

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 06-0163

IN RE THE RULES OF)	State Bar of Montana
CONTINUING LEGAL)	Comment
EDUCATION)	

On August 12, 2021, the Court opened a 30-day public comment period on proposed amendments to the Montana Rules for Continuing Legal Education (MCLE). *In re the Rules of Cont. Legal Educ.*, No. AF 06-0163 (Aug. 12, 2021).

The amendments were proposed by the Commission for Mandatory Continuing Legal Education, commonly known as the CLE Commission, and included in the Court's order. *Id.*

In its order, the Court recognized the importance of inviting participation and comment on the proposed amendments. *Id.* at 1 (ordering the proposed revisions and soliciting public comment to be posted on the Montana judicial branch and State Bar websites and asking the State Bar to provide notice of the proposed revisions in the next issue of *The Montana Lawyer*).¹ The Court granted the State Bar of Montana's request for additional time to file comments on September 7, 2021. *See* State Bar of Montana Petition for Extension of Time (filed

¹ The August/September issue of the *Montana Lawyer* had already gone to print at the time of the Court's order. The State Bar included notice and a link to the Court's order in its *Bar Briefs* email to all members on August 20, 2021.

Sept. 7, 2021); Order Granting Extension of Time (filed Sept. 7, 2021). Because the Court’s order does not include an explanation from the Commission, this response provides background and context for the Court and other interested parties.

The State Bar, through its Board of Trustees and Executive Committee, supports the CLE Commission’s request for an increase in the attorney transcript fee. It recognizes the challenges faced by State Bar employees who administer the program on behalf of the Court with declining resources. At the same time, the State Bar is both the fiduciary of fees paid by its members and the entity overseeing the budget for CLE operations. Those obligations provide the impetus for the State Bar’s hesitation in supporting the other amendments as proposed by the CLE Commission, and the State Bar’s request for the Court to appoint a working group to consider the proposed amendment. Collectively, these issues highlight some of the administrative challenges inherent in the commission structure.²

Although the principles of MCLE adopted by this Court state that “[t]he MCLE program should be administered for the Court by the State Bar in a cost effective manner,” in practice neither the State Bar executive director nor the State

² The State Bar similarly provides administrative support to the Commission on Character and Fitness and the Board of Bar Examiners. CLE compliance overlaps more with the State Bar’s core mission of assessing and collecting annual dues and fees from the members than does admissions, making administration more complicated.

Bar Board of Trustees has any authority over monitoring or enforcing CLE. Order, *In re the Rules for Contin. Legal Educ.* (filed Sept. 26, 2000), attached as Exh. A. CLE staff are State Bar employees. The office equipment, software, and office space used by CLE staff are owned or leased by the State Bar and the CLE Commission reimburses the State Bar from fees it derives from CLE operations.

The CLE Commission budget is part of the State Bar budget, and the Trustees' fiduciary obligations extend to CLE operations. In other words, the CLE Commission is staffed by the State Bar, funded by CLE fees in a budget approved by the State Bar Board of Trustees, but otherwise supervised by the Court:

The Commission shall operate, **for administrative purposes only**, under the general authority of the Board of Trustees. **For all other purposes** including amendments to the rules, recommendations for changes in the methods of operation, and reports on the effectiveness of enforcement, the Commission shall operate **under the authority of the Court**.

Rule 3(G), Montana Rules for Continuing Legal Education (emphasis added).

The State Bar's challenge is to administer the MCLE program in a cost-effective manner without having authority to make "changes in methods of operation." The Court must review and approve operational changes.

The State Bar views the CLE Commission's proposed amendments as an opportunity to report to the Court on challenges it faces in administering CLE in a "cost effective" manner. Specifically, the State Bar is concerned that recent decisions by the Commission, including some reflected in the proposed rules, may

not align with the Court's acceptance of reciprocity and an increasingly regional, if not national, bar.

While the State Bar agrees that additional funding is needed to meet existing MCLE administrative obligations, the remaining issues raised by the CLE Commission's proposed amendments are intertwined with other State Bar functions as well as Court policies underlying attorney licensure and regulation. Thorough vetting by various stakeholders will help avoid unintended consequences.

