

OPEN SESSION

AGENDA ITEM

50-1 (1) OCTOBER 2017

DATE: October 6, 2017

TO: Members, Board of Trustees

FROM: Kevin Harper, Interim Chief Financial Officer

SUBJECT: Executive Director Three-Year Contract

EXECUTIVE SUMMARY

The Board is asked to approve a three-year contract with Leah Wilson, Executive Director, for the period September 7, 2017 to September 7, 2020 as negotiated by personnel liaisons Jim Fox and Mark Broughton and recommended by the Ad Hoc Transition Committee.

On September 7, 2017, the Board of Trustees appointed Leah Wilson to serve as Executive Director (ED). She has been serving in that capacity since that time pursuant to her existing Chief Operating Officer employment agreement. The Board's approval of Ms. Wilson's Executive Director contract is now sought.

The compensation provisions are as follows:

| Provision | Amount/Source | Comment |
|---|----------------------|--|
| Salary | \$267,500 | Same as prior ED |
| Health Benefits | Per Exec Rules | Same as other State Bar Executives |
| Retirement Benefits | Per Exec Rules | Same as other State Bar Executives |
| Maximum Age Allowable Deferred Compensation | \$18,000 | Same as prior ED |
| Vehicle Allowance | \$625/month | NEW. Substitutes for mileage and parking reimbursement |

CPS HR Consulting, Inc. (CPS) completed its classification and compensation analysis of the State Bar earlier this year. That study included a specific review of State Bar salaries in relation to those paid by comparable public sector agencies. Seventeen comparator agencies were selected for the CPS analysis, 14 of which were identified by CPS and the Bar's union.

With respect to Executive Director compensation, CPS found that, on a salary basis, the State Bar Executive Director compensation of \$267,500 is 8.17 percent below the market median; on a total compensation basis, 1.23 percent above. See Attachment A for the CPS Executive Director compensation analysis¹.

If this position is compared to State Executive service alone, it is not under-market, however given the differences between the State executive branch and the State Bar, CPS concluded that it is not an appropriate *sole* comparator for the State Bar. First, the State Bar is a judicial branch agency. As a result, other entities, including the Judicial Council, were necessarily included in a State Bar labor market salary study. In addition, according to CPS, the State Bar encompasses a multitude of extremely diverse functional areas including prosecution, adjudication, probation supervision, victim restitution, licensing and admissions, grant making, real property management, and compliance auditing. With this in mind, CPS selected the state's Government Operations Department as the most appropriate executive branch comparator. It should be noted that salaries for leadership positions in state Executive Branch agencies vary drastically, resulting in a high degree of "price" sensitivity based on the particular comparator agency chosen.

Ultimately, and as noted above, the vast majority of the 17 comparator agencies used by CPS in its analysis were identified in partnership with the State Bar's union. These same agencies were used for compensation benchmarking for all State Bar positions, including the Executive Director.

Other contractual benefits provided mirror those provided to other Executive Staff or prior Executive Directors with the exception of the proposed vehicle allowance, which is expected to offer cost effectiveness for the State Bar.

On a total compensation basis, the proposed Executive Director contract reflects a 10 percent reduction from the compensation package afforded to the previous State Bar ED.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: Successfully transition to the "new State Bar" – an agency focused on public protection, regulating the legal profession, and promoting access to justice.

BOARD RECOMMENDATIONS

It is recommends that the Board of Trustees approve the following resolution:

¹ Note that this analysis was conducted based on the prior Executive Director's contract; health and other benefits provided under that contract exceed those proposed for the current Executive Director.

RESOLVED, that the Board of Trustees approve a three-year contract with Leah Wilson, Executive Director, for the period September 7, 2017 to September 7, 2020.

ATTACHMENT(S) LIST

- A.** CPS Executive Director data sheets

Attachment A

Executive Salary Comparisons

| Surveyed Agency | Classification Title | Monthly Min. | Monthly Max. |
|---|----------------------------------|--------------|--------------|
| State Bar of California | Executive Director (CEO) | | \$22,292 |
| Alameda County Superior Court | CEO | | \$18,086 |
| California Judicial Council | Administrative Director | | \$24,074 |
| City and County of San Francisco | City Administrator | | |
| City of Anaheim | City Manager | | \$24,892 |
| City of Long Beach | City Manager | | \$22,496 |
| City of Los Angeles | CAO | | \$24,965 |
| City of Oakland | City Administrator | | \$27,552 |
| City of San Jose | City Manager | | \$27,318 |
| County of Alameda | County Administrator | | \$27,238 |
| County of Los Angeles | CEO | | \$39,806 |
| County of Orange | CEO | | \$20,671 |
| County of Santa Clara | County Executive | | \$29,952 |
| Los Angeles County Superior Court | Court Executive Officer | | \$29,129 |
| Los Angeles Unified School District | COO | | \$18,952 |
| San Francisco County Superior Court | CEO | | \$18,616 |
| State of California, Executive Branch | Secretary, Government Operations | | \$16,822 |
| Economic Research Institute - Los Angeles | CEO | | \$22,240 |
| Economic Research Institute - San Francisco | CEO | | \$24,113 |

| | | |
|----------------------------------|--|----------|
| Base Salary Median | | \$24,113 |
| Base Salary Mean | | \$24,525 |
| Percentage Above or Below Median | | -8.17% |
| Percentage Above or Below Mean | | -10.02% |

