



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #9(b)

REQUESTED ACTION: Approval of amendments to the New York Continuing Legal Education Requirements with respect to newly-admitted attorneys.

Attached is a proposed amendment to the New York Mandatory Continuing Legal Education requirements. The Committee on Continuing Legal Education has submitted the attached memorandum referencing the effective changes. In its memorandum, the committee recommends an amendment to 22 NYCRR §1500.12(c) that would permit newly admitted attorneys, who are presently required to obtain the entirety of their 32 mandatory CLE credits via live attendance programs, to earn at least half of their credits through alternative means. The effective changes would permit newly admitted attorneys to complete up to sixteen of the 32 required credit hours by attending non-traditional format CLE programs via alternative verifiable learning formats. These formats include: videotape; audiotape; on-line computer presentations; satellite simulcasts; teleconferencing; videoconferencing; or other remote learning formats authorized by the Board and/or as provided in the Regulations and Guidelines.

The New York County Lawyers' Association has submitted comments opposing the proposal. As set forth in the attached letter, live programming enables newly-admitted lawyers to interact with other lawyers and ask questions of speakers. In addition, it provides an opportunity for skills-building and to engage in other interactive exercises. While acknowledging that some attorneys may have difficulty in meeting the live programming requirements, the CLE Board has procedures in place to accommodate those lawyers.

The report will be presented at the January 24 meeting by committee chair Deborah A. Scalise and committee member Marvin E. Schechter.

MEMORANDUM

TO: NYSBA EXECUTIVE COMMITTEE

***FROM: Deborah A. Scalise and Marvin E. Schechter, on behalf of the
NYSBA CLE COMMITTEE***

***RE: Proposed Amendment to New York CLE Requirements to Allow
Newly Admitted Attorneys to Earn Half of 32 Credits via
Nontraditional Formats***

DATE: November 1, 2012

Introduction

The purpose of this Memorandum is for the NYSBA Executive Committee¹ to consider passing a resolution which would propose an amendment to New York Mandatory Continuing Legal Education (MCLE) requirements that would permit Newly Admitted Attorneys, who are required to obtain all 32 of their CLE credits via live attendance programs, to earn at least half of their CLE credits via alternative means.

Since 1998 all New York attorneys have been required to attend MCLE courses. At the inception a two tiered system was created, distinguishing between attorneys who were "Newly Admitted" (those admitted in New York for fewer than 24 months and all others (those admitted for 24 months or longer). The CLE requirements for New York's Newly Admitted Attorneys are more exacting².

¹ The CLE Committee considered and the issues in this Memorandum at its July 13, 2012 meeting. After a unanimous vote in favor, as well as input from members of the Committee, this memorandum was updated.

² For Other Than Newly Admitted Attorneys, the Statement of Purpose at 22 NYCRR § 1500.21 provides:

It is of utmost importance to members of the Bar and to the public that attorneys maintain their professional competence by continuing their legal education throughout the period of their active practice of law. This Program establishes the minimum requirements for continuing legal education for attorneys other than newly admitted attorneys in New York State.

Attorneys admitted for more than two years are only required to complete 24 credit hours, 4 of which must be in ethics and professionalism. 22 NYCRR §1500.22. However, each Newly Admitted Attorney is required to “complete a minimum of 32 credit hours of accredited transitional education within the first two years of the date of admission to the Bar. 16 accredited hours shall be completed in each of the first two years of admission to the Bar as follows: 3 hours of ethics and professionalism; 6 hours of skills; and 7 hours of law practice management and areas of professional practice. 22 NYCRR §1500.12(a). Moreover, Newly Admitted Attorneys may only take “transitional courses” in a traditional format, rather than a “continuing legal education course or program consisting of nontraditional formats such as self-study, correspondence work, videotapes, audiotapes, motion picture presentations or on-line programs may be accepted for credit without prior permission from the CLE Board, except as provided in the Regulations and Guidelines”. 22 NYCRR §1500.12(c).

