

AGENDA ITEM

JULY 134

DATE: July 7, 2011

TO: Members, Member Oversight Committee

FROM: Michael Tenenbaum, Chair

SUBJECT: Provision of Core Curriculum of 25 Hours of Free Online MCLE in Legal Ethics – Return from Public Comment

ATTACHMENTS: Proposed Curriculum of Free Legal Ethics Continuing Legal Education Courses

EXECUTIVE SUMMARY

Recognizing the importance of ensuring that lawyers acquire and maintain an understanding of the Rules of Professional Conduct, and mindful of the legislature's statutory direction that the State Bar provide MCLE courses online at no charge, this item makes available a core curriculum of a minimum of 25 hours of participatory continuing legal education courses in Legal Ethics at no charge through a dedicated page on the State Bar website.

At its May 13, 2011 meeting, the Member Oversight Committee ("MOC") authorized a 45-day period of public comment for a proposal to make available a core curriculum of a minimum of 25 hours of participatory continuing legal education courses in Legal Ethics at no charge through a dedicated page on the State Bar website. The 45-day period expired on June 16, 2011.

This agenda item returns the proposal from public comment for consideration by MOC and the Board.

Board members with any questions on this proposal may contact Laila Bartlett at (415) 538-2232 or laila.bartlett@calbar.ca.gov, or Pam Wilson (415) 538-2395 or pam.wilson@calbar.ca.gov.

BACKGROUND AND DISCUSSION

California law has, since before 2000, directed the State Bar to provide free and low-cost continuing legal education to lawyers. Section 6070(d) of the State Bar Act specifically states: "Special emphasis shall be placed upon the use of internet

capabilities and computer technology in the development and provision of no-cost and low-cost programs and materials.”

The State Bar currently offers 872 participatory MCLE courses online, many of which are more than one hour long — including 105 hours of Legal Ethics content. The State Bar charges \$35 per hour for virtually all of these, and there is currently only 1 course available for free.¹

In addition to these 872 participatory courses, the State Bar currently offers 72 self-study MCLE courses online, all of which are one hour long — including 4 hours of Legal Ethics content. The State Bar charges \$15 per hour for these, and there are currently only 3 courses available for free.²

The State Bar Act and the California Rules of Court require lawyers to take at least 25 hours of MCLE every three years.³ 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 credit hours of a lawyer’s MCLE may be self-study.⁴

In addition to providing MCLE courses of its own, the State Bar also approves outside providers of educational activity. There are currently an estimated 1,500 approved providers. A “single activity provider” is approved after submitting an application for approval of a particular course. If a provider offers 4 approved activities within 2 years, it is eligible to become a “multiple activity provider” and can thereafter (subject to renewal) grant credit for any activity that meets the MCLE guidelines.

A review of the most recent Annual Discipline Report with relevant statistics shows that, over the past five years, the main subjects of the public’s complaints about lawyers to the Office of Chief Trial Counsel are in the following areas: performance (including failure to communicate), fees, duties to clients (e.g., representation of adverse interests), and handling of funds.⁵

The State Bar currently has MCLE courses online in these subjects, for which it charges \$35 per hour and which — perhaps not surprisingly in light of other offerings in the

¹ This course, which offers 1.5 hours in Legal Ethics, was just added following the Ethics Symposium held on April 9, 2011.

² Two of these courses are in Legal Ethics and were published in August and November 2010; the third is entitled “Stress, Depression, and Substance Abuse in the Legal Profession” and was published in December 2010.

³ See Cal. Bus. & Prof. Code § 6070 and Cal. R. Ct. 9.31.

⁴ See Rule 2.72 of the Rules of the State Bar.

⁵ These are based on the Annual Discipline Report for 2009, issued in April 2010. The recently-issued Annual Discipline Report for 2010 no longer summarizes complaints to the State Bar based on the category of alleged professional misconduct.

market — only a relative handful of lawyers have taken. For example, a two-hour course entitled “Recognizing and Avoiding Conflicts of Interest,” for which the State Bar charges \$70, was taken by only 13 lawyers in 2010. Similarly, a 1.5-hour course entitled “Attorneys Fees — Practically, Ethically,” for which the State Bar charges \$52.50, was taken by only 30 lawyers.

By contrast, the State Bar’s experience in offering a one-hour self-study course entitled “The Proposed New and Amended Rules of Professional Conduct” for free has resulted in a far larger response, with 2,295 lawyers having taken that course in just the first four months of 2011 alone — more than all of the other online MCLE offerings on Attachment 1 combined.

To fulfill its core mission, the State Bar should help ensure that lawyers acquire and maintain an understanding of the Rules of Professional Conduct. MOC has identified at least 25 hours of participatory MCLE courses in the areas that are most frequently the subject of public complaints to the Office of Chief Trial Counsel. This item directs staff to provide a core curriculum of these Legal Ethics courses at no charge through a dedicated page on the State Bar’s website.

Attachment 1 to this item includes the proposed curriculum. These 25 course selections provide 36.25 hours of Legal Ethics content. All of these courses were developed by State Bar staff. At the request of staff, in light of its concern about the effect on Section revenues, MOC has excluded from this curriculum any courses developed by the State Bar sections.