2017 State Bar of California

Total Matches: 17

Attachment A

Executive Compensation Comparisons

| Surveyed Agency | Classification Title | Monthly Min. | Monthly Max. | Auto | Deferred Comp | Retirement Pickup | Educational Incentive | Cafeteria Plan | Health | Dental | Vision | Transit Subsidy | Other Health | Retirement | Social Security | Monthly Total Compensation |
|---|----------------------------------|--------------|--------------|-------|---------------|-------------------|-----------------------|----------------|---------|--------|--------|-----------------|--------------|------------|-----------------|----------------------------|
| State Bar of California | Executive Director (CEO) | | \$22,292 | | \$2,000 | | | \$3,000 | | | | | | \$1,449 | \$936 | \$29,677 |
| Alameda County Superior Court | CEO | | \$18,086 | | Yes | | \$800 | \$1,500 | \$1,529 | \$264 | | | | \$5,381 | \$868 | \$28,428 |
| California Judicial Council | Administrative Director | | \$24,074 | | | | | | | | | | | | | |
| City and County of San Francisco | City Administrator | | | | | | | | | | | | | | | |
| City of Anaheim | City Manager | | \$24,892 | \$650 | | | | | \$1,388 | \$56 | | \$29 | | \$6,564 | \$361 | \$33,940 |
| City of Long Beach | City Manager | | \$22,496 | | | | | | \$1,436 | \$121 | \$14 | | | \$4,135 | \$938 | \$29,140 |
| City of Los Angeles | CAO | | \$24,965 | | | | | | | | | | | | | \$24,965 |
| City of Oakland | City Administrator | | \$27,552 | | | | | | | | | | | | | |
| City of San Jose | City Manager | | \$27,318 | Yes | \$480 | | | | \$1,575 | \$144 | | | | \$1,557 | \$396 | \$31,471 |
| County of Alameda | County Administrator | | \$27,238 | | | | | | | | | | | | | |
| County of Los Angeles | CEO | | \$39,806 | | | | | | | | | | | | | \$39,806 |
| County of Orange | CEO | | \$20,671 | | \$277 | | | | \$1,229 | | | | | \$7,007 | \$300 | \$29,485 |
| County of Santa Clara | County Executive | | \$29,952 | | | | | | | | | | | | | |
| Los Angeles County Superior Court | Court Executive Officer | | \$29,129 | | | | | | | | | | | | | |
| Los Angeles Unified School District | COO | | \$18,952 | | | | | | | | | | | | | |
| San Francisco County Superior Court | CEO | | \$18,616 | | | | | | | | | | | | | |
| State of California, Executive Branch | Secretary, Government Operations | | \$16,822 | | | | | \$1,572 | | | | \$65 | | \$4,231 | \$1,287 | \$23,977 |
| Economic Research Institute - Los Angeles | CEO | | \$22,240 | | | | | | | | | | | | | |
| Economic Research Institute - San Francisco | CEO | | \$24,113 | | | | | | | | | | | | | |

| | | |
|----------------------------------|--|----------|
| Base Salary Median | | \$24,113 |
| Base Salary Mean | | \$24,525 |
| Percentage Above or Below Median | | -8.17% |
| Percentage Above or Below Mean | | -10.02% |

| | |
|----------------------------------|----------|
| Total Compensation Median | \$29,312 |
| Total Compensation Mean | \$30,151 |
| Percentage Above or Below Median | 1.23% |
| Percentage Above or Below Mean | -1.60% |

2017 State Bar of California

Total Matches: 17

OPEN SESSION

AGENDA ITEM

50-1 (2) OCTOBER 2017

DATE: September 26, 2017

TO: Members, Board of Trustees

FROM: Randall Difuntorum, Program Manager, Professional Competence

SUBJECT: Ten-Hour New Admittee Continuing Legal Education – E-Learning Vendor Contract Approval

EXECUTIVE SUMMARY

Under Board Policy, Tab 4.3, Article 1, Section 2 of the Board Book, agreements for consulting services, capital equipment, or technology purchases with anticipated expenditures exceeding \$75,000 must be specifically approved by the Board. In accordance with this policy, Board approval is requested for the State Bar's procurement of an e-learning vendor to consult with the State Bar and to develop ten hours of continuing legal education courses that will implement the State Bar's new attorney training program.

BACKGROUND

The "New Attorney Training Program," under Rule 2.53(D) of Title 2, Division 4, Chapter 1 of the Rules of the State Bar, becomes operative on February 1, 2018, and provides that: "A new member is required to complete a State Bar New Attorney Training program during the first year of admission which can also be applied to the regular MCLE requirement." Detailed background on staff's work to develop a curriculum and provide for timely implementation is set forth in Board Agenda Item 703 September 2017 (see Attachment 1).

DISCUSSION

At the Board's meeting on September 6, 2017 a budget amendment of \$250,000 to fund the ten-hour new attorney training project was approved subject to review and approval by the Special Master. The Special Master subsequently reviewed and approved the budget amendment and the funds have been allocated for this expenditure.

A Request for Proposals ("RFP") for an e-learning developer was issued with a deadline of September 1, 2017. Seven bids were submitted and reviewed by the staff working group. After interviewing five of the vendors, the staff working group selected InfoPro Learning and issued a Notice of Intent to Award which is subject to Board of Trustees final approval. InfoPro Learning is a top provider in the field of e-learning with over twenty-three years of experience and has developed hundreds of training programs for clients such as Verizon Communications, Incorporated, FranklinCovey Company, and the American Academy of Pediatrics. InfoPro

Learning will perform instructional design and development services in collaboration with State Bar staff and subject matter experts to transform educational content into engaging educational experiences. The ten hours will be formatted into multiple media types and will: (1) require that users understand the material in order to advance through the course, (2) require users to complete the entire course regardless of the amount of time it takes; and (3) allow the course to be completed in discrete segments, in order to accommodate new attorneys' schedules.

A contract to retain the services of InfoPro Learning has been prepared with a cap of \$218,570 for all compensation and expenses. Staff recommends that the Board of Trustees approve this agreement.

FISCAL/PERSONNEL IMPACT

The agreement for the services of an e-learning vendor is a budgeted expenditure. State Bar staff will serve as the subject matter experts for some segments of the curriculum. For other segments, expert consultants will be retained. The total cost of the "New Attorney Training Program" is not expected to exceed \$250,000.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: d. Develop and implement new attorney MCLE requirements and evaluate their impact and effectiveness.

BOARD COMMITTEE RECOMMENDATIONS

Should the Board of Trustees agree with the above recommendation, adoption of the following resolution would be in order.