Thus, unless they apply for and receive advance permission from the CLE Board at the Office of Court Administration, Newly Admitted Attorneys are limited to live courses. Indeed it is doubtful that most attorneys are aware of this “opt-in” provision and generally most attorneys are aware of only the broad outlines of the MCLE requirements. At a time, early in their careers when they are extremely busy learning the intricacies of the law, such a formal method for obtaining MCLE courses other than by live attendance, makes little sense. Further this limitation, which may have been applicable in 1998 when these rules were enacted, no longer

In contrast, for Newly Admitted Attorneys, the Statement of Purpose at 22 NYCRR §1500.11 provides:

Mandatory Continuing Legal Education for Newly Admitted Attorneys in the State of New York is a transitional continuing legal education program designed to help recent graduates and newly admitted attorneys become competent to deliver legal services at an acceptable level of quality as they enter practice and assume primary client service responsibilities. The Program seeks to help the newly admitted attorney establish a foundation in certain practical skills, techniques and procedures, which are and can be essential to the practice of law, but may not have been adequately addressed in law school. It includes courses targeting ethics and professionalism, skills, practice management and areas of professional practice.

takes into account the substantial CLE technological presentation advances of the last fourteen years^{3 4}. Moreover, live attendance may also serve to work undue hardship (financial and otherwise⁵) on Newly Admitted Attorneys.⁶

Survey of Other Jurisdictions

We reviewed other jurisdictions to determine what they require.

California does not have any specific requirements for newly admitted attorneys. For all attorneys, half of the 25 CLE credits must be earned in “participatory” programs (which include online programs) and the other half can be earned through self-study programs. Newly admitted attorneys have proportional requirements which are calculated according to the date of admission. Rule 2.72, Rules of the California State Bar. **Florida** requires

³ Interestingly, in 1998 the MCLE rules permitted attorneys admitted longer than two years to take CLE Board accredited programs in alternative formats, such as video and audio products and online programs. Since that time the CLE Board has expanded the types of alternative programs for this group of attorneys to include: DVD’s, Teleconferences, Computer CD, Prerecorded online, Webcast and Videoconferencing.

⁴ More and more lawyers and law firms are conducting business online, so allowing newly admitted attorneys to obtain CLE credit via online programs makes sense. Indeed, it was noted that even the Office of Court Administration allows lay Judges and magistrates to take CLE and receive credits via webcasts it offers. Thus, it follows that Newly Admitted Attorneys who have successfully completed three years of law school and been admitted to the New York Bar after a careful review by the Character and Fitness Committee should be able to take at least half of their credits via the same format.

⁵ There are a lot of lawyers in New York State! According to a recent publication by the New York Lawyers Fund for Client Protection there are over 271,000 lawyers registered in New York State. Highlights from the 2011 Annual Report of the Board of Trustees, p. 1. In addition, in its June 4, 2012 publication entitled “NYLJ 100- Largest Private Law Offices in the State, Top 100 in the State, Minority-Owned First, Lawyers in Government” the listing “Attorney Concentration by County” obtained statistics from OCA that the total of all attorneys listed by county is 163,798. Both are attached. The latter is informative because it gives us some idea of attorneys in far reaching counties who must take programs offered by local bar associations, or travel to obtain CLE credits, or take CLE via alternate methods (electronic).

⁶ The CLE Committee noted that webcasts can be a much more practical format and do offer a simultaneous Question and Answer option during the presentation, so there is interaction with the program faculty. Webcasts can also be viewed at night when it may be more convenient for a Newly Admitted Attorney to avoid travel time, and thereby allow them time in the office to handle the matters they are working on, as well as time with family.

30 MCLE credits which may be earned in any format (including the specialty credits). Rule 6-10.3, Rules Regulating the State Bar. Newly admitted attorneys (admitted after October 1, 1988) must complete a Basic Skills Course Requirement (“BSCR”) presented by The Young Lawyers Division of the state bar. Rule 6-12.

Connecticut, Michigan, Maryland, Massachusetts and Vermont are all “voluntary” states with no MCLE credit requirements. *See* the ABA’s website.⁷

Delaware requires newly admitted attorneys (who passed the bar in 2005 or thereafter) to complete a Basic Legal Skills Requirement, consisting of a mandatory two-day Bridge-the-Gap course which must be completed before admission. Newly admitted attorneys are subject to prorated CLE requirements depending on the number of months remaining in the reporting period following admission to the bar. One-sixth of the prorated required hours must be earned in Enhanced ethics. For all other attorneys, half of the standard required 24 credit hours every two years can be earned through self-study formats (which has an expanded definition to include online programs), as long as the program is not more than two years old. Four of the 24 credit hours must be earned from Enhanced Ethics programs. Rule 4, Rules of the Delaware State Bar.

