

AGENDA ITEM

NOVEMBER 2016

DATE: November 1, 2016

TO: Members, Admissions and Education Committee

FROM: Saul Bercovitch, Office of General Counsel

SUBJECT: Consistency Project –
Proposed amendments to the State Bar rules regarding 1) member record;
2) minimum continuing legal education; and 3) providers of continuing
education services – request to release for public comment

EXECUTIVE SUMMARY

The Office of General Counsel has reviewed all State Bar Rules to determine whether there are any material inconsistencies with the related statutes and Rules of Court. This Agenda Item contains proposed Rule amendments to remedy inconsistencies in State Bar Rules regarding 1) member record; 2) minimum continuing legal education; and 3) providers of continuing education services. It requests that the proposed amendments be released for a 45-day public comment period.

BACKGROUND

The Office of General Counsel has reviewed all of the State Bar Rules to determine whether there are any material inconsistencies with the related statutes and Rules of Court. This Agenda Item contains proposed amendments to State Bar Rules with inconsistencies in three areas relevant to Admissions and Education.

DISCUSSION

For each State Bar Rule addressed herein, the discussion below 1) quotes the relevant language of the related statute and/or Rule of Court; 2) quotes the relevant language of the State Bar Rule; 3) identifies the inconsistency; and 4) recommends a solution to resolve the inconsistency.

1. Member Record (Title 2, Division 1, Rule 2.2)

Business and Professions Code section 6002.1 states, in part: ¹

- (a) Official member records include: . . .
- (3) any other jurisdictions in which the member is admitted and dates of his or her admission.

California Rules of Court, rule 9.6, reiterates the requirements of section 6002.1, as well as section 6064 (the admission of the applicant as an attorney at law in all the courts of this state). That rule states that official membership records:

must include the information specified in Business and Professions Code section 6002.1 and 6064 and other information as directed by the Supreme Court.

Rule 2.2 covers the public information that must be contained in a member's record. That rule states, in part:

A member record contains public information, including the following: . . .
(F) places and dates of admission in other jurisdictions before admission in California;

Inconsistency

Section 6002.1(a)(3) provides that the official membership records include any other jurisdictions in which the member is admitted but the State Bar Rule applies only to admission in other jurisdictions before admission in California.

The rule and statute should be made consistent by deleting "before admission in California" from the rule. This proposed amendment would, as a practical matter, also conform the rule to actual practice. The State Bar website, under "California Attorney Mandatory Reporting Requirements" has a section on Membership Updates, which says:

Additional jurisdictions
Attorneys are required to notify the State Bar if they are admitted to practice law or have been disciplined in another jurisdiction, or by any licensing agency.
Additional Jurisdiction Reporting. Please email or fax the date of admittance and what jurisdiction to: msc@calbar.ca.gov or fax to 415-538-2576.

On its face, notice of this requirement applies to admission in other jurisdiction both before and after admission in California.

¹ All Section references throughout are to the Business and Professions Code.

Proposed amendment

As proposed to be amended, State Bar Rule 2.2 would provide, in relevant part:

A member record contains public information, including the following: . . .

(F) places and dates of admission in any other jurisdictions ~~before admission in California~~;

2. Minimum Continuing Legal Education (Title 2, Division 4, Rules 2.54(A)(3) and (A)(4))

Section 6070(c) provides the following MCLE exemption for state employees:

Full-time employees of the State of California, acting within the scope of their employment, shall be exempt from the provisions of this section.

Rule 2.54(A)(3) provides the following MCLE exemption for state employees:

those employed full-time by the State of California as attorneys or administrative law judges on a permanent or probationary basis, regardless of their working hours, who do not otherwise practice law;

California Rules of Court, rule 9.31(c), provides the following MCLE exemption for federal employees:

full-time employee of the United States Government, its departments, agencies, and public corporations, acting within the scope of his or her employment.

Rule 2.54(A)(4) provides the following MCLE exemption federal employees:

those employed full-time by the United States government as attorneys or administrative law judges on a permanent or probationary basis, regardless of their working hours, who do not otherwise practice law.

Inconsistencies

Rule 2.54(A)(3) is inconsistent with the statute and Rule 2.54(A)(4) is inconsistent with the rule of court for the same reason. The statute and rule of court provide an exemption for all full-time employees, but the State Bar rule restricts that exemption to those who are employed as attorneys or administrative law judges.

