

AGENDA ITEM

114 OCT 12 2013

DATE: October 12, 2013

TO: Members, Board Committee on Operations
Members, Board of Trustees

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

SUBJECT: Proposed Changes to MCLE Rules - Request for Adoption Following Public Comment

EXECUTIVE SUMMARY

The Member Oversight Committee (“MOC”) conducted a series of public hearings in April and May 2013 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.

At its July 2013 meeting, MOC approved a 45-day public comment period on proposed amendments to the MCLE rules in Title 2 and Title 3 (MCLE member compliance rules and MCLE provider rules). Simultaneously, proposed changes to Rule of Court 9.31, the MCLE Rule of Court, were sent out for public comment for purposes of gathering additional information. 111 public comments were received.

This item will address recommendations regarding the proposed changes that are limited to the State Bar Rules Title 2 and Title 3, which are within the sole discretion of the Board.

Board members with any questions may contact:

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DISCUSSION

The proposed changes to Rule of Court 9.31 regarding Minimum Continuing Legal Education suggested a return to a 36 hour total requirement including 8 hours of legal ethics and/or law practice management, with at least 4 of the 8 hours in ethics. These

proposed changes were sent out for public comment for purposes of gathering additional information.

Staff recommends that this proposal, specifically addressing the number of hours required, including legal ethics and law practice management, be further analyzed, with a detailed proposal developed for MOC and the Board to consider at a future meeting.

For immediate consideration, today's item will address staff's recommendation regarding the proposed changes that are limited to Title 2 and Title 3 within the Rules of the State Bar, which are within the sole discretion of the Board. The original proposals, as sent out for public comment, addressed the following issues:

Bias - Proposal: Expand the scope of bias education to include "the recognition and elimination of bias in the legal profession and society."

Substance Abuse - Proposal: Create a requirement called "competence issues" to replace "prevention, detection, and treatment of substance abuse or mental illness."

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

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

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.

PUBLIC COMMENT

The proposed revision to the MCLE Rules in Title 2 and Title 3 was published on the State Bar's website for a 45-day comment period ending on September 5, 2013. As a supplement to normal publication of the public comment posting, the CalBar Journal featured an article on the proposed MCLE program revisions, an email was sent inviting comments from providers notifying them of the changes to Title 3, and further communications were sent to the local bars welcoming comment.

111 public comments were received. Many comments referred to the increase in the number of MCLE hours, reflected in the Rule of Court 9.31, which we are not addressing in this agenda item.

Comments addressing proposed revisions within Title 2 and Title 3 are addressed below and sorted as they relate to each proposal. (A detailed summary of all comments is provided as Attachment C).

MCLE Attorney Requirements

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 (Attachment A).

Some comments received supported the proposed revision, others wanted to increase the requirement and others wanted it eliminated completely. Staff suggests that the expansion of the Bar’s definition for bias education will allow for a variety of courses on this subject.

One comment asked that we remove the word “physical” from the term “physical disability” which is included among the protected classes listed in Rule 2.72. This is not intended to be an exhaustive list of protected classes; it is inclusive but not limited to the areas listed.

At this time staff feels that there is no need to make a further substantive change and recommends moving forward with the original proposal.

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 (Attachments A and B).

While some were in favor of this change, some others did not want to expand the substance abuse requirement for fear of diluting the area of focus. Many others wanted it completely eliminated.

The goal of the expanded “competence issues” is not to dilute the requirement, but expand the areas of discussion. Under the broader requirement, it is true that it would be possible for a lawyer to go throughout their entire career without taking a course specifically in substance abuse (Comment #107). The proposal’s intent is to accommodate the desire for similar types of awareness education without creating a separate requirement.

One comment of interest requested education on how to identify fellow attorneys with substance abuse issues and what attorneys should do to protect clients and their duty to report to the Bar or others.

Another comment suggested a change to the wording to “impairs a member’s ability to competently perform legal services.” The proposed wording deliberately reflects the California Rules of Professional Conduct, which defines “competence”.

At this time staff feels that there is no need to make a further substantive change and recommends moving forward with the original proposal.

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 (Attachment B).

In addition, the proposal would establish a process for filing a complaint about a provider. The State Bar does not intervene in disputes between a provider and a member. Complaints about a provider, however, can be submitted to the State Bar and 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.

Comments were received concerning the potential cost burden of the MCLE Activity Auditors on providers. Staff anticipates some financial impact from the use of MCLE Activity Auditors beyond the scope of what has been done in the past, but it would most likely not be substantial. (Note: There may indeed be a need to increase provider certification fees, but any proposed increase would be presented to the Board at a later date for approval.)

In addition, some providers expressed concern regarding the sharing of privileged information that may be presented during MCLE programs (particularly in-house programs). Staff understands and appreciates the potential conflict issues and controls will be included in detailed Audit guidelines to be developed, which need not be a part of Title 3.

