

**From:** Mandatory Continuing Legal Education Board

**Date:** July 20, 2020

**RE: REPORT AND RECOMMENDATION OF THE MCLE BOARD**

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### **Mandatory Continuing Legal Education Board**

The Mandatory Continuing Legal Education Board (“MCLE Board”) of the MCLE Board consists of seven members : Asia Wright (MCLE Board Chair), Ayanna Eagan (MCLE Board Vice Chair), Melissa Skelton, Merri Hartse, Robert Malae, Christopher Bueter, and Todd Alberstone.

### **Suggested Amendment**

The MCLE Board recommends an amendment to Admission and Practice Rule (APR) 11 that would require each licensed legal professional to complete at least one (1) credit hour of equity, inclusion and the mitigation of bias as Continuing Legal Education per each three year MCLE reporting period. The MCLE Board’s suggested amendment would not increase the total number of ethics hours required, nor prevent legal professionals from earning additional ethics credits on other topics, which would also count toward the 45 total required credits.

The MCLE Board is recommending the following suggested amendment to APR 11:

**APR 11(c)(1)(ii)** at least six credits must be in ethics and professional responsibility, as defined in subsection (f)(2), with at least one credit in equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law.

**APR 11(f)(2)** Ethics and professional responsibility, defined as topics relating to the general subject of professional responsibility and conduct standards for lawyers, LLLTs, LPOs, and judges, including ~~diversity and antibias with respect to the practice of law or the legal system,~~ equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law, and the risks to ethical practice associated with diagnosable mental health conditions, addictive behavior, and stress;

### **Background**

At the MCLE Board’s meeting of October 5, 2018, the WSBA Diversity Committee and the Washington Women’s Lawyers presented to the MCLE Board a suggested amendment to Rule 11 of the Washington Supreme Court’s Admission and Practice Rules (APR 11). The suggested amendment was developed by a collaboration between Washington Women Lawyers and the WSBA Diversity Committee; and was endorsed by the Asian Bar Association, the Cardozo Society of Washington State, the Filipino Lawyers of Washington, the Pierce County Minority Bar Association, Loren Miller Bar Association, Latina/o Bar Association of Washington, the South Asian Bar Association of Washington, and QLAW (the LGBT Bar Association of Washington). The suggested amendment would have required that at least one of the six



required ethics credits be on the topic of equity, inclusion and the mitigation of bias in the legal profession.

Following the presentation, the MCLE Board formed a subcommittee to study the suggested amendment and make a recommendation to the MCLE Board. The subcommittee provided a report and recommendation at the January 2019 MCLE Board meeting. The subcommittee recommended that the MCLE Board propose an amendment that included not only a required credit for equity, inclusion, and anti-bias; but also one credit for mental health and addiction, and one credit technology education focusing on digital security for a total of three of the six required credits.

The MCLE Board presented the above-suggested amendments to the Washington State Bar Association's Board of Governors on September 27, 2019, who voted against the amendments. The governors directed that in lieu of the MCLE suggested amendment, WSBA will offer three free one-hour CLEs each year, one on each of the three topics. At the October 4, 2019 MCLE Board meeting, the MCLE Board moved to send the suggested APR 11 amendment to the Washington Supreme Court. On December 4, 2019, the Washington State Supreme Court rejected the proposed amendments without comment.

This year the MCLE Board plans to continue their work to address systemic inequities, by suggesting a single, narrow amendment of the APR 11 Continuing Legal Education Ethics requirement to the Washington State Supreme Court -- a requirement focused on equity, inclusion and mitigation of bias. The need for this requirement is highlighted by increased demand for the legal profession to refresh its commitment to address systemic inequities and increase awareness of both conscious and unconscious biases. The MCLE Board believes that this suggested amendment is a valuable step in the right direction.

The MCLE Board originally considered submitting this suggested amendment to the Washington Supreme Court in the fall of 2021. However, given the recent recognition of the continued injustices that Black and other minority communities and individuals are subject to, and urgent calls for positive changes to many institutions, the MCLE Board - at a special meeting held on July 16th - decided to expedite the suggested amendment to October 2020. The MCLE Board will continue to solicit feedback on the suggested amendment, and will hear public comment and review any initial written feedback at their meeting scheduled on August 7<sup>th</sup>. The MCLE Board will collect further written feedback by August 22<sup>nd</sup>. After considering the feedback the MCLE Board intends to present the suggested amendment to the WSBA Board of Governors during their meeting in September 2020. The MCLE Board is hopeful that, with broader support and endorsements from community partners, the WSBA Board of Governors and the Court may be amenable to adopting this important suggested amendment.

## **Factors & Information**

### Need for Equity, Inclusion and Mitigation of Bias in the Legal Profession



Licensed legal professionals in the state of Washington are required to continue their legal education throughout their careers in order to remain eligible to practice law<sup>1</sup>. As created and appointed by the Washington Supreme Court, and administered by the WSBA, the Mandatory Continuing Legal Education (MCLE) Board plays a critical regulatory role in determining compliance with the minimum education requirements, as set out in Admission and Practice Rule (APR) 11. Part of this role is to develop, propose, and support continuing legal education that will not only educate Washington licensed legal professionals on the state of the law in various subjects but also improve inter-cultural communication, improve equitable outcomes, and reduce the risk of potential liability. Further, the MCLE Board has a duty to ensure that Washington licensed legal professionals have the skills and knowledge base to effectively serve their clients, the legal system, and society as a whole.

This suggested amendment will better equip legal professionals with tools of cultural competency and understanding in working with the diverse public we serve. When legal professionals cannot recognize and identify implicit bias, they cannot work individually and collectively to disrupt the inequitable and unconscionable influence of bias on clients and the general public.

#### Aligns with WSBA Diversity Plan

Since its adoption seven years ago, the WSBA's Diversity Plan continues to make progress on some levels, but WSBA can do better by ensuring members are educated and able to contribute to equity, inclusion, and to mitigate bias. This amendment will help its members better understand the lived experiences of individuals and entire communities who are currently both underrepresented and underserved by the legal community. As part of organizational self-reflection and to better align with our values and our guiding principles of equity and inclusion, the MCLE Board suggests the above amendment.

#### Access to Free CLEs in the required topics

The WSBA Board of Governors made a commitment, at their September 2019 Board meeting, to provide free ethics CLEs to be made accessible both in-person and on-demand each year in these three topics: equity, inclusion, and the mitigation of both implicit and explicit bias; mental health and addiction; and the use of technology as it pertains to professional responsibility including how to maintain security. This eliminates any access barriers, as the suggested amendment topic will be provided at no cost.

#### Contributes to Better Business Outcomes

Promoting equity and inclusion drives better business outcomes. Innovation and creative thinking are enhanced by recognizing and considering the diverse experiences and backgrounds of others. This is

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<sup>1</sup> In the state of Washington, individual members of the WSBA as legal professionals serve the public as a privilege, not a right. As members of the legal community, legal practitioners know that they are an integral part of the wider community and serve at the discretion of the Washington State Supreme Court.



particularly important amongst decision-makers. Conversely, failing to include diverse perspectives can result in a failure to take useful action despite some acceptable risks and ultimately lead to stagnation. The business sector as a whole has recognized this reality, with many major employers in this state and elsewhere investing in diversity even when not required by law. The legal profession needs to catch up in this regard. Addressing issues of equity and inclusion is not a political move, but a practical one.

#### Other Jurisdictions

A review of the MCLE requirement in other U.S. jurisdictions found that at least six (6) states have adopted a diversity, inclusion and elimination of bias requirement, with California as the first state to do so in 2008. In 2014, California amended their requirement to include elimination of bias outside of the legal profession. Following this, Minnesota adopted a diversity and anti-bias requirement in 2016, New York in 2018, both Illinois and Missouri in 2019, and Vermont most recently implementing the requirement in 2020. Similarly, two states have implemented a requirement that encompasses diversity and anti-bias: Oregon requires one credit of 'Access to Justice', and Maine requires one credit of 'Harassment/Discrimination'. In the summer of 2020, the New Jersey State Bar Association sent a letter to the New Jersey Supreme Court suggesting an amendment to the MCLE rule to require at least two credits in diversity, inclusion, and the elimination of bias.

#### ABA Model Rule for Minimum Continuing Legal Education (2017)

The ABA recently amended its Model Rule for MCLE in 2017. Section 3(A) of the ABA Model Rule recommends that jurisdictions require one credit per year in the area of ethics and professionalism (which would be three credits for a three-year reporting period in Washington). In addition, the ABA Model Rule recommends one credit every three years specifically in the area of diversity and inclusion. Washington already requires six credits in ethics and professional responsibility, one more than the total recommended by the ABA, and allows for topics covering diversity and inclusion to meet the ethics requirement; however, Washington does not *require* that any of the six credits be in the area of diversity and inclusion. All six ethics credits may currently be completed without instruction in the area of diversity, inclusion, and the mitigation of bias.

Timeline for expedited suggested amendment:		
July 20 <sup>th</sup>		Open Comment Period
July & August		Gather feedback on the suggested amendment
August 7 <sup>th</sup>	Regularly schedule MCLE Board meeting	Discuss comments received to date, and begin materials to the BOG.
August 22 <sup>nd</sup>		Close Comment Period & Finalize BOG materials
Week of August 22 <sup>nd</sup> (TBD)	Tentative Subcommittee meeting	Subcommittee meeting only if substantial change in comments that were presented at earlier August meeting.



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Sept 2 <sup>nd</sup>	BOG materials due	
Sept 17-18	BOG Meeting	Present to WSBA BOG and ask for Support
Week of Sept 22 <sup>nd</sup> (TBD)	Special MCLE Meeting	Discuss feedback from BOG and decide whether to move forward with suggested amendment
October 15, 2020	Suggested Amendment Deadline	Send Recommendation to Court

### Attachments

1. WSBA Diversity and Inclusion Plan (2013)
2. Additional Statistical Support for MCLE Requirement on Equity, Inclusion and Mitigation of Bias
3. ABA Model Rule for Minimum Continuing Legal Education (2017)





WSBA

## Diversity and Inclusion Plan

Approved by the Board of Governors May 2013



# Washington State Bar Association Diversity & Inclusion Plan

## Mission Statement

The Washington State Bar Association's mission is to serve the public and the members of the Bar, ensure the integrity of the legal profession, and to champion justice.