District of Columbia is also a voluntary jurisdiction, but all attorneys admitted after July 1, 1994 (as well as reactivated and reinstated attorneys) must complete a live, mandatory course on the D.C. Rules of Professional Conduct. Rule 1.1, D.C. Rules of Professional Conduct; *see also*, www.dcbbar.org.

Illinois requires, for attorneys admitted on or after October 1, 2011, (1) completion of a Basic Skills Course (of not less than 6 hours) or participation in a mentoring program approved by the Commission on Professionalism; (2) at least 9 additional MCLE credit hours; and (3) reporting of credits. Rule 793, Illinois Supreme Court Rules. This requirement does not apply to attorneys admitted on or after October 1, 2011 who have at least 3 years of practice in another state prior to admission in Illinois. These attorneys must complete 15 credit hours within the first year of admission in Illinois. *Id.*

⁷ There is no mention of any CLE requirements in the individual states’ rules.

Attorneys admitted to practice after December 31, 2005, and before October 1, 2011 may opt to complete a Basic Skills Course totaling at least 15 actual hours of instruction or completing the requirements for newly admitted attorneys as detailed above. *Id.*

The requirements for experienced attorneys are detailed in Rule 794 and are based on a two-year reporting period. These requirements increase incrementally over time to 30 hours for the most recent two-year reporting period.

Minnesota (the first state to enact MCLE in 1976) has no specific requirement for newly admitted attorneys. Attorneys must complete 45 credit hours every three years, including two hours in Elimination of Bias, three hours in Ethics, no more than six hours in Law Office Management, and no more than six hours from *pro bono* legal representation. There is no limit on credit hours earned in Professional Development areas. All of the required CLE credit hours can be earned through live or online webcasts. Self-study programs are not approved in Minnesota. Rule 9, Rules of the Minnesota State Board of Continuing Legal Education.

Missouri does not require newly admitted attorneys to complete or report any CLE hours in the year in which the attorney is first licensed. However, candidates for admission to the bar must attend The Missouri Bar's annual law update (or an equivalent accredited CLE course) before admission. All attorneys admitted or reinstated between June 30, 1990 and July 1, 2009 must take three hours in the areas of professionalism, legal or judicial ethics, and malpractice prevention within twelve months of admission or reinstatement. There is no stated requirement as to whether those credits must be earned in a live format. Generally, Missouri requires 15 hours per reporting year and allows all attorneys a maximum of 6 credits from self-study or taped programs. The remaining credits, including all specialty credits, must be earned from live format programs. Rule 15.05, Rules Governing the Missouri Bar and the Judiciary.

New Jersey⁸ requires 24 credit hours every two years for all attorneys. For newly admitted attorneys, 15 of those hours must be taken in any five of nine designated subject areas. Newly admitted attorneys are given a specific

⁸ A copy of the New Jersey Regulations is attached.

number of required hours in the first and second reporting periods depending on the year of admission, typically 12 hours in the first two-year reporting period and up to the standard 24-hour requirement in the second period. For newly admitted attorneys, as well as all other attorneys, half of the 24 credit hours must be completed in a live, interactive format where the participants are in the same room as the instructors. The remaining half can be earned through other “alternative verifiable learning” formats, including: videotape; audiotape; on-line computer presentations; satellite simulcasts; teleconferencing; videoconferencing; internet computer self-study or other remote learning format authorized by the Board. Rule 1:42-1, Rules of the New Jersey Supreme Court Board on Continuing Legal Education.

Ohio requires newly admitted attorneys to complete a New Lawyer Training course as part of its 12-hour requirement (in a two-year period). The 12 hours must be earned through live attendance at CLE programs and must include the following: (1) three hours divided evenly among the topics of professionalism, law office management, and client fund management; and (2) nine hours in one or more specific practice area. Rule X, §3(H) (1), Rules Governing the State Bar of Ohio.

Pennsylvania requires new attorneys to complete a “Bridge the Gap” program (offered on DVD) in the first compliance period. Apart from this requirement, the standard CLE requirement applies to all attorneys: 12 credit hours per year (including 1 hour of ethics), with a maximum of four (4) hours earned through “distance learning” (online, telephonic, or other remote programs). Rule 105, Pennsylvania Rules for Continuing Legal Education.

