



The State Bar of California

OPEN SESSION AGENDA ITEM 707 SEPTEMBER 2020

DATE: September 24, 2020

TO: Members, Board of Trustees

FROM: Hon. Esther P. Kim, Incoming Chair, Council on Access and Fairness (COAF)
Elizabeth Hom, Acting Program Manager, Office of Access & Inclusion
Erica Carroll, Senior Program Analyst, Office of Access & Inclusion

SUBJECT: Changes in Elimination of Bias (EOB) Requirement in Minimum Continuing Legal Education (MCLE) Rules – Return from Public Comment and Request for Approval

EXECUTIVE SUMMARY

Goal 4, Objective (m) of the State Bar Strategic Plan provides that the State Bar will modify the Elimination of Bias (EOB) requirements for the State Bar's rules for Minimum Continuing Legal Education (MCLE) by December 31, 2020. This includes revising the rules to possibly include subtopics and expand the number of hours dedicated to the Elimination of Bias MCLE requirement.

In March 2020, the Board of Trustees approved circulating the proposal developed by the Council on Access and Fairness (COAF) to increase the required number of hours of EOB MCLE per cycle from one to two—including an implicit bias training requirement and rules ensuring the appropriate experience of trainers—for a 45-day public comment period. In light of the focus of many commenters on the ramifications of the COVID-19 pandemic, the public comment period was extended such that additional comments could be submitted.

The State Bar received 31 comments, all in relation to the requirements for licensees. At its meeting on August 28, COAF recommended adoption of the proposed rules as circulated for public comment, with one amendment necessary to conform to a statutory change that was adopted August 31, 2020.

BACKGROUND

MCLE Requirements

The State Bar establishes and monitors compliance with the Minimum Continuing Legal Education (MCLE) requirements for attorneys licensed in California. The State Bar also approves proposed MCLE courses (also known as “activities”) and MCLE provider applications pursuant to Title 3, Division 5, Chapter 1 of the Rules of the State Bar.

Currently, attorneys are required to complete a minimum of 25 hours of MCLE every three years. State Bar Rule 2.72(A)(2) presently includes a requirement that attorneys participate in “at least one hour dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation” as part of the 25 hours.¹

The State Bar’s Strategic Plan & Business and Professions Code Section 6070.5

In January 2019, the Board of Trustees updated the State Bar’s 2017–2022 Strategic Plan to adopt nine objectives related to diversity and inclusion. This included Objective (m), which focuses on modifying the current Elimination of Bias (EOB) MCLE curriculum and increasing the number of hours.

Concurrently, the California State Legislature advanced AB 242, adding Business and Professions Code section 6070.5 to require the State Bar to enact rules incorporating the topic of implicit bias and bias-reducing strategies into its MCLE curriculum for all licensees (Stats. 2019, ch. 418).

This statute also calls for the State Bar to require MCLE providers who offer implicit bias courses to meet minimum recruitment, training, and content requirements. Beginning no later than January 1, 2022, providers offering courses on implicit bias will have to meet the requirements of the statute. Licensees will have to meet the additional implicit bias MCLE requirement in the compliance period ending January 31, 2023.²

Due to an error in the original version of Business and Professions Code section 6070.5, it applied to licensees beginning with those reporting for the compliance period ending January 31, 2024, instead of 2023. This was corrected through AB 3364, which was passed by the Legislature and signed by the governor on August 31 (Stats. 2020, ch. 36, Attachment A).

¹ Attorneys must also participate in a minimum of four hours of legal ethics training and one hour related to competence issues (substance abuse and/or mental or physical issues that impair an attorney’s ability to competently perform legal services). Beyond these specialized topic requirements, attorneys may take any course approved for general MCLE credit (State Bar Rule 2.72(A)).

² MCLE compliance periods run from February 1 through January 31 of the following year.

COAF'S Recommendations to the Board of Trustees

In December 2019 and February 2020, COAF discussed the EOB requirements and recommended making the necessary rule changes to conform to the new Business and Professions Code section, and to increase the EOB MCLE required hours from one to two. Staff also consulted with the Office of Attorney Regulation & Consumer Resources, which is responsible for administering and auditing compliance with the MCLE requirements, to ensure that the proposed rule language is sufficiently clear to allow for appropriate enforcement.

Staff presented the proposed changes to the Board of Trustees in March 2020, and the Board approved circulation for a 45-day public comment period. Due to the impact of the COVID-19 pandemic, to allow sufficient opportunity for public review and comment, the public comment period was extended 60 days through June 30, and 31 comments were received.