## Commitment to Diversity

The Washington State Bar Association is committed to advancing diversity and inclusion within the legal profession. Toward that end, WSBA is committed to understanding and responding to the professional environment which exists for all lawyers in Washington. Inclusion is best understood as an environment which encourages and incorporates different perspectives, ideas and experiences. The profession is changing. The business interests of attorneys, employers and clients call for more diverse legal representation across the state. WSBA recognizes the need to enhance opportunity in the legal profession and the public's experience with lawyers by demonstrating to its members and the public at large a genuine commitment to supporting and advancing diversity and inclusion.

This plan reflects the unique roles for which WSBA is positioned, as a unified bar, to create and help nurture the conditions that will encourage diverse lawyers to enter, remain, thrive and ultimately lead the profession and inspire others to follow in their footsteps. The plan rests on a fundamental assumption that WSBA's commitment to its own culture of inclusion and cultural competence provides the best foundation for meaningful progress. We refer to this as "Inside – Out" diversity. It is our hope that stakeholders and partners will answer the call to involvement as we work from the inside out to distinguish the Washington State legal profession as an inclusive community.

## Background

In 2003 the Washington State Bar Association formally established diversity as one of its nine strategic goals. In 2006 the Board of Governors formed its own Diversity Committee to help improve diversity within the elected leadership. In 2007 WSBA adopted five guiding principles, one of which is advancing and promoting "Diversity, equality, and cultural understanding throughout the legal community." Consistent with this guiding principle, WSBA next adopted two focus areas: working to understand the lay of the land of the legal community and providing tools to members and employers in order to enhance the retention of minority lawyers in the community.

The guiding principle of promoting **diversity, equality, and cultural understanding throughout the legal community** was supported by the 2011- 2013 Strategic Goal: **Conduct a detailed study of the composition of the legal profession and retention rates within the profession in the state of Washington.** In 2011 WSBA launched this groundbreaking study. The purpose was to

create a statistically reliable study of the membership's demographics and trends. Study results were released in March 2012 and presented at the April 2012 Board of Governors meeting.

### **Purpose of the Plan**

With the baseline study completed, the Diversity & Inclusion Plan is intended to outline WSBA's next steps and long term priorities.

Staff, member and leadership participation are particularly important to the effective coordination and delivery of systems, services and programs. The Plan's objectives all work towards the goals of retaining diverse attorneys, increasing their participation within the profession and creating opportunities for leadership within the Association.

### **Plan Objectives**

#### **1. MEMBERSHIP DEMOGRAPHICS**

- a. Improve diverse representation across WSBA entities, especially with respect to faculty and leadership**
  - i. Provide tools, systems, and evaluation for intentional recruitment of diverse faculty and leadership in collaboration with Minority Bar Associations (MBAs)
- b. Measure demographics/ diversity indicators longitudinally**
  - i. Conduct bi-annual follow-up surveys and full study every 10 years
  - ii. Administer more frequent surveys and evaluations to gather timely information on trends and opportunities
- c. Be the resource for others who care about the demographic trends of Washington's legal community**
  - i. Publish, present and share demographic news, trends and information
  - ii. Host events, discussions and online chats about the data and its implications
  - iii. Help develop a more complete picture of the future of the profession by partnering with the Initiative for Diversity, the ABA, and law schools to measure complementary data and methods to address inequities

#### **2. EDUCATION AND TRAINING**

- a. Ensure everyone who represents WSBA is knowledgeable about membership demographics and trends**
  - i. Present updated information and resources to leadership, staff and entities regularly
  - ii. Conduct annual review and analysis of board, staff and leadership demographics
  - iii. Articulate case to members about the business case for diversity and improve overall understanding of why this effort matters
  - iv. Develop tools and shared language for WSBA representatives to educate members why diversity matters to everyone



- v. Deliver consistent, ongoing training on cultural competence and inclusion
- vi. Develop and adopt a shared dictionary of terms and meanings
- b. Leverage and target WSBA programming to remove barriers/ improve conditions identified in the study**
  - i. Target outreach, educational tracks and special offerings within existing WSBA programs (including Continuing Legal Education, New Lawyer Education, Law Office Management Assistance Program, Lawyer Assistance, Public Service, and the Law Clerk Program) to members *in all diversity groups* focusing on:
    - a. Strengthening mentorship opportunities
    - b. Accelerating outreach to members statewide
    - c. Expanding support for new and solo practitioners

### **3. COLLABORATION AND PARTNERHSIP**

- a. Provide the forum for dialogue, focusing on the conditions for lawyers to enter, stay, thrive and lead the profession**
  - i. Accelerate communications and education to address inequities relating to diverse populations, specifically via:
    - a. Town Hall Series with law schools and employers
    - b. Online chats to stimulate dialogue
    - c. Guest posts and articles that raise new voices
- b. Provide WSBA representation and information in support of community projects, task forces and initiatives that intersect with WSBA's commitment to diversity**
  - i. Awards and spotlights on innovation and success – using WSBA's reach for maximum exposure for good ideas
  - ii. Increase outreach and facilitation, specifically via:
    - a. Networking events to open access to bar leaders
    - b. Receptions and events to connect with stakeholders
    - c. Clarified support for MBAs
    - d. Facilitating and hosting a peer network of mentor programs

### **Accountability & Reporting**

A report describing the progress of advancing WSBA's diversity and inclusion efforts will be presented at each Board of Governors meeting. The Diversity Chair and staff will present highlights of activities and ongoing advancement toward these objectives. WSBA will host an annual diversity convocation whereby each section and entity will report on the status of its efforts towards objectives 1 – 3 and to talk about what's working and what support is needed. Finally, staff will present an annual report at each September BOG meeting on the overall status of the Diversity & Inclusion Plan. The annual report will be published and distributed widely.

## Adelaine Shay

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**From:** KARRIN KLOTZ <karrink@aol.com>  
**Sent:** Tuesday, October 9, 2018 3:09 PM  
**To:** MCLE  
**Cc:** Dana Barnett  
**Subject:** Additional Statistical support for MCLE requirement on "Equity, Inclusion & Mitigation of Bias"

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

I contacted Retired Justice Faith Ireland about the issue of support for our proposal for a required MCLE on "Equity, Inclusion & Mitigation of Bias" and she sent me the below link for your follow-up purposes:

<http://projectimplicit.org/demopapers.html>  
<http://www.pewsocialtrends.org/2015/08/19/exploring-racial-bias-among-biracial-and-single-race-adults-the-iat/>  
<http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf>

ABA Model Rule for Minimum Continuing Legal Education  
(2017)

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**  
**FEBRUARY 6, 2017**

**RESOLUTION**

RESOLVED, That the American Bar Association adopts the Model Rule for Minimum Continuing Legal Education (MCLE) and Comments dated February 2017, to replace the Model Rule for MCLE and Comments adopted by the American Bar Association in 1988 and subsequently amended.

**American Bar Association**  
**Model Rule for Minimum Continuing Legal Education**  
**February 2017**

**Purpose**

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. In furtherance of this purpose, the ABA recommends this Model Rule for Minimum Continuing Legal Education (MCLE) and Comments, which replaces the prior Model Rule for MCLE and Comments adopted by the American Bar Association in 1988 and subsequently amended.

**Contents****Section 1. Definitions.****Section 2. MCLE Commission.****Section 3. MCLE Requirements and Exemptions.****Section 4. MCLE-Qualifying Program Standards.****Section 5. Accreditation.****Section 6. Other MCLE-Qualifying Activities.****Section 1. Definitions.**

**(A)** “Continuing Legal Education Program” or “CLE Program” or “CLE Programming” means a legal education program taught by one or more faculty members that has significant intellectual or practical content designed to increase or maintain the lawyer’s professional competence and skills as a lawyer.

**(B)** “Credit” or “Credit Hour” means the unit of measurement used for meeting MCLE requirements. For Credits earned through attendance at a CLE Program, a Credit Hour requires sixty minutes of programming. Jurisdictions may also choose to award a fraction of a credit for shorter programs.

**(C)** “Diversity and Inclusion Programming” means CLE Programming that addresses diversity and inclusion in the legal system of all persons regardless of race, ethnicity, religion, national origin, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias.

**(D)** “Ethics and Professionalism Programming” means CLE programming that addresses standards set by the Jurisdiction’s Rules of Professional Conduct with which a lawyer must comply to remain authorized to practice law, as well as the tenets of the legal profession by which a lawyer

demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts, clients, other lawyers, witnesses, and unrepresented parties.

**(E)** “In-House CLE Programming” means programming provided to a select private audience by a private law firm, a corporation, or financial institution, or by a federal, state, or local governmental agency, for lawyers who are members, clients, or employees of any of those organizations.

**(F)** “Interdisciplinary Programming” means programming that crosses academic lines that supports competence in the practice of law.

**(G)** “Jurisdiction” means United States jurisdictions including the fifty states, the District of Columbia, territories, and Indian tribes.

**(H)** “Law Practice Programming” means programming specifically designed for lawyers on topics that deal with means and methods for enhancing the quality and efficiency of a lawyer’s service to the lawyer’s clients.

**(I)** “MCLE” or “Minimum Continuing Legal Education” means the ongoing training and education that a Jurisdiction requires in order for lawyers to maintain their license to practice.

**(J)** “Mental Health and Substance Use Disorders Programming” means CLE Programming that addresses the prevention, detection, and/or treatment of mental health disorders and/or substance use disorders, which can affect a lawyer’s ability to perform competent legal services.

