

WSR 21-04-094
RULES OF COURT
STATE SUPREME COURT
[January 8, 2021]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENT TO APR) NO. 25700-A-1335
11-MANDATORY CONTINUING)
LEGAL EDUCATION)

The Mandatory Continuing Legal Education Board, having recommen-
ded the suggested amendment to APR 11—Mandatory Continuing Legal Edu-
cation, and the Court having approved the suggested amendment for pub-
lication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested
amendment as shown below is to be published for comment in the Wash-
ington Reports, Washington Register, Washington State Bar Association
and Administrative Office of the Court's websites in January 2021.

(b) The purpose statement as required by GR 9(e), is published
solely for the information of the Bench, Bar and other interested par-
ties.

(c) Comments are to be submitted to the Clerk of the Supreme
Court by either U.S. Mail or Internet E-Mail by no later than April
30, 2021. Comments may be sent to the following addresses: P.O. Box
40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Com-
ments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 8th day of January, 2021.

For the Court

Stephens, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendments

ADMISSION AND PRACTICE RULE (APR) 11

Mandatory Continuing Legal Education

Submitted by the Mandatory Continuing Legal Education Board

A. Name of Proponent:

Mandatory Continuing Legal Education (MCLE) Board
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B. Spokesperson:

Ayanna Colman
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C. Purpose:

This suggested amendment is to ensure that licensed legal profes-
sionals in Washington State are adequately educated in order to pro-

protect the public and improve each licensed legal professional's ability to render competent and effective legal services to clients.

This suggested amendment will enable licensed legal professionals to better serve their clients by requiring that one of the required ethics credits be in the category of equity, inclusion and the mitigation of bias. The MCLE Board has identified this category as necessary to the practice of law that all lawyers, LLLTs, and LPOs should be required to be educated in this area in order to protect the public and work with clients in an ethical manner. The suggested amendment has been discussed and reviewed at length by the MCLE Board and is designed to enhance the existing ethics requirements of legal practitioners in Washington State.

Background

Pursuant to Washington Supreme Court Admission and Practice Rule (APR) 11 (d) (2) (i), Rules and Regulations, "The MCLE Board shall review and suggest amendments or make regulations to APR 11 as necessary to fulfill the purpose of MCLE ... Suggested amendments are subject to review by the Board of Governors and approval by the Supreme Court." The purpose of MCLE is "to enhance lawyers', LLLTs', and LPOs' legal services to their clients and protect the public by assisting lawyers, LLLTs, and LPOs in maintaining and developing their competence ..." (APR 11(a)). Therefore, the MCLE Board is continuing its work to address systemic inequities, by suggesting a single, narrow amendment of the APR 11 ethics and professional responsibility requirement focused on equity, inclusion, and mitigation of bias. The need for this requirement is highlighted by increased demand for the legal profession to refresh its commitment to address systemic inequities, as recently noted by statements made by the WSBA President and the Washington Supreme Court.¹ The MCLE Board believes that this suggested amendment is a valuable step toward realizing the necessary change called for by our profession's leaders.

¹ The June 3rd, 2020 statement from the WSBA President may be viewed here: https://www.wsba.org/docs/default-source/about-wsba/governance/civil-unrest.pdf?sfvrsn=1b7809f1_6; the June 4th 2020 open letter from the Washington Supreme Court may be viewed here: <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>

The MCLE Board previously submitted a suggested amendment of the ethics requirement to the Washington Supreme Court in 2019 that would have required additional ethics credits in three specific topics. The Supreme Court rejected that suggested amendment. This year, the MCLE Board began seeking a narrower amendment to the ethics requirement, addressing one topic and specifying one credit of the existing ethics requirement. The MCLE Board created an MCLE Board Rules Subcommittee, tasked with drafting a suggested amendment focused solely on the topic of diversity. This suggested amendment more closely aligns with the original proposal heard by the MCLE Board in October 2018, as presented by the WSBA Diversity Committee and Washington Women Lawyers, with the support of eight minority bar associations: the Asian Bar Association of Washington, the Cardozo Society of Washington State, Filipino Lawyers of Washington, the Pierce County Minority Bar Association, the Loren Miller Bar Association, the Latina/o Bar Association of Washington, the South Asian Bar Association of Washington, and QLaw. That proposal was to require that at least one of the six ethics credits licensed legal professionals are required to earn each reporting period be on the topic of "equity, inclusion and the mitigation of bias in the legal profession."

