

OPEN SESSION AGENDA ITEM

54-133 NOV 2017

DATE: October 25, 2017

TO: Members, Programs Committee
Members, Board of Trustees

FROM: Dina DiLoreto, Program Director, Attorney Regulation & Consumer Resources

SUBJECT: Annual Recommendation re Attorneys in Non-compliance with MCLE Audit

EXECUTIVE SUMMARY

Pursuant to California Rules of Court, Rule 9.31, State Bar staff request permission to enroll all attorneys of MCLE Compliance Group 3 (last names N-Z) who have not complied with MCLE Audit requirements by February 1, 2018, as administratively inactive, and place them on “Not Eligible to Practice” status effective February 2, 2018. This item also authorizes staff to remove members from this inactive status once they have provided proof of compliance and paid all non-compliance fees. In addition, staff requests permission to act on any other Group 1, Group 2, and Group 3 attorneys who were granted MCLE modifications (extensions of time) for a prior period and who have not complied by their extended deadlines. Questions on this item should be directed to Dina DiLoreto at (415) 538-2121 or Dina.DiLoreto@calbar.ca.gov, or Robert McPhail at (415) 538-2237 or Robert.McPhail@calbar.ca.gov.

BACKGROUND

The Supreme Court has delegated to the Bar the authority to enroll attorneys who fail to comply with Minimum Continuing Legal Education (MCLE) requirements on administrative inactive status. Rule 9.31, of the California Rules of Court, provides that any attorney who fails to satisfy the requirements of the State Bar’s MCLE program must be enrolled as inactive, under rules adopted by the Board.

Pursuant to Rule 9.31, the Board has adopted MCLE program rules, which are incorporated into the Rules of the State Bar (“Rules”). The Rules establish the procedures for noncompliance with the MCLE requirement. Rule 2.32(A) provides that “A member who fails to meet requirements for Minimum Continuing Legal Education (MCLE) will be involuntarily enrolled as inactive.” Rule 2.92 provides that “A member who fails to comply with a notice of noncompliance is enrolled as inactive and is not eligible to practice law. The enrollment is administrative and no hearing is required.”

The Rules define noncompliance to include: failure to complete the required education during the compliance period or an extension of it, failure to report compliance or claim exempt status, failure

to keep a record of MCLE compliance, or failure to pay all noncompliance fees (Rule 2.90.) An attorney's record of MCLE compliance is defined to include providers' certificates of attendance, a detailed record of self-study credit, or proof of exempt status (Rule 2.73). The Rules also dictate that for one year after reporting compliance, attorneys must retain and provide these records upon demand and to the satisfaction of the State Bar (Rule 2.73).

In September, the State Bar undertook an audit of attorneys who are in MCLE Compliance Group 1 and who reported MCLE compliance for the period ending January 31, 2017. This agenda item requests authorization to enroll as inactive those members who do not bring themselves into compliance with the MCLE Audit requirements by February 1, 2018.

Additionally, State Bar MCLE Rule 2.55 allows the State Bar to make modifications in the form of extensions of time or permission to complete all MCLE by self-study in cases of hardship. These attorneys are required to file a declaration of compliance with their "modified" requirement. Failure to comply with a modified requirement is treated in the same manner as failure to comply with MCLE requirements. Once the State Bar has issued a 60-day notice and a final notice to comply, these attorneys are enrolled as administratively inactive upon Board authorization.

DISCUSSION

On September 18, 2017, 700 attorneys in MCLE Compliance Group 3 who had reported MCLE compliance for the period ending January 31, 2017, were mailed a notice of MCLE Audit, requiring them to submit proof of compliance. This number represents approximately 1% of the attorneys who submitted an MCLE compliance declaration by the final reporting deadline. Because this year's MCLE compliance cycle was extended (in conjunction with the extended 2017 billing cycle), the audit is being performed later in the year, and will overlap with the next billing and compliance cycle. Still wishing to execute our usual audit, we have compromised by selecting a smaller sample than has been our recent standard of 10%. As a result, we are using existing State Bar staff instead of a team of temporary employees. Concurrently, the State Bar is exploring a different model for monitoring MCLE compliance that would involve proactively collecting attendance records from all providers. Any remaining Staff resources will be redirected to developing this new process.

The initial deadline to satisfy the audit was set forth as November 3, 2017. Attorneys who were not able to provide proof to support their original compliance declaration will be assessed a \$200 MCLE Audit deficiency fee and are required to make up the missing MCLE hours. Members who failed to respond to the original audit notice by the November 3 deadline will be further assessed a \$75 noncompliance fee.

MCLE Noncompliance 60-Day Notices will be mailed to any members of the audit group who have still not satisfied all audit requirements and a final notice will be sent by certified mail on or about December 1, 2017. Those members of Compliance Group 3 who have still not complied with the MCLE Audit requirements as of February 1, 2018, will be enrolled as administratively inactive and will be deemed "Not Eligible to practice" effective February 2, 2018. Staff estimates that less than 50 attorneys will be placed on Administrative Inactive status for failure to comply with the audit.

In addition, we have been following up with attorneys in Compliance Groups 1, 2 and 3 who were granted good cause modifications (as provided by State Bar MCLE Rule 2.55), for the period ending January 31, 2017, or a prior period, and who have not complied by their modified (extended) deadlines. These attorneys will be mailed "60-Day Notices" and if need be, "Final Notices." If they have still not complied with their modified MCLE requirement or provided

justification for further extension by February 1, 2018, they will be moved to “Not Eligible to Practice” status effective February 2, 2018. Staff anticipates that less than 10 attorneys will ultimately be placed on Administrative Inactive Status for failure to comply with a modified requirement.

Please note that the procedure for placing attorneys on administrative inactive status for failure to comply with the MCLE requirement is unlike the procedure for suspending attorney licenses for non-payment of fees. For MCLE, the Supreme Court has delegated to the Bar the authority to change an attorney’s status. Whereas in the case of non-payment of fees, the Board submits a list to the Supreme Court for action.

As attorneys bring themselves into compliance, staff removes them from the noncompliance list. Only attorneys who do not bring themselves into compliance by the final deadline of February 1, 2018, will be enrolled as inactive. An attorney placed on administrative inactive status for failure to comply with the MCLE requirement is not eligible to practice law while on such status. Reinstatement requires that all audit requirements be satisfied, including the payment of any penalties.

FISCAL/PERSONNEL IMPACT

These actions were included in the 2017 budget and personnel planning; there will be no additional fiscal or personnel impact. Effective 2016, the MCLE Audit penalties were adjusted to make conducting the MCLE Audit cost neutral. With a smaller audit group this year, reduced revenues collected from penalties, will be offset by the reduced staffing costs.

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.

Objective e.: Develop and implement an effective mechanism for ensuring compliance with MCLE requirements.

RECOMMENDATION

The Programs Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees approve that pursuant to California Rule of Court 9.31 and the Rules of the State Bar, those attorneys in MCLE Compliance Group 3 who were audited and who do not bring themselves into compliance with their MCLE Audit requirements by February 1, 2018, as well as those attorneys who have failed to comply with their modified MCLE requirement by February 1, 2018, be enrolled as inactive and placed on “Not Eligible to Practice” status in State Bar records, effective February 2, 2018; and it is

FURTHER RESOLVED, that the Board of Trustees hereby authorizes staff to remove an attorney from administrative inactive status once the attorney has provided proof of compliance and paid all noncompliance fees.

ATTACHMENT(S) LIST

None