For these reasons, the State Bar requests that the Court establish a working group to examine the proposed MCLE rule changes. For the reasons explained *infra*, the State Bar does not endorse any rule changes other than an increased fee at this time.

I. Proposed Rule Changes: An Overview.

The CLE Commission's proposed amendments include four substantive changes. Specifically, the Commission proposes the following:

- 1) **Increasing members' annual CLE fee** from \$25 to up to \$75. *See* MCLE Rule 5(B); *see also* Rule 3(B)(e). While a fee increase is needed, the Commission has not offered any explanation for its request of up to three times the current fee. Moreover, the fee request raises questions about budgetary control and oversight that deserve deeper consideration. *See infra* Sec. IV, Proposed MCLE Rule 5: Increasing the Annual CLE Fee. However, the State Bar's budget projection for FY23 indicate that if

the CLE fee is increased to \$45 a year, MCLE operations will no longer operate at a deficit.

- 2) **Eliminating presumptive accreditation** of CLE courses approved by states other than Montana. MCLE Rule 8; *see also* proposed Rule 8(E) (“Accreditation in another jurisdiction will not guarantee accreditation in Montana.”). *See infra* Sec. V, MCLE Rule 8: Eliminating Presumptive Accreditation. This rule change most profoundly affects the State Bar’s out-of-state active members, who comprise about 20% of the active members. The Commission has not explained why it cannot rely on other states’ CLE accreditation to ensure Montana lawyers’ continued competence. Additionally, this change will create substantially more work for CLE staff.
- 3) **Eliminating accredited sponsors**, i.e., organizations that offer five or more CLEs a year. MCLE Rule 10. The Commission discontinued accredited sponsors a few years ago and now seeks to amend the rules to reflect its current practice. *See infra* Sec. VI, MCLE Rule 10: Eliminating Accredited Sponsors. Although this change has increased revenue by increasing sponsor fees, it has simultaneously increased expenses by creating more work for CLE staff.
- 4) **Changing the process** of moving a noncompliant attorney to inactive status from “the Commission will direct the State Bar of Montana to transfer the attorney to inactive status” to “the Commission shall transfer the attorney to inactive status and forward to the Montana Supreme Court the name of the attorney transferred.” Proposed Rule 10(A), (B). *See infra* Sec. VII, Proposed MCLE Rule 12: Eliminating the State Bar’s Role in Noncompliance. This change is at odds with the State Bar’s role

in overseeing membership, as articulated in its Constitution and bylaws, and may complicate administration of this process.

II. State Bar Membership.

“All persons admitted to the practice of law in the state of Montana are members of the State Bar of Montana.” Const. of the State Bar of Montana.

“Membership in the State Bar of Montana is a condition of practicing law in this state.” *Id.* To practice law in the state courts of Montana, a member must have (i) paid dues and assessments for active membership and (ii) completed all continuing legal education, as set forth in the Rules for Continuing Mandatory Legal Education. SBM Bylaws, Art. I, section 5.

Active members include all members of the State Bar who are licensed to practice law in Montana and fulfill all necessary conditions of practice. SBM Bylaws, Art. I, § 3(a)(i). Inactive members include those who are eligible for active practice but are not engaged in the practice of law in Montana. *Id.* § 3(a)(iii). Members may be transferred to inactive status if they do not comply with the Rules for Continuing Legal Education. *Id.* “The transfer of an attorney to inactive status [for failing to fulfill the CLE requirement for the previous year] shall not be deemed a punishment or disciplinary action for purposes of the Montana Rules of Professional Conduct or the Montana Rules for Lawyer Disciplinary Enforcement.” MCLE Rule 12(c).

III. Continuing Legal Education is a Necessary Condition of Practicing Law in Montana.

“The practice of law is a privilege burdened with conditions[,]” one of which is the requirement for continuing legal education. *Appl. of the Pres. of the Mont. Bar Ass’n*, 163 Mont. 523, 526, 518 P.2d 32, 33 (1974). One of the primary purposes of the State Bar has always been “to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct.” *Id.* at 526, 518 P.2d at 34.