**(K)** “Moderated Programming” means programming delivered via a format that provides attendees an opportunity to interact in real time with program faculty members or a qualified commentator who are available to offer comments and answer oral or written questions before, during, or after the program. Current delivery methods considered Moderated Programming include, but are not limited to:

- (1) “In-Person” – a live CLE Program presented in a classroom setting devoted to the program, with attendees in the same room as the faculty members.
- (2) “Satellite/Groupcast” – a live CLE Program broadcast via technology to remote locations (i.e., a classroom setting or a central viewing or listening location). Attendees participate in the program in a group setting.
- (3) “Teleseminar” – a live CLE program broadcast via telephone to remote locations (i.e., a classroom setting or a central listening location) or to individual attendee telephone lines. Attendees may participate in the program in a group setting or individually.
- (4) “Video Replay” – a recorded CLE Program presented in a classroom setting devoted to the program, with attendees in the same room as a qualified commentator. Attendees participate in the program in a group setting.

- (5) “Webcast/Webinar” – a live CLE Program broadcast via the internet to remote locations (*i.e.*, a classroom setting or a central viewing or listening location) or to individual attendees. Attendees may participate in the program in a group setting or individually.
- (6) “Webcast/Webinar Replay” - a recorded CLE program broadcast via the internet to remote locations (*i.e.*, a classroom setting or a central viewing or listening location) or to individual attendees. A qualified commentator is available to offer comments or answer questions. Attendees may participate in the program in a group setting or individually.

**(L)** “New Lawyer Programming” means programming designed for newly licensed lawyers that focuses on basic skills and substantive law that is particularly relevant to lawyers as they transition from law school to the practice of law.

**(M)** “Non-Moderated Programming with Interactivity as a Key Component” means programming delivered via a recorded format that provides attendees a significant level of interaction with the program, faculty, or other attendees. Types of qualifying interactivity for non-moderated formats include, but are not limited to, the ability of participants to: submit questions to faculty members or a qualified commentator; participate in discussion groups or bulletin boards related to the program; or use quizzes, tests, or other learning assessment tools. Current delivery methods considered Non-Moderated Programming with Interactivity as Key Component include, but are not limited to:

- (1) “Recorded On Demand Online” – a recorded CLE Program delivered through the internet to an individual attendee’s computer or other electronic device with interactivity built into the program recording or delivery method.
- (2) “Video or Audio File” – a recorded CLE Program delivered through a downloaded electronic file in mp3, mp4, wav, avi, or other formats with interactivity built into the program recording or delivery method.
- (3) “Video or Audio Tape” – a recorded CLE Program delivered via a hard copy on tape, DVD, DVR, or other formats with interactivity built into the program recording or delivery method.

**(N)** “Self-Study” includes activities that are helpful to a lawyer’s continuing education, but do not meet the definition of CLE Programming that qualifies for MCLE Credit. Self-Study includes, but is not limited to:

- (1) “Informal Learning” - acquiring knowledge through interaction with other lawyers, such as discussing the law and legal developments
- (2) “Non-Moderated Programming Without Interactivity” - viewing recorded CLE Programs that do not have interactivity built into the program recording or delivery method
- (3) “Text” - reading or studying content (periodicals, newsletters, blogs, journals, casebooks, textbooks, statutes, etc.)

**(O)** “Sponsor” means the producer of the CLE Program responsible for adherence to the standards of program content determined by the MCLE rules and regulations of the Jurisdiction. A Sponsor may be an organization, bar association, CLE provider, law firm, corporate or government legal department, or presenter.

**(P)** “Technology Programming” means programming designed for lawyers that provides education on safe and effective ways to use technology in one’s law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters. Such programming assists lawyers in satisfying Rule 1.1 of the ABA Model Rules of Professional Conduct in terms of its technology component, as noted in Comment 8 to the Rule (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]”).

## **Section 2. MCLE Commission.**

The Jurisdiction’s Supreme Court shall establish an MCLE Commission to develop MCLE regulations and oversee the administration of MCLE.

### **Comments:**

1. Section 2 assumes that the Jurisdiction’s highest court is its Supreme Court and that the Supreme Court is the entity empowered to create an MCLE Commission. The titles of the applicable entities may vary by Jurisdiction.
2. Supreme Courts are encouraged to consider the following when establishing an MCLE Commission: composition of the Commission; terms of service; where and how often the Commission must meet; election of officers; expenses; confidentiality; and staffing.
3. It is anticipated that MCLE Commissions will develop Jurisdiction-specific regulations (or rules) to effectuate the provisions outlined in this Model Rule, such as regulations concerning when and how lawyers must file MCLE reports, penalties for failing to comply, and appeals. Further, it is anticipated that MCLE Commissions will develop regulations concerning the accreditation process for MCLE that is provided by local, state, and national Sponsors. This Model Rule also addresses recommended accreditation standards in Sections 4 and 5.



### **Section 3. MCLE Requirements and Exemptions.**

#### **(A) Requirements.**

- (1) All lawyers with an active license to practice law in this Jurisdiction shall be required to earn an average of fifteen MCLE credit hours per year during the reporting period established in this Jurisdiction.
- (2) As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following areas:
  - (a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year);
  - (b) Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years); and
  - (c) Diversity and Inclusion Programming (at least one Credit Hour every three years).
- (3) A jurisdiction may establish regulations allowing the MCLE requirements to be satisfied, in whole or in part, by the carryover of Credit Hours from the immediate prior reporting period.

#### **(B) Exemptions.** The following lawyers may seek an exemption from this MCLE Requirement:

- (1) Lawyers with an inactive license to practice law in this Jurisdiction, including those on retired status.
- (2) Nonresident lawyers from other Jurisdictions who are temporarily admitted to practice law in this Jurisdiction under *pro hac vice* rules.
- (3) A lawyer with an active license to practice law in this Jurisdiction who maintains a principal office for the practice of law in another Jurisdiction which requires MCLE and who can demonstrate compliance with the MCLE requirements of that Jurisdiction.
- (4) Lawyers who qualify for full or partial exemptions allowed by regulation, such as exemptions for those on active military duty, those who are full-time academics who do not engage in the practice of law, those experiencing medical issues, and those serving as judges (whose continuing education is addressed by other rules).

**Comments:**

1. While many Jurisdictions have chosen to require twelve Credit Hours per year, and a minority of Jurisdictions require fewer than twelve Credit Hours per year, Section 3(A)(1) recommends an average of fifteen Credit Hours of CLE annually, meaning lawyers must earn fifteen Credit Hours per reporting period in Jurisdictions that require annual reporting, thirty Credit Hours per reporting period in Jurisdictions that require reporting every two years, and forty-five Credit Hours per reporting period in Jurisdictions that require reporting every three years. In addition, this Model Rule recommends sixty minutes of CLE Programming per Credit Hour, which is the standard in the majority of Jurisdictions, although a minority of Jurisdictions have chosen to require only fifty minutes of CLE Programming per Credit Hour.

2. Section 3(A)(1) does not take a position on whether lawyers should report annually, every two years, or every three years, all of which are options various Jurisdictions have chosen to implement, in part based on their own Jurisdiction's administrative needs. Allowing a lawyer to take credits over a two-year or three-year period provides increased flexibility for the lawyer in choosing when and which credits to earn, but it may also lead to procrastination and may provide less incentive for a lawyer to regularly take CLE that updates his or her professional competence.

3. Section 3(A)(2) recognizes that Jurisdictions may choose to identify specific MCLE credits that each lawyer must earn, such as those addressing particular subject areas. This Model Rule recommends that every lawyer be required to take the specific credits outlined in Section 3(A)(2)(a), (b), and (c). While requiring specific credits may increase administrative burdens on accrediting agencies, CLE Sponsors, and individual lawyers, and also requires proactive efforts to ensure the availability of programs, it is believed that those burdens are outweighed by the benefit of having all lawyers regularly receive education in those specific areas.

4. Many Jurisdictions currently allow CLE Programs on topics outlined in Section 3(A)(2)(b) and (c) (relating to Mental Health and Substance Use Disorders Programming, and Diversity and Inclusion Programming) to count toward the general CLE requirement or the Ethics and Professionalism Programming requirement, rather than specifically requiring attendance at those specialty programs. This Model Rule recommends stand-alone requirements for those specialty programs, in order to ensure that all lawyers receive minimal training in those areas. With respect to Mental Health and Substance Use Disorders Programming in particular, research indicates that lawyers may hesitate to attend such programs due to potential stigma; requiring all lawyers to attend such a program may greatly reduce that concern. Nonetheless, this Model Rule recognizes that Jurisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement. All Jurisdictions are encouraged to promote the development of those specialty programs in order to reach as many lawyers as possible. Nearly every Jurisdiction has a lawyers assistance program that can offer, or assist in offering, Mental Health and Substance Use Disorders Programming. In addition, numerous bar associations, including the American Bar Association, have diversity committees that can offer, or assist in offering, Diversity and Inclusion Programming.

5. Section 3(A)(3) endorses regulations that allow lawyers to carry over MCLE credits earned in excess of the current reporting period's requirement from one reporting period to the next, which encourages lawyers to take extra MCLE credits at a time that meets their professional and learning needs without losing credit for the MCLE activity. It is anticipated that each Jurisdiction will draft carryover credit regulations that best meet the Jurisdiction's needs, taking into account factors such as the length of the reporting period, the availability of CLE Programs in the Jurisdiction, administrative considerations, and other factors.

6. Section 3(B) recognizes that Jurisdictions may choose to exempt certain lawyers from MCLE requirements. It is anticipated that regulations addressing such exemptions will identify those who are automatically exempt, those who may seek an exemption based on their particular circumstances, and the process for claiming an exemption.

7. Section 3(B)(3) provides a mechanism for lawyers licensed in more than one Jurisdiction to be exempt from MCLE requirements if the lawyer satisfies the MCLE requirements of the Jurisdiction where his or her principal office is located. A Jurisdiction may consider limiting this exemption to lawyers with principal offices in certain Jurisdictions if the Jurisdiction is concerned that the MCLE rules of other Jurisdictions vary too greatly from its own rules. A Jurisdiction may also consider limiting this exemption to require that the lawyer attend particular CLE Programs, such as a Jurisdiction-specific professionalism program, or other specific programs not required in the Jurisdiction where the lawyer's principal office is located.

#### **Section 4. MCLE-Qualifying Program Standards.**

To be approved for credit, Continuing Legal Education Programs must meet the following standards:

**(A)** The program must have significant intellectual or practical content and be designed for a lawyer audience. Its primary objective must be to increase the attendee's professional competence and skills as a lawyer, and to improve the quality of legal services rendered to the public.

