

To: Interested Stakeholders
From: MCLE Board's Rules Subcommittee
Date: January 15, 2019
RE: REPORT AND RECOMMENDATION OF THE MCLE BOARD'S RULES SUBCOMMITTEE

Rules Subcommittee

The Rules Subcommittee ("Subcommittee") of the MCLE Board is made up of three members from the MCLE Board: Todd Alberstone, Ayanna Eagan, and Asia Wright. It is staffed by Bobby Henry, Associate Director for Regulatory Services, and Nina Cohen, MCLE Analyst.

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 proposed amendment to Rule 11 of the Washington Supreme Court's Admission and Practice Rules (APR 11). The proposal was developed by a collaboration between Washington Women Lawyers and the WSBA Diversity Committee; and it has been endorsed by the Asian Bar Association, the Cardozo Society of Washington State, the Filipino Lawyers of Washington, and 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 proposed amendment would require 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 this Subcommittee to study the proposal and make a recommendation to the MCLE Board. In addition to reviewing the materials contained in this report, the Subcommittee met on November 13, 2018, and December 14, 2018.

Proposed Amendment by WSBA Diversity Committee and Washington Women Lawyers

The WSBA Diversity Committee and Washington Women Lawyers specifically proposed to the MCLE Board the following amendments 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 of the six credits from subsection (f)(2)(ii).

APR 11(f)(2): Ethics and professional responsibility, defined as topics relating to (i) 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, and the risks to ethical practice associated with diagnosable mental health conditions, addictive behavior, and stress or (ii) equity, inclusion and the mitigation of bias in the legal profession and the practice of law, including client advising;



Recommendation

The Subcommittee recommends that the MCLE Board suggest an amendment to APR 11 that includes not only the proposal by the WSBA Diversity Committee and Washington Women Lawyers but also includes a requirement for mental health and addiction, and one for technology education focusing on digital security. The Subcommittee recommends the following specific amendments to APR 11:

APR 11(c)(1)(ii):

(ii) at least six credits must be in ethics and professional responsibility, as defined in subsection (f)(2), with at least one credit from each of subsections (f)(2)(ii), (iii), and (iv).

APR 11(f)(2):

(2) *Ethics and professional responsibility*, defined as topics relating to:

(i) 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, and~~

(ii) the risks to ethical practice associated with diagnosable mental health conditions, addictive behavior, and stress; or

(iii) equity, inclusion and the mitigation of bias in the legal profession and the practice of law, including client advising; and

(iv) the use of technology in the practice of law and how to maintain the security of electronic or digital property, communications, data, and information.

As the Subcommittee reviewed the materials and considered the available information, it became apparent that national trends are moving toward increased requirements in education in the topics of not only diversity, inclusion and antibias, but also in mental health/substance abuse, and technology security. A few of the largest states have already implemented one or more of these requirements, including California, Illinois, New York and Florida. The Subcommittee believes these three areas are among the most important issues facing not only the legal profession but also the general population in the United States today.

The Subcommittee notes that the additional topics of mental health and technology would most likely come under consideration at some time in the near future. It is logical to implement requirements all at the same time rather than doing them piecemeal. In addition, the rulemaking process can take a considerable amount of time. Doing them all now is more efficient and prevents unnecessary delay in the future.

The Subcommittee also notes that this recommendation does not increase the total number of ethics credits that are required for each reporting period. Instead, it requires that three of the ethics credits



be in the recommended topics, two of which are already included in the current ethics category but not specifically required.

The Subcommittee recommends a target implementation date of January 1, 2021.

Factors & Information

In determining the recommendation, the Subcommittee considered the following factors and information.

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

The Subcommittee reviewed the information and materials provided by the WSBA Diversity Committee and Washington Women Lawyers that discussed the need for required diversity and mitigation of bias training for all licensed legal professionals. The Subcommittee believes that education in this area is needed for and would benefit all licensed legal professionals whether they are currently engaged in the active practice of law or not.