Staff recommends moving forward with the original proposal.

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 one hour but not for programs and classes of one hour and less. The proposed change would require all MCLE activities to provide relevant and substantive written materials for each activity offered regardless of program length. The proposed change is included in Title 2 and Title 3 of the State Bar Rules (Attachments A and B).

A significant number of convincing comments were received from providers, which described valuable educational programs that are less than one hour in length. According to those who commented, obtaining and providing written materials for many of these programs would not be possible (or not particularly helpful). The new requirement, as originally proposed, could possibly result in the reduction of the availability of these often very worthy programs. Since the vast majority of MCLE education is an hour or more in length, staff suggests a compromise to the original proposal that was sent out for public comment, and recommends instead that programs that are one hour or more in length require written materials. This should still raise the current standard, but would allow providers to provide MCLE credit for courses that are under one hour in length without providing written materials.

Therefore, staff recommends a change to the language in Rules 2.52 (D) and 3.601 (D), which is illustrated in legislative style in Attachments A and B, and if approved, would then read as follows:

“If the activity lasts one hour or more, the provider must make substantive written materials relevant to the MCLE activity available either before or during the activity. Any materials provided online must remain online for at least thirty calendar days following the MCLE activity.”

Staff believes that an additional period of public comment is not needed because the modification is reasonably implicit; thus, another period of public comment is not being recommended. (State Bar rule 1.10(b)(2) states that public comment is not needed if the Board deems a modification of a proposal is reasonably implicit in the proposal.)

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 (Attachments A and B).

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

Some comments received from providers referred to the cost burden associated with verifying in person attendance. The inclusion of the definitions in the rules does not create a substantive change to the current requirement or expectation of providers. The definitions are included in order to provide clarity.

Staff recommends moving forward with the original proposal.

ISSUE

Whether to approve proposed amendments to State Bar MCLE rules in Title 2 and Title 3 (MCLE member compliance rules and MCLE provider rules).

Whether to refer the proposed changes to Rule of Court 9.31 to staff for further analysis and development of a proposal for consideration by MOC and the Board at a future meeting.

EFFECTIVE DATE OF PROPOSAL

If the Board of Trustees approves the proposed amendments to Title 2 and Title 3 of the State Bar Rules, the rule changes would become effective July 1, 2014.

FISCAL / PERSONNEL IMPACT

There will be some financial impact on the use of MCLE Activity Auditors beyond the scope of what has been done in the past, but it is not expected to be substantial. If the proposed amendments are adopted by the Board, an implementation plan, which will include an analysis of the cost of administering the program under the amended rules, will be prepared. If it appears that a fee increase is needed to cover the costs associated with administering the program, a recommendation to adjust the fees charged for provider certification will be prepared for review by the Planning, Program Development & Budget and the Board at a future meeting,

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 Operations approve the proposed changes to Rules of the State Bar, Title 2, Div. 4 and Title 3, Div. 5.

Staff recommends that the Board Committee on Operations refer the proposed changes to Rule of Court 9.31 to staff for further analysis and development of a proposal for consideration by the Member Oversight Committee and the Board of Trustees at a future meeting.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Board Committee on Operations agree with the above recommendations, the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of the comments received, that the Board Committee on Operations recommends that the Board of Trustees approve the proposed revisions to the Rules of the State Bar, Title 2, Div. 4, in the form attached as Attachment A, effective July 1, 2014; and it is

FURTHER RESOLVED, following publication for comment and consideration of the comments received, that the Board Committee on Operations recommends that the Board of Trustees approve the proposed revisions to the Rules of the State Bar, Title 3, Div. 5, in the form attached as Attachment B, effective July 1, 2014; and it is

FURTHER RESOLVED, that the Board Committee on Operations recommends that the Board of Trustees refer the proposed changes to Rule of Court 9.31 to staff for further analysis and development of a proposal for consideration by the Member Oversight Committee and the Board of Trustees at a future meeting.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board of Trustees concur with the Board Committee on Operations recommendation, the following resolutions would be in order:

RESOLVED, following publication for comment and consideration of the comments received, and upon recommendation of the Board Committee on Operations, that the Board of Trustees hereby approves the proposed revisions to the Rules of the State Bar, Title 2, Div. 4, in the form attached as Attachment A, effective July 1, 2014; and it is

FURTHER RESOLVED, following publication for comment and consideration of the comments received, and upon recommendation of the Board Committee on Operations, that the Board of Trustees hereby approves the proposed revisions to the Rules of the State Bar, Title 3, Div. 5, in the form attached as Attachment B, effective July 1, 2014; and it is

FURTHER RESOLVED, that upon recommendation of the Board Committee on Operations the Board of Trustees hereby refers the proposed changes to Rule of Court 9.31 to staff for further analysis and development of a proposal for consideration by the Member Oversight Committee and the Board of Trustees at a future meeting.

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: Public Comment Summary