

RESOLUTION 09-06-2007

DIGEST

Continuing Legal Education: Pro Bono Hours Exception

Amends Rule 9.31 of the Rules of Court to permit state bar members to obtain up to five hours of MCLE credit for participation in pro bono activities.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolutions 04-05-2002 and 02-13-2003, which were disapproved.

Reasons:

This resolution amends Rule 9.31 of the Rules of Court to permit state bar members to obtain up to five hours of MCLE credit for participation in pro bono activities. This resolution should be disapproved because it fails to identify what “pro bono activities” would or should qualify for MCLE credits.

Under Rule 9.31 of the California Rules of Court, all active members must complete 25 hours of approved MCLE over a three year period. These courses are aimed at furthering practice skills, education and knowledge. Credit can be earned for participating in educational activities and/or through self-study. Arguably, the current education scheme demands too little and is questionably effective for ensuring that all practitioners in our state continue to learn more about how to best serve the public.

In effect, this resolution could decrease even the minimal aims of Rule 9.31. This is because this resolution fails to address which “pro bono activities” warrant approval, if any, by the bar for credit as MCLE. As both the state and model rules for legal practitioners ethically oblige attorneys to participate in pro bono activities, doing so should not result in being held less accountable for ensuring that MCLE requirements are met.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council amend Rule of Court 9.31 to authorize the State Bar to amend Business and Professions Code section 6070 to read as follows:

- 1 Rule 9.31
- 2 (a) This rule is adopted under Business and Professions Code section 6070.
- 3 (b) The State Bar must establish and administer a minimum continuing legal
- 4 education program under rules adopted by the Board of Governors of the State Bar. These
- 5 rules may provide for carryforward of excess credit hours, staggering of the education
- 6 requirement for implementation purposes, and retroactive credit for legal education.
- 7 (c) Each active member of the State Bar (1) not exempt under Business and
- 8 Professions Code section 6070, (2) not a full-time employee of the United States

9 Government, its departments, agencies, and public corporations, acting within the scope of
10 his or her employment, and (3) not otherwise exempt under rules adopted by the Board of
11 Governors of the State Bar, must, within 36-month periods designated by the State Bar,
12 complete at least 25 hours of legal education approved by the State Bar or offered by a State
13 Bar-approved provider. Four of those hours must address legal ethics. In lieu of 5 of the 25
14 required hours of legal education, members may complete at least 5 hours in pro bono
15 activities for no or low income residents approved by the State Bar or approved by a local
16 Bar Association. Members may be required to complete legal education in other specified
17 areas within the 25-hour requirement under rules adopted by the State Bar. Each active
18 member must report his or her compliance to the State Bar under rules adopted by the Board
19 of Governors of the State Bar.

20 (d) A member of the State Bar who fails to satisfy the requirements of the State Bar's
21 minimum continuing legal education program must be enrolled as an inactive member of the
22 State Bar under rules adopted by the Board of Governors of the State Bar.

23 (e) The State Bar has the authority to set and collect appropriate fees and penalties.

24
25 §6070

26 (a) The State Bar shall request the California Supreme Court to adopt a rule of court
27 authorizing the State Bar to establish and administer a mandatory continuing legal education
28 program. The rule that the State Bar requests the Supreme Court to adopt shall require that,
29 within designated 36-month periods, all active members of the State Bar shall complete at
30 least 25 hours of legal education activities approved by the State Bar or offered by a State
31 Bar approved provider, with four of those hours in legal ethics. In lieu of 5 of the 25
32 required hours of legal education, members may complete at least 5 hours in pro bono
33 activities for no or low income residents approved by the State Bar or approved by a local
34 Bar Association. A member of the State Bar who fails to satisfy the mandatory continuing
35 legal education requirements of the program authorized by the Supreme Court rule shall be
36 enrolled as an inactive member pursuant to rules adopted by the Board of Governors of the
37 State Bar.

38 (b) For purposes of this section, statewide associations of public agencies and
39 incorporated, nonprofit professional associations of attorneys, shall be certified as State Bar
40 approved providers upon completion of an appropriate application process to be established
41 by the State Bar. The certification may be revoked only by majority vote of the board, after
42 notice and hearing, and for good cause shown. Programs provided by the California District
43 Attorneys Association or the California Public Defenders Association, or both, including,
44 but not limited to, programs provided pursuant to Title 1.5 (commencing with Section
45 11500) of Part 4 of the Penal Code, are deemed to be legal education activities approved by
46 the State Bar or offered by a State Bar approved provider.