DISCUSSION

Proposed changes to Rules of the State Bar for licensees would increase the required number of EOB hours from one to two, and at least one of those two hours would need to be focused on content related to implicit bias. This change would shift one hour from general credit to EOB; the overall number of MCLE hours reported every three years would remain at 25 (Attachment B).

Proposed changes to the Rules of the State Bar for providers would require MCLE providers who offer implicit bias courses to do the following:

1. Make reasonable efforts to recruit and hire trainers who reflect the diversity of persons that the California legal system serves;
2. Ensure that trainers have academic training or experience educating legal professionals about implicit bias;
3. Include in the training course components on implicit, explicit, and systemic bias and their effects; and
4. Offer actionable steps for licensees to address their own implicit biases.

Non-substantive changes provide clarification regarding who may serve as an MCLE activity auditor and confirm the Board's sole authority to revoke or suspend a provider's approval to offer MCLE credit (Attachment C).

After the comment period closed on June 30, staff and COAF analyzed the responses; all individuals and entities that made public comments are listed in Attachment D. Of the 31 comments received, all were in relation to the proposed changes for attorneys, rather than providers. At its August 28 meeting, COAF recommended adopting the proposed rules as-is, with one amendment to make the changes effective for licensees beginning with the reporting period ending January 31, 2023; this will conform to the recent changes made to Business and Professions Code section 6070.5 through AB 3364 (Stats. 2020, ch. 36).³

³ COAF's recommendation to amend the effective date was contingent upon passage and approval of AB 3364, which occurred three days later, on August 31.

Comments in Favor of the Proposed MCLE Rule Changes

Approximately 60 percent of the comments were in favor of the proposed changes for licensees; one was in favor only if the proposal was amended to further increase the number of EOB hours. Four statewide organizations commented in favor of the proposal: the California Commission on Access to Justice, California Lawyers Association, California Minority Counsel Program, and Legal Aid Association of California. This reflects a broad coalition of support for the proposed changes.

Many comments spoke to the importance of enhanced EOB training to: (1) increase awareness of all types of bias, (2) open more dialogue on the topic, and (3) improve experiences in the workplace and in the legal system in general. The comments underscored the fact that the proposed changes are part of the larger goal of achieving and maintaining a truly diverse and inclusive legal profession. Some comments requested that the State Bar make larger changes, such as adding more hours to the EOB requirement or incorporating an anti-racism requirement.

Comments Opposed to the Proposed MCLE Rule Changes

All comments opposed to the proposed rules changes were from individuals. The comments that opposed the proposed changes centered on two themes: (1) disagreement with devoting more MCLE time to a specific subject, and (2) skepticism about the efficacy of implicit bias training. Those who disagreed with adding more time to the EOB requirement felt that: MCLE was not effective in general (regardless of topic); it would be better to have more time to devote to education in their own practice areas; or, in one or two cases, appeared to misunderstand the intent of the change and thought it aimed to increase overall MCLE hours.⁴

Other responses indicated that the commenter did not believe implicit bias exists or claimed there was insufficient basis to maintain that training in this topic will be beneficial. For example, three commenters stated that there is not enough scientific support to prioritize this topic. A similar number reported that their prior experiences with other MCLE EOB courses were not useful.

Response to Public Comments

Some of the assertions from commenters who opposed the changes are simply inaccurate (there is a substantial body of research that demonstrates the existence and effects of implicit bias), while others touch on considerations that are targeted by the proposed rule changes. The fact that there has been variability in the perceived quality and effectiveness of prior MCLE EOB courses will hopefully be addressed through the strengthened training and experience requirements for instructors and the guidance from the Legislature and the State Bar regarding course content and objectives.

⁴ The proposed change takes one hour from general MCLE credit and devotes it to implicit bias coursework; it does not increase the overall amount of continuing education hours, which remains at 25 hours over three years.

Moreover, given that the EOB requirement is currently only one hour, it is not surprising that in some instances, participants have felt that they were not getting enough benefit from the curriculum or were ill-equipped to continue the work outside of the MCLE course. Increasing the hours requirement will allow for more in-depth exploration of the various topics that fall under the umbrella of EOB and will signal that this subject demands more serious engagement across the profession.

The current MCLE reporting requirement is 25 hours every three years, an average of slightly more than eight hours of continuing education per year. This is a fairly modest requirement, and it is a floor, not a ceiling, so licensees are able to take more classes in their preferred practice areas; adding one hour to EOB from general credit still leaves 72 percent of the required 25 hours to general credit.