ABA Model Rule for Minimum Continuing Legal Education (2017)

The ABA recently amended its Model Rule for MCLE. 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 as in Washington). In addition, it recommends one credit every three years in the specific areas of mental health and substance abuse disorders, and in diversity and inclusion. That is a total of five required credits. Washington already requires six credits in ethics and professional responsibility, one more than the total recommended by the ABA.

Trends in United States Jurisdictions

A review of the MCLE requirement in other U.S. jurisdictions found that four states have adopted a diversity requirement. In addition, five states have adopted a mental health or substance abuse requirement, and, two states have adopted a technology education requirement. Given the recommendation by the ABA and the trend so far in the United States, the Subcommittee decided to consider mental health/substance abuse as a requirement, not just as a permitted creditable topic, in Washington as well. The Subcommittee noted that it appears states are starting to include requirements for technology also. However, instead of a general technology requirement, the Subcommittee believes a technology requirement should focus on digital security and the protection of confidential information.

Intent of APR 11

Another factor considered by the Subcommittee was the intent of APR 11. When APR 11 was rewritten by the MCLE Task Force in 2014, the MCLE Task Force issued a report that recognized that not all active



members are practicing law and stressed the importance of the relevance of the education to the individual. In its July 2014 report, the task force wrote:

One of the fundamental premises on which the task force bases its recommendations is that Washington lawyers are not only engaged in the traditional lawyer-client representation, but that there is an increasing amount of lawyers in Washington whose career options or employment are in a myriad of different legal and nonlegal professions. ...

The task force's proposed new rules recognize, in its requirements, that a lawyer who is not practicing law in the traditional sense is still licensed to practice while an active member of the Bar. The task force's recommendations, therefore, attempt to strike a balance between the needs of protecting the public and the needs of all lawyers who may or may not be practicing law but could do so at any moment in any given situation.

The report's conclusion included:

The recommendations also address specific current and future needs of WSBA members wanting healthier practices and recognition that the practice of law – and use of a lawyer's skills – is much wider than in the past. In addition, the recommendations are based on solid pedagogical grounding – that mandatory legal education is only effective if it addresses a lawyer's true needs and is relevant to the lawyer. The public is also best protected and served when members take courses that address true need.

Taking the approach currently recommended by this committee would be moving away from the philosophy of the MCLE Task Force and the current credit compliance requirements. This is not to say that such a move necessarily would be bad, but simply to flag this issue for consideration by the current MCLE Board.

Resources and Time Needed to Implement

The Subcommittee considered the input from WSBA staff about resources needed to implement an amendment of this type. WSBA staff reported that it would be impractical or excessively costly to implement the rule prior to January 1, 2021. Due to the current technological structure of the MCLE online system, it would be difficult, if not impossible, to incorporate a change to the credit structure into the current system. It would also result in delays to other technology projects underway at the WSBA. The WSBA is currently planning and working on a major revision to the MCLE system and, therefore, including a change to the credit structure into those plans is relatively easy to do at this time. Although implementation would be approximately two years out, that is only a few months longer than a normal rule-making schedule. Proposed rules generally go to the Washington Supreme Court in October and are effective the following September. Because the MCLE requirements are based on three calendar-



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year reporting periods, it would be logical for the requirement to start on a January 1 so that all members will have, at a minimum, one year to meet the new requirement.

Proposed Schedule

Jan 11, 2019	MCLE Board Meeting	Share Report with MCLE Board for approval by Board
Jan-Mar 2019		Share Report with stakeholders for comment
May 10, 2019	MCLE Board Meeting	Revise if needed after member comments
May-June		Seek member comment
July 26-27, 2019	BOG Meeting	Share with BOG for FYI
Aug 16, 2019	MCLE Board Meeting	Revise if needed if any feedback from BOG
Oct 15, 2019	Deadline	Send recommendation to Court; request effective date Jan 1, 2021

Attachments

1. Proposal from WSBA Diversity Committee and Washington Women Lawyers
2. Additional Statistical Support for MCLE Requirement on Equity, Inclusion and Mitigation of Bias
3. ABA Model Rule for Minimum Continuing Legal Education (2017)
4. MCLE Requirements in United States Jurisdictions
5. MCLE Task Force Report, July 2014