47 (c) Notwithstanding the provisions of subdivision (a), officers and elected officials
48 of the State of California, and full-time professors at law schools accredited by the State Bar
49 of California, the American Bar Association, or both, shall be exempt from the provisions of
50 this section. Full-time employees of the State of California, acting within the scope of their
51 employment, shall be exempt from the provisions of this section. Nothing in this section
52 shall prohibit the State of California, or any political subdivision thereof, from establishing
53 or maintaining its own continuing education requirements for its employees.

54 (d) The State Bar shall provide and encourage the development of low-cost programs
55 and materials by which members may satisfy their continuing education requirements.
56 Special emphasis shall be placed upon the use of internet capabilities and computer
57 technology in the development and provision of no-cost and low-cost programs and
58 materials. Towards this purpose, the State Bar shall ensure that by July 1, 2000, any member
59 possessing or having access to the internet or specified generally available computer
60 technology shall be capable of satisfying the full self-study portion of his or her MCLE
61 requirement at a cost of fifteen dollars (\$15) per hour or less.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: Does not mandate members of the State Bar perform pro bono services for no or low income residents of California.

This Resolution: This would be the first step by the State Bar in providing no or low income residents with free legal services.

The Problem: There are increasing numbers of no or low income residents needing free legal services. There is a major concern expressed by numerous members of the Conference of Delegates that the State Bar advocate for the availability of free legal services for all residents of California.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

STATE BAR BOARD OF GOVERNORS

The State Bar supports the desire to encourage members to provide pro bono services and is sensitive to the intention of providing some incentive for lawyers to provide pro bono services. However, the effort to encourage participation in pro bono services through the MCLE program is problematic, and raises numerous issues and questions.

MCLE is intended to protect the public by requiring ongoing legal education for active members of the State Bar. A determination has been made that a certain minimum number of hours of continuing legal education should be required. Although providing incentives for pro bono service is a laudable goal, reducing the required number of hours of legal education – as a trade-off – does not seem to be the appropriate mechanism.

This proposal is also problematic because the 5 hours in “pro bono activities” would only count if they were “approved” by the State Bar or a local Bar Association. The standards for approval are not set out in the proposal. Moreover, the proposal is flawed to the extent it intends to suggest that pro bono activities would necessarily be equivalent to “education activities” under the current rules.

The basic nature of the MCLE program, which is regulatory, is different from the basic nature of pro bono services. Whether someone is “learning” is not the question in determining whether an activity is education and should provide MCLE credit. As a general observation, it is in the nature of most legal work that continued learning follows from course work, whether it be on one’s own, in conducting further research, or in service or employment situations where there is supervision, training and mentoring.

As a participatory credit activity, the proposal would fall short. MCLE Rule 4.1 sets out the criteria that must be met to qualify for participatory credit: “Participatory credit refers to participation in an *education activity* that can be verified by the education provider . . .” (emphasis added). The standards that all “education activities” must meet are set out in MCLE Rule 7.1: 1) the education activity must have significant current intellectual or practical content; 2) the education activity must be an organized program of learning; 3) the education activity must be conducted by an individual or group qualified by practical or academic experience; and 4) where the education activity is more than one hour in length, substantive written materials must be distributed to all participants. Pro bono “activities” – as envisioned by this resolution – do not appear to meet these criteria.

ORANGE COUNTY BAR ASSOCIATION

Exchanging MCLE hours for *pro bono* hours is an oft-repeated proposal -- most recently rejected by this Conference in 2002 -- albeit with noble intentions. However, those good intentions cannot overcome the fact that the goals of MCLE and the goals of *pro bono* work are quite different, and the time spent on each is not interchangeable. The loosely defined *pro bono* activities identified by this resolution do not necessarily require any learning—they just require doing for free what you may otherwise charge for, and otherwise don’t get MCLE credit for. To the extent that these activities have the potential to be educational, the same could be said for regular billable work, which potentially includes conducting legal research about a new issue. Nonetheless, all private practitioners have MCLE requirements, because they may or may not be keeping abreast of the latest developments in the law as a consequence of representing clients. By reducing MCLE obligations, this resolution in effect would effectively lower the competency standards for lawyers who do *pro bono* work. While that work should be encouraged, it should not be traded for MCLE hours.

SAN DIEGO COUNTY BAR ASSOCIATION

While pro bono work is needed and commendable, it should not and cannot replace MCLE education. Ours is one of the few professions that does not require periodic testing. Our only burden is to sit through a very de minimus number of hours of education and report to the bar every three years. There is no legitimate purpose in eroding that further.