Based on an initial draft from the subcommittee, the MCLE Board sought feedback from the WSBA Diversity Committee, the Washington Women Lawyers and other stakeholders including Court-appointed boards,

WSBA committees, local and minority bar associations, and CLE sponsors. Based on stakeholder feedback, the MCLE Board again refined the suggested amendment, and posted it for public comment.

As of October 5, 2020, the MCLE Board have received 937 written comments, and four in-person comments during a public comment session held at the MCLE Board meeting on August 7, 2020. Out of the written comments, respondents were near equally split as 'in favor' and 'not in favor', with a slight lean towards 'in favor' of the suggested amendment. Of these 937 comments, 45 identified as members of the public (non-WSBA members); 41 of the 45 responded as 'in favor'. Last year, the compiled feedback for the previous suggested amendment resulted in a large majority opposed. See the attached compiled feedback regarding the current suggested amendment.

The MCLE Board reviewed and considered all written and oral feedback at its August 7, 2020 meeting. After discussing the feedback and hearing public comment, the MCLE Board voted unanimously to continue to move forward with the suggested amendment by sending it to the Board of Governors for review.

On September 18, 2020, MCLE Board member Asia Wright presented the suggested amendment to the WSBA Board of Governors for review. The Board of Governors voted to support the MCLE Board's suggested amendment.² Subsequently, at a special meeting held on September 22, 2020, the MCLE Board voted unanimously to suggest the amendment to the Court.

² WSBA Board of Governors Meeting on September 2020. Video of Review and Comments Re Mandatory Continuing Legal Education (MCLE Board) Suggested Amendment to APR 11 Ethics Requirement: <http://link.videoplatform.limelight.com/media/?channelListId=34d9718a114a453fa4067f9dad13df94&width=960&height=360&playerForm=WidescreenTabbedPlayer>

Suggested Amendment

The role of the MCLE Board is to suggest amendments to APR 11 that support the purpose of mandatory continuing legal education. The MCLE Board believes that the suggested amendment will not only educate Washington licensed legal professionals on the state of the law on various subjects, but also improve inter-cultural communication, improve equitable outcomes, and reduce the risk of potential liability. Further, the MCLE Board has a duty to ensure that Washington licensed legal professionals have the skills and knowledge base to effectively serve their clients, the legal system, and society as a whole. For these reasons, the MCLE Board recommends adopting the suggested amendment.

Many opponents of the suggested amendment are not in favor of mandatory requirements; however, the practice of law is not a right, but a privilege. It is a natural tendency to choose CLEs that seem directly relevant to one's practice or that sound interesting. However, a person who lacks understanding of a topic covered by the suggested amendment might be more likely to discount the value of the topic, and therefore not choose to participate in a given CLE. Accordingly, if this suggested ethics topic is not mandatory, the licensed legal professionals who might benefit most from the training may not receive it.

The suggested requirement is neither burdensome nor onerous. There are currently hundreds of both live and recorded CLE courses from around the world that cover equity, inclusion, and the mitigation of bias; nearly 200 such courses have been approved for credit in Washington in the past year alone. With the recent commitment by the WSBA Board of Governors, free ethics CLEs on the topic of equity, inclusion and the mitigation of bias in the legal profession will be

made accessible both in-person and on-demand.³ This eliminates any barriers to accessing the CLE, as this topic will be provided at no cost and offered in multiple formats. On September 15, 2020, the WSBA offered a free CLE, titled "Beyond the Dialogue: From Transphobia to Gender Inclusion in the Practice of Law". This CLE covered equity, inclusion and the mitigation of bias, and was attended by 1,031 licensed legal professionals.