Prior to 2001, the State Bar directly regulated CLE through a Board of Continuing Legal Education, the members of which were appointed and supervised by the elected State Bar Board of Trustees. In 2001, with the support of the State Bar Board of Trustees, the Court moved the responsibility for promulgating and enforcing CLE rules to a newly created Commission on Continuing Legal Education. *See In re Rules of Con. Legal Educ.*, attached as Exh. A. The members of the CLE Commission are volunteers appointed by the Court rather than by the Trustees. The Commission staff are State Bar employees supervised by the State Bar executive director.

State Bar members pay a \$25 CLE fee each year along with their State Bar dues. These fees go directly to the CLE Commission budget and, like all State Bar operational funds, are spent in accordance with budgets approved by the Board of Trustees and audited by independent accountants. The Trustees remain

fiduciarly responsible for all funds collected from State Bar members, including those earmarked for the CLE Commission.

The State Bar reports to the Court every three years on the financial status of the Bar. *In re the Petition of the State Bar of Mont. for a Dues Increase*, 2001 MT 108, ¶ 27, 305 Mont. 279, 53 P.3d 854. The report must also analyze “the dues structure in light of the Bar’s responsibility to address the purposes of the Unified Bar as stated herein and in paragraph 1(b) of the 1974 Order.” *Id.*

Active members of the State Bar must earn at least 15 credit hours of approved CLE each reporting year. MCLE Rule 4(A). If a member fails to meet that requirement, the CLE Commission directs the State Bar to transfer that attorney to inactive status until the noncompliance is corrected and any required fees are paid. MCLE Rule 12(A); *see also* MCLE Rule 3(B)(h).

To return to active status, an individual must apply for reinstatement in accordance with the State Bar bylaws. MCLE Rule 12(D). Montana attorneys who have been suspended for nonpayment of dues and/or assessments (which includes the CLE fee assessment) may not practice law until paying a reinstatement penalty of \$200. Bylaws, Art. I, § 4(e)(ii). Members who are transferred to inactive status because they did not earn sufficient CLE credits must also reapply to the Montana Supreme Court and pay a fee “equal to the greater of two hundred dollars (\$200) or

the usual and customary fee charged by the State Bar of Montana for transferring a member from inactive to active status.” MCLE Rule 12.

IV. Proposed MCLE Rule 5: Increasing the Annual CLE Fee by a Smaller Amount is Warranted.

The Commission requests permission to increase the annual MCLE reporting fee from \$25 to “up to \$75.” See Proposed Amended MCLE Rule 5(B). Again, the Commission did not provide any docketed justification for the increase; however, the MCLE fee has not increased since 2000. The State Bar agrees a smaller fee increase may be warranted, with the caveats noted below.

1. MCLE Staff Requirements are Increasing at the Same Time that Non-MCLE State Bar Staff Requirements are Decreasing.

The CLE Commission’s administrative operations are staffed by State Bar employees pursuant to an annual budget approved by the Board of Trustees. Over the past few years, the CLE Commission’s staffing needs have nearly tripled in spite of the fact that State Bar membership has remained fairly constant³ and the non-CLE operations of the State Bar have become more efficient. As has been alluded to in other public comments on these proposed amendments, the CLE Commission’s approval of CLE credits has become more time-consuming for staff and members alike. It is worth asking why that is occurring.

³ The State Bar had 3,837 active members in June 2017 and 3,940 active members in June 2020, an increase of 2.6%. State Bar of Montana, *Report to the Montana Supreme Court* 4 (July 2020). Notably, this increase “derives almost exclusively from the addition of 101 out-of-state active members.” *Id.*

Montana previously relied upon attorney affidavits to track MCLE compliance. Under that system, attorneys would submit a notarized affidavit each year listing the CLE programs they had attended, and the approved number of credit hours for each program. Under the current system, which was adopted along with MCLE Rules changes in 2013, the CLE Commission compiles CLE attendance information from each attorney as well as from program sponsors and posts that information on an online transcript for each member. *See, e.g.*, Montana Continuing Legal Education, <https://www.mtcle.org/lawyer/lawyer.asp> (last visited Sept. 19, 2021).

Around the time the CLE Commission moved away from affidavits, it began using CLE compliance software developed by regulators in Pennsylvania, known as PACLE (pronounced “pak-lee”).⁴ Not unexpectedly, the move away from attorney affidavits requires more staff time to gather, review, and approve members’ CLE completion. Additionally, PACLE also increased the CLE Commission’s staff requirements. Other states in our region who have used PACLE no longer do.