Recommendation for Approval and Adoption

Given that the proposed rule changes implemented the stated goals of the Board, enjoy broad support, and aim to remediate some of the criticisms leveled against the EOB requirement, staff and COAF recommend approval and adoption of the proposed changes for licensees and providers. As discussed above, the only change made to the proposed rules since the Board's last review is the change to the effective date for licensees in order to match the recent revisions to Business and Professions Code section 6070.5.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

Title 2, Division 4, Chapter 1, Rule 2.52

Title 2, Division 4, Chapter 2, Rules 2.71 and 2.72

Title 3, Division 5, Chapter 1, Rules 3.601, 3.602, 3.603, and 3.604

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 4. Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: m. By December 31, 2020, adopt revised rules to modify the Elimination of Bias MCLE requirements in a manner that considers the creation of sub-topics and expanding the number of hours of requirement and is consistent with the timelines adopted in Business and Professions Code section 6070.5.

RECOMMENDATIONS

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees hereby approves and adopts proposed amendments to Rules of the State Bar 2.52, 2.71, and 2.72, related to licensee requirements, set forth in Attachment B; and proposed amendments to Rules of the State Bar 3.601, 3.602, 3.603, and 3.604, related to MCLE provider requirements, set forth in Attachment C.

ATTACHMENT(S) LIST

- A.** Text of AB 3364
- B.** Proposed amendments to Rules of the State Bar 2.52, 2.71, and 2.72, incorporating changes necessitated by AB 3364
- C.** Proposed amendments to Rules of the State Bar 3.601, 3.602, 3.603, and 3.604
- D.** List of individuals and entities that submitted public comments

AB 3364 BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 6070.5 of the Business and Professions Code is amended to read:

6070.5.

(a) The State Bar shall adopt regulations to require, as of January 1, 2022, that the mandatory continuing legal education (MCLE) curriculum for all licensees under this chapter includes training on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system. A licensee shall meet the requirements of this section for each MCLE compliance period ending **after January 31, 2022.**

(b) When approving MCLE providers to offer the training required by subdivision (a), the State Bar shall require that the MCLE provider meets, at a minimum, all of the following requirements:

(1) The MCLE provider shall make reasonable efforts to recruit and hire trainers who are representative of the diversity of persons that California's legal system serves.

(2) The trainers shall have either academic training in implicit bias or experience educating legal professionals about implicit bias and its effects on people accessing and interacting with the legal system.

(3) The training shall include a component regarding the impact of implicit bias, explicit bias, and systemic bias on the legal system and the effect this can have on people accessing and interacting with the legal system.

(4) The training shall include actionable steps licensees can take to recognize and address their own implicit biases.

(c) As part of the certification, approval, or renewal process for MCLE-approved provider status, or more frequently if required by the State Bar, the MCLE provider shall attest to its compliance with the requirements of subdivision (b) and shall confirm that it will continue to comply with those requirements for the duration of the provider's approval period.

[Remaining sections omitted.]

Proposed Revisions to Rules Establishing Minimum Continuing Legal Education Requirements for Licensees

Rule 2.52 MCLE Activities

To receive MCLE credit, a licensee must complete an MCLE activity that meets State Bar standards.

- (A) The MCLE activity must relate to legal subjects directly relevant to licensees of the State Bar or have significant current professional and practical content.
- (B) The presenter of the MCLE activity must have significant professional or academic experience related to its content.
- (C) Promotional material must state that the MCLE activity is approved for MCLE credit or that a request for approval is pending; specify the amount of credit offered; and indicate whether any of the credit may be claimed for required MCLE in legal ethics, elimination of bias, or competence issues.
- (D) If the activity lasts one hour or more, the provider must make substantive written materials relevant to the MCLE activity available either before or during every MCLE activity. Any materials provided online must remain online for at least thirty calendar days following the MCLE activity.
- (E) Programs and classes must be scheduled so that participants are free of interruptions.
- (F) On and after January 1, 2022, for all training dealing with, or including a component dealing with, implicit bias and the promotion of bias-reducing strategies, the MCLE provider must meet the requirements of Business and Professions Code section 6070.5.

Rule 2.52 adopted effective January 1, 2008; amended effective January 1, 2013; amended effective July 1, 2014; amended effective January 25, 2019.

Rule 2.71 Compliance periods

- (A) A compliance period consists of thirty-six months. It begins on the first day of February and ends three years later on the last day of January. The three compliance groups begin and end their compliance periods in different years. A licensee must report MCLE compliance no later than the day following the end of the compliance period. The report must be made online using My State Bar Profile or with an MCLE Compliance Form. Fees for noncompliance are set forth in the Schedule of Charges and Deadlines.
- (B) Compliance with State Bar New Attorney Training must be effectuated and reported completed, in a manner established by the State Bar, by the last day of the month of an attorney's one-year anniversary as a State Bar licensee. Fees for noncompliance are set forth in [the](#) Schedule of Charges and Deadlines.