**(B)** The program must pertain to a recognized legal subject or other subject matter which integrally relates to the practice of law, professionalism, diversity and inclusion issues, mental health and substance use disorders issues, civility, or the ethical obligations of lawyers. CLE Programs that address any of the following will qualify for MCLE credit, provided the program satisfies the other accreditation requirements outlined herein:

- (1) Substantive law programming
- (2) Legal and practice-oriented skills programming

- (3) Specialty programming (*see* Section 3(A)(2))
- (4) New Lawyer Programming (*see* Section 1(L))
- (5) Law Practice Programming (*see* Section 1(H))
- (6) Technology Programming (*see* Section 1(P))
- (7) Interdisciplinary Programming (*see* Section 1(F))
- [(8) Attorney Well-Being Programming]

**(C)** The program must be delivered as Moderated Programming, or Non-Moderated Programming with Interactivity as a Key Component. The Sponsor must have a system which allows certification of attendance to be controlled by the Sponsor and which permits the Sponsor to verify the date and time of attendance.

**(D)** Thorough, high-quality instructional written materials which appropriately cover the subject matter must be distributed to all attendees in paper or electronic format during or prior to the program.

**(E)** Each program shall be presented by a faculty member or members qualified by academic or practical experience to teach the topics covered, whether they are lawyers or have other subject matter expertise.

**Comments:**

1. This Model Rule recommends approval of CLE programs designed for lawyers on the topics outlined in Section 4(B). This Model Rule supports allowing a lawyer to make educated choices about which programs will best meet the lawyer’s educational needs, recognizing that the lawyer’s needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned through the programs identified in Section 4(B).

2. Section 4(B)(4) supports accrediting CLE Programs specifically designed for new lawyers. Many Jurisdictions require new lawyers to take one or more specific programs that focus on basic skills and substantive law particularly relevant to new lawyers, either prior to or immediately after bar admission. Other Jurisdictions simply accredit such programs as general CLE. The catalyst for some Jurisdictions to begin offering such programs was a 1992 ABA task force report entitled: “Task Force on Law Schools and the Profession: Narrowing the Gap” (commonly known as the “MacCrate Report”), which offered numerous recommendations for preparing law students and new graduates to practice law. This Model Rule supports the creation of programs designed for new lawyers, but does not specifically require such programs, because many Jurisdiction-specific

factors may influence a Jurisdiction's decision on this issue, such as the number of lawyers in the Jurisdiction, the availability of existing CLE programs, whether there are specific Sponsors available to teach such programs, similar educational programs required before licensure, and other factors.

3. Law Practice Programming, Section 4(B)(5), is programming specifically designed for lawyers on topics that deal with means and methods for enhancing the quality and efficiency of a lawyer's service to the lawyer's clients. Providing education on the operation and management of one's legal practice can help lawyers avoid mistakes that harm clients and cause law practices to fail. In some cases, Law Practice Programming may qualify as Ethics and Professionalism Programming.

4. Technology Programming, Section 4(B)(6), provides education on safe and effective ways to use technology in one's law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters, thereby assisting lawyers in satisfying Rule 1.1 of the ABA Model Rules of Professional Conduct in terms of its technology component, as noted in Comment 8 to the Rule ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]"). In some cases, Technology Programming may qualify as Ethics and Professionalism Programming.

5. Interdisciplinary Programming, Section 4(B)(7), provides a lawyer the opportunity to gain knowledge about a subject pertinent to his or her law practice, such as the treatment of particular physical injuries, child development, and forensic accounting.

6. In recent years, some Jurisdictions have begun accrediting programming that addresses attorney wellness or well-being topics. Some of those programs qualify for accreditation under this Model Rule's definitions of Mental Health and Substance Use Disorders Programming and Ethics and Professionalism Programming. In the future, this Model Rule may be amended to include additional programming that falls within a broader definition of Attorney Well-Being Programming. For that reason, Section (4)(B)(8) appears in brackets and Attorney Well-Being Programming is not defined in this Model Rule.

7. If a lawyer seeks MCLE credit for attending a program that has not been specifically designed for lawyers, including but not limited to programs on the topics identified in Section 4(B), Jurisdictions may choose to consider creating regulations that would require the lawyer to explain how the program is beneficial to the lawyer's practice. The regulations could also address how to calculate Credit Hours for programs that were not designed for lawyers.

8. In-Person Moderated Programming, *see* Section 4(C) and Section 1(K)(1), requires lawyers to leave their offices and learn alongside other lawyers, which can enhance the education of all and promote collegiality. Other forms of Moderated Programming and Non-Moderated Programming

with Interactivity as a Key Component, such as Section 4(C), Section 1(K) and (M), and Section 4(A)(2), allow lawyers to attend programs from any location and, in some cases, at the time of their choice. This flexibility allows lawyers to select programs most relevant to their practice, including specialized programs and programs with a national scope. Some Jurisdictions have expressed concern with approving programming that does not occur In-Person on grounds that the lawyer is less engaged. Thus, some Jurisdictions have declined to accredit or have limited the number of credits that can be earned through these other forms of programming. This Model Rule supports allowing a lawyer to make educated choices about whether attending Moderated Programming (In-Person or other) or Non-Moderated Programming with Interactivity as a Key Component will best meet the lawyer's educational needs, recognizing that the lawyer's needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned through Moderated Programming or Non-Moderated Programming with Interactivity as a Key Component. If a Jurisdiction believes that Moderated Programming, specifically In-Person Programming, is crucial to a lawyer's education, then it is recommended that the Jurisdiction establish a minimum number of credits that must be earned through this type of programming, rather than place a cap on the number of credits that can be earned through other types of programming. A key factor in deciding whether to require In-Person Programming is the availability of programs throughout a particular Jurisdiction, which may be affected by geography, the number of CLE Sponsors, and other Jurisdiction-specific factors.

9. Currently, all Jurisdictions calculate credits exclusively based on the number of minutes a presentation lasts. Several Jurisdictions have explored offering MCLE credit for self-guided educational programs, such as those offered using a computer simulation that is completed at the lawyer's individual pace. Jurisdictions may wish to consider offering MCLE credit for such programs, especially as technology continues to advance.

10. Self-Study does not qualify for MCLE Credit. Jurisdictions have used the term "self-study" in varying ways. As defined in this Model Rule, Self-Study refers to activities that are important for a lawyer's continuing education and professional development, but which do not qualify as MCLE. Lawyers are encouraged to engage in Self-Study as a complement to earning MCLE Credits.

## **Section 5. Accreditation.**

**(A)** The Jurisdiction shall establish regulations that outline the requirements and procedures by which CLE Sponsors can seek approval for an individual CLE Program. The regulations should indicate whether the Jurisdiction imposes specific requirements with respect to the following:

- (1) Faculty credentials
- (2) Written materials
- (3) Attendance verification

(4) Interactivity

(5) Applications and supplemental information required (agenda, sample of materials, faculty credentials, etc.)

(6) Accreditation fees

**(B)** Any Sponsor may apply for approval of individual programs, but if the Jurisdiction determines that a Sponsor regularly provides a significant volume of CLE programs that meet the standards of approval and that the Sponsor will maintain and submit the required records, the Jurisdiction may designate, on its own or upon application from a Sponsor, such a Sponsor as an “approved provider.” The MCLE Commission may revoke approval if a Sponsor fails to comply with its regulations, requirements, or program standards.

**(C)** Programs offered by law firms, corporate or government legal departments, or other similar entities primarily for the education of their members or clients will be approved for credit provided that the program meets the standards for accreditation outlined in Section 4.

**(D)** A Jurisdiction may establish regulations allowing an individual lawyer attendee to self-apply for MCLE Credit for attending a CLE program that the Sponsor did not submit for accreditation in the Jurisdiction where the individual lawyer is licensed.

**Comments:**

1. The vast majority of Jurisdictions now require MCLE. Over the four decades during which Jurisdictions began implementing MCLE requirements, they have taken a variety of approaches to accreditation requirements and processes. This has allowed Jurisdictions to consider Jurisdiction-specific priorities and needs when drafting CLE requirements. However, this has created challenges for CLE Sponsors seeking program approval in multiple Jurisdictions. Many regional and national CLE Sponsors spend considerable time and resources to file applications in multiple Jurisdictions with differing program requirements. This increased financial and administrative burden can increase costs for CLE attendees, and it can also affect the number of programs being offered nationwide on specialized CLE and federal law topics. While differences in regulatory requirements among Jurisdictions are likely to continue, Jurisdictions are encouraged to consider ways to reduce financial and administrative burdens so that CLE Sponsors can offer programming that meets lawyers' educational needs at a reasonable price. For instance, Jurisdictions can promulgate regulations that are clear and specific, and they can streamline application processes, both of which would make it easier for Sponsors to complete applications and know with greater certainty whether programs are likely to be approved for MCLE credit. In addition, Jurisdictions may choose to reduce administrative costs to the Jurisdictions, CLE Sponsors, and individual lawyers by recognizing an accreditation decision made for a particular program by another Jurisdiction, thereby eliminating the need for the CLE Sponsor or individual lawyer to submit the program for accreditation in multiple Jurisdictions. Jurisdictions might also consider creating a regional or national accrediting agency to supplement or replace accreditation processes in individual Jurisdictions.

2. Many Jurisdictions outline specific requirements for CLE program faculty members, such as requiring that at least one member of the faculty be a licensed lawyer. Section 5(A)(1) does not suggest specific regulations with respect to faculty, but Section 4(B) recognizes the value of programming in Law Practice, Technology, and Interdisciplinary topics. For CLE Programs on those topics, the most qualified speaker may be a non-lawyer. Therefore, Jurisdictions are encouraged to allow non-lawyers to serve as speakers in appropriate circumstances, and Sponsors are encouraged to include lawyers in the planning and execution of programs to ensure that any subject area is discussed in a legal context.

