

# AGENDA ITEM

**May III E** Auditing of MCLE Compliance

**DATE:** May 6, 2011

**TO:** Members, Member Oversight Committee

**FROM:** Michael Tenenbaum, Chair

**SUBJECT:** Auditing of MCLE Compliance

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## EXECUTIVE SUMMARY

Lawyers are required by statute and court rule to certify every three years that they have completed at least 25 hours of MCLE, including 4 hours in Ethics. The State Bar specifically advises lawyers that their certifications are subject to audit to assess compliance. In 2010, however, the State Bar did not conduct any audits of lawyers' compliance — nor have audits been conducted since 2006. This item directs staff to perform a random audit of 500 (approximately 0.8%) of the lawyers from the most recent compliance group, with the results to be presented at the July 2011 meeting of MOC. As part of the audit, staff shall identify how many hours of Legal Ethics are reported by each lawyer and shall attempt to measure how each lawyer fulfilled the remainder of his or her MCLE requirements as well as any patterns (e.g., timing, subjects) relevant to the purpose of the MCLE program.

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## BACKGROUND

California's MCLE program is the result of a process that began in 1989, when Governor Deukmejian signed into law Senate Bill 905 (Davis), the continuing legal education bill. (SB 905 added Section 6070 to the Business and Professions Code.) The 1989 legislation required the State Bar to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer an MCLE program. On December 7, 1990, the Court adopted Rule 9.31, the MCLE Rule of Court.

Rule 9.31 provides a skeletal outline of an MCLE program and authorizes the State Bar Board of Governors to adopt more detailed rules and regulations. The MCLE Rules and Regulations (former) were approved by the Board of Governors on December 8, 1990 and the MCLE program officially began on February 1, 1992. Current MCLE Rules (see above) became effective Jan. 1, 2008.

The State Bar Act and Rule 9.31 require lawyers to take at least 25 hours of MCLE every three years. Four of these hours must be in Legal Ethics.

By separate rule, the Board of Governors has further provided that the total hours must include “at least one hour dealing with the elimination of bias in the profession” and “at least one hour of education designed to prevent, detect, and treat substance abuse or mental illness that impairs professional competence.” No more than 12.5 of a lawyer’s hours may be self-study.

The statute provides that “[a] member of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the State Bar.” This consequence of non-compliance is also reflected in the Supreme Court’s Rule 9.31.

The State Bar specifically advises lawyers that their certifications are subject to audit to assess compliance. In 2010, however, the State Bar did not conduct any audits of lawyers’ compliance — nor have audits been conducted since 2006. Even then, the audit consisted of specifically telling 500 lawyers prior to the compliance deadline that their certifications would be audited. The result, perhaps not surprisingly, was that only a very small number failed to comply. The next audit prior to that was in 2003, nearly eight years ago.

### ***The Main Reason for the Audit***

At present, the board has no empirical sense of whether the goal of the MCLE legislation — presumably to require lawyers to make efforts to keep up to date in their areas of practice and maintain knowledge of the Rules of Professional Conduct — is actually being met. What percentage of lawyers are taking most of their courses on subjects having nothing to do with their areas of practice? What if the courses lawyers are taking do not appear to have true educational value for practicing lawyers? What percentage of lawyers are taking the vast majority of their courses at the very end of the three-year compliance period? How are lawyers complying with the requirement — by attending live presentations? Online seminars? Self-study? Are lawyers taking more than the minimum four hours in Legal Ethics (which works out to an hour and 20 minutes per year)? What if a large percentage of lawyers are not complying at all?

A random audit of 500 lawyers (about 0.8%) who were required to certify their compliance as recently as February 1, 2011, can help provide a basic set of data from which to start to answer these questions. At a minimum, staff should identify how many hours of Legal Ethics are reported by each lawyer and should attempt to measure how each lawyer fulfilled the remainder of his or her MCLE requirements as well as any patterns (e.g., timing, subjects) relevant to the purpose of the MCLE program.

While the main purpose of this audit is not to threaten to place non-compliant lawyers on inactive status, there is also a salutary effect of having all lawyers actually subject to audit, in the absence of which one would expect compliance rates to be lower.

If the State Bar is going to expend the resources it does to administer an MCLE program, and if lawyers are going to be required to sit through 25 hours of unspecified courses every three years, then the State Bar should make an appropriate effort to determine whether the program is achieving its legislative purpose.

#### **FISCAL / PERSONNEL IMPACT:**

Auditing the MCLE compliance of 500 lawyers should be expected to consume minimal staff resources. Staff has already developed and currently makes available online a "[Personal MCLE Log](#)" that calls for almost all of the summary data necessary to perform this audit. If each lawyer's information can be extracted from a modified version of this form in 5 minutes, an audit of 500 lawyers should be expected to take approximately 40 hours, not counting additional time for analysis. If the State Bar's information technology department can enable lawyers to provide the information through a simple online form, the data can be obtained even more easily.

#### **RULE AMENDMENTS:**

None

#### **BOARD BOOK IMPACT:**

None

#### **RECOMMENDATION**

The Member Oversight Committee recommends that State Bar Staff undertake an audit of 500 members from the most recent compliance group and provide a report to MOC at the July 2011 meeting of MOC.

#### **PROPOSED BOARD COMMITTEE RESOLUTION:**

Should the Member Oversight Committee agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that the Member Oversight Committee recommends that the Board directs staff to perform a random MCLE audit of at least 500 (approximately 0.8%) of the lawyers from the most recent compliance group, with the results to be presented at the July 2011 meeting of MOC. As part of the audit, staff shall identify how many hours of Legal Ethics are reported by each lawyer and shall attempt to measure how each lawyer fulfilled the remainder of his or her MCLE

requirements as well as any patterns (e.g., timing, subjects) relevant to the purpose of the MCLE program.