³ On September 27, 2019, the WSBA Board of Governors passed a motion (7-5 vote) directing WSBA CLE to offer free CLEs one credit in each of the following subjects each year: 1) equity, inclusion and the mitigation of bias, 2) mental health, addiction, and stress, and 3) technology education focusing on digital security. The CLEs will be offered in-person and on-demand for free. The Board of Governors confirmed their commitment to offer the equity, inclusion, and mitigation of bias training for free at their September 2020 meeting. The first of the free WSBA CLEs, titled "Ethics Booster", took place on July 21, 2020. This CLE covered the topics of mental health, addiction and stress, and digital security. It was attended by 2,379 licensed legal professionals.

Throughout the amendment process, the MCLE Board was guided by APR 11, which states that the purpose of MCLE is "to enhance lawyers', LLLTs', and LPOs' legal services to their clients and protect the public by assisting lawyers, LLLTs, and LPOs in maintaining and developing their competence as defined in RPC 1.1 or equivalent rule for LLLTs and LPOs, fitness to practice as defined in APR 20, and character as defined in APR 20."

APR 20:

(c) Good Moral Character.

Good moral character is a record of conduct manifesting the qualities of honesty, fairness, candor trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process.

(d) Fitness to Practice Law.

Fitness to practice law is a record of conduct that establishes that the applicant meets the essential eligibility requirements for the practice of law.

The following describes each suggested amendment and the amendment's purpose and intended effect:

APR 11 (c) (1) (ii)

APR 11 (c) (1) (ii) states "at least six credits must be in ethics and professional responsibility, as defined in subsection (f) (2)." The Board suggests an amendment that adds "with at least one credit in equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law." The amendment would require one credit per three-year reporting period in the subject of equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law.

This amendment would simply require that one credit of the required six ethics hours be devoted to the subject identified in the suggested amendment. The ethics requirements are a required minimum, and any credits earned above the required minimum of six ethics credits and fifteen law and legal credits can be counted towards the overall 45 credit requirement regardless of the credit category.

The MCLE Board notes that the subject - diversity, equity and inclusion, and implicit/explicit bias⁴ - is a core area in which modern licensed legal professionals must be fluent in order to provide legal services and representation. Furthermore, the bar has an important role to play in addressing systemic inequities in our society.

⁴ The MCLE Board references the glossary (provided by the WSBA Equity and Justice team) in Just Lead Washington's REJI Equity Organizational Toolkit: 'Diversity', 'Equity', 'Inclusion' and 'Bias'. The glossary is found on pages 107-113 of the toolkit, and may be accessed here: <https://justleadwa.org/wp-content/uploads/2019/08/REJI-Organizational-Toolkit-Full-1.pdf>

APR 11 (f) (2)

The Board's suggested amendment to APR 11 (f) (2) (i) strikes a phrase "including diversity and anti-bias with respect to the practice

of law or the legal system, and;" this phrase would be reworded to "equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law." This wording replaces the wording "diversity" with "equity, inclusion, and mitigation of implicit and explicit bias" at the suggestion of the Washington Attorneys with Disabilities Association. This wording suggestion was originally made when soliciting stakeholder feedback for the previous rejected suggested amendment in 2019, which held similar language and included the term "diversity". The suggestion was supported by the Korean American Bar Association and the South Asian Bar Association of Washington. Similarly, the Middle Eastern Legal Association of Washington and the Loren Miller Bar Association advised changing the language to incorporate "unconscious bias". The MCLE Board believes the intent of that language is captured by adding "implicit" and "explicit" to the proposed amendment.

Objective data demonstrates that the population of Washington State is rapidly becoming more racially diverse.⁵ Increasing the cultural competencies of our legal professionals will equip each of its members to better serve the public today and in the future.