RESOLVED, that the Board of Trustees approve the e-learning services agreement with InfoPro Learning, with a cap of \$218,570 for all compensation and expenditures; and it is

FURTHER RESOLVED, that the total cost of the "New Attorney Training Program" is not expected to exceed \$250,000.

ATTACHMENT(S) LIST

A. Board Agenda Item 703 September 2017

AGENDA ITEM

703 SEPTEMBER 2017

DATE: August 31, 2017

TO: Members, Board of Trustees

FROM: Randall Difuntorum, Program Manager, Professional Competence

SUBJECT: Update and Funding Request: Ten-Hour New Admittee Continuing Legal Education

EXECUTIVE SUMMARY

At its September 12, 2016, meeting, the Board of Trustees ("Board") adopted rules recommended by the Task Force on Admissions Regulation Reform (TFARR) to require ten hours of mandatory continuing legal education for new admittees. A Working Group was established to specify the topics of study and oversee the development of the content. This agenda item provides an update on the Working Group's activities. In addition, this agenda item seeks authorization for a project budget of up to \$250,000. Funding will be used to finalize content development and to secure a full-service multimedia e-learning designer and developer to produce interactive education modules in a Shareable Content Object Reference Model ("SCORM") format for engagement and tracking purposes. Funding may also be used to retain subject matter experts as consultants to work closely with the e-learning designer. Given the Special Master's broad authority over significant aspects of 2017 State Bar revenue and expenditures, his approval for project funding will be sought subsequent to Board authorization and prior to any expenditure of funds.

BACKGROUND

The "New Attorney Training Program," under Rule 2.53(D) of Title 2, Division 4, Chapter 1 of the Rules of the State Bar, becomes operative on February 1, 2018, and provides that: "A new member is required to complete a State Bar New Attorney Training program during the first year of admission which can also be applied to the regular MCLE requirement."

A Working Group was established to guide the development of the curriculum. The Working Group is comprised of staff from the Offices of the Chief Trial Counsel, Member Records and Compliance, Professional Competence, and Research and Institutional Accountability. The Working Group also includes representatives from the TFARR Working Group C, Committee of Bar Examiners, California Young Lawyers Association, and Board of Trustees' Committee on Admissions and Education. Also participating is a professional mentoring consultant and a liaison from the Supreme Court staff.¹

¹ A roster of the Working Group members is provided at Attachment A.

The Working Group held an orientation webinar on June 12, 2017, and had its first working meeting on July 17, 2017. A second meeting was held on August 30, 2017.

DISCUSSION

There are three main components of the Working Group's activities: (1) development of a curriculum of course topics for the ten hours of education, including articulation of course objectives and learning outcomes for each topic; (2) oversight of the implementation of a final education work product in the form of online interactive modules created by an e-learning vendor; and (3) consideration of policy issues including: (a) the coordination of the Working Group's recommendation with the State Bar's Content Validation Study of the bar examination subjects;² and (b) the role of the State Bar as the exclusive provider of the ten hours of education at no cost to the participating new admittees.

1) Development of a Curriculum:

The Working Group is considering the following topics for inclusion in the ten hours of curriculum: legal ethics; basic lawyering skills; competency; elimination of bias; and a possible substantive area of law, such as community property. Consideration of the foregoing topics followed from the Working Group's review of the TFARR report (Phase II, Final Report, Recommendation C); a 2013 National Conference of Bar Examiners Job Analysis Report;³ an O-Net Online Summary Report for attorney job classifications;⁴ research on the MCLE programs most frequently purchased at the State Bar's MCLE online store for legal ethics and lawyer skills; and the 2017 Multistate Bar Examination Subject Matter Outline.⁵

Provided as Attachment B are detailed outlines of recommended legal ethics and basic lawyering skills topics. These outlines are tentative pending study of all other categories of possible topics to include. The selection of legal ethics topics involved the Working Group reviewing the following: (1) the existing State Bar curriculum for Ethics School and Client Trust Accounting School; (2) enforcement data surveying the most common disciplinary complaints for the years 2012 through 2016; (3) Ethics Hotline data regarding the most frequently raised

² The State Bar is currently conducting several studies related to the California Bar Exam. One of these, the Content Validation Study, seeks to determine whether or not the content of the Bar Exam aligns with the knowledge and skills needed by a minimally competent new attorney. The Content Validation Study design included a focus group, held on August 18, 2017, where the specific topic of possible transition of bar examination subjects to the New Attorney Training Program was discussed.

³ Knowledge and General Task Statements from the NCBE Job Analysis Survey (2013) (<http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F55>). This broad-ranging survey of new attorneys was developed by NCBE to gather data on what type of work new lawyers do, as well as what knowledge, skills, and abilities these new lawyers believe they need to carry out their work. NCBE observed that organizations administering licensure examinations must "periodically assess whether what is tested accurately reflects the knowledge and skills that are needed by newly licensed professionals." (*The Bar Examiner*, Volume 82, Number 4, December 2013, at p. 3.)

⁴ Task, Skill, and Knowledge Statements from the O*NET (<https://www.onetonline.org/link/summary/23-1011.00>) The Occupational Information Network (O*NET) is developed under the sponsorship of the U.S. Department of Labor, Employment and Training Administration and the O*NET database, containing hundreds of standardized and occupation-specific descriptors on almost 1,000 occupations covering the entire U.S. economy, is a primary nationwide resource for occupational information. The database, which is available to the public at no cost, is continually updated from input by a broad range of workers in each occupation. (<https://www.onetcenter.org/overview.html>)

⁵ MBE Subject Matter Outline 2017 (<http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F201>)

ethics questions posed by attorneys who were in practice for one year or less; (4) the legal ethics topics identified in the TFARR report (Phase II, Final Report, Recommendation C); and (5) observations offered by the OCTC and Ethics Hotline representatives serving on the Working Group. The tentative estimate is that the legal ethics topics would comprise four to five of the ten hours of education.