Rule 2.71 adopted effective January 1, 2008; amended effective February 1, 2018; amended effective January 25, 2019.

Rule 2.72 Requirements

(A) Until December 31, 2021, all licensees shall be subject to the following:

- (1) Unless these rules indicate otherwise, a licensee who has been active throughout a thirty-six-month compliance period must complete twenty-five credit hours of MCLE activities. No more than twelve and a half credit hours may be self-study.⁴ Total hours must include no less than 6 hours as follows:
 - (a) at least four hours of legal ethics;
 - (b) at least one hour dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation; and
 - (c) at least one hour of education addressing substance abuse or other mental or physical issues that impair a licensee's ability to perform legal services with competence.
- (2) Required education in legal ethics, elimination of bias, or competence issues may be a component of an approved MCLE activity that deals with another topic.
- (3) A licensee may reduce the required twenty-five hours in proportion to the number of full months the licensee was inactive or exempt in the thirty-six-month compliance period. Up to half the reduced hours may be self-study.⁵ A tool for applying this formula is available at the State Bar Web site.
- (4) Excess credit hours may not be applied to the next compliance period.⁶

(B) On and after January 1, 2022, all licensees shall be subject to the following:

- (1) Licensees reporting for the compliance periods ending January 31, 2022 and January 31, 2023, shall be subject to the requirements set forth in paragraphs (A)(1), (A)(2), (A)(3), and (A)(4) for the compliance period ending January 31, 2022 and January 31, 2023.

⁴ Rule 2.83.

⁵ Rule 2.83.

⁶ But see Rule 2.93.

(2) Beginning with the compliance period ending January 31, 2023, all licensees shall comply with the following:

(a) Unless these rules indicate otherwise, a licensee who has been active throughout a thirty-six-month compliance period must complete twenty-five credit hours of MCLE activities. No more than twelve and a half credit hours may be self-study.⁷ Total hours must include no less than ~~6~~7 hours as follows:

(i) at least four hours of legal ethics;

(ii) at least two hours dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation;

1. Of those two hours, at least one hour must focus on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system; and

(iii) at least one hour of education addressing substance abuse or other mental or physical issues that impair a licensee's ability to perform legal services with competence.

~~(a)~~(b) Required education in legal ethics, elimination of bias, or competence issues may be a component of an approved MCLE activity that deals with another topic, consistent with the requirements of Rule 2.52(F).

~~(b)~~(c) A licensee may reduce the required twenty-five hours in proportion to the number of full months the licensee was inactive or exempt in the thirty-six-month compliance period, except that the requirements of paragraphs (B)(2)(a)(ii) and (B)(2)(a)(iii) may not be reduced to less than one hour each. Up to half the reduced hours may be self-study.⁸ A tool for applying this formula is available at the State Bar Web site.

~~(c)~~(d) Excess credit hours may not be applied to the next compliance period.⁹

⁷ Rule 2.83.

⁸ Rule 2.83.

⁹ But see Rule 2.93.

Rule 2.72 adopted effective January 1, 2008; amended effective July 1, 2014; amended effective January 25, 2019.

Proposed Revisions to Rules Establishing Minimum Continuing Legal Education Standards for Providers

Rule 3.601 MCLE Activities

To be approved for MCLE credit, an MCLE activity must meet State Bar standards.²

- (A) The MCLE activity must relate to legal subjects directly relevant to licensees of the State Bar or have significant current professional and practical content.
- (B) The presenter of the MCLE activity must have significant professional or academic experience related to its content.
- (C) Promotional material must state that the MCLE activity is approved for MCLE credit or that a request for approval is pending; specify the amount of credit offered; and indicate whether any of the credit may be claimed for required MCLE in legal ethics, elimination of bias, or competence issues.³
- (D) If the activity lasts one hour or more, the provider must make substantive written materials relevant to the MCLE activity available either before or during the activity. Any materials provided online must remain online for at least thirty calendar days following the MCLE activity.

(E) Programs and classes must be scheduled so that participants are free of interruptions.

~~(E)~~(F) On and after January 1, 2022, for all training dealing with, or including a component dealing with, implicit bias and the promotion of bias-reducing strategies, an MCLE provider must meet the requirements of Business and Professions Code section 6070.5.

Rule 3.601 adopted as Rule 3.501 effective January 1, 2008; renumbered as Rule 3.601 effective November 4, 2011; amended effective January 1, 2013; amended effective July 1, 2014; amended effective January 25, 2019.

