require 45 hours every 3 years. California attorneys also have some of the lowest continuing education requirements among major professions in the state. Physicians must complete 50 hours of continuing education per 2-year period, and accountants must do 40 hours over a 2-year period.

Active members meet their MCLE hour requirement through a variety of educational activities (such as courses, programs and self-study) that are identified in the MCLE rules in Title 2 of the State Bar Rules. These “MCLE activities” are continuing legal education that the State Bar approves as meeting standards for MCLE credit.

Initially, attorneys were required to complete 36 hours of MCLE every three years. The requirements were changed in October 2000 to reduce that number to 25 hours of MCLE every three years. The proposed change to Rule of Court 9.31 suggests a return to the 36 hour requirement.

Legal Ethics / Law Practice Management

Proposal: At least 8 hours of ethics and/or law practice management, with at least 4 of the 8 hours in legal ethics.

The original Rule of Court authorized a law practice management option as part of the legal ethics requirement. The proposed change within Rule of Court 9.31 suggests a return to the original requirement. The proposed change would reestablish the importance of law practice management education in maintaining a lawyer’s professional responsibilities and minimizing malpractice risks.

Bias

Proposal: Expand the scope of bias education to include “the recognition and elimination of bias in the legal profession and society.”

The expanded scope is meant to include implicit societal bias that manifests in the legal profession. MCLE activities in this area would address how to identify and eliminate bias. The proposed change is within MCLE rules in Title 2 of the State Bar Rules.

Substance Abuse

Proposal: Create a requirement called “competence issues” to replace “prevention, detection, and treatment of substance abuse or mental illness.”

The broader “competence issues” requirement includes mental or physical issues (such as dementia or mental illness), in addition to substance abuse, that may adversely impact attorneys’ performance. This would create the opportunity to provide education that is directly related to Rule 3-110 (B) 3 of the California Rules of Professional Conduct

addressing mental, emotional and physical competence. The proposed change is within MCLE rules in Title 2 and 3 of the State Bar Rules.

MCLE Provider Requirements

MCLE Provider Auditors

Proposal: Establish a provider audit system that includes auditors of programs or classes in the field.

The proposal suggests that the State Bar establish a program of MCLE Activity Auditors comprised of individuals from the Board of Trustees, the California Legal Specialization Board or Advisory Commissions, the California Young Lawyers Association, State Bar staff, or other persons designated by the State Bar to conduct audits of any program or class offered by a State Bar approved MCLE Activity Provider. The rule governing State Bar MCLE Activity Auditors is included in Title 3 of the State Bar Rules.

In addition, a new provision is suggested that would establish a process for filing a provider complaint. The State Bar does not intervene in disputes between a provider and a member. Complaints about a provider, however, could be submitted to the State Bar, but would only be considered in assessing whether a particular provider is in compliance with the rules. The additional rules governing State Bar MCLE Activity Auditors are included in Title 3 of the State Bar Rules.

Written Material Requirement

Proposal: Require written materials for all MCLE activities, regardless of the length of a program.

Currently materials are required for programs and classes over 1 hour but not for programs and classes of 1 hour and less. The proposed change would require all MCLE activities to provide relevant and substantive written materials for each activity offered. The proposed change is included in Title 3 of the State Bar Rules.

Definitions of “participatory” activity and “self-study” activity

Proposal: To provide clarification, definitions of “participatory” activities and “self-study” activities are included in the proposed amendments to Title 2 and Title 3 of the State Bar Rules.

Participatory activity is MCLE for which the provider must verify attendance. Whereas, in self-study activity, attendance is not verified by the provider.

EFFECTIVE DATE OF PROPOSAL

If, following the public comment period and after all comments received have been considered, the Board of Trustees approves the proposed amendments to Title 2 and Title 3 of the State Bar Rules, it is anticipated the rule changes would become effective July 1, 2014.

FISCAL / PERSONNEL IMPACT

There could be some financial impact on the use of MCLE Activity Auditors beyond the scope of what has been done in the past, but it would most likely be minimal.

RULE AMENDMENTS

Rules of the State Bar, Title 2, Div. 4, amend rule 2.51; rule 2.52; rule 2.72; rule 2.73; rule 2.81; rule 2.82; rule 2.83; rule 2.84; rule 2.85; rule 2.86;

Rules of the State Bar, Title 3, Div. 5, amend rule 3.600; rule 3.601; rule 3.602; rule 3.621;

Rules of the State Bar, Title 3, Div. 5, renumber current rule 3.603 as rule 3.604;

Rules of the State Bar, Title 3, Div. 5, add new rule 3.603 and new rule 3.605

BOARD BOOK IMPACT

None.

RECOMMENDATION

Staff recommends that the Board Committee on Member Oversight approve the request that the proposed amendments to the Rules of the State Bar, Title 2 and Title 3 (Attachment A and B) and proposed amendments to Rule of Court 9.31 (Attachment C) be circulated for public comment.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Member Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Member Oversight Committee authorizes staff to make available for public comment for a period of 45 days, the proposed revisions to the Rules of the State Bar, Title 2, Div. 4, in the form attached; and it is

FURTHER RESOLVED, that the Member Oversight Committee authorizes staff to make available for public comment for a period of 45 days, the proposed revisions to the Rules of the State Bar, Title 3, Div. 5, in the form attached; and it is

FURTHER RESOLVED, that the Member Oversight Committee authorizes staff to make available for public comment for a period of 45 days, the proposed revisions to Rule of Court 9.31 in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.

Attachments:

- A: Proposed revisions to Rules of the State Bar, Title 2, Div. 4
- B: Proposed revisions to Rules of the State Bar, Title 3, Div. 5
- C: Proposed revisions to California Rule of Court 9.31