

OPEN SESSION

AGENDA ITEM

54-131 SEPTEMBER 2018

PRO COMM ITEM III.C.

DATE: September 13, 2018

TO: **Members, Programs Committee**
Members, Board of Trustees

FROM: Dina DiLoreto, Program Director, Attorney Regulation & Consumer Resources
Robert McPhail, Program Manager, 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 in MCLE Compliance Group 2 (last names H-M) who have not complied with MCLE Audit requirements by November 6, 2018, as administratively inactive, and place them on "Not Eligible to Practice" status effective November 7, 2018. This item also authorizes staff to remove attorneys 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 extensions of time for a prior period and who have not complied by their extended deadlines.

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 requirements. 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 July, the State Bar undertook an audit of attorneys who are in MCLE Compliance Group 2 and who reported MCLE compliance for the period ending January 31, 2018. This agenda item requests authorization to enroll as inactive those attorneys who do not bring themselves into compliance with the MCLE Audit requirements by November 6, 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. Attorneys granted extensions of time 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, those attorneys who remain noncompliant are enrolled as administratively inactive upon Board authorization.

DISCUSSION

On July 16, 2018, 556 attorneys in MCLE Compliance Group 2 who had reported MCLE compliance for the period ending January 31, 2018, were mailed a notice of MCLE Audit, requiring them to submit proof of compliance. This number represents 1% of the attorneys who submitted an MCLE compliance declaration by the final reporting deadline of July 2, 2018. The initial deadline for audited attorneys to provide proof to support their original compliance declaration was August 23, 2018. Those who could not provide proof were assessed a \$200 MCLE Audit deficiency fee and are required to make up the missing MCLE hours. Attorneys who failed to respond to the original audit notice by the August 23 deadline were further assessed a \$75 noncompliance fee.

During the first week of September, MCLE Noncompliance 60-Day Notices were mailed to approximately 180 attorneys in the audit group who still had not satisfied all audit requirements and a final notice will be sent by certified mail during the first week of October. Those attorneys who have still not complied with the MCLE Audit requirements by November 6, will be enrolled as administratively inactive and will be deemed “Not Eligible to Practice” effective November 7, 2018. Staff estimates that less than 30 attorneys will be placed on administrative inactive status for failure to comply with the audit.

In addition, staff has 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, 2018, or a prior period, and who have not complied by their modified (extended) deadlines. These attorneys were mailed “60-Day Notices” and will be mailed “Final Notices.” If they have still not complied with their modified MCLE requirement or provided justification for further extension by November 6, 2018, they will be moved to “Not Eligible to Practice” status effective November 7, 2018. Staff anticipates that less than 5 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 November 6, 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.

The State Bar is developing a different model for monitoring MCLE compliance going forward. This approach would require MCLE providers to submit attendance records, enabling the State Bar to have accurate information on compliance for all members of a compliance group. In the meantime, we have selected a smaller sample than has been our usual standard of 10%.

FISCAL/PERSONNEL IMPACT

Starting in 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 reduced staffing costs.

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

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: e. Begin auditing attorney compliance with MCLE requirements in the most cost effective and efficient manner no later than December 31, 2019.

RECOMMENDATION

It is recommended that the Programs Committee and Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees approve, pursuant to California Rule of Court 9.31 and the Rules of the State Bar, that those attorneys in MCLE Compliance Group 2 who were audited and who do not bring themselves into compliance with their MCLE Audit requirements by November 6, 2018, as well as those attorneys who have failed to comply with their modified MCLE requirement by November 6, 2018, be enrolled as inactive and placed on “Not Eligible to Practice” status in State Bar records, effective November 7, 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