The selection of the basic skills topics involved reviewing: (1) the most frequently purchased lawyering skills programs at the State Bar's MCLE online store; (2) consideration of the specific skills identified in the NCBE survey report as having a 98% or more "percent performing" response by the survey respondents; (3) the basic skills topics identified in the TFARR report (Phase II, Final Report, Recommendation C); and (4) the O-Net Online report's sections on skills, abilities and work activities. Staff also reviewed the Board's consideration of the 1992 American Bar Association's Commission on Lawyering Skills Report (a.k.a., the MacCrate Commission Report).⁶

At the Working Group's meeting on August 30, 2017, competency, elimination of bias, and possible substantive law subjects were discussed. With respect to competency, the Working Group considered the content developed by Patrick Krill, a leading authority on addiction and mental health issues, regarding substance abuse and mental health issues in the legal profession, with specific emphasis on the younger attorney. For elimination of bias, the Working Group received input from a former member of the Diversity Pipeline Task Force, the predecessor to the current Council on Access & Fairness. Lastly, as related to any potential substantive law subjects, the Bar Exam Content Validation Study and focus group discussion were discussed. While no final recommendation has been formed by the Working Group on the categories of competency, elimination of bias, or substantive law subjects, staff anticipates that these subjects might comprise two to four hours of the 10 hours of education, if they are included.

2) Oversight of e-Learning Implementation:

A Request for Proposals ("RFP") for an e-learning developer was issued on August 10, 2017.⁷ Proposals are due to the State Bar by the end of Friday, September 1, 2017. Several confirmations of interest and detailed requests for additional information were received immediately after invitations were transmitted. To date, no responsive proposals have been received; this is normal for competitive solicitations.

The selected vendor will perform instructional design and development services in collaboration with State Bar and subject matter experts to transform educational content into engaging educational experiences; a product and industry referred to as "e-learning." In order to engage the target population of new attorneys, who have grown up with modern technology, the ten hours of MCLE content will be formatted into multiple media types and produced to a higher quality than that currently available on the Bar's current CLE hosting platform. The e-learning course will: (1) require users understand the material in order to advance through the course, (2) require users to complete the entire course regardless of the amount of time it takes; and (3) allow the course to be completed in discrete segments, in order to accommodate new attorneys' schedules.

⁶ ABA Section Of Legal Education And Admissions To The Bar, Legal Education And Professional Development – An Educational Continuum (Report Of The Task Force On Law Schools And The Profession: Narrowing The Gap) (1992).

⁷ This RFP is posted on the Bar's website at: <http://www.calbar.ca.gov/About-Us/Jobs-Opportunities/Business-Opportunities>

3) Policy Issues:

One issue discussed by the Working Group was the coordination of the Board's review of the 10-hour curriculum proposal with the pending results of the Content Validation Study of the bar examination. For example, that Study may conclude that there are subjects from the Bar Exam that are appropriate for removal from the examination, and inclusion as one of the subjects in the 10-hour curriculum. For example, if community property is removed from the bar examination then a new admittee MCLE program might be developed on that subject. The program could implement a limited learning objective of alerting new admittees to basic concepts and selected issues that might otherwise go unrecognized.⁸ Similar to a typical bar examination preparation course developed for law graduates who may or may not have taken community property in law school, the limited learning objective of the MCLE module on community property would be different from the learning objective of a comprehensive law school course, but still informative and helpful to a new admittee.

Another issue addressed by the Working Group was the State Bar's role as the exclusive provider of the education at no cost to the participating new admittees. Although this issue was resolved by the Board at the Board's September 16, 2016, meeting, one member of the Working Group expressed the view that other MCLE providers might be willing to develop and present some or all of the 10-hour curriculum and that the State Bar should not miss the opportunity to engage these other providers. Staff explained to the Working Group that the intent of the Bar is to centralize the development and management of the 10-hour curriculum as a matter of quality control of the educational content and efficiency in tracking lawyer compliance.

A third issue being considered by the Working Group is the interactive computer-based nature of the anticipated e-learning product and whether, and if so to what extent, the product can include features that are similar to a testing function. Traditional MCLE does not impose a testing requirement to satisfy completion of a participatory or self-study MCLE program. However, an e-learning product might be able to briefly "test" the participant's understanding of the material being taught by posing questions throughout the course, assessing the answers, and either certifying understanding or constructively addressing the participant's lack of understanding. For example, if a participant answers a question prompt incorrectly, the participant could be directed to an explanation of why their chosen answer was incorrect, and then given subsequent chances to answer the question correctly before proceeding any further in the program.

Funding Request

In July, the Board adopted a budget amendment for the 2017 fiscal year. The report presented to the Board at that time showed that the Bar was projected to spend approximately \$4.9 million less than budgeted, with \$3.3 million of that savings in the General Fund. The budget amendment reallocated \$1.5 million of the General Fund savings to an OCTC space expansion and an Oracle Enterprise Resource Planning system upgrade. Following that amendment, the

⁸ A new admittee working in a public defender's office might not need to possess comprehensive knowledge of community property law but there are circumstances where basic familiarity might be important. For example, asset forfeiture laws in California include an exception for certain property that is held by the defendant as community property. See Health and Safety Code section 11470(e) which provides, in part that: "An interest in a vehicle which may be lawfully driven on the highway with a class C, class M1, or class M2 license, as prescribed in Section 12804.9 of the Vehicle Code, shall not be forfeited under this subdivision if there is a community property interest in the vehicle by a person other than the defendant and the vehicle is the sole class C, class M1, or class M2 vehicle available to the defendant's immediate family."

Bar is still projected to have \$1.8 million in General Fund savings for 2017. This agenda item requests the Board authorize up to \$250,000 of that savings to fund the ten-hour new admittee continuing legal education project.

The Supreme Court authorized an interim special regulatory assessment in November of 2016 following the failure of the Legislature to pass a Bar fee bill. This emergency measure provided funding for the Bar's discipline system and contained certain provisions regarding the funds collected under the assessment. One such provision was the appointment of a Special Master to oversee the disbursement of the funds. The proposed budget amendment in this item may be subject to Special Master approval; his review will be sought prior to any expenditure of funds.