Texas allows newly admitted attorneys 24 months to complete their 15-credit requirement (which must be completed within one year by experienced attorneys). Rule 3.1, Texas MCLE Regulations. There is no specification as to format for new attorneys, except that all attorneys must complete a minimum of 12 credit hours at an “accredited CLE activity” (which can include online programs). A maximum of three credit hours can be earned through self-study programs. Rule 2.2. Three credit hours must be earned in ethics and/or professional responsibility (and of these three hours, two hours must be earned at an “accredited CLE activity,” while one hour can be earned through self-study). Rule 3.2.

Based on the foregoing, it appears that most jurisdictions allow attorneys, including Newly Admitted Attorneys, to earn some CLE credit via alternative

formats.⁹ And, in fact, New Jersey requires the programs to have alternative verifiable learning” formats. Thus, even when a jurisdiction requires a certain amount of credits to be earned by attending programs, they still provide for attendance by alternate means to allow attorneys some discretion and flexibility to fulfill the requirements. Indeed, the other formats mentioned above include: videotape; audiotape; on-line computer presentations; satellite simulcasts; teleconferencing; videoconferencing; internet computer self-study or other remote learning format authorized by the Board.

Concerns

For purposes of this discussion, we identified and have tried to address the following concerns.

Live attendance encourages collegiality and socialization. This may be true to a certain extent, however, anecdotally, it appears that most attendees come and go without any or limited interaction with each other or the presenters.

Ability to simultaneously pose questions to the presenters. As stated, above it appears that most attendees come and go without any or limited interaction with each other or the presenters. Moreover, live webcast or telecast enables the off location attendees to send questions to the presenters during transmission of the program. At many programs very little time is allotted for questions and often this exchange occurs at the completion of a speaker’s presentation, around the forty-five minute mark of a 50 minute allotment.

Less attendance at live programs. Based on statistics kept by this Committee over the past year, it appears that the audience for webcasts or replays differs from that of the live programs in that we have increased attendance by offering these alternatives.

⁹ In a survey conducted by the New York State Bar Association’s MCLE Committee in 2007-2008 of 50,000 lawyers with responses (partial and complete) from 6,496 lawyers, “more than 40% agreed that newly admitted attorneys should be allowed to satisfy their requirements with recorded or online programs.” See “Report on Mandatory Continuing Legal Education,” New York State Bar Association, Committee on Mandatory Legal Education, September 25, 2008, p. 11.

Advantages

It is no secret that Newly Admitted Lawyers are having a difficult time in this job market. Indeed, they compete for very few jobs and many hang out their own shingles, which means they have to work harder to prove themselves and longer hours to complete the work that they have obtained. While we agree with the asserted goals in the Statement of Purpose for Newly Admitted Attorneys at 22 NYCRR §1500.11 in that CLE helps them to “become competent to deliver legal services at an acceptable level of quality as they enter practice and assume primary client service responsibilities” and “seeks to help” them “establish a foundation in certain practical skills, techniques and procedures, which are and can be essential to the practice of law, but may not have been adequately addressed in law school”, we simply cannot agree that only live attendance at CLE programs will fulfill such goals. In fact, we submit that the travel time and costs associated with mandatory live CLE, not to mention the distraction and time away from legal matters they are handling for clients, deters and discourages potential CLE attendees from taking courses from which they would otherwise benefit. Indeed, for the younger generation of lawyers who customarily communicate via electronic means, CLE attendance by alternative means may enhance the value of bar association membership, a not insubstantial side benefit in terms of having newly admitted attorneys participate in programs with more experienced counsel.

Recommendation

The CLE Committee unanimously voted upon and recommends the resolution set forth below for consideration by the Executive Committee as to a proposed amendment to New York CLE requirements to allow Newly Admitted Attorneys, who are required to obtain all 32 of their CLE credits via live attendance, to earn their CLE credits via alternative means.

Optimally, as is the case in New Jersey, Newly Admitted Attorneys should be allowed to take at least half (16 of the 32) required CLE credits via Alternative Verifiable Learning Formats including: videotape; audiotape; on-line computer presentations; satellite simulcasts; teleconferencing; videoconferencing; or other remote learning format authorized by the Board. We note however that we have excluded internet computer self-study because it does to appear to be an option under New York’s Mandatory CLE Rules.

