

WASHINGTON STATE BAR ASSOCIATION

Office of Disciplinary Counsel

Douglas J. Ende
Chief Disciplinary Counsel

April 22, 2024

Erin Lennon
Clerk of the Supreme Court
PO Box 4929
Olympia, WA 98504-0929

Re: Comment on Proposed Amendments to APR 11

Dear Clerk Lennon:

As Chief Disciplinary Counsel of the Washington State Bar Association (WSBA), I submit the following comment on the proposed amendments to Rule 11 of Washington's Admission and Practice Rules (APR).¹ Contrary to the proposal, I suggest that the Court preserve the current six-credit-per-reporting-period ethics education requirement. I do not object to classifying equity—along with mental health and technology security—as a separate Mandatory Continuing Legal Education (MCLE) category.

The primary purpose of the amendments as suggested by the MCLE Board is to require licensed legal professionals to earn one credit per MCLE reporting period (every three years) in both the subjects of mental health and technology security. These credits would be classified neither as “ethics and professional responsibility” credits nor as “law and legal procedure” credits but instead would be separate standalone categories of credits.

I have no disagreement with that aspect of the proposal.

In addition to those changes, the MCLE Board's amendments would create a separate category for the already required subject of “equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law.” The Purpose Statement in the MCLE Board's General Rule (GR) 9 submission (“GR 9 Cover Sheet”) describes this change as follows:

The suggested amendments reduce the ethics requirement to five credits, because the one credit requirement for “equity” will become its own category as opposed to a subcategory of ethics as currently provided for in APR 11. Although “equity” will be a

¹ The proponent of the amendment is the Mandatory Continuing Legal Education Board (“MCLE Board”). As noted in the proponent's GR 9 Cover Sheet, the MCLE Board presented the draft amendments to the WSBA Board of Governors at its August 11, 2023 meeting, and the Board of Governors voted to support the amendments in part and oppose the amendments in part. At the August 2023 meeting, I requested and was granted leave by the Board of Governors under Section IV(E) of the WSBA Bylaws to submit, in my capacity as Chief Disciplinary Counsel, a public comment during GR 9 rulemaking in partial opposition to the proposed amendment on separate grounds.



separate category for credit count and compliance, the definition of “equity” remains unchanged. Creating a separate “equity” category will make it easier for licensed legal professionals and WSBA staff both to understand that there is a one credit “equity” requirement each reporting period and to track compliance with the “equity” requirement. Therefore, although the suggested amendments will technically reduce the ethics requirement to five credits, there remain essentially six ethics credits required because “equity” will still be a required credit category.

GR 9 Cover Sheet at 2.

According to the MCLE Board, the amendments “do NOT . . . dilute the ethics and professional responsibility . . . requirements.” *Id.* (emphasis in original).

I disagree.

The rules define the topic of ethics and professional responsibility as “relating to the general subject of professional responsibility and conduct standards for lawyers, LLLTs, LPOs, and judges” APR 11(f)(2). As generally understood, this topic is aimed at programming that educates licensed legal professionals about obligations under the Rules of Professional Conduct (RPC); in other words, ethics credits focus on the fundamentals of legal ethics compliance.

Ethics credits have been obligatory in the MCLE rules since 1994, with a requirement of six ethics credits per three-year reporting period in effect since 1996. When a credit requirement relating to “equity, inclusion, and the mitigation of bias” was added to APR 11 in 2022, it became one of the six credits per reporting period required to be on the topic of ethics and professional responsibility. APR 11(c)(1)(ii). At that time, the definition of ethics and professional responsibility was modified to encompass “equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law” APR 11(f)(2).²

In now carving out the equity credit requirement from the ethics credit requirement, the MCLE Board seems to believe that nothing has changed; in other words, equity is a mere component of ethics. What the MCLE Board has failed to apprehend is that the definition of “ethics and professional responsibility” and the definition of “equity, inclusion, and the mitigation of . . . bias” are different, and educational activities in the two areas serve complementary but distinct purposes. Each is an important topic. Licensed legal professionals ought to be educated in both. Indeed, there are aspects of RPC compliance that bear on equity, inclusion, and the mitigation of bias. *See, e.g.*, RPC 8.4(g) & (h). But, as I see it, the topic of equity, inclusion, and the mitigation of bias is more expansive and far-reaching than RPC compliance alone. Accordingly, I applaud the proposal to make equity a separate MCLE category. This will give equity education the range and breadth it deserves.

² In 2009, the now-repealed MCLE Regulations were amended to authorize the award of ethics credits “in the areas of diversity and anti-bias with respect to the practice of law, or the risks to ethical practice associated with diagnosable conditions of stress, anxiety, depression, and addictive behavior.” Former Appendix APR 11 Reg. 101(g).

What I do not applaud, however, is the reduction in the required number of RPC-compliance ethics credits per reporting period from six to five. The proponent has pointed to no evidence that Washington's licensed legal professionals need less RPC-focused ethics education, and I daresay there is none.

I see no harm in preserving a six-credit-per-reporting-period ethics education requirement while classifying equity—along with mental health and technology security—as a separate MCLE category.

Thus, the only change I recommend to the proposed amendments is to do away with the proposal to strike “six” and substitute “five” in APR 11(c)(1)(ii).

Specifically, instead of

(ii) at least ~~six~~ five credits must be in ethics and professional responsibility, as defined in subsection (f)(2).₂

I suggest

(ii) at least six credits must be in ethics and professional responsibility, as defined in subsection (f)(2).₂

I am available to answer any questions or provide additional information if the Court so requests.

Sincerely,



Douglas J. Ende
Chief Disciplinary Counsel

cc: Sunitha Anjilvel, Acting WSBA President
Efrem R. Krisher, Chair, MCLE Board
Terra K. Nevitt, WSBA Executive Director
Adelaine Shay, WSBA Staff Liaison to the MCLE Board