⁴ The license fee(s) for this software, as with other MCLE administrative expenses, is paid for from CLE fees paid to the State Bar.

In FY18, 1.5 State Bar full-time employees (FTE) were dedicated to MCLE compliance. Today that number has almost doubled. MCLE compliance now requires 2.9 FTE.

In FY18, the Board of Trustees approved a \$137,585 staff budget for CLE operations, which includes salaries, benefits, and applicable taxes. In FY20, that budget increased to \$148,727, and again in FY21 to \$191,788. The requested and approved budget for FY22 was \$189,509, an increase of \$51,924 (38%) over FY18. The only change to CLE enforcement during this time was the move away from accredited sponsors.

During this time, MCLE operated in the red, spending through the CLE fee fund balance and into investment reserves overseen by the Trustees. *See* MCLE Budgets FY21-FY23, attached as Exh. B. In the absence of an increase in members' CLE fee, or another source of revenue, at the current rate of spending the CLE budget will exhaust its fund balance in FY23 and its investment reserves by FY25. *Id.* The current level of revenue from all sources does not support the current administrative expenses at existing staffing levels. Fewer staff need to be dedicated to the MCLE program and/or efficiencies need to be gained, or revenue needs to be increased.⁵

⁵ When faced with a similar situation in the admissions support budget recently, the State Bar worked with the Commission on Character and Fitness and the Board of Bar Examiners to decrease their staffing by .5 FTE and absorbed the cost of .5 FTE by shifting a part of that staff member's work to other State Bar activities.

The CLE budgets reflect numbers requested by the Commission through the MCLE Administrator. The Board of Trustees approved the requested budgets, deferring to the Commission's stated staffing needs. The State Bar has been especially deferential because of a significant backlog in MCLE approval of CLE brought about by the change from the affidavit system.

During that same time frame, the State Bar's FY18 non-MCLE personnel budget was \$799,890. Its FY22 budget has since decreased to \$758,430. MCLE personnel expenditures have thus increased by 38% during the same time that the overall personnel budget for the State Bar decreased by 5%.

The State Bar recognizes that the costs of doing business increase from time to time. In preparing its budgets, the State Bar assumes a 3% annual increase in costs, then works to reduce costs, including those for personnel. The State Bar strives to be an organization that runs efficiently without the need for frequent dues increases from members. As noted in the State Bar's most recent report to the Court, this strategy has allowed the State Bar to significantly extend the predicted time frame until the next needed dues increase. State Bar of Montana, *Report to the Montana Supreme Court 8* (July 2020) (reporting that budget models forecast a deficit in FY26, while actual revenue and expenses do not forecast a deficit until after 2030).

The requested increase of up to \$50 in the annual MCLE fee coupled with the increase in CLE personnel needs over the past few years raises questions about the efficiencies of the CLE monitoring and compliance system. Those questions deserve deeper examination. As discussed *infra*, the State Bar is cognizant of the potential barriers to practice created by costs of practice and believes that any request to raise those costs must be thoroughly considered.

Other states with whom the State Bar regularly interacts through conferences like the Jackrabbit Bar Conference have also struggled with MCLE administration, including with PACLE, the MCLE software platform. Until recently, New Mexico and Nevada were also using PACLE. The highest courts in each of those states recently examined and then made fundamental changes to their overall MCLE structure.⁶ As part of those changes, both states are transitioning away from PACLE and are using the same Association Management Software (AMS) that the State Bar recently purchased.⁷

The State Bar has proposed to the CLE Commission that it begin using the State Bar's AMS for managing and monitoring Montana CLEs – and purchased the

⁶ See, e.g., *In the Matter of the Administration of the Minimum Continuing Legal Education Program Through the State Bar of New Mexico*, No. 18-8500-13 (N.M. 2018), attached as Exh C; *Cont. Legal Educ. for Active Members of the State Bar*, Nev. Sup. Ct. Rules 205-215, attached as Exh D.