⁵ Projections of the state population by age, sex, race and Hispanic origin: <https://ofm.wa.gov/washington-data-research/population-demographics/population-forecasts-and-projections/projections-state-population-age-sex-race-and-hispanic-origin>

Given the diversity of our community, it is important to understand the different lived experiences of others. Certain assumptions, attitudes, words, phrases and behaviors can harm others, negatively impact their mental and social well-being, and deny them their due economic wellness. Words can be confusing and change interactions if misused; they can also help persuade a judge or jury, sway negotiations, and determine how we meet our clients' needs. An individual's tone of voice, and non-verbal cues also impact how we interact with others. By understanding and identifying biases and interrupting their adverse impacts on others, the Washington licensed legal professionals can better understand their clients' needs and other points of view. It is a business imperative to understand bias. Being aware of our own bias and being sensitive to different perspectives can establish communication bridges. Through this communication, a licensed legal professional can become a credible source, build client relationships, and gain others' trust or convince another to see the other side of an argument.

No one is without some sort of bias. Recognizing our own biases, whether they be positive or negative, implicit or explicit, is a continual process. Opponents' claims that such courses would shame or target a particular group are erroneous. The equity requirement is not about shaming a particular group; any attempts to shame are counterproductive and a detour from achieving equitable outcomes. It is about understanding how one's bias can have adverse impact on the equitable practice of law.

Additionally, knowing that a significant segment of our colleagues and clients face unfair treatment in the legal community, including by legal professionals, requires purposeful action. Both racial discrimination and gender bias remain prevalent issues in the legal community. According to the National Association for Law Placement's 2018 Diversity Report, women make up nearly 42% of the profession, but only about 23% are represented at the level of partner. A similar disparity is evident with racial minorities, which comprise nearly 17% of the profession, but only 9% are represented at partner level⁶. Mandatory training in this area is both proper and necessary.

⁶ Nat'l Ass'n for Law Placement, 2018 Report on Diversity in U.S. Law Firms 9 (Jan. 2019) https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf the

The original report and recommendation of the WSBA Diversity Committee and Washington Women Lawyers (with the support of multiple minority bar associations) demonstrates the need for education within the profession across all categories of Washington licensed legal professionals (private practitioners, government lawyers, professors and instructors, judges, regulators, in house counsel, LLLTs, LPOs etc.), to raise the awareness and sensitivity of Washington lawyers to diversity issues, and particularly with respect to equity, inclusion, and both implicit and explicit biases.⁷ Our role as licensed legal professionals should be to work to eliminate our own biases, and to have a positive effect on both the profession and Washington generally. Intuitively, this is an idea whose time has more than come.

⁷ State of Science "Implicit Bias Review" from The Ohio State University Kirwan Institute for Study of Race and Ethnicity: <http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf>

Promoting equity and inclusion drives better business outcomes. Having individuals that think differently, by virtue of their distinct backgrounds and experiences, encourages creative thinking and innovation. This is particularly important amongst decision-makers. Conversely, failing to included diverse perspectives can result in a failure to take useful risks and ultimately lead to stagnation. The business sector as a whole has recognized this reality, with many major employers in this state and elsewhere investing in diversity even when not required by law. The legal profession needs to catch up in this regard.

Addressing issues of equity and inclusion is not political move, but a practical one. It is an undeniable fact that certain communities - such as people of color, those with disabilities, and those with non-majority religions, to name just a few - do not have and have not had the same opportunities as others who have not been marginalized.

Members of the MCLE Board talked to citizens of Washington State, who are not licensed to practice law, about this proposal. Board members heard consistently that this proposal is necessary to ensure appropriate treatment and consideration of the various issues and concerns the general public faces, no matter who is in office, or running local, state, and national government.

Promoting equity and inclusion is appropriate for the Bar. The regulatory objectives outlined in General Rule 12.1 specifically address the topic of diversity and inclusion.

◦ **GR 12.1:**

Legal services providers must be regulated in the public interest. In regulating the practice of law in Washington, the Washington Supreme Court's objectives include:

...