Accordingly, we propose that 22 NYCRR §1500.12(c) be amended as follows:

Accredited Courses or Programs Only. Transitional continuing legal education credit will be granted only for courses and programs approved as such by the CLE Board, except as provided in subdivision (d). ~~No transitional continuing legal education course or program consisting of nontraditional formats, such as self-study, correspondence work, videotapes, audiotapes, motion picture presentations or on-line programs may be accepted for credit without prior permission from the CLE Board, except as provided in the Regulations and Guidelines.~~ Newly admitted attorneys shall take a minimum of sixteen (or half) of the 32 required credit hours as set forth at 22 NYCRR § 1500.12(a) above, by attending CLE programs presented in transitional and traditional live formats. As to the remainder of the credits hours, newly admitted attorneys may take up to sixteen (or half) of the 32 required credit hours as set forth at 22 NYCRR § 1500.12(a) above by attending non-traditional format CLE programs via Alternative Verifiable Learning Formats including: videotape; audiotape; on-line computer presentations; satellite simulcasts; teleconferencing; videoconferencing; or other remote learning format authorized by the Board and/or as provided in the Regulations and Guidelines”.

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

January 2, 2013

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Dear President James:

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These comments were approved by the NYCLA Executive Committee on December 27, 2012.

At a meeting of NYCLA's Committee on CLE held on December 13, 2012, the Committee unanimously voted to oppose the NYSBA's Proposal to Amend the New York CLE Requirements for Newly Admitted Attorneys. The Committee believes that the reason to amend a current rule or regulation arises when a problem is perceived in the implementation of that rule or regulation. NYCLA's CLE Committee believes that the reasons behind differentiating the CLE requirements for newly admitted attorneys and experienced attorneys are as valid today as they were in 1998 when mandatory CLE was implemented in New York State.

In a bad economy, many new attorneys are having difficulty finding jobs, and are unable to find mentors, clients are refusing to pay for the hours spent by inexperienced associates on their cases, and the law school curriculum is being severely criticized for failing to prepare new graduates to practice law. It is now more important than ever for CLE providers to step in and fill the void.

At live programs, newly admitted attorneys have the chance to interact with their peers, speakers and other members of a diverse audience, as well as ask questions of the speakers. While it has been hypothesized that most attendees do not actually interact with others, the NYCLA experience has been quite different.

Members of the Bridge the Gap audience continually ask questions, both during the program and after. In fact many times we set up a separate room for attendees to continue dialogs with speakers after the formal session is over. Many of our speakers also report that they are contacted by program attendees after the courses have been completed to ask follow-up questions, seek advice or set up follow-up meetings. Further, since so many young attorneys lack practical skills when they graduate from law school, obtaining instruction in a live setting enhances the skills-building experience. For example, we have interactive programs on how to conduct a voir dire, where members of the Bridge the Gap audience actually play the parts of jurors, and the audience votes on whether the candidates should be selected or challenged and why. Other programs teach young lawyers communication or stress-management skills, with the

audience members engaging in interactive exercises. Still others allow audience members to be critiqued by experienced panel members, or participate as a party in a mock real estate closing -- all experiences that the attendees would not have if they took the course in an alternative format. Further, many judges, disciplinary committee members and government officials speak at Bridge the Gap and other programs and provide some of the most practical and useful information to newly admitted attorneys. These prestigious speakers frequently do not allow themselves to be taped, and often it is against their agencies' policy to be recorded. It would be a shame not to expose young lawyers to the information such esteemed speakers impart.

While it may be argued that interactive programs can still be offered to supplement recorded programs, the reality is that young lawyers, like most of us, will frequently opt for the "easy way out" of a recorded program. We do not believe that such an approach is consistent with CLE objectives for these new lawyers.

The live course requirement only lasts for the first two years of a lawyer's practice. After that, New York State is very liberal in allowing attorneys to take all of their CLE credit requirements through alternative formats if they so desire. While we acknowledge that some attorneys may experience difficulties in meeting the live program requirements, the CLE Board already has procedures in place to grant waivers or make other accommodations for attorneys experiencing hardships. And, cost should not be a factor at all in keeping young attorneys from attending live programs, as each accredited MCLE provider in New York State is required to have a financial hardship policy. This policy, we can attest, is frequently utilized.

Sincerely,

A handwritten signature in black ink, appearing to read "Stewart D. Aaron", with a stylized flourish at the end.

Stewart D. Aaron
President