⁷ As part of its last Strategic Plan, the State Bar undertook a comprehensive modernization of its operations, including making major software changes for accounting functions and ongoing modernization of the payroll and human resource functions for the State Bar. After hiring national consultants to guide it, the State Bar is in the midst of transitioning to new association management and records software, including a new website, member interface, and modernization of dues payment, IOLTA compliance (in consultation with the Montana Justice Foundation), and other improvements to improve the online member interface and gain operational efficiencies for the State Bar.

AMS with that possibility in mind. Although the Commission and the State Bar have yet to reach consensus, the State Bar is hopeful that an integrated solution, with software used with success in neighboring mandatory bar jurisdictions, can be implemented and result in increased efficiency.

2. *The Overall Cost to Practice Should Guide the Court's Analysis of a Requested Fee Increase.*

Each attorney licensing jurisdiction takes a somewhat different approach to mandatory continuing legal education. Some jurisdictions do not require CLE. As of 2020, only nine states have a mandatory attorney CLE fee. American Bar Ass'n, *Total Cost to Practice*, attached as Exh. E.⁸ This includes both mandatory and voluntary bar states where assessments are paid to an applicable licensing authority. The fees range from \$5 in Wyoming to \$100 in South Dakota (this is likely due to the fact that it is not a mandatory CLE jurisdiction). There are no mandatory CLE fees in Idaho, North Dakota, Nevada, New Mexico, Oregon, Utah and Washington and Colorado.

Adding as much as \$75 to the existing cost to practice would increase the total cost to practice in Montana by \$50. Currently, attorneys pay \$495 a year: \$300 in dues, \$125 to the Disciplinary Counsel Assessment, \$20 to the Lawyer's Fund for Client Protection, \$25 as a license tax, and \$25 as a CLE fee. Raising the

⁸ It is possible that other jurisdictions may have fees that are not easily identified as CLE-related.

CLE fee by \$50 would raise annual dues, fees, and assessments to \$545, which would make the total cost to practice in Montana among the highest in the nation. Only Alaska, Connecticut, Hawaii, Oregon, and Tennessee would be more expensive for attorney licensure. *See Amer. Bar Ass'n, Total Cost to Practice*, attached as Exh. E.

The current fee of \$25 was raised from \$15 in 2000. Adjusted for inflation, \$25 in 2000 would be \$39.72 today, an increase of roughly \$15. Raising the fee to \$40 to \$45 would address inflation while keeping Montana's total cost to practice at \$510 to \$515, comparable to neighboring states.⁹

Whether that level of increase will stem the red ink is another matter. As reflected in the attached analysis, without an increase of at least \$20 to \$45 total, or a corresponding decrease in costs, including personnel costs, the budget just doesn't balance over time. *See Exh. B.*

This is not an academic exercise for the State Bar. If the CLE compliance fee increases significantly, thereby driving up the overall cost to practice, some out-of-state lawyers who maintain an active license but do not typically practice in Montana may choose to forego their active membership. For each member who decides to move to inactive status, their dues to the State Bar are

⁹ Idaho \$425; Nevada \$490; North Dakota \$380; New Mexico \$420; Oregon \$687; Utah \$445; South Dakota \$415; Washington, \$488; and Wyoming \$355. *Amer. Bar Ass'n, Total Cost to Practice*, attached as Exh. ___.

reduced by 37%, from \$300 to \$190. Ironically, those members would no longer be required to pay the MCLE fee.

State Bar dues and MCLE fees are inextricably linked from the perspective of both the members and the State Bar. Maximizing potential fees for one part of the organization is an unintended consequence if it results in an overall loss of members for the entire organization.

V. MCLE Rule 8: Eliminating Presumptive Accreditation Creates Unnecessary Barriers for the State Bar's Non-Montana Members.

The Commission proposes eliminating presumptive accreditation of CLE that has been approved by other jurisdictions. This affects non-resident active members as well as Montana active members who attend CLE in other jurisdictions. It will unquestionably increase the workload of Commission staff, making any reduction in staff expenses for MCLE operations nearly impossible.

Before 2001, the MCLE rules provided for CLE reciprocity. Prior to the 2001 revisions, Rule 8 stated:

The Board may approve continuing legal education activities jointly or on a reciprocal basis with other states requiring continuing legal education for attorneys practicing in those states. The Board may refuse to act on a request for approval of a specific course or activity sponsored by an organization other than an Accredited Sponsor unless a Montana attorney intends to attend or has attended the proposed course or activity.