FISCAL/PERSONNEL IMPACT

Reduce General Fund year end savings from \$1.8 million to \$1.55 million.

RULE AMENDMENTS

None

BOARD BOOK IMPACT

None

BOARD GOALS & OBJECTIVES

State Bar's adopted 2017-2022 Strategic Plan Goals and Objectives – Goal 1 Ensure a timely, fair, and appropriately resourced discipline and regulatory system.

BOARD RECOMMENDATION

The Board of Trustees approve the following resolution:

RESOLVED, that, pending Special Master review and approval, the Board of Trustees approve the proposed budget amendment of \$250,000 to fund the ten-hour new admittee MCLE project as described above.

ATTACHMENT(S) LIST

- A.** Roster of Working Group Members
- B.** Outlines of Legal Ethics and Basic Lawyering Skills Topics

Attachment A - Roster of Working Group Members

STATE BAR OF CALIFORNIA NEW ATTORNEY 10-HOUR MCLE WORKING GROUP

WORKING GROUP MEMBERS

Ida Abbott

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Carin Fujisaki

Supreme Court of California

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Legal Ethics Subjects for the 10-Hour New Admittee MCLE Curriculum
Draft Learning Objectives

(Rev. 8-17-17)

1. Attorney-Client Relationship 101

Course Objectives:

Participant will gain an understanding of key considerations in the formation and termination of the attorney-client relationship with an emphasis on the relevant professional obligations. Participant will improve their knowledge of ethical rules and standards regarding formation and termination issues that are common bases for lawyer misconduct.

Learning Outcomes:

- Distinguish between the elements of, and consequences of, express formation and implied-in-fact or putative formation of an attorney-client relationship
- Identify ethical and practical issues in the assessment and selection of potential clients
- Assess specific problem areas, including allocation of authority, limited scope representation, and interactions with officers/employees/constituents of a governmental or corporate client

Course Outline:

A. Formation of the A-C Relationship

- i. Express Relationships, including who is the client?
 - a) Scope of representation and limited scope services
 - b) Formation in private practice, including written fee agreements
 - c) In-house attorney duties to officers, employees and subsidiaries
 - d) Government attorney duties to officers, bodies, employees and stakeholders
 - e) Relationship with corporate promoters and start-ups
 - f) Allocation of authority among lawyer and client
 - g) Prohibited objectives of a representation
 - h) Limiting liability to a client
 - i) Sexual relations with a client
 - j) Willfully appearing for a party without authority as a cause for disbarment or suspension
- ii. Implied-in-Fact/Putative Relationships
 - a) social media example (casual advice to Facebook friends)
 - b) disclaimers and non-representation notices
 - c) disqualification risk
 - d) breach of fiduciary duty liability
 - e) misleading advertising/solicitation as a factor considered
- iii. Client Selection
 - a) Competence Issues
 - Financial ability
 - Time commitment

- Area of law subject matter expertise
- Technology competence
- Personality fit
- Conflicts checking system
- b) Prohibited Discrimination

B. Termination of the A-C Relationship

- i. Tribunal's permission required when appearing before a tribunal
- ii. Client consent to end the A-C relationship (disengagement notices)
- iii. Permissive v. Mandatory termination
- iv. Prohibited unilateral termination/malpractice by abandonment
- v. Duties to client at termination
 - a) Due notice and reasonable steps to avoid prejudice
 - b) Release of client file and client property
 - c) Disbursement of any trust funds
 - d) Refund of any unearned advanced fee payments
- vi. The missing client
- vii. Securing a practice administrator to wind down a law office
- viii. Sale and purchase of a law practice

2. Traps for the Unwary in Communicating with Clients, Opposing Parties, Judicial Officers, Tribunals, Jurors, Witnesses and Others

Course Objectives:

Participant will gain an understanding of the basic requirements and restrictions on various types of communications that occur routinely in the practice of law. Participant will learn to identify circumstances where a lawyer must initiate communications with clients or others and where communications are limited or strictly prohibited.

Learning Outcomes:

- Determine when communications with a client are required including the duties to: keep a client informed about their case; respond to inquiries; provide copies of documents; and convey information provided by opposing counsel and others
- Identify when certain communications are restricted or prohibited including: prohibited ex parte communications with represented parties, judicial officers and others
- Analyze specific problem areas, including communications with: pro se litigants; employees or constituents of a corporate or agency client; and the State Bar

Course Outline:

A. Communication with clients

- i. Willful failure to communicate as a frequent disciplinary complaint
- ii. Keeping a client informed about significant developments
- iii. Promptly responding to a client's reasonable requests for information
- iv. Provision of copies of significant documents to a client
- v. Requirement to inform a client in writing if a lawyer does not have professional liability insurance

Attachment B - Outlines of Legal Ethics and Basic Lawyering Skills Topics

- vi. Communication of settlement offers
- vii. Communication of terms and conditions offered to a criminal defendant
- viii. Communication with an organization as client, including corporations and government agencies

B. Communication with Opposing Parties, Jurors and Witnesses

- i. Prohibited communication with a party represented by counsel
 - a) Disciplinary exposure for both direct and indirect ex parte communications
 - b) Opposing party's permission for, or initiation of, ex parte communications
 - c) Communications when the opposing party is an organization
 - d) Exception for communications with a represented public officer, board, committee or other governmental body
 - e) Exception for communications authorized by law
 - f) Disqualification and exclusion of information as civil remedies for violations
 - g) Prohibited threats of criminal, disciplinary or administrative charges to obtain an advantage in a civil dispute
 - h) Misleading ex parte communications with a person represented by counsel in a separate but related matter as a basis for discipline for moral turpitude and breach of fiduciary duty
- ii. Restrictions on communication with Jurors
 - a) Contact with a member of the venire
 - b) Direct or indirect contact with any juror during trial
 - c) After discharge, communications with a juror that harass or embarrass the juror
 - d) Out of court investigations of a member of the venire or a juror or family members of such persons
 - e) Duty to inform the court about any known improper conduct by a member of the venire or a juror
 - f) Concept of "juror" as inclusive of empanelled, discharged or excused jurors
- iii. Restrictions on communication with witnesses
 - a) Prohibition against advising a witness to leave a jurisdiction for the purpose of being unavailable to a tribunal
 - b) Improper compensation contingent on testimony
 - c) Witness intimidation