² [Business & Professions Code § 6070\(b\)](#) provides that programs offered by the California District Attorneys Association and the California Public Defenders Association are deemed to be approved MCLE. State Bar Rule 2.84 provides that “A licensee may claim MCLE credit for educational activities that the California Board of Legal Specialization approves for certification or recertification.”

³ ~~Business & Professions Code § 6070(b) provides that programs offered by the California District Attorneys Association and the California Public Defenders Association are deemed to be approved MCLE. State Bar Rule 2.84 provides that “A licensee may claim MCLE credit for educational activities that the California Board of Legal Specialization approves for certification or recertification.”~~ See State Bar Rule 2.72 for a description of competence issues and elimination of bias.

Rule 3.602 Responsibilities of every provider

Every provider must

- (A) comply with any State Bar rules and terms applicable to an approved MCLE activity;
- (B) retain the Record of Attendance for an MCLE activity for four years from the date of the activity and submit it to the State Bar upon request. The record must include the title of the MCLE activity, date, total hours awarded, any credits awarded for legal ethics, elimination of bias, or competence issues as a component of the topic of the activity, whether the activity is participatory or self-study, and the name and State Bar number of each attendee;
- (C) furnish an MCLE Certificate of Attendance to each attendee who has met the requirements for the MCLE activity. The certificate must include the provider name, title of the MCLE activity, date, total hours awarded, any credits awarded for legal ethics, elimination of bias, or competence issues as a component of the topic of the activity, and whether the activity is participatory or self-study;
- (D) give each attendee who completes an MCLE activity a State Bar MCLE Activity Evaluation Form or its equivalent; retain the completed form for at least one year; and submit it to the State Bar upon request; ~~and~~
- (E) notify the State Bar in writing of any change in the name, address, or other contact information required by the State Bar; and
- (F) beginning January 1, 2022, if providing training dealing with, or including a component dealing with, implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system, attest to the following:
 - (1) The provider makes reasonable efforts to recruit and hire trainers who are representative of the diversity of persons that California's legal system serves.
 - (2) The trainers have either academic training in implicit bias or experience educating legal professionals about implicit bias and its effects on people accessing and interacting with the legal system.
 - (3) The training includes a component regarding the impact of implicit bias, explicit bias, and systemic bias on the legal system and the effect this can have on people accessing and interacting with the legal system.
 - ~~(4)~~ (4) The training includes actionable steps licensees can take to recognize and address their own implicit biases.

Rule 3.602 adopted as Rule 3.502 effective January 1, 2008; renumbered as Rule 3.602 effective November 4, 2011; amended effective July 1, 2014.

3.603 State Bar MCLE Activity Auditors

A State Bar MCLE Activity Auditor may be a State Bar staff member, Board of Trustees member, California [Board of Legal Specialization](#) ~~Board or Commission~~ member, ~~California Young Lawyers Association member~~ or other person designated by the State Bar to conduct an audit of a particular MCLE program or class on behalf of the State Bar. A State Bar MCLE Activity Auditor may not have a business, financial or personal relationship with or oversight responsibility for the provider of the program or class being audited. A State Bar MCLE Activity Auditor may audit the particular MCLE program or class at no cost.

Rule 3.603 adopted effective July 1, 2014.

Rule 3.604 Suspension or revocation of provider approval

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

Rule 3.604 adopted as Rule 3.503 effective January 1, 2008; renumbered as Rule 3.603 effective November 4, 2011; renumbered as Rule 3.604 effective July 1, 2014; amended effective March 10, 2017.

**PUBLIC COMMENTS FROM INDIVIDUALS/ENTITIES REGARDING
REVISIONS TO THE MCLE ELIMINATION OF BIAS RULES***

- 1 Audrey Faber
- 2 Beth W Mora
- 3 Brian Del Bono
- 4 California Commission on Access to Justice
- 5 California Lawyers Association
- 6 California Minority Counsel Program
- 7 Christine Tuma
- 8 Eric Zylstra
- 9 Esther Ro and Leana Taing
- 10 Gabriella
- 11 Jahmy Graham
- 12 Jeffrey Corcoran
- 13 Jenn French
- 14 Joshua Schoonover
- 15 Karyn Ihara
- 16 Kelly Ranasinghe
- 17 Kenan Ezal
- 18 Leigha Weinberg
- 19 Lenton Aikins/Aikins Mediation
- 20 Matthew Moschetti
- 21 Mike Young
- 22 Mina Sirkin
- 23 Randee Barak
- 24 Tami Kameda Sims
- 25 The Legal Aid Association of California
- 26 Vi Hua
- 27 Vicki Rubin-Howton

*Four of the 31 comments received were submitted anonymously.