

STATE BAR OF NEVADA

October 22, 2018

Chief Justice Michael Douglas
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701-4702

Re: **Renewed Request for Amendment to ADKT 0499**

Dear Chief Justice Douglas:

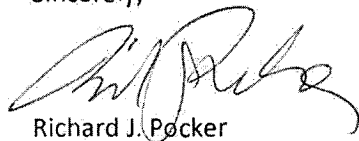
The State Bar of Nevada reviewed the Renewed Request for Amendment to ADKT 0499, submitted by the Nevada Board of Continuing Legal Education ("MCLE Board"). The MCLE Board proposal seeks to replace the provider plan implemented this year with a flat fee application program. Admittedly, the MCLE Board did not realize the financial projections in the previous plan, necessitating a change in course.

The State Bar has concerns that the revised proposal seeks to generate revenue from CLE providers and treats for-profit providers the same as individual attorneys, state and local bar associations, courts and pro bono organizations. The amended plan does not include budget projections, and with no meaningful examination of operational expenses, the state bar is concerned that it may fall susceptible to the same problems encountered in the past year.

This response outlines the state bar's concerns and offers an alternative governance structure that places administration of CLE compliance under the State Bar of Nevada. The proposed alternative will better serve our members by reducing expenses, facilitating annual compliance reporting, and removing barriers to obtain quality CLE programming.

If I can provide further information or insight regarding the comments that follow, please do not hesitate to contact me.

Sincerely,



Richard J. Pocker
President, State Bar of Nevada

cc: Elizabeth Brown

Enclosure

FILED

OCT 22 2018

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18-41343

A. HISTORICAL OVERVIEW AND CURRENT CONCERNS

The MCLE Board began the process to transition to a provider-based model four years ago and submitted a Business Plan to the Court in 2015 to effectuate the new model ("2015 Plan"). The state bar provided ongoing feedback to the MCLE Board, both directly, and through its written comments to the Court. The state bar was supportive of a transition to a provider-based model but had concerns about the lack of financial assumptions built into the 2015 Plan, the unintended consequences to attorneys who take CLE courses from non-accredited providers, and administration expenses that were dependent on non-compliance fees. The state bar's concerns were not addressed by the MCLE Board in the timeframe between submitting the 2015 Plan and implementation in 2018.

Concerns identified in the 2015 Plan continue with the amended plan ("2019 Plan"). They are briefly outlined below:

- (1) *Budget Assumptions: Transparency of operation is important, and the 2019 Plan budget details do not demonstrate continued operations under the fees proposed without having to increase application fees in future years.*

The 2019 Plan is focused on revenue generation, namely through program application fees and reduction of CLE provider exemptions. However, as with the 2015 Plan, no budget assumptions are provided in the 2019 Plan, such as the number of programs expected to be filed under each corresponding fee or how many programs are expected to be exempt under the proposed rules.

The state bar is concerned that if revenue projections fall flat, provider fees, as proposed under SCR 208, will continue to rise. This may result in increased fees passed along to the attorneys who purchase CLE programs or a reduction in the number of quality programs offered in this state.

- (2) *Increased Compliance: A stated goal of the 2015 Plan was to increase compliance with CLE credit reporting. Neither the 2015 Plan nor the 2019 Plan demonstrates how the MCLE Board previously addressed or intends to improve credit reporting compliance.*

Although not included as part of the 2015 Plan, this year, the state bar collected MCLE fees with the bar's annual renewal fees. This joint effort increased fee collection compliance rates. MCLE Board financial statements provided to the Board of Governors as of April 2018 illustrated the success of this joint program, with late fees and request for extension fees down \$84,000 and \$22,000 respectively from the 2017 calendar year.

- (3) *Ongoing Expenses: The state bar is concerned that provider application fees will continue to rise to accommodate ongoing MCLE operational expenses. The 2019 Plan contemplates a reduction in operational expenses; however, no financial details are provided.*

Program administration expenses continued to remain high during the past year, despite automation created with implementation of the 2015 Plan (CLE providers enter all attendance records online) and the MCLE Board's partnership with the state bar to collect MCLE Board fees.

The 2017 MCLE Annual Report shows that staffing (salaries, taxes and benefits) comprise \$493,129, or 71%, of the MCLE Board's total expenses. The Renewed Request for Amendment to ADKT suggests a reduction in staffing and operating budget; however, no specifics were provided.

- (4) *Attorney Impact: Barriers to obtaining quality CLE programming