3. All Jurisdictions currently require that a CLE program include written materials, which enhance the program and serve as a permanent resource for attendees. Section 4(D) continues to require program materials for a program to qualify for credit. Section 5(A)(2) does not suggest specific requirements for written materials, but Jurisdictions are encouraged to provide clear guidance on the format and length of required materials, which will better enable CLE Sponsors and individual lawyers seeking credit for programs to satisfy the Jurisdiction's requirements with respect to written materials.

4. Section 5(A)(3) recognizes that many Jurisdictions require lawyers to complete attendance sheets at In-Person CLE programs or provide proof they are attending an online program. This



Model Rule does not take a position on how Jurisdictions should verify attendance, but Jurisdictions are encouraged to weigh the benefits of particular methods of verifying attendance against the administrative cost of the various methods of tracking and reporting attendance.

5. Section 5(A)(4) acknowledges that many Jurisdictions require that attendees have an opportunity to ask the speakers questions. While this Model Rule does not offer specific regulations on this topic, this Model Rule does endorse Moderated Programming with Interactivity as a Key Component, which includes allowing lawyers to attend CLE on demand. Those Jurisdictions that wish to provide an opportunity for attendees to ask questions are encouraged to consider alternate ways of allowing speakers and attendees to communicate, such as using Webinar chat rooms or email.

6. Section 5(A)(6) recognizes that most Jurisdictions impose fees on CLE Sponsors or individual lawyers to offset the cost of accrediting and tracking MCLE credits. The amount and type of fees vary greatly by Jurisdiction. In some cases, CLE Sponsors make decisions about where they will apply for accreditation based on the fees assessed, and may decide not to seek credit in particular Jurisdictions, such as if providing MCLE credit for a handful of attendees costs more than the tuition paid by those attendees. This can affect the availability of CLE programming to individual lawyers, especially on national and specialized topics that may not otherwise be offered in a particular Jurisdiction. Jurisdictions are encouraged to consider various fee models when determining how best to cover administrative costs.

7. For an approved provider system, *see* Section 5(B), Jurisdictions should create regulations which define the standards, application process for approved provider status, ongoing application process for program approval, reporting obligations, fees, and benefits of the status. Benefits may include reduced paperwork when applying for individual programs, reduced fees for program applications, or presumptive approval of all programs.

8. Many Jurisdictions impose specific requirements on In-House CLE Programming, which is sponsored by a private law firm, a corporation, or financial institution, or by a federal, state or local governmental agency for lawyers who are members, clients, or employees of any of the those organizations. This Model Rule recommends that Jurisdictions treat In-House Sponsors the same as other Sponsors and allow for full accreditation of programs when all other standards of Section 4 have been met.

9. Section 5(D) endorses regulations that allow an individual lawyer to self-apply for MCLE credit for attending a CLE Program that would qualify for MCLE Credit under Section 4, but which was not submitted for accreditation by the Sponsor in the Jurisdiction where the individual lawyer is licensed. This allows greater flexibility for a lawyer to select CLE programming that best meets his or her educational needs regardless of where the program Sponsor has chosen to apply for MCLE credit. It is anticipated that each Jurisdiction will draft regulations that best meet the Jurisdiction's needs, taking into account factors such as: the standards, delivery format, and

content of the program; the Sponsor's qualifications; other accreditation of the program by CLE regulators; the availability of CLE Programs in the Jurisdiction; administrative considerations, including fees; and other factors.

#### **Section 6. Other MCLE-Qualifying Activities.**

Upon written application of the lawyer engaged in the activity, MCLE credit may be earned through participation in the following:

**(A) Teaching** – A lawyer may earn MCLE credit for being a speaker at an accredited CLE program. In addition, lawyers who are not employed full-time by a law school may earn MCLE credit for teaching a course at an ABA-accredited law school, or teaching a law course at a university, college or community college. Jurisdictions shall create regulations which define the standards, credit calculations, and limitations of credit received for teaching or presenting activities.

**(B) Writing** – A lawyer may earn MCLE credit for legal writing which:

- (1) is published or accepted for publication, in print or electronically, in the form of an article, chapter, book, revision or update;
- (2) is written in whole or in substantial part by the applicant; and
- (3) contributed substantially to the continuing legal education of the applicant and other lawyers.

Jurisdictions shall create regulations which define the standards, credit calculations, and limitations of credit received for writing activities.

**[(C) Pro Bono]**

**[(D) Mentoring]**

#### **Comments:**

1. A minority of Jurisdictions award MCLE credit for providing pro bono legal representation. This Model Rule takes no position on whether such credit should be granted, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the extent of free legal services existing in the Jurisdiction and pro bono requirements imposed by the Jurisdiction's ethical rules. Accordingly, this option appears in brackets in this Model Rule.

2. A minority of Jurisdictions award MCLE credit for participating in mentoring programs for fellow lawyers. This Model Rule takes no position on whether credit should be available for that activity, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the perceived need for formal mentoring programs in the Jurisdiction and the

availability of organizations to administer formal mentoring programs. Accordingly, this option appears in brackets in this Model Rule.



## REPORT

Nearly thirty years have passed since the American Bar Association House of Delegates adopted the Model Rule for Minimum Continuing Legal Education (MCLE) and Comments (hereafter, “1988 MCLE Model Rule”) to serve as a model for a uniform standard and means of accreditation of CLE programs and providers. The CLE landscape has changed considerably in the last three decades. Technological advancements have made it possible for lawyers to learn about the law in new and exciting ways. Evolution in the practice of law and changes in society have also created opportunities for educating lawyers about new subjects. In addition, increasing numbers of lawyers are licensed in more than one Jurisdiction.<sup>1</sup>

Although only thirty United States Jurisdictions required MCLE in 1988, forty-six states and four other Jurisdictions now do so.<sup>2</sup> While each Jurisdiction has its own MCLE rules and regulations, many requirements are consistent across Jurisdictions. As Jurisdictions continue to evaluate their MCLE requirements, they look to successes and challenges other Jurisdictions have experienced, as well as to the 1988 MCLE Model Rule. In light of the many changes that have occurred in CLE and the legal profession over the past thirty years, the time has come to adopt a new MCLE Model Rule to assist Jurisdictions in the years to come. This Model Rule retains many of the core provisions of the 1988 MCLE Model Rule, but it eliminates some detailed recommendations, such as those concerning the organization of MCLE commissions in each Jurisdiction and specific penalties for lawyers who do not satisfy MCLE requirements. This Model Rule also adds a definitions section, as well as new recommendations for specific types of programming and methods of program delivery. In addition, it has been reorganized for easier navigation.

### **I. Model Rule drafting process.**

Although the 1988 MCLE Model Rule was amended by the House of Delegates several times over the last three decades, the House of Delegates has not considered the document as a whole since it was adopted. In recent years, the MCLE Subcommittee of the ABA Standing Committee on Continuing Legal Education (“SCOCLE”) discussed several developments in CLE

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<sup>1</sup> The terms “Jurisdiction” and “Sponsor” are among those defined in Section 1 of the Model Rule. Those terms are capitalized in this report.

<sup>2</sup> United States Jurisdictions include the fifty states, the District of Columbia, territories, and Indian tribes. The following forty-six states require lawyers to take MCLE: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In addition, Guam, Mariana Islands, Puerto Rico, Virgin Islands, and some Indian tribes (e.g., Navajo Nation) require MCLE.

that could necessitate amendments to the 1988 MCLE Model Rule. Then, in August 2014, the House of Delegates passed Resolution 106, which specifically asked SCOCLE to consider changes to the 1988 MCLE Model Rule, including those related to law practice CLE. *See* 2014A106.

To address issues identified by the MCLE Subcommittee and by Resolution 106, SCOCLE initiated the MCLE Model Rule Review Project (hereafter, “Project”), which has undertaken a comprehensive review of the 1988 MCLE Model Rule. The Project began by seeking volunteers from within and outside the ABA to serve on working groups. Over fifty volunteers—including individual lawyers, ABA leaders, CLE regulators, CLE providers, judges, academics, law firm professional development coordinators, and state/local/specialty bar association leaders—considered a wide variety of issues related to MCLE, including: CLE delivery methods, substantive law programming, specialty programming, CLE for specific constituent groups, the impact of technology on CLE, international approaches to CLE,<sup>3</sup> and many other topics.

Based on reports of the various working groups and larger discussions with working group members and other interested persons, the Project prepared a draft Model Rule that was circulated for comment to entities within and outside the ABA in August 2016. As a result of feedback from various entities and individuals, the draft was revised and is now being submitted to the House of Delegates for adoption.

## II. The Purpose of MCLE.

Long before Jurisdictions began requiring CLE, Jurisdictions recognized the need for CLE.<sup>4</sup> “Continuing legal education ... was originally implemented as a voluntary scheme after World War II to acclimate attorneys returning to practice after a lengthy absence in the military

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<sup>3</sup> The International Approaches working group looked at MCLE requirements in Canada, New Zealand, Australia, England, and Wales. In Canada, between 2009 to 2016, eight of the ten provinces and the three territories introduced a mandatory credit hours system. Although these Canadian requirements are similar to those in the U.S.A., the regulatory mechanisms have been designed to be less complex and significantly less expensive to administer. In New Zealand and four Canadian jurisdictions, a learning or study plan requirement has been introduced either in combination with or in place of a credit hours requirement. Most Australian states have a mandatory credit hours system. Very recently in England and Wales, the credit hours requirement for solicitors has been eliminated in place of a requirement that solicitors certify they are maintaining their competence to practice law. For information on these changes in England and Wales, please visit: <http://www.sra.org.uk/solicitors/cpd/solicitors.page>. Barristers in England and Wales moved to a similar requirement that became effective on January 1, 2017. *See* <https://www.barstandardsboard.org.uk/regulatory-requirements/regulatory-update-2016/bsb-regulatory-update-may-2016/changes-to-cpd/>.