Pre-2001, MCLE Rule 8.

In 2001, MCLE Rule 8 was eliminated and replaced with the current rule allowing for “presumptive accreditation.” The Commission now seeks to eliminate the current rule.

Over the past 25 years, attorney regulation in Montana has been marked by a period of professional isolationism followed by the current acceptance of out-of-state members and more regional cross-jurisdictional practices. In 1998, the Court eliminated admission on motion in Montana. Elimination of CLE reciprocity in the 2000 MCLE Rules was a logical continuation of that decision. The Court rejected a 2004 effort to reinstate admission on motion, led by the State Bar Board of Trustees. *See Order, No. 03-861, July 7, 2004.*

However, that trajectory changed in 2012 when Montana became one of the first states to adopt the Uniform Bar Exam (UBE), ushering in the modern era of attorney regulation in Montana. Forty jurisdictions have since adopted the UBE, including all of Montana’s western neighboring states except for South Dakota, Nevada, and California.

Two years after Montana adopted the UBE, the Court reinstated admission on motion. Presumptive accreditation concretely benefits at least 20% of active State Bar members. As of August 24, 2021, 840 active members of the State Bar reside outside of Montana, representing one-fifth (21%) of the 3,959 active members of the State Bar. As of September 6, 2021, the eight largest

concentrations of active members residing outside of Montana include 114 active members in Colorado, 104 in Washington, 68 in California, 68 in North Dakota, 53 in Wyoming, 46 in Minnesota, 42 in Utah, and 41 in Texas.

Currently, “The Commission may recognize and presumptively accredit courses that have been accredited by and held in other states.” MCLE Rule 8. The FAQ section on the MCLE website poses this question: “Will CLE credits earned in other states be accepted in Montana?” The answer is:

Yes. We will honor the approval given by other CLE jurisdictions on a case-by-case basis.

If a Montana attorney attends an in-person seminar that has been approved for CLE credit in the state in which it is held, there is no need for him or her to apply for accreditation in Montana. . . . To claim credit, attorneys should submit documentation of the other state's approval to the Montana Commission of CLE at cle@montanabar.org. . . .

Mont. CLE Comm’n, *Frequently Asked Questions*,

https://www.mtcle.org/lawyer/Frequently_Asked_Questions.asp (last visited Sept. 19, 2021).

The proposed revision eliminates this rule entirely. The end of presumptive accreditation will inevitably create staffing needs, as CLE personnel must re-evaluate all CLE previously accredited by other jurisdictions. More importantly, eliminating presumptive accreditation ignores the fact that a significant number of

active members live in other states, and are presumably interested in a streamlined process to fulfill their CLE obligations.

In addition to driving up personnel costs and alienating out-of-state members, this approach stands in sharp contrast to that taken by some of our neighboring states. For example, the State Bar of California and the State Bar of North Dakota -- both of which have 68 residents who are active State Bar of Montana members -- presumptively accredit (1) programs already approved by Montana and (2) programs that are offered in a foreign jurisdiction where that jurisdiction has already approved the program. *See* California Rules for Minimum Continuing Legal Education Rule 2.85; *see also* CLE Policy 1.14 of the State Bar of North Dakota.

Other states in our region are even more creative. Idaho, Washington, Oregon, Colorado, and Utah allow member attorneys who reside outside of the reporting jurisdiction to file a comity certificate indicating they have complied with the CLE requirements in the jurisdiction of their principal place of residence. *See, e.g.,* Idaho Bar Commission Rule (IBCR) 408 (which allows for home state comity, but not for Alaska and Hawaii); Utah Rule 14-404(d); Oregon Rule 3.4, Washington APR 11(c)(6). The filing of a comity certificate fulfills the member's CLE requirements in the non-resident state.

The 2000 elimination of CLE reciprocity mirrored the Court's broader rejection of reciprocity in licensing. In the past ten years, however, the Court has moved to increase reciprocity. Eliminating presumptive accreditation would counter this current trend.