(j) diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

In addition, the authorized activities of the Washington State Bar Association found in General Rule 12.2 (a) (6) further emphasize this objective:

◦ **GR 12.2(a):**

(a) **Purposes: In General.** In general, the Washington State Bar Association strives to:

(6) Promote diversity and equality in the courts and the legal profession.

It is therefore both appropriate and beneficial for the Washington Supreme Court to mandate training to help licensed legal professionals gain awareness and understanding of these issues. While it is true that training does not guarantee equitable and inclusive outcomes, training does result in an increased understanding of various topics, especially in a legal context where rules and regulations change constantly. For example, discussion around visible and invisible disabilities allows us, as legal professionals, to better identify legal concerns facing these communities. If we fail to take action while the rest of society engages in this conversation, we risk providing inadequate counsel to our clients as well as the community at large. Given our position in society as rule makers and legal deciders, we cannot afford to sit back and react only when a lawsuit or other grievance takes place.

Conclusion

Washington has an opportunity to take the lead by adopting a requirement that training in all the category of equity, inclusion, and the elimination of bias become mandatory. Education in equity and inclusion is already required in multiple states (eight in total), with more states following their lead. To recognize the importance in this category of continuing legal education and to require it is to identify Washington as a leader in its approach to MCLE.

The MCLE Board recommends that this suggested amendment become effective on September 1, 2022, and that the first group of licensed legal professionals who will be required to report this one ethics credit on this subject be those who are in the 2023-2025 MCLE reporting period. This will allow time for WSBA staff to develop tracking mechanisms in the MCLE database and to notify both licensed legal professionals and CLE sponsors of the new requirement. In addition, an effective date of September prior to the start of the 2023-2025 reporting period allows the Bar's MCLE staff to accredit courses taking place in 2023 according to the new requirements.

D. Hearing: Because of the outreach conducted and input previously received by the MCLE Board, a hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material: In addition to the submission of the suggested amendment to APR 11, attached is a letter of support from the WSBA Board of Governors, and the collected public comments on the suggested amendment. The initial MCLE Board report and recommendation may be viewed online.⁸

⁸ The MCLE Board report and recommendation may be viewed here: https://www.wsba.org/docs/default-source/legal-community/committees/mcle-board/mcle-board-report-and-recommendation.pdf?sfvrsn=52e008f1_4

Reviser's note: The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

SUGGESTED AMENDMENTS TO APR 11 (Redline)

TITLE

ADMISSION AND PRACTICE RULES (APR)

RULE 11. MANDATORY CONTINUING LEGAL EDUCATION (MCLE)

Sections (a) - (b) No Changes.

(c) Education Requirements.

(1) *Minimum Requirement.* Each lawyer must complete 45 credits and each LLLT and LPO must complete 30 credits of approved continuing legal education by December 31 of the last year of the reporting period with the following requirements:

(i) at least 15 credits must be from attending approved courses in the subject of law and legal procedure, as defined in subsection (f) (1); and

(ii) at least six credits must be in ethics and professional responsibility, as defined in subsection (f) (2) ~~-, with at least one credit in equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law.~~

Sections (c) (2) - (e) No Changes.

(f) Approved Course Subjects. Only the following subjects for courses will be approved:

(1) *Law and legal procedure*, defined as legal education relating to substantive law, legal procedure, process, research, writing, analysis, or related skills and technology;

(2) *Ethics and professional responsibility*, defined as topics relating to the general subject of professional responsibility and conduct standards for lawyers, LLLTs, LPOs, and judges, including ~~diversity and antibias with respect to the practice of law or the legal system,~~ equity, inclusion, and the mitigation of both implicit and explicit bias in the legal profession and the practice of law, and the risks to ethical practice associated with diagnosable mental health conditions, addictive behavior, and stress;

Sections (f) (3) - (k) No Changes.

SUGGESTED AMENDMENTS TO APR 11 **(Redline)**

Sections (f) (3) - (k).

No Changes.

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.