C. Communication with Judicial Officers, Tribunals and Others

- i. Duty of candor to a tribunal, including misrepresentation by omission
- ii. Misquoting to a tribunal the language of a book, statute or decision
- iii. Citing to a tribunal a decision that has been overruled or a statute that has been repealed or declared unconstitutional
- iv. In a proceeding before a tribunal, asserting personal knowledge of a fact at issue, except when testifying as a witness (including requirements imposed on attorneys who testify as a witness)
- v. Social media issues, including "friending" judicial officers

Attachment B - Outlines of Legal Ethics and Basic Lawyering Skills Topics

- vi. Duty to maintain respect due to the courts and judicial officers
- vii. Duty to advance no fact prejudicial to the honor or reputation of a party or witness unless required to seek justice
- viii. Duty to cooperate and participate in any disciplinary investigation against the attorney
- ix. Self-reporting duties to the State Bar

3. **The Duty of Confidentiality, the Attorney-Client Privilege and the Work Product Protection Doctrine**

Course Objectives:

Participant will improve their knowledge of attorney-client confidentiality. Participant will learn to identify the limited circumstances where an attorney is permitted to reveal confidential information without first obtaining a client's informed consent.

Learning Outcomes:

- Distinguish between the ethical duty of confidentiality, the evidentiary attorney-client privilege and the work product protection doctrine
- Identify exceptions to confidentiality and the attorney-client privilege
- Analyze specific problem areas, including: permissive disclosures of confidential information necessary to prevent a crime of death or substantial bodily injury; and the handling of inadvertently transmitted confidential information

Course Outline:

A. Duty of Confidentiality

- i. Codified in statute, guidance provided in the rules
- ii. Scope of the duty, including public record information and duties to prospective clients
- iii. Exception for information revealed with the informed consent of the client
- iv. Exception for information revealed to prevent a crime of death or substantial bodily harm
- v. Breach notification
- vi. Revealing confidential information in order to withdraw from a client's representation

B. Attorney-Client Privilege

- i. Comparison with the duty of confidentiality
- ii. The privilege as an evidentiary principle
- iii. Definitions of "lawyer," "client," and "confidential communication" for purposes of the privilege
- iv. Holder of the privilege
- v. Duty to assert the privilege
- vi. Codified exceptions, including the "self-defense" exception and the "joint-client" exception
- vii. The related privilege for information provided by a client of a lawyer referral service

C. Work Product Protection Doctrine

- i. Comparison with the duty of confidentiality and the attorney-client privilege
- ii. Scope of the protection
- iii. Exceptions

D. Inadvertent Transmission of Information

- i. Duties imposed by case law
- ii. Discipline, disqualification, exclusion of information and civil liability

4. Identifying, Avoiding and, When Necessary, Resolving Conflicts of Interests

Course Objectives:

Participant will gain an understanding of the basic concepts of the duty of loyalty and avoidance of adverse representations and interests. Participant will learn to identify the circumstances that require a lawyer to seek a client's or former client's informed written consent to an adverse representation and other conflicts of interests protocols imposed by the rules

Learning Outcomes:

- Using rules and case law principles, identify various circumstances that give rise to a conflict of interest
- Distinguish between conflicts protocols that require informed written consent and those that only require a written disclosure
- Analyze specific problem areas, including: imputation of confidential information and vicarious disqualification; adverse business transactions; and relationships with other lawyers in a case or matter

A. Adverse Representations

- i. Representations adverse to a current client
- ii. Representations adverse to a former client
- iii. Joint or multiple client representations, including aggregate settlements, special standards for adoption matters and concurrent representations of an organization and an officer, employee or constituent of the organization
- iv. Accepting representation of an opposing party in an unrelated case
- v. Accepting payment of fees from a person other than the client
- vi. Definition of "disclosure" for purposes of the conflicts rules
- vii. Definition of "informed written consent" for purposes of the conflict rules
- viii. The substantial relationship test
- ix. California's common law duty of loyalty
- x. Imputation, vicarious disqualification and ethical walls
- xi. Conflicts checks, including special standards for limited legal services
- xii. Special standards for government lawyers and former judicial officers or employees of a tribunal
- xiii. Malpractice, breach of fiduciary duty, and the voiding of an attorney's entitlement to fees when a representation is tainted by a conflict

B. Disclosure of Interests and Relationships

- i. An existing legal, business, financial, professional or personal relationships with a party or witness in the same matter
- ii. A prior legal, business, financial, professional or personal relationships with a party or witness in the same matter
- iii. An existing legal, business, financial, professional or personal relationship with a person or entity that would be affected substantially by the resolution of the matter
- iv. Any legal, business, financial, or professional interest in the subject matter of the representation
- v. Representations where the opposing counsel is the attorney's spouse, parent, child or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the member

5. The Lawyer as a Fiduciary of Funds and Property of Clients and Others, including Misappropriation and Commingling as a Frequent Basis for Lawyer Discipline

Course Objectives:

Participant will gain an understanding of a lawyer's role as a fiduciary in receiving, holding and disbursing the funds and property entrusted by clients and others. Participant will become familiar with basic, practical steps to avoid misappropriation, commingling, and interference with the rights of lienholders.