<sup>4</sup> Several important national conferences considered the role of CLE. They were known as the “Arden House” conferences and were held in 1958, 1963, and 1987. More recently, in 2009, the Association for Continuing Legal Education Administrators (ACLEA) and the American Law Institute-American Bar Association (ALI-ABA) cosponsored an event called “Critical Issues Summit, Equipping Our Lawyers: Law School Education, Continuing Legal Education, And Legal Practice in the 21st Century.”

and to meet the needs of increased numbers in the profession.”<sup>5</sup> In 1975, Minnesota and Iowa became the first states to require MCLE, in part to counteract negative publicity caused by the involvement of lawyers in the Nixon Watergate scandal.<sup>6</sup>

Ultimately, it is clear that the primary reasons for requiring CLE have remained the same since the first states began requiring MCLE forty years ago: ensuring lawyer competence, maintaining public confidence in the legal profession, and promoting the fair administration of justice. In recognition of those goals, this Model Rule includes the following Purpose Statement, from which all other provisions of the Model Rule flow:

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. In furtherance of this purpose, the ABA recommends this Model Rule for Minimum Continuing Legal Education (MCLE) and Comments, which replaces the prior Model Rule for MCLE and Comments adopted by the American Bar Association in 1988 and subsequently amended.

### **III. Key themes addressed by this Model Rule.**

The Project’s working groups were asked to consider what works well in Jurisdictions that require MCLE and what has challenged consumers, providers, and regulators of MCLE. Several key themes emerged and are reflected in this Model Rule.

First, when it comes to regulating MCLE, there are many similarities among Jurisdictions, but no two Jurisdictions have identical rules and regulations. Given that the vast majority of Jurisdictions already have MCLE rules and regulations in place, it is unrealistic to expect that every Jurisdiction will adopt identical rules. Rather than suggest that every Jurisdiction adopt identical rules for every aspect of MCLE administration, this Model Rule focuses on the most important aspects of MCLE, including those that affect MCLE on a national level. The Model Rule states that it is anticipated that Jurisdictions will develop additional rules and regulations to address administrative decisions such as reporting deadlines, fees, attendance verification, and other issues.

Second, the continuing education needs of lawyers vary based on the lawyer’s length of experience, practice setting, and area of practice. For instance, an introduction to an individual

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<sup>5</sup> Lisa A. Grigg, Note, “The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence or Just Busy Work?”, 12 *BYU. J. PUB. L.* 417, 418 (1998). For additional history of the development of MCLE, *see* Cheri A. Harris, MCLE: The Perils, Pitfalls, and Promise of Regulation, 40 *VAL. U. L. REV.* 359, 369 (2006); and Chris Ziegler and Justin Kuhn, “Is MCLE A Good Thing? An Inquiry Into MCLE and Attorney Discipline,” available at: [https://www.clereg.org/assets/pdf/Is\\_MCLE\\_A\\_Good\\_Thing.pdf](https://www.clereg.org/assets/pdf/Is_MCLE_A_Good_Thing.pdf).

<sup>6</sup> *See* Rocio T. Aliaga, “Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar’s Consideration of MCLE,” 8 *GEO J. LEGAL ETHICS* 1145, 1150 (1995).

state's laws of intestacy will be helpful to a newer lawyer engaging in general practice in a single state, but of little use to a lawyer with twenty years of experience practicing products liability law in federal courts in six Jurisdictions. It is imperative that lawyers have access to high-quality CLE that most meets their educational needs. One way to achieve that goal is to allow lawyers to access CLE in person or using technology-based delivery methods such as teleconferences and webinars. This Model Rule addresses that goal by recommending that Jurisdictions allow lawyers to choose CLE offered in a variety of program delivery formats and not limit the number of credits that can be earned using a particular delivery format.

Third, it is important that lawyers continue to receive CLE on substantive legal topics—especially those areas in which the lawyer practices—because the law is ever-evolving. At the same time, it is also important that lawyers have access to CLE that addresses the management of their practices to ensure that they can properly serve and manage their clients. For these reasons, it is imperative that CLE be offered in substantive law areas, law practice, and technology. This Model Rule addresses that goal by recommending that Jurisdictions accredit substantive law programs, law practice programs, and technology programs, and further recommending that Jurisdictions not limit the number of credits that can be earned in a particular subject area.

Fourth, although this Model Rule is designed to allow lawyers to choose the CLE topics that best meet their educational needs, there are several topics that are so crucial to maintaining public confidence in the legal profession and the rule of law, and promoting the fair administration of justice, that all lawyers should be required to take CLE in those topic areas. Those areas include: (1) Ethics and Professionalism; (2) Diversity and Inclusion; and (3) Mental Health and Substance Use Disorders.

Fifth, the Model Rule recognizes that having each Jurisdiction draft its own rules and regulations over the past thirty years has allowed Jurisdictions to consider Jurisdiction-specific priorities and needs when drafting CLE requirements, but has also created challenges for CLE Sponsors seeking program approval in multiple Jurisdictions. There are increased financial and administrative burdens associated with seeking MCLE credit in multiple Jurisdictions, which can increase costs for CLE attendees and affect the number of programs being offered nationwide on specialized CLE and federal law topics. This Model Rule suggests several strategies Jurisdictions may consider to reduce those financial and administrative burdens so that CLE Sponsors can offer programming that meets lawyers' educational needs at a reasonable price.

Sixth, with the vast majority of Jurisdictions now requiring MCLE, many law firms, government legal departments, and other legal workplaces—especially those with offices in multiple cities and states—offer in-house CLE programs that address educational topics most relevant to the legal entity. In some Jurisdictions, these programs are not granted MCLE credit. This Model Rule recommends that Jurisdictions treat in-house Sponsors of CLE programs the same as other Sponsors and allow for full accreditation of programs when all other accreditation standards have been met.



Seventh, the legal profession includes hundreds of thousands of lawyers who are licensed in more than one Jurisdiction.<sup>7</sup> Some of these lawyers experience challenges meeting the requirements of each Jurisdiction in which they are licensed due to differences in requirements and the process for MCLE program approval. To reduce the administrative burdens on those lawyers, this Model Rule recommends that Jurisdictions adopt a special exemption for lawyers licensed in multiple Jurisdictions, pursuant to which a lawyer is exempt from satisfying MCLE requirements if he or she satisfies the MCLE requirements of the Jurisdiction where the lawyer's principal office is located.

#### **IV. 2017 MCLE Model Rule: A Closer Look.**

The Model Rule contains the aforementioned Purpose Statement plus six Sections, including:

- Section 1. Definitions.
- Section 2. MCLE Commission.
- Section 3. MCLE Requirements and Exemptions.
- Section 4. MCLE-Qualifying Program Standards.
- Section 5. Accreditation.
- Section 6. Other MCLE-Qualifying Activities.

The discussion below highlights some of the most important provisions of those Sections.

##### **A. Section 1. Definitions.**

The Definitions section defines sixteen important terms which are then incorporated in the five sections that follow. The term “Jurisdiction,” which we use throughout this report, is defined as: “United States jurisdictions including the fifty states, the District of Columbia, territories, and Indian tribes.” The term “Sponsor” refers to “the producer of the CLE Program responsible for adherence to the standards of program content determined by the MCLE rules and regulations of the Jurisdiction” and may include “an organization, bar association, CLE provider, law firm, corporate or government legal department, or presenter.”

##### **B. Section 2. MCLE Commission.**

Section 2 and its three Comments recognize that Jurisdictions, generally acting through the Jurisdiction's highest court, will develop MCLE regulations and oversee the administration of MCLE.

##### **C. Section 3. MCLE Requirements and Exemptions.**

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<sup>7</sup> Based on publicly available information, it is estimated that approximately twenty-one percent of lawyers are licensed in more than one Jurisdiction. The percentage varies greatly by Jurisdiction. For instance, nearly forty percent of lawyers licensed in New York are licensed in another Jurisdiction, but less than ten percent of lawyers in Florida are licensed in another Jurisdiction.

Section 3(A) outlines several MCLE requirements, such as requiring lawyers with an active law license to earn an average of fifteen credit hours each year; credit hours are defined in Section 1(B) as sixty minutes. Section 3, Comment 1 recognizes that some states have chosen to require fewer than fifteen hours or to define a credit hour as less than sixty minutes. Section 3, Comment 2 acknowledges that the Model Rule does not take a position on whether lawyers should report annually, every two years, or every three years, and it includes the following observation from the 1988 MCLE Model Rule: allowing a lawyer to take credits over a two-year or three-year period provides increased flexibility for the lawyer in choosing when and which credits to earn, but it may also lead to procrastination and may provide less incentive for a lawyer to regularly take CLE that updates his or her professional competence.

Section 3(B) recommends that all lawyers be required to take three types of specialty MCLE, including: (a) Ethics and Professionalism Credits (an average of at least one Credit Hour per year); (b) Mental Health and Substance Use Disorders Credits (at least one Credit Hour every three years); and (c) Diversity and Inclusion Credits (at least one Credit Hour every three years).

Ethics and Professionalism Credits are currently required in every state and territory with MCLE. They assist in expanding the appreciation and understanding of the ethical and professional responsibilities and obligations of lawyers' respective practices; in maintaining certain standards of ethical behavior; and in upholding and elevating the standards of honor, integrity, and courtesy in the legal profession. This Model Rule defines Ethics and Professionalism Programming as: "CLE programming that addresses standards set by the Jurisdiction's Rules of Professional Conduct with which a lawyer must comply to remain authorized to practice law, as well as the tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts, clients, other lawyers, witnesses, and unrepresented parties." *See* Section 1(D). Many Jurisdictions have similar definitions and, like the Model Rule, do not separate Ethics topics from Professionalism topics, but at least one Jurisdiction requires separate credits for those topics.<sup>8</sup>

Mental Health and Substance Use Disorders Programming is currently accredited in most Jurisdictions, and many Jurisdictions allow such programs to count towards Ethics and Professionalism Programming requirements. Three Jurisdictions specifically require all lawyers to attend programs that focus on mental health disorders and/or substance use disorders.<sup>9</sup> This Model

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<sup>8</sup> Georgia requires lawyers to attend both Ethics programs and Professionalism programs. Georgia's Rule 8-104, Regulation 4 offers this definition of the latter: "Professionalism refers to the intersecting values of competence, civility, integrity, and commitment to the rule of law, justice, and the public good. The general goal of the professionalism CLE requirement is to create a forum in which lawyers, judges, and legal educators can explore and reflect upon the meaning and goals of professionalism in contemporary legal practice. The professionalism CLE sessions should encourage lawyers toward conduct that preserves and strengthens the dignity, honor, and integrity of the legal profession."

