

AGENDA ITEM

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DATE: October 20, 2011

TO: Members, Member Oversight Committee
Members, Board of Governors

FROM: Mary Lavery Flynn, Director, Office of Legal Services
Dina DiLoreto, Director of Administration, Member Services Center

SUBJECT: State Bar Rules, MCLE, Proposed Amendment of Rule 2.54 –
Return from Public Comment

EXECUTIVE SUMMARY

This agenda item brings back from public comment a proposal to amend MCLE Rule 2.54 so as to encourage pro bono by active California attorneys who are working outside California as an attorney or administrative law judge for a federal government agency.

Currently, State of California and federal government attorneys have an exemption from the MCLE requirement, but they lose that exemption if they do legal work outside their employment. Rule 2.54 allows them to keep that exemption if they are doing pro bono work for a legal services program funded by our Legal Services Trust Fund Program. However, for federal government attorneys working outside of California who want to do pro bono work for their local legal aid and pro bono organizations, as opposed to their colleagues who happen to be working for a federal government agency within California, they would lose their MCLE exemption if they do volunteer legal aid work.

The proposed amendment would permit these federal government attorneys to volunteer outside California without losing their MCLE exemption. The proposed amendment would allow volunteer work with similarly-situated legal aid programs in other states that are funded either by their jurisdiction's IOLTA program or by the Legal Services Corporation or the Older Americans Act.

Questions may be directed to Mary Flynn at mary.flynn@calbar.ca.gov, (415) 538-2251, or Dina DiLoreto at Dina.DiLoreto@calbar.ca.gov, (415) 538-2121.

BACKGROUND

The Office of Legal Services, the California Commission on Access to Justice, the Standing Committee on Delivery of Legal Services and other groups have long sought to encourage government attorneys to do pro bono work. There have been two primary barriers to overcome:

1. **Lack of Agency Support for Pro Bono.** One barrier has been the lack of adequate agency support for their attorneys to volunteer, and ongoing efforts have been made to encourage agencies to establish pro bono policies. Samples of government pro bono policies are provided below.
2. **Loss of MCLE Exemption.** The other barrier is the fact that federal and California government attorneys have an exemption from the minimum continuing legal education requirements, but they lose that exemption if they do legal work outside their employment. The Board of Governors approved a modification to the MCLE rules in 1997 that allowed California and federal government attorneys to maintain their MCLE exemption if the work outside their government employment was pro bono work for a California IOLTA-funded program. However, the State Bar is now receiving requests from federal government attorneys who are working out-of-state who are interested in doing pro bono work locally, but would lose their MCLE exemption because our Rule is limited to California programs.

This agenda item brings a proposed amendment to MCLE Rule 2.54 back from public comment. The amendment would enable out-of-state attorneys working with a federal government agency to do local volunteer work without losing their MCLE exemption by adding legal aid entities outside California. The proposed new language would cover similarly-situated legal aid programs in other states that are funded either by their jurisdiction's IOLTA program or by the Legal Services Corporation or the Older Americans Act. The proposed Rule, as amended, would read:

- (B) Members whom this rule exempts by reason of their employment with the State of California or the United States government may provide pro bono legal services through a [\[Insert text begin\] California \[Insert text end\]](#) qualified legal services project or a qualified support center¹, [\[Insert text begin\] or through a legal services project or support center that primarily provides legal services without charge to indigent persons in another jurisdiction and is funded by the Legal Services Corporation or the Older Americans Act² or receives funding administered by the jurisdiction's interest on lawyers trust accounts program. \[Insert text end\]](#)

DISCUSSION

The U.S. Department of Justice has recently increased efforts to encourage their attorneys to do pro bono work. [Please see the U.S. Department of Justice pro bono policy at the link included below, or the attached policy applicable specifically to the Civil Division of the Department of Justice.] As a result, the State Bar has received requests from attorneys working for the Department of Justice who want to do pro bono work in

¹ Business and Professions Code § 6213

² See Business and Professions Code § 6214(a)

Washington, D.C. However, they cannot comply with these new policies without losing their MCLE exemption. Their colleagues who work in a California office of the Department of Justice are able to do pro bono work locally without losing their MCLE exemption. However, similarly-situated attorneys in an office outside California are restricted because their local legal services programs do not fit within our exemption. This agenda item is intended to update our rule to make it easier for federal government attorneys outside of California to do pro bono work.

When the Board of Governors approved the earlier amendments in 1997 allowing government attorneys to maintain their MCLE exemption when doing pro bono work with IOLTA-funded programs, the determination was made that there were adequate protections in place to ensure that these volunteers would be competent to undertake that legal work. Active Attorneys are covered by the Rules of Professional Conduct requiring that attorneys be competent, have adequate training, and avoid conflicts of interest, etc. Legal aid programs routinely provide training and mentoring for their volunteers because their volunteers normally lack experience with poverty law, or with representing low-income clients. They also normally provide malpractice coverage for their volunteers.

In addition, the funding agencies for these legal aid programs provide oversight and ensure quality control procedures are in place. That is true for our own Legal Services Trust Fund Program, and it is also true for IOLTA programs in other states as well as for the Legal Services Corporation and the Department of Health & Human Services' Administration on Aging, that administers funding under the Older Americans Act.

This minor amendment to California's MCLE rules will help ensure that MCLE policies are effective and consistent for all members of the State Bar wherever situated and will result in additional legal assistance being provided to needy low-income families.

PUBLIC COMMENTS:

The proposed amendment was published for a 30-day public comment period. As of the date of this item, 4^ comments were received in support of the proposal, and are included in Attachment 3. No comments opposed the proposal. Any other comments received by the October 24, 2011 deadline will be made available at the meeting.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

Title 2, Division 4, Chapter 1, State Bar Rule 2.54 [Adopted effective 1/1/2008]

BOARD BOOK IMPACT:

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RECOMMENDATION

It is recommended that the Member Oversight Committee recommend this proposal to the Board for adoption.

PROPOSED BOARD COMMITTEE RESOLUTION:

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

RESOLVED, following consideration of public comments received, that the Member Oversight Committee recommends that the Board adopt the amendment to Rule 2.54 of the State Bar Rules, in the form attached as Attachment A, to be effective immediately.

PROPOSED BOARD RESOLUTION:

Should the Board concur with the recommendation of the Member Oversight Committee, the following resolution would be appropriate:

RESOLVED, following consideration of public comments received and upon the recommendation of the Member Oversight Committee, that the Board hereby adopts the amendment to Rule 2.54 of the State Bar Rules, in the form attached as Attachment A, effective immediately.

ATTACHMENTS:

Attachment A: Proposed Rule 2.54, legislative style, showing modifications proposed to be released for public comment

Attachment B: Civil Division, U.S. Department of Justice, Pro Bono Administrative Leave Policy

Attachment C: Public comments received

LINKS TO RESOURCES:

U.S. Department of Justice pro bono policy
http://www.justice.gov/jmd/ethics/docs/probonopol_pol.htm

For more information about pro bono efforts, please see the State Bar's pro bono resource page, where many of the resources designed to encourage pro bono are located:

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<http://cc.calbar.ca.gov/CommitteesCommissions/StandingCommittees/DeliveryofLegalServices/ProBonoResources.aspx>

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