Moreover, the Commission has expressed reluctance about accrediting certain CLEs involving attorney wellness and well-being. In addition, many jurisdictions allow credit for diversity and inclusion training (as do the Model CLE Rules promulgated by the ABA). At present, a Montana attorney interested in those topics could attend a workshop or CLE elsewhere that *might* be presumptively accredited in Montana.¹⁰ With the proposed elimination of presumptive accreditation, that possibility would be all but foreclosed.

The more than 800 active State Bar members residing out-of-state will have to reapply for accreditation of all CLE previously accredited elsewhere, including by many UBE jurisdictions and the multiple jurisdictions from which attorneys apply to join the Montana bar on motion. Given that out-of-state attorneys represent 21% of the active members of the State Bar, and considering the significant increases in the MCLE personnel budget over the past four years, the State Bar questions the wisdom of this proposed change.

¹⁰ Attorney well-being is one of the most significant issues facing the profession. Importantly, it is one of the most pressing consumer protection matters facing the Office of Disciplinary Counsel. Making it harder for attorneys to obtain CLE for programs directed at well-being is a move in the wrong direction.

VI. MCLE Rule 10: Eliminating Accredited Sponsors Increases Revenue But Simultaneously Increases Personnel Expenses.

The proposed changes to Rule 10 eliminating “accredited sponsors” is an amendment designed to conform to an existing practice that the Commission implemented to increase revenue. Under the existing (but not followed) Rule 10, an accredited sponsor is “exempt from applying for approval for individual programs.” *See* MCLE Rule 10. Several years ago, the Commission discontinued the accredited sponsor program without amending Rule 10, and has since been requiring all CLE producers to submit an application and pay a processing fee for each CLE program.

Accredited sponsors have been part of the MCLE Rules for many years. They create efficiencies for the program sponsor who is putting on several CLE programs a year by eliminating the need to submit an application and fee for every single program. Accredited sponsors also create efficiencies for the CLE Commission, as CLE staff are not required to review and approve every individual CLE program put on by an accredited sponsor.

The State Bar of Montana previously was an accredited sponsor, as was the Alexander Blewett III School of Law, the Montana Trial Lawyers Association, the National Business Institute (NBI), the American Law Institute (ALI), the State of Montana, the American Bar Association (ABA), ALPS, and others. As provided in Rule 10, an organization seeking to be designated an accredited sponsor applied annually and paid a one-time fee for all programming it offered that year.

Eliminating accredited sponsors creates more work for everyone. First, organizations like the State Bar must submit each individual program for approval, which in turn requires the State Bar staff assigned to the Commission to evaluate each individual program. As a result, the State Bar and other similarly situated organizations are paying higher overall sponsor fees to the Commission each year.

In FY19, sponsor fees totaled \$25,680 and accredited sponsor fees were \$11,400, for a total of \$37,080 in accreditation fees. In that same fiscal year, MCLE staffing was 1.5 FTE. In FY20, MCLE staffing increased to 2.9 FTE, resulting in a budget increase of \$54,203. This occurred at approximately the same time as the CLE Commission stopped recognizing accredited sponsors.

In FY21, the CLE Commission collected \$138,600 in accreditation fees, an increase of more than \$100,000. However, that increase was offset by the additional staffing costs of \$54,203. This reduced the net to \$46,597, which is still a notable increase. However, the FY22 budget for accreditation fees is \$72,000, or half of the actual revenue in FY21. Considering the additional staff line at \$54,203, this results in a net loss of \$19,283.¹¹

¹¹ It is the understanding of the State Bar that the reduced budget for accreditation fees in FY22 reflects uncertainty about the total number of programs likely to be offered in a post-pandemic setting. During the pandemic, the number of shorter, online programs increased. This increased the overall number of programs applying for credit and resulted in the higher accreditation fees. A smaller number of longer, in-person CLE programs in a post-pandemic setting would reduce the yearly accreditation fees, leading to a more conservative budget estimate.

Therein lies the rub. While the elimination of accredited sponsors resulted in additional fees, it also created additional work. Staff must now review every submission, whereas accredited sponsors in the past required no more than minimal review. It is not possible to focus on the revenue side and ignore the expense side. From a budgetary perspective, creating more revenue by creating more regulatory work is like running west looking for a sunrise. This is not to criticize the hard work of the State Bar CLE staff who are searching for new sources of revenue, or the work of the Commission, but to acknowledge that increasing gross revenue by creating more work also increases expenses and may result in a decrease in net revenue.