Rules 2.54(A)(3) and (A)(4) have been the subject of some confusion in the past. The State Bar website explains these exemptions in the MCLE FAQs as follows:

What if my job title is not “attorney” or “administrative law judge”?

Answer: For purposes of 2.54(A)(3) and 2.54(A)(4), attorneys are Exempt who are required by The State Bar of California to maintain 'Active' membership status as a result of the duties they are required to perform by virtue of their employment with the State of California or the United States government.
Example of those Exempt: law clerks

The current situation seems more confusing than necessary. The statute and rule of court cover full-time employees. The State Bar Rule, on its face, adds if "employed as attorneys or administrative law judges" but the website says the attorney does not need to be employed as an attorney or administrative law judge, as long as he or she is required to maintain "active" status (for example, a law clerk). But attorneys who are not active are not subject to the MCLE requirements, so exemptions are irrelevant for those who are inactive. As a practical matter, therefore, the language in Rules 2.54(A)(3) and 2.54(A)(4) is currently interpreted in a way that is not inconsistent with the statute or rule of court. The situation should all be clarified, simplified, and made consistent with the language of the statute and rule of court by amending Rules 2.54(A)(3) and 2.54(A)(4) to delete the statement that full-time employees be employed "as attorneys or administrative law judges."

Proposed amendment

As proposed to be amended, State Bar Rules 2.54(A)(3) and (A)(4) would provide:

(A) The following active members are exempt from MCLE requirements, provided they claim the exemption in their assigned compliance periods using My State Bar Profile online or an MCLE Compliance Form:

- (1) officers and elected officials of the State of California;
- (2) full-time professors at law schools accredited by the State Bar of California or the American Bar Association;
- (3) those employed full-time by the State of California ~~as attorneys or administrative law judges~~ on a permanent or probationary basis, regardless of their working hours, who do not otherwise practice law; and
- (4) those employed full-time by the United States government ~~as attorneys or administrative law judges~~ on a permanent or probationary basis, regardless of their working hours, who do not otherwise practice law.

3. Providers of Continuing Education Services (Title 3, Division 5, Chapter 1, Rule 3.604)

Section 6070(b) states, with respect to certification of approved MCLE providers:

The certification may be revoked only by majority vote of the board, after notice and hearing, and for good cause shown.

Rule 3.604 provides

The State Bar may suspend or revoke a provider's approval at any time for failure to comply with these rules or the terms of any applicable State Bar agreement.

Inconsistencies

The rule is inconsistent with the statute because:

- (1) The statute refers only to revocation, while the rule gives the State Bar the power to suspend or revoke a provider's approval.
- (2) The statute states that certification may be revoked only by majority vote of the board, after notice and hearing, and for good cause shown, while the rule states that the MCLE provider approval can be revoked at any time and does not provide for majority vote of the board, after notice and hearing, and for good cause shown.

Proposed amendment

As proposed to be amended, State Bar Rule 3.604 would provide:

The State Bar may ~~suspend or~~ revoke a provider's approval ~~at any time~~ for failure to comply with these rules or the terms of any applicable State Bar agreement only by majority vote of the board, after notice and hearing, and for good cause shown.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None. This agenda item only requests authorization to release for public comment. A Board decision to adopt a rule amendment would be the subject of a separate agenda item.

BOARD BOOK IMPACT

None. This agenda item only requests authorization to release for public comment. A Board decision to adopt a rule amendment would be the subject of a separate agenda item.

BOARD COMMITTEE RECOMMENDATIONS

It is recommended that the Admissions and Education Committee authorize the release of the proposed amendments to the State Bar rules regarding 1) member record; 2) minimum continuing legal education; and 3) providers of continuing education services for a 45-day public comment period, as set forth in Attachment A hereto. If the Board Committee agrees, it is recommended that the Board Committee approve the following resolution:

RESOLVED, that the Admissions and Education Committee authorizes staff to release proposed amendments to the State Bar Rules regarding 1) member record; 2) minimum continuing legal education; and 3) providers of continuing education services for a 45-day public comment period; 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.

ATTACHMENT LIST

- A.** Proposed amendments to the State Bar rules regarding 1) member record; 2) minimum continuing legal education; and 3) providers of continuing education services.