Learning Outcomes:

- Distinguish between funds that must be held in trust and funds that may be held in trust
- Apply trust account recordkeeping standards adopted by the Board of Trustees and statutory IOLTA requirements
- Analyze specific problem areas, including: disputed funds; non-lawyer signatory/supervision; unclaimed funds; and duties to lienholders

Course Outline:

A. Client Trust Accounting

- i. Misappropriation and comingling as a frequent basis for client complaints and lawyer discipline
- ii. Funds and property regarded as received or held for the benefit of a client, including advances for cost and expenses and distinguished from advance payments of fees
- iii. Duty to segregate from attorney's funds or property (a.k.a., avoiding commingling)
- iv. Duty to label, deposit and keep funds and property safe
- v. Non-lawyer signatories on a client trust account
- vi. Duty to promptly disburse, pay or deliver funds or property
- vii. Proper steps when trust funds or disbursement are in dispute, including interpleader
- viii. Duty to notify a client of the receipt of funds or property
- ix. Duty to maintain records

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- x. Duty to respond to a client's requests for an accounting
- xi. Duty to collect interests for legal services programs (a.k.a., IOLTA)
- xii. Duties arising from unclaimed trust funds or property
- xiii. Bank reports to the State Bar of insufficient funds transactions on a client trust account
- xiv. State Bar audits of a trust account

B. Duties to Non-clients

- i. Duty to lien-holders
- ii. Duties where a lawyer has voluntarily accepted, or has been ordered by a court to hold, funds or property entrusted by a non-client including marital dissolution cases
- iii. No duties to mere creditors of a client

6. Statutory Duties under the State Bar Act, including Discipline for Criminal Convictions and Moral Turpitude in Activities Unrelated to the Practice of Law

Course Objectives:

Participant will gain an understanding of selected statutory duties and other bases for discipline under the State Bar Act and discipline case law including duties arising from criminal convictions, misconduct arising outside of the practice of law and aiding in the unlawful practice of law. Participant will learn to identify professional responsibility obligations contained outside the Rules of Professional Conduct.

Learning Outcomes:

- Distinguish between misconduct involving moral turpitude and misconduct that does not constitute moral turpitude but nevertheless may serve as a basis for discipline
- Identify disparate, narrow topics of statutory duties outside of the Rules of Professional Conduct, including duties related to mortgage loan modification services, immigration services, and an attorney's failure to pay child or spousal support
- Recall special procedures triggered when an attorney is criminally charged with any felony or a lesser criminal charge where the surrounding circumstances involve moral turpitude

Course Outline:

A. Criminal Charges and Convictions

- i. Disciplinary exposure for criminal charges or convictions may involve matters outside of the practice of law
- ii. A criminal prosecutor's requirement to provide notice to the State Bar when an attorney is charged with a felony or misdemeanor
- iii. Interim suspension upon conviction of a felony or any crime involving moral turpitude
- iv. Special process for final disciplinary proceedings based on a certified copy of the record of the conviction of an attorney

B. Acts of Moral Turpitude, Statutory Law Violations and the Other Misconduct Doctrine

- i. Acts constituting moral turpitude, dishonesty or corruption whether or not the act is crime and irrespective of whether the acts occurred in the practice of law
- ii. Duty to support the Constitution and laws of the United States and California
- iii. The other misconduct doctrine, including discipline for driving under the influence violations
- iv. Discipline for failure to pay child or spousal support
- v. Discipline for advocating the overthrow of the government by force, violence, or other unconstitutional means
- vi. Insurance fraud statutory violations
- vii. Mortgage loan modification statutory violations
- viii. Immigration related statutory violations
- ix. ADA construction defect demand letters statutory violations
- x. Membership records statutory requirements
- xi. Statutory prohibition against the unlawful practice of law and rules prohibiting an attorney from aiding another person or entity in the unlawful practice of law

Basic Skills Subjects for the 10-Hour New Admittee MCLE Curriculum
Draft Learning Objectives

(Rev. 8-17-17)

1. The Lawyer as an Officer of the Court Sworn to Uphold the Dignity, Courtesy and Integrity of the Legal Profession

Course Objectives:

Participant will appreciate the role of a lawyer as an officer of the court in the administration of justice and the characteristics of attorney professionalism and civility.

Learning Outcomes:

- Distinguish between legal ethics rules that are causes for discipline and aspirational standards of professionalism and civility that may lead to peer disapprobation as well as contempt orders and sanctions when appearing before a tribunal
- Apply civility guidelines to exercise discretion in scenarios that challenge a lawyer's trained disposition toward zealous advocacy at all costs
- Analyze the practical considerations and significant benefits of voluntary pro bono services to the administration of justice, including identification of specific activities and monetary contributions that fulfill a lawyer's responsibility for supporting access to justice through voluntary pro bono service

Course Outline:

A. Civility and Professionalism

- i. The attorney oath
- ii. The importance of public confidence in the administration of justice
- iii. How incivility can harm a client's representation
- iv. The State Bar's "Attorney Guidelines of Civility and Professionalism"
- v. Guidelines adopted by bar associations and courts
- vi. Contempt and sanctions, including the duty to self-report to the State Bar
- vii. Duties under the State Bar Act and the potential for Bar discipline

B. Pro Bono Legal Services

- i. The access to justice crisis
- ii. Statutory declaration that pro bono services are an ethical commitment of every lawyer who has the privilege of practicing law
- iii. State Bar of California Board of Trustees Pro Bono Resolution
- iv. Definition of pro bono legal services
- v. Contributions of financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services
- vi. Pro bono duty under the American Bar Association's Model Rules of Professional Conduct

Attachment B - Outlines of Legal Ethics and Basic Lawyering Skills Topics

- vii. *[Statutory requirement for annual reporting of pro bono activity to the State Bar]*¹

2. Basic Conflict Resolution, Negotiation and Interpersonal Skills that All Lawyers Must Have in the Practice of Law

Course Objectives:

Participant will gain an understanding of how to recognize conflicts and differentiate between behaviors that will effectively resolve the conflict rather than escalate it. Participant will improve their basic understanding of negotiation concepts and how to negotiate effectively as an advocate.

