

To: Washington Supreme Court Justices
From: MCLE Board
Date: August 20, 2021
RE: **2020-2021 MCLE BOARD TERM REPORT**

Background & Purpose:

The Mandatory Continuing Legal Education (MCLE) Board derives its authority from the Washington Supreme Court. Under Admission and Practice Rule (APR) 11(d)(2), the MCLE Board is authorized to accredit courses and educational programs that satisfy the educational requirements of the mandatory CLE rule, consider MCLE policy issues, determine and adjusts fees, consider member and sponsor petitions for waivers from requirements and appeals from decisions, and suggest amendments or regulations to APR 11. The MCLE Board is comprised of 6 WSBA members and 1 community members. On average, the MCLE Board meets five times a year.

FY 2020-2021 MCLE Board Goals:

1. Suggested Amendment

Taking into consideration feedback from the public, licensed legal professionals, and the WSBA Board of Governors, the MCLE Board made a goal of determining whether to recommend to the Washington Supreme Court an amendment to the Admission and Practice Rule (APR) 11 ethics requirement. On October 15, 2020, the MCLE Board submitted the suggested amendment to the Washington Supreme Court. On July 1, 2021, the Washington Supreme Court entered order 25700-A-1349 approving the MCLE Board's suggested amendment. The order is effective September 1, 2022. The amendment to APR 11 requires, per each three-year MCLE reporting period, that each licensed legal professional complete at least one ethics credit in the topic of equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law.

2. Course Audits

MCLE Board members have a goal of auditing two or more CLE courses each year, focusing on accredited sponsors. The MCLE Board has completed five (5) audit reports throughout the 2020-2021 term, and are in the process of auditing three (3) additional courses. Accredited sponsors have the same duties as general sponsors, but have the additional responsibility of approving their own courses and determining appropriate MCLE credit in accordance with APR 11. Accredited sponsors pay an annual flat fee for all course applications submitted in lieu of an application fee for each individual course.

3. Diversity



The MCLE Board will continue to examine and work to increase the diversity of the MCLE Board. The MCLE Board continues to seek board members who represent diversity in geography, and all other diversity criteria used by the WSBA. In addition, the MCLE Board has done targeted outreach to WSBA members and CLE sponsors regarding topics that the Board has considered during the year. Also, the Board routinely receives and considers input from petitions filed by WSBA members affected by the MCLE rules.

The MCLE Board fosters an atmosphere of civility and collegiality insofar as how the Board receives comments from WSBA members, staff, fellow board members, and others. This is accomplished by active listening and respectful discussion. Consistency in the application of the rules is maintained by active discussion on the merits of each issue brought before the MCLE Board. The MCLE Board aims to achieve Board consensus whenever possible.

Newly Adopted MCLE Board Policies

At its August 6, 2021 meeting, the MCLE Board adopted two policies with the intent to provide guidance for the implementation of the Court's order NO. 25700-A-1349, which requires at least one MCLE credit in equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law (hereinafter referred to as "equity credit"). Pursuant to APR 11(d)(2)(ii) the policies will become effective 60 days after promulgation by the MCLE Board. Below is a brief description of each policy.

MCLE Board Policy – Implementation of New Ethics Requirement

This policy establishes 2023-2025 as the first reporting period required to report and certify the new requirement. The policy is intended to allow time for WSBA staff to develop tracking mechanisms in the MCLE database for certification and course accreditation according to the new requirements. In addition, this policy provides time to notify both licensed legal professionals and CLE sponsors of the new requirement.

MCLE Board Policy – Credit Carryover

This policy clarifies that while all ethics credit earned in excess of the reporting period requirement will be carried over as ethics credit in accordance with APR 11(c)(7), a new equity requirement must be earned in each reporting period. This policy is consistent with the current administration of ethics carryover credits: excess ethics credits carryover in its broader, general definition. For example, activities that relate to: the ethical risks to practice associated with diagnosable mental health issues, Rules of Professional Conduct, diversity and antibias as it relates to the legal system all currently carryover as ethics credit.

MCLE Credit for Law Clerk Tutors Workgroup



Over the years, there have been several requests by Law Clerk tutors to receive MCLE credit for giving their time as tutors. Tutors provide three hours of personal supervision each week, including instruction and substantive discussion of the law. It's a four-year program, and each year law clerks are required to study six subjects and pass monthly examinations. The exams are developed, administered, and graded by the tutors. At its May 25, 2021 meeting, the MCLE Board nominated two members to serve on the workgroup alongside two members from the Law Clerk Board to explore the possibility of suggesting an amendment to APR 11(e)(6) to allow Law Clerk tutors to obtain MCLE credit for teaching. On August 12, 2021, the workgroup met to discuss and draft potential language for an amendment to APR 11(e)(6).

WSBA Task Force Administering Xenial Involvement with Court Appointed Boards

MCLE Board member Robert Malae serves as the MCLE Board representative on the WSBA Task Force Administering Xenial Involvement with Court Appointed Boards (TAXICAB), and provides regular updates to the MCLE Board regarding the actions of the task force, at each MCLE Board meeting. The task force was created to begin a collaborative discussion with the Washington Supreme Court and to coordinate efforts to administer Court Boards, as well as to facilitate cooperation and the sharing of information between the Court and the WSBA on issues related to substantive, fiscal, and administrative concerns.

Board Interpretations of APR 11

After receiving a request for course accreditation guidance from MCLE staff, the MCLE Board determined that courses not designed nor intended for licensed legal professionals—that cover issues of diversity, inclusion, and elimination of bias—are not eligible for MCLE credit under APR 11(h). The MCLE Board requested MCLE staff to bring additional course applications in this topic to future meetings, in order to explore potential accreditation.