<sup>9</sup> The following three states require one credit every three years of programming addressing mental health and/or substance use disorder issues: Nevada (substance abuse), North Carolina (substance abuse

Rule recommends that all lawyers be required to take one credit of programming every three years that focuses on the prevention, detection, and/or treatment of mental health disorders and/or substance use disorders. It is anticipated that programs may address topics including, but limited to, the prevalence and risks of mental health disorders (including depression and suicidality) and substance use disorders (including the hazardous use of alcohol, prescription drugs, and illegal drugs).

The need for required Mental Health and Substance Use Disorders Programming was underscored in early 2016 with the release of a landmark study conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, which revealed substantial and widespread levels of problem drinking and other behavioral health problems in the U.S. legal profession.<sup>10</sup> The study, entitled “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” found that twenty-one percent of licensed, employed lawyers qualify as problem drinkers, twenty-eight percent struggle with some level of depression, and nineteen percent demonstrate symptoms of anxiety. The study found that younger lawyers in the first ten years of practice exhibit the highest incidence of these problems. The study compared lawyers with other professionals, including doctors, and determined that lawyers experience alcohol use disorders at a far higher rate than other professional populations, as well as mental health distress that is more significant. The study also found that the most common barriers for lawyers to seek help were fear of others finding out and general concerns about confidentiality. Many organizations, including the ABA Commission on Lawyer Assistance Programs, have seen the study’s findings as a call to action, which led to this Model Rule’s recommendation that all lawyers take one credit of Mental Health and Substance Use Disorder Programming every three years. Section 3, Comment 4 explains: “[R]esearch indicates that lawyers may hesitate to attend such programs due to potential stigma; requiring all lawyers to attend such a program may greatly reduce that concern.”<sup>11</sup>

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and debilitating mental conditions), and California (“Competence Issues,” formerly known as “Prevention, Detection and Treatment of Substance Abuse or Mental Illness”).

<sup>10</sup> See Krill, Patrick R.; Johnson, Ryan; and Albert, Linda, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” *JOURNAL OF ADDICTION MEDICINE*, February 2016 Volume 10 Issue 1, available at: <http://journals.lww.com/journaladdictionmedicine/toc/2016/02000>. The mainstream media have also shone a light on rates of depression in the legal system. See <http://www.cnn.com/2014/01/19/us/lawyer-suicides/>.

<sup>11</sup> At the same time, Section 3, Comment 4 recognizes that “Jurisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement.” In those Jurisdictions, Lawyer Assistance Programs, bar associations, and other CLE providers may wish to focus on increasing the amount of available Mental Health and Substance Use Disorder Programming, so that lawyers more frequently choose it to satisfy their Ethics and Professionalism requirement. It is extremely unlikely, however, that one hundred percent of lawyers will elect to take Mental Health and Substance Use Disorder Programming if it is not specifically required, which is why this Model Rule recommends a stand-alone requirement.

Diversity and Inclusion Programming can be used to educate lawyers about implicit bias, the needs of specific diverse populations, and ways to increase diversity in the legal profession. Currently, only three states require lawyers to take specific Diversity and Inclusion Programs, while other states allow programs on elimination of bias to qualify for Ethics and Professionalism Credits.<sup>12</sup> In February 2016, the ABA House of Delegates recognized the importance of requiring this programming when it adopted a resolution encouraging Jurisdictions with MCLE requirements to “include as a separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias.” *See* 2016M107.<sup>13</sup> Resolution 107 did not specify the number of credits that should be required. This Model Rule recommends that all lawyers be required to take one credit every three years.

Section 3(B) recognizes that Jurisdictions may choose to provide MCLE exemptions for certain categories of lawyers, such as those on retired status. Section (3)(B)(3) recommends an exemption for lawyers licensed in multiple Jurisdictions who satisfy the MCLE requirements of the Jurisdiction where their principal office is located. This exemption is designed to reduce the administrative burden and costs to those lawyers who have already satisfied the requirements of the Jurisdiction where their principal office is located. Section 3, Comment 7 recognizes that Jurisdictions may choose to limit the exemption to lawyers with principal offices in certain Jurisdictions, or to require that the lawyer attend particular CLE Programs, such as a Jurisdiction-specific Ethics and Professionalism Program.

#### **D. Section 4. MCLE-Qualifying Program Standards.**

Section 4 outlines the types of programs that the Model Rule suggests should receive MCLE credit. It explicitly addresses seven types of programming that are defined in Section 1, such as Technology Programming. Section 4, Comment 1 emphasizes that this Model Rule supports allowing a lawyer to make educated choices about which programs will best meet the lawyer’s educational needs, recognizing that the lawyer’s needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned for any particular type of program, including those outlined in Section (4)(B).

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<sup>12</sup> California, Minnesota, and Oregon require specific Diversity and Inclusion Programming (which they refer to “elimination of bias” or “access to justice” programming), while states such as Hawaii, Kansas, Illinois, Maine, Nebraska, Washington, and West Virginia allow such programs to count towards their Ethics and Professionalism Programming requirements. This Model Rule encourages Jurisdictions to implement a stand-alone credit requirement, but Section 3, Comment 4 also recognizes that “Jurisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement.” As with the Mental Health and Substance Use Disorder Credit, it is extremely unlikely that one hundred percent of lawyers will elect to take Diversity and Inclusion Programming if it is not specifically required, which is why this Model Rule recommends a stand-alone requirement.

<sup>13</sup> The full text of ABA House of Delegates Resolution 2016M107 is available at: [http://www.americanbar.org/content/dam/aba/directories/policy/2016\\_hod\\_midyear\\_107.docx](http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_107.docx).

Section 4, Comment 2 explains that while the Model Rule supports the creation of programs designed for new lawyers, it does not specifically require such programs, because many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the number of lawyers in the Jurisdiction, the availability of existing CLE programs, whether there are specific Sponsors available to teach such programs, similar educational programs required before licensure, and other factors.<sup>14</sup>

Section 4(B)(5) and Section 4, Comment 3 recommend that Law Practice Programming be approved for MCLE credit. That programming is defined as: “programming specifically designed for lawyers on topics that deal with means and methods for enhancing the quality and efficiency of a lawyer’s service to the lawyer’s clients.” *See* Section 1(H). This Model Rule provision builds on policy adopted by the ABA House of Delegates in August 2014. *See* 2014A106.<sup>15</sup> Resolution 106 and this Model Rule both recognize that providing education on the management of one’s legal practice can help lawyers avoid mistakes that harm clients and cause law practices to fail. Lawyers require far more than knowledge of substantive law to set up and operate a law practice in a competent manner. In fact, at a national conference on CLE, it was noted that the percentage of cases involving lawyers’ shortcomings in personal and practice management far outweighs the percentage of cases involving lack of substantive law awareness.<sup>16</sup> Effective client service requires lawyers to be good managers of their time and offices, skilled managers of the financial aspects of running a practice, and knowledgeable in areas that do not necessarily involve substantive law. Law Practice Programming is designed to help lawyers develop those skills.

Section 4(B)(5) and Section 4, Comment 4 recommend that Technology Programming be approved for MCLE credit. Technology Programming is defined as “programming designed for lawyers that provides education on safe and effective ways to use technology in one’s law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters.” *See* Section 1(P). The definition and Section 4, Comment 4 also recognize that Technology Programming “assists lawyers in satisfying Rule 1.1 of the ABA Model Rules of

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<sup>14</sup> Section 4, Comment 2 also recognizes that many of the Jurisdictions that have mandated specific CLE programming for new lawyers based the development of those programs on recommendations from a 1992 ABA task force report entitled: “Task Force on Law Schools and the Profession: Narrowing the Gap” (commonly known as the “MacCrate Report” after the late Robert MacCrate, who chaired the commission), which offered numerous recommendations for preparing law students and new graduates to practice law. New lawyer programming varies by jurisdiction. For instance, Florida, Pennsylvania, and Tennessee require new lawyers to complete basic skills courses, but Virginia requires new lawyers to take a professionalism course that focuses primarily on ethics CLE.

<sup>15</sup> The full text of ABA House of Delegates Resolution 2014A106 is available at: [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2014\\_hod\\_a\\_nual\\_meeting\\_106.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_a_nual_meeting_106.authcheckdam.pdf).

<sup>16</sup> *See* Critical Issues Summit, *supra* note 4.

Professional Conduct in terms of its technology component, as noted in Comment 8 to the Rule (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]”). The ABA Ethics 20/20 Commission that proposed that Comment to Rule 1.1 concluded that “in a digital age, lawyers necessarily need to understand basic features of relevant technology” and “a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.” *See* 2012A105A.<sup>17</sup> The Commission further noted it was important to make this duty explicit because technology is such an integral—and yet, at times invisible—aspect of contemporary law practice. One MCLE Jurisdiction not only allows for the accreditation of these programs, but also requires lawyers to take technology-related courses.<sup>18</sup>

Section 4, Comment 6 acknowledges that some Jurisdictions have begun accrediting programming that addresses attorney wellness or well-being. While some Jurisdictions explicitly accredit attorney wellness or well-being programs, others allow accreditation under their Ethics and Professionalism or Mental Health and Substance Use Disorder programming. *See, e.g.,* Maryland, South Carolina, Tennessee, and Texas.<sup>19</sup> Across the country, numerous bar association committees, lawyer assistance programs, and other entities have recognized attorney wellness and well-being as compelling and important issues that affect attorney professionalism, character, competence, and engagement. The National Task Force on Lawyer Well-Being is currently compiling the various approaches and research regarding attorney mental health and wellness and will be preparing a formal report in 2017 outlining its findings and recommendations.<sup>20</sup> ABA

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<sup>17</sup> The text of ABA House of Delegates Resolution and Report 2012A105A and additional information on the Ethics 20/20 Commission are available at: [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html). That resolution revised then Comment 6 to Model Rule 1.1, which was renumbered as Comment 8 pursuant to Resolution and Report 2012A105C.