Learning Outcomes:

- Identify and assess different strategies for conflict resolution strategies
- Apply negotiation techniques to achieve a desired outcome
- Practice effective interpersonal and communication skills to support appropriate negotiation technique

Course Outline:

A. Conflict Resolution

- i. Objective dispute assessment including research and analysis of facts and applicable law
- ii. Identification of common ground and clarification of areas of disagreement
- iii. Determination of the strengths and weaknesses of each party's position
- iv. Critical evaluation of a client's desired outcome
- v. Preparation of persuasive arguments using applicable law and public policy
- vi. Articulation of a cogent and provable factual narrative
- vii. Evaluation of dispute resolution options and development of a strategic plan for achieving an acceptable result
 - a) Negotiation
 - b) Conciliation
 - c) Mediation
 - d) Arbitration
 - e) Collaborative law
 - f) Litigation including settlement contingencies

B. Interpersonal Skills

- i. Active listening and issue spotting
- ii. Detail orientation
- iii. Reading comprehension
- iv. Oral and written expression including being succinct
- v. Critical and analytical thinking

¹ See Senate Bill No. 316 (Wieckowski) [requiring all active members of the State Bar to report the hours of pro bono legal aid services performed and the amount of money contributed financial contributions to California legal aid organizations and nonprofit public benefit corporations on an annual basis through the member's My State Bar online profile.] This sub-topic will be included only if Senate Bill No. 316 is enacted and includes a reporting requirement similar to terms of the presently pending version of the bill.

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- vi. Deductive and inductive reasoning
- vii. Persuasion and creativity
- viii. Cooperation, adaptability and flexibility
- ix. Self-awareness and self-control
- x. Decisiveness
- xi. Recognition of implicit and explicit bias

3. **Basic Law Practice Management Skills that Help Avoid Malpractice and State Bar Discipline**

Course Objectives:

Participant will gain an understanding of the practical aspects of organizing and managing a law practice as a business. Participant will learn to identify administrative, technological, or other business systems and procedures designed to avoid errors in the practice of law or violations of the Rules of Professional Conduct.

Learning Outcomes:

- Explain how ethical obligations and effective law practices relate to/affect competent client representation
- Describe the basic principles of organization and management of legal work, including available technology
- Identify strategies or technologies available concerning management of documents, calendaring systems, and client communication

Course Outline:

A. Personal Organizational Skills

- i. Personal planner/schedule/data assistant
- ii. Prioritization/deadline tracking
- iii. Automated reminders
- iv. Action plans, goal setting, delegation and progress assessment
- v. Protocol for e-mail/voice mail responses
- vi. Contacts/personal networking maintenance
- vii. Special project planning
- viii. Pre-meeting prep and post-meeting debriefing
- ix. Electronic document management
- x. Note taking, filing and record-keeping
- xi. Continuing education/licenses, Client Security Fund and certifications
- xii. News and recent developments alerts
- xiii. Office, workstation and desk organization
- xiv. Personal device OS and application updating
- xv. Portable computer memory device management
- xvi. Password security/management
- xvii. Strategic distraction avoidance including limits on social media activity while working

Attachment B - Outlines of Legal Ethics and Basic Lawyering Skills Topics

B. Office Management Skills

- i. Calendaring
- ii. Case management systems
- iii. Client intake and conflicts screening
- iv. Commercial accounting/finance/billing/collection
- v. Mandatory Fee Arbitration
- vi. Client trust accounting/IOLTA
- vii. Human resources compliance/payroll
- viii. Standard operating procedures
- ix. Policy and practice training manuals, including ADA compliance and required discrimination and harassment avoidance training
- x. Org chart, succession planning and hiring practices
- xi. Facility, services (including ISP, court reporting, etc. . .), software licensing and subscriptions
- xii. Word processing, document imaging, printing
- xiii. Document management, archiving, retention and destruction policy
- xiv. IT, A/V, web-master, and computer networks management
- xv. Legacy systems, vendor support and EOL
- xvi. Marketing, trending and reputation management
- xvii. Certified Lawyer Referral Services
- xviii. Intellectual property management
- xix. Risk assessment and management
- xx. Quality control measures/client feedback
- xxi. Corporate/partnership compliance
- xxii. Restrictive covenants/anti-compete/mergers/withdrawals
- xxiii. Contract attorney, consultants and other contractor management
- xxiv. Bench-bar, local or specialty bar relations
- xxv. Pro bono and legal services opportunities

4. The Risks and Rewards of Using Modern Technology in the Practice of Law

Course Objectives:

Participant will gain a basic understanding of the intersection of information technology and the practice of law. Participant will learn how to assess the risks and benefits of using technological advances, including data storage and communication methods.

Learning Outcomes:

- Identify technology tools that help establish successful practices and serve clients in an efficient and ethical manner
- Identify technology tools that help mitigate risks to client confidential information
- Recognize the ethical and regulatory issues in using technology as part of his or her law practice

Course Outline:

A. Information and Data Security

- i. E-tools for lawyers including free legal research sites (Google Scholar, etc...)

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- ii. Email encryption, computer and network firewalls
- iii. Use of public WIFI networks
- iv. Cloud storage
- v. Software-as-a-Service
- vi. Document metadata
- vii. Network protection
- viii. Archiving and back-ups
- ix. Storage media and portable computer memory device security
- x. Virus checking software
- xi. Passwords and keys
- xii. Online contact with prospective clients, current clients, judges and others
- xiii. Phishing and other online scams targeting law firms
- xiv. Browser privacy, online search history
- xv. Device or app location tracking
- xvi. TSA and border searches
- xvii. Auto and remote kill safeguards
- xviii. Breach notification

B. Other Issues

- i. Online legal directories/rating services
- ii. Use of personal devices for client communications or other business purposes
- ii. VLO (virtual law office)
- iii. E-discovery
- iv. Solicitation and chat rooms, texting, and other real-time messaging
- v. Social media contact with prospective clients, current clients, judges and others
- vi. Lawyer blogs, vlogs and trial publicity restrictions