

AGENDA ITEM

132 MARCH 2017

DATE: February 23, 2017

TO: Members, Admissions and Education Committee
Members, Board of Trustees

FROM: Saul Bercovitch, Office of General Counsel

SUBJECT: Consistency Project –
Proposed adoption of amendments to the State Bar rules regarding 1) member record; 2) minimum continuing legal education; and 3) providers of continuing education services – return from 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. As part of that effort, on November 17, 2016, the Admissions and Education Committee authorized staff to release for a 45-day public comment period proposed amendments to the State Bar rules regarding (1) member records; (2) minimum continuing legal education; and (3) providers of continuing education services. This Agenda Item addresses the comments received and recommends adoption of the proposed amendments, as released for public comment.

DISCUSSION

A. Proposed amendments

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

Business and Professions Code section 6002.1(a)(3) provides that the official membership records include any other jurisdictions in which the member is admitted, but State Bar Rule 2.2 (F) requires that a member's record contain public information, including places and dates of admission in other jurisdictions before admission in California. Rule 2.2 and the Business and Professions Code should be made consistent by deleting "before admission in California" from the rule, and by adding "any" before the word jurisdiction. The proposed amendment would, as a practical matter, conform the rule to actual State Bar practice.

The proposed amendment to State Bar Rule 2.2, as released for public comment and recommended for adoption, 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))

State Bar Rule 2.54(A)(3) is inconsistent with Business and Professions Code section 6070(c) and State Bar Rule 2.54(A)(4) is inconsistent with California Rules of Court, rule 9.31(c), for the same reason. The statute and rule of court provide an MCLE 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 State Bar Rules should, however, be clarified 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 must be employed “as attorneys or administrative law judges.”

The proposed amendment to State Bar Rules 2.54(A)(3) and (A)(4), as released for public comment and recommended for adoption, 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)

State Bar Rule 3.604, which covers certification of approved MCLE providers, is inconsistent with Business and Professions Code section 6070(b) because:

- (1) The statute refers only to revocation of a provider's certification, 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.

The proposed amendment to State Bar Rules 3.604, as released for public comment and recommended for adoption, 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.

B. Public comments received on the proposed amendments

The State Bar received the following three comments on the proposed amendments to the State Bar Rules.

One comment said:

I propose that each attorney send their extended education credits as each attorney completes their individual studies throughout their 3-year renewal terms so that the State Bar can review them as needed and not have to conduct audits.

The current audit system places attorney's in a bind should they lose some of their MCLE records or forget to keep track of them and lessens the discipline factor as well.

Just a thought!

Two separate comments from the same individual said:

I do not believe state employees or attorneys should be exempt from continuing education under MCLE Rules. Other than the usual political pull, there is no logical rational for this exemption. If all other lawyers have to comply, certainly state personnel otherwise subject to continuing education should get "continuing education." We have more then 13 State Bar employees being paid over \$200,000 per year and we have all state employees exempt from MCLE. Res Ipsa Loquitor! REPULSIVE.

Simple rule: All active licensed attorneys in California should be subject to MCLE Rules. Get rid of the lobbyists within or without.

None of the comments directly address the proposed amendments, so the comments should have no impact on the proposed amendments to the State Bar rules, as presented.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title 2, Division 1, Rule 2.2(F)
Title 2, Division 4, Rule 2.54(A)(3) and (A)(4)
Title 3, Division 5, Chapter 1, Rule 3.604

BOARD BOOK IMPACT

None.

BOARD COMMITTEE RECOMMENDATIONS

It is recommended that the Admissions and Education Committee recommend that the Board of Trustees adopt amended State Bar rules regarding (1) member records; (2) minimum continuing legal education; and (3) providers of continuing education services, as released for public comment. If the Admissions and Education Committee agrees, the following resolution is recommended:

RESOLVED, that the Board of Trustees, following consideration of the public comments received, hereby adopts amended State Bar Rules regarding (1) member records; (2) minimum continuing legal education; and (3) providers of continuing education, as contained in Attachment A hereto.

ATTACHMENT LIST

- A. Amended State Bar rules regarding 1) member records; 2) minimum continuing legal education; and 3) providers of continuing education services.