VII. Proposed MCLE Rule 12: Eliminating the State Bar’s Role in Noncompliance is Cumbersome and Unnecessary.

The Commission proposes wholesale revisions to the noncompliance provisions of the current rules, eliminating any reference to the State Bar. The resulting change in the process is both cumbersome and unnecessary.

The State Bar of Montana was created through the Montana Supreme Court’s unification order and its own Constitution, which provides that the State Bar is to “provide for the continuing legal education of members of the bar.” State Bar Constitution, Art. III. A member who wants to remain an active member in good standing and be able to practice law in Montana must complete all required continuing legal education. Bylaws of the State Bar of Montana, Art. I, sec. 5.

According to the MCLE Rules, in the case of CLE noncompliance, “the Commission will direct the State Bar of Montana to transfer the attorney to inactive status until the noncompliance is corrected” MCLE Rule 12(A). The rule further states that the Commission shall:

furnish the names of the attorneys and the effective date of their transfers to inactive status to the named attorneys, to the Montana Supreme Court, to the Clerks of the District Courts of the State of Montana with a request that they provide a copy to the district judges in their judicial districts, to the Clerk of the Federal District Court of the District of Montana, with a request that the Clerk provide a copy to the United States District Judges in Montana and to the Clerk of the Circuit Court of Appeals of the Ninth Circuit.

MCLE Rule 12(B).

Importantly, Rule 12(A) and (B) mirror provisions of the State Bar bylaws concerning suspension for non-payment of dues. “The Executive Director must provide (20) days written notice of the intent to certify the names of all members suspended from membership for non-payment of dues to all courts of record in the State of Montana.” SBM Bylaws, Art. I, § 4(e)(i). To practice law in the state courts of Montana, a member of the State Bar must have “(a)(i) paid dues and assessments for active membership” and “(ii) have completed all continuing legal education as set forth in the Rules of Mandatory Continuing Legal Education.” *Id.*, Art. I, § 5(a)(i) and (ii).

Confusingly, proposed Rule 12 eliminates any reference to the State Bar despite the direction of the State Bar Constitution. It is as if the State Bar is but a

secondary player in maintaining membership status. But the State Bar bylaws state explicitly that CLE is a requirement for active membership. *Id.*, Art. I, § 5(a)(ii).

In fact, the proposed revisions remove notice to the State Bar that a member is no longer in good standing for CLE (even though State Bar employees administer the MCLE program). More confusingly, the new language eliminates a requirement that the Commission provide notice to the courts of the state, instead having the Commission provide notice only to this Court without articulating who will communicate with the other courts where Montana lawyers practice. In contrast, the provisions for non-payment of dues require the State Bar executive director to notify the Montana courts.

The proposed rule creates an entirely new process whereby the Commission would file something with this Court stating that a member was not in compliance with the MCLE Rules but would not provide notice to the State Bar. Presumably, the Court would then take the list -- originally generated in a State Bar office by State Bar employees -- and return that list to the State Bar, leaving this Court, or perhaps the Clerk of the Supreme Court, to provide notice to other state courts.

The proposed rule also eliminates any reference to the State Bar in the attorney reinstatement process. The proposed revisions ignore the fact that the reinstatement fee is paid to the State Bar, as it must be, as the member is paying to

be reinstated to active practice having now satisfied the requirements of the State Bar's bylaws.

VIII. Conclusion.

The State Bar recognizes that MCLE needs more revenue and supports an increase in the member CLE fee. However, the proposed amendments also raise fundamental questions and may end up creating more work and member frustration than is necessary to maintain a high level of competence in the membership of the State Bar.

Providing more money alone is unlikely to produce a better product. To avoid unintended consequences and allow for thorough discussion of the proposed amendments, the State Bar requests that the Court establish a working group to examine the proposed MCLE rule changes.

RESPECTFULLY SUBMITTED this 22nd day of September, 2021.

STATE BAR OF MONTANA

By: /s/ J. Stuart Segrest

J. Stuart Segrest, Chair
State Bar of Montana
Board of Trustees

/s/ Brian C. Smith

Brian C. Smith, President
State Bar of Montana