<sup>18</sup> On September 29, 2016, Florida became the first state to require Technology CLE, effective January 1, 2017. The Florida Supreme Court amended the MCLE requirements “to change the required number of continuing legal education credit hours over a three-year period from 30 to 33, with three hours in an approved technology program.” *See* <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/3b05732accd9edd28525803e006148cf!OpenDocument>.

<sup>19</sup> For more information, please visit: [www.msba.org/committees/wellness/default.aspx](http://www.msba.org/committees/wellness/default.aspx) (Maryland); [www.scbar.org/lawyers/sections-committees-divisions/committees/wellness-committee/](http://www.scbar.org/lawyers/sections-committees-divisions/committees/wellness-committee/) (South Carolina); [cletn.com/images/Documents/Regulations2013.04.16.pdf](http://cletn.com/images/Documents/Regulations2013.04.16.pdf) (Tennessee); and [www.texasbar.com/AM/Template.cfm?Section=Lawyers&Template=/CM/ContentDisplay.cfm&ContentID=15117](http://www.texasbar.com/AM/Template.cfm?Section=Lawyers&Template=/CM/ContentDisplay.cfm&ContentID=15117) (Texas).

<sup>20</sup> The National Task Force on Lawyer Well-Being is a collection of entities within and outside the ABA that was created in August 2016. Its participating entities include: ABA Commission on Lawyer Assistance Programs; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Well-Being Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; and others.

entities participating in the Task Force may, in the future, propose amendments to the MCLE Model Rule based on the Task Force's findings and recommendations.

Section 4, Comment 8 discusses In-Person Moderated Programming, *see* Section 4(C) and Section 1(K)(1), which requires lawyers to leave their offices and learn alongside other lawyers, which can enhance the education of all and promote collegiality. Other forms of Moderated Programming and Non-Moderated Programming with Interactivity as a Key Component, such as Section 4(C), Section 1(K) and (M), and Section 4(A)(2), allow lawyers to attend programs from any location and, in some cases, at the time of their choice. This flexibility allows lawyers to select programs most relevant to their practice, including specialized programs and programs with a national scope. Some Jurisdictions have expressed concern with approving programming that does not occur in person on grounds that the lawyer is less engaged. Thus, some Jurisdictions have declined to accredit or have limited the number of credits that can be earned through these other forms of programming. This Model Rule supports allowing a lawyer to make educated choices about whether attending Moderated Programming (In-Person or other) or Non-Moderated Programming with Interactivity as a Key Component will best meet the lawyer's educational needs, recognizing that the lawyer's needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned through Moderated Programming or Non-Moderated Programming with Interactivity as a Key Component. If a Jurisdiction believes that Moderated Programming, specifically In-Person Programming, is crucial to a lawyer's education, then it is recommended that the Jurisdiction establish a minimum number of credits that must be earned through this type of programming, rather than place a cap on the number of credits that can be earned through other types of programming.<sup>21</sup> A key factor in deciding whether to require In-Person Programming is the availability of programs throughout a particular Jurisdiction, which may be affected by geography, the number of CLE Sponsors, and other Jurisdiction-specific factors.

Section 4, Comment 9 recognizes that jurisdictions currently calculate the number of credits earned based on the number of minutes of instruction or lecture provided to attendees, but it suggests that Jurisdictions may wish to consider offering MCLE credit for self-guided educational programs, especially as technology continues to advance. Those that choose to explore other ways of calculating credit could look to the experience of other professions. For instance, Certified Professional Accountants (CPAs) may earn credit for self-paced learning programming. Calculation of credit is determined by review by a panel of pilot testers (professional level, experience, and education consistent with the intended audience of the program) and the average time of completion (representative completion time) is then used to determine credit to be received

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<sup>21</sup> Currently, several Jurisdictions limit the number of credits that may be earned through non-live programming. These include: Georgia, Indiana, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, Ohio, Pennsylvania, Puerto Rico, South Carolina, Tennessee, Utah, and West Virginia. There are currently no Jurisdictions that explicitly require In-Person Programming credits; instead, they use the cap on non-live formats to effectively require In-Person Programming credits.

by all who complete the program.<sup>22</sup> The regulators require additional safeguards as part of the program including review questions and other content reinforcement tools, evaluative and reinforcement feedback, and a qualified assessment such as a final examination. CPAs may also earn credit for text-based content with credit calculation based on a word-count formula, and now allow for nano-learning—short programs (minimum 10 minutes) focusing on a single learning objective.

Section 4, Comment 10 recognizes that Jurisdictions have used the term “self-study” in varying ways. As defined in this Model Rule, Self-Study refers to activities that are important for a lawyer’s continuing education and professional development, but which do not qualify as MCLE.

#### **E. Section 5. Accreditation.**

Section 5(A) recognizes the need for regulations on topics including faculty credentials, written materials, attendance verification, interactivity, applications and accreditation fees, but it does not prescribe those specific regulations, leaving that role to individual Jurisdictions.

Section 5, Comment 1 recognizes that because regulations vary among Jurisdictions—and are likely to continue to vary—Sponsors bear significant financial and administrative burdens to seek MCLE credit in multiple Jurisdictions, which can affect the number of programs being offered nationwide on specialized CLE and federal law topics. Comment 1 suggests several ways Jurisdictions can minimize those burdens, such as by promulgating regulations that are clear and specific and by streamlining the application processes, both of which would make it easier for Sponsors to complete applications and know with greater certainty whether programs are likely to be approved for MCLE credit. Section 5, Comment 1 further states that Jurisdictions may choose to reduce administration costs to the Jurisdictions, CLE Sponsors, and individual lawyers by recognizing an accreditation decision made for a particular program by another Jurisdiction, thereby eliminating the need for the CLE Sponsor or individual lawyer to submit the program for accreditation in multiple Jurisdictions. Finally, Section 5, Comment 1 recognizes that Jurisdictions might consider creating a regional or national accrediting agency to supplement or replace accreditation processes in individual Jurisdictions.

Section 5, Comments 2, 3, 4, 5, and 6 discuss suggested provisions for faculty credentials, written materials, attendance verification, interactivity, applications and accreditation fees.

Section 5(B) recognizes that Jurisdictions may choose to create an approved provider program for Sponsors who frequently present CLE in the Jurisdiction. Section 5, Comment 7

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<sup>22</sup> The Statement on Standards for Continuing Professional Education (CPE) Programs (2016) (Standards) is published jointly by the American Institute of Certified Public Accountants (AICPA) and the National Association of State Boards of Accountancy (NASBA) to provide a framework for the development, presentation, measurement, and reporting of CPE programs. General information on those Standards is available at: <https://www.nasbaregistry.org/the-standards>. The Standards, including a discussion of the methods of calculating credit, is available at: [https://www.nasbaregistry.org/\\_\\_media/Documents/Others/Statement\\_on\\_Standards\\_for\\_CPE\\_Programs-2016.pdf](https://www.nasbaregistry.org/__media/Documents/Others/Statement_on_Standards_for_CPE_Programs-2016.pdf).



discusses the types of regulations that would need to be created and the list of possible benefits for preferred providers.

Section 5(C) and Section 5, Comment 8 recommend that in-house programs, such as those offered by law firms, corporate or government legal departments, should be approved for credit as long as the program meets the general standards for accreditation outlined in Section 4.

Section 5(D) and Section 5, Comment 9 endorse regulations that allow an individual lawyer to self-apply for MCLE credit for attending a CLE Program that would qualify for MCLE Credit under Section 4, but which was not submitted for accreditation by the Sponsor in the Jurisdiction where the individual lawyer is licensed.

#### **F. Section 6. Other MCLE-Qualifying Activities.**

Section 6(A) and (B) recommend that lawyers be allowed to earn MCLE credit for teaching and writing, and that Jurisdictions create regulations which define the standards, credit calculations, and limitations of credit received for teaching or presenting activities or writing on legal topics.

Section 6(C) and Section 6, Comment 1 recognize that a minority of Jurisdictions award MCLE credit for providing pro bono legal representation, but this Model Rule takes no position on whether such credit should be granted, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the extent of free legal services existing in the Jurisdiction and pro bono requirements imposed by the Jurisdiction's ethical rules.<sup>23</sup> For that reason, Section 6(C) appears in brackets.

Similarly, Section 6(D) and Section 6, Comment 2 recognize that a minority of Jurisdictions award MCLE credit for participating in mentoring programs for fellow lawyers, giving credits to both mentors and mentees.<sup>24</sup> This Model Rule takes no position on whether credit should be available for that activity, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the perceived need for formal mentoring programs in the Jurisdiction and the availability of organizations to administer formal mentoring programs. For that reason, Section 6(D) appears in brackets.

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<sup>23</sup> Jurisdictions that currently allow lawyers to earn credit through the provision of pro bono legal services include: Arizona, Colorado, Delaware, Louisiana, Minnesota, New York, North Dakota, Ohio, Tennessee, Washington, Wisconsin, and Wyoming.

<sup>24</sup> For instance, Georgia and Ohio both offer lawyer-to-lawyer mentoring programs that allow lawyers to earn MCLE credit for participation. For more information on those programs, visit: <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/mentoring.cfm> (Georgia) and <http://www.supremecourt.ohio.gov/AttySvcs/mentoring/> (Ohio). Other Jurisdictions which allow mentors and mentees to gain credit are: Alaska, Arizona, Colorado, Illinois, Indiana, Oregon, Texas, Utah, Washington, and Wyoming.

**V. Conclusion.**

MCLE continues to play a crucial role in maintaining public confidence in the legal profession and the rule of law and promoting the fair administration of justice. This Model Rule, which builds on four decades of experience in the Jurisdictions that have mandated MCLE, recognizes effective ways to provide lawyers with the high quality, accessible, relevant, and affordable programming that enables them to be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. The American Bar Association strongly urges all Jurisdictions—whether they currently have MCLE or not—to consider implementing the recommendations in this Model Rule to further the continuing education of lawyers throughout the United States.

Respectfully Submitted,

Micah Buchdahl, Chair  
Standing Committee on Continuing Legal Education

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