FISCAL/PERSONNEL IMPACT:

In 2010, the 171,000 active lawyers in California made a total of 617 purchases from among the courses that form part of the proposed core curriculum. (By contrast, they ordered the free self-study course on The Proposed New and Amended Rules of Professional Conduct alone 720 times.) The revenue associated with these 617 purchases was \$38,876. Through April 2011, these courses have generated an additional \$38,448 in revenue.

Offering this curriculum of courses at no cost to the membership can reasonably be expected to reduce annual revenue by between \$38,000 and \$76,000. Yet the potential fiscal impact to the State Bar may be greater than just the loss of revenue from these courses to the extent that lawyers substitute these courses for other State Bar offerings.

Currently, the vast majority of the State Bar’s online CLE courses are produced by the Sections in their respective areas of interest. In 2010, total revenues from online CLE were approximately \$800,000, for which approximately 33,000 credit hours were granted. To put that in perspective, with 171,000 active lawyers required to take 25 hours of MCLE every three years, the total number of credit hours that must be earned each year is at least 1.43 million. The State Bar’s 33,000 credit hours thus represent a market share equivalent of around 2.3%.

PUBLIC COMMENTS RECEIVED:

The proposal was published for a 45-day comment period ending on June 16, 2011.

Fourteen comments were received. Of the Fourteen, seven opposed the proposal, six favored it and one section, the Environmental Law Section, took no position, stating that as a member section of the Council of State Bar sections, it did not join in, or endorse, any of individual sections' or Council's comments (Attachments 2 & 3).

The comments supporting the proposal, mostly from individual members, saw it as easing the financial burden of MCLE and that free access to ethics credits would benefit public protection.

The seven comments opposing the proposal were from State Bar Sections and local and specialty bars (Beverly Hills Bar Association, Continuing Education of the Bar, Council of Section Chairs, San Francisco Trial Lawyers Association, Santa Clara County Bar Association, Solo and Small Firm Practice Section and the Workers' Compensation Section).

Some themes from those opposing the proposal were as follows:

- The State Bar Sections already provide free and low cost MCLE
- No fiscal impact study has been conducted
- The proposal will make it more difficult for the Sections and local and specialty bars to offer ethics curriculum that focuses on the local practice of law.
- The State Bar only offers annual educational programming that cannot ensure that new and changing ethics matters are addressed
- The availability of free CLE programming will undermine the attendance at local and Section fee based programs
- The proposal lacks detail and input from stakeholders
- How will the program be funded and what is the fiscal impact to the Bar and would this diminish services to members and the public
- Who determines MCLE content and who may provide the programming?
- No relationship has been shown between ethics classes and the number of discipline complaints
- Attorneys may avoid continuing education in their practice areas
- The State Bar should consider the alternatives proposed by the Council of Sections

The alternatives proposed by the Council of State Bar Sections:

- Offering free ethics MCLE on a purely self-study basis
- Offering 1 hour of free electronic MCLE each month on a specific date and time

- Offering 4 hours of free participatory ethics sponsored by the State Bar
- Requesting each Section to provide a free one hour webinar per year that includes ethics with the Section's area of expertise
- Implementing any final plan on a one-year trial basis, so that a fiscal study can be completed to determine the impact on the Bar and the Sections as well as the proposals effectiveness

RULE AMENDMENTS:

None

BOARD BOOK IMPACT:

None

RECOMMENDATION

This memorandum asks the Member Oversight Committee to recommend to the Board to provide at least 25 hours of participatory MCLE courses in Legal Ethics (in the areas that are most frequently the subject of the public's complaints to the Office of Chief Trial Counsel) on the State Bar's website at no charge to the membership.

PROPOSED BOARD COMMITTEE RESOLUTIONS:

1. No change. Should the Board Committee on Member Oversight decline to recommend the proposal, no resolution is needed.
2. Should the Member Oversight agree with the recommendation to provide at least 25 hours of participatory MCLE courses in Legal Ethics (in the areas that are most frequently the subject of the public's complaints to the Office of Chief Trial Counsel) on the State Bar's website at no charge to the membership, the following resolution would be appropriate:

RESOLVED, that the Member Oversight Committee recommends that the Board of Governors approve the proposed core curriculum of free MCLE in Legal Ethics as set out in Attachment 1. These courses will be offered online on a dedicated page on the State Bar's website at no charge to the membership.

PROPOSED BOARD RESOLUTION:

Should the Member Oversight agree with the recommendation to provide at least 25 hours of participatory MCLE courses in Legal Ethics (in the areas that are most frequently the subject of the public's complaints to the Office of Chief Trial Counsel)

on the State Bar's website at no charge to the membership, the following resolution would be appropriate:

RESOLVED, that upon the recommendation of the Member Oversight Committee the Board of Governors approves the proposed core curriculum of free MCLE in Legal Ethics as set out in Attachment 1. These courses will be offered online on a dedicated page on the State Bar's website at no charge to the membership.