Petitions & Board Decisions

At each meeting, the MCLE Board reviews petitions that have been submitted on the basis of undue hardship. Per APR 11(i)(5): “a lawyer, LLLT, or LPO may file with the MCLE Board an undue hardship petition for an extension, waiver, and/or modification of the MCLE requirements.”

All petitions are first reviewed by the MCLE staff liaison and approved, denied, or forwarded to the MCLE Board based on the Board-approved decision matrix, which defines applicable hardships. The MCLE Board also reviews appeals of denials and holds hearings at the request of licensed legal professionals who also have the option to appeal a denial by the MCLE Board to the Supreme Court.

In total, two (2) petitions of undue hardship were reviewed by the MCLE Board during the 2020-2021 meeting term; however, both petitions were for the 2017-2019 reporting period. Due to the Court ordered extension of the 2018-2020 reporting period, and as of August 11, 2021, no petitions have been submitted to the MCLE Board for either the 2018-2021 extended reporting period or the 2019 -2021 reporting period. However, it is anticipated that the MCLE Board will begin to receive petitions for both

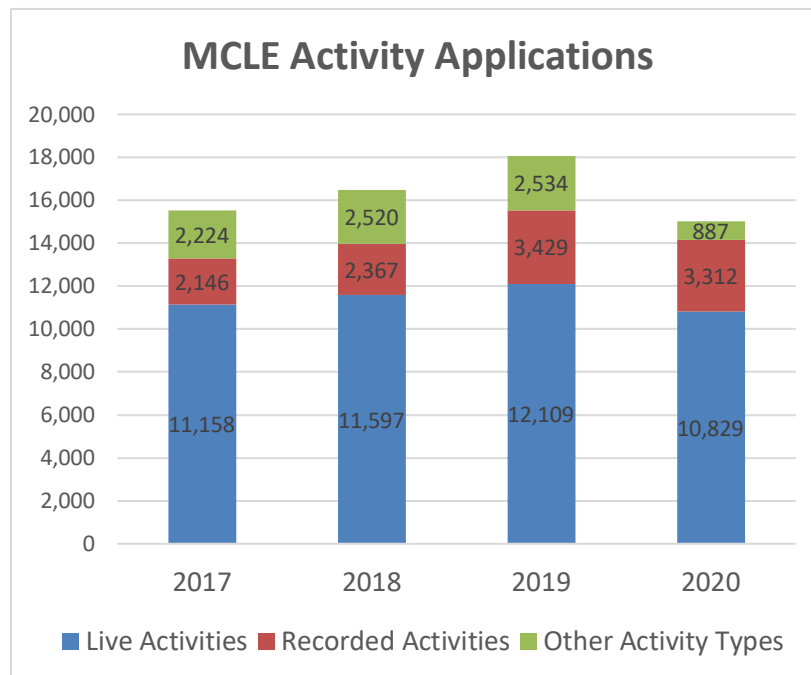


reporting periods this fall. For comparison, the MCLE Board received a total of sixty-eight (68) petitions during the 2017-2019 reporting period.

Strategies for Mitigating Implicit and Explicit Bias

In an effort to mitigate implicit and explicit bias from the MCLE petition review process, MCLE staff will begin to redact information pertaining to the petitioner’s identity, such as name, email, and license number before forwarding it to the MCLE Board.

MCLE Certification and Activity Submissions



The MCLE Board has delegated approval of courses to the WSBA’s MCLE staff. MCLE analysts regularly review CLE course submissions and accredit activities per standards outlined in APR 11. Hundreds of CLE activity applications are received each month, and MCLE analysts review and approve thousands of activity applications each year.

In addition to CLE activity reviews, MCLE staff handle the certification review process. As MCLE reporting and certification are based on a three-year reporting period, MCLE analysts review and verify that the MCLE requirements

are completed for one-third of active membership each year.

Due to the Court-ordered extension of the 2018-2020 reporting period (now 2018-2021), twice as many licensed legal professionals are due to certify credits by February 1, 2022. In order to meet and accomplish this increased workload (each individual certification must be reviewed by an MCLE analyst), MCLE staff worked with WSBA IT to open the MCLE certification in July 2021—several months ahead of the normal certification opening month of November. As of August 11, 2021, **1,538** licensed legal professionals have certified and are compliant for the 2018-2021 and 2019-2021 reporting periods, out of the **21,376** individuals that are due to report.

Sponsor Fees during COVID-19

MCLE staff provided an overview to the MCLE Board of sponsor application fee procedures in the midst of the COVID-19 pandemic—including charging separate application fees for formerly in-person



seminars that are divided into unique webcast offerings/separate applications. MCLE staff had encountered several examples of CLE sponsors attempting to apply for webinars as a package, to avoid multiple application fees. MCLE staff requested sponsors to separate such applications where non-consecutive days could cause confusion for 8-hour violation tracking (required per APR 11(c)(2)). The MCLE Board agreed with the current fee assessment procedure—to ensure that courses advertised as individual webinars be applied for individually—and requested MCLE staff to watch for any unique application issues that may require an additional assessment of the MCLE fee structure.

Attachments:

- 2020-2021 MCLE Board Roster
- MCLE Board Policies and Letter to Court (Ethics Requirement Implementation and Credit Carryover)
- WSBA Board of Governors Memo
- MCLE Board Undue Hardship Decision Matrix
- Fee Structure & Budget
- Admission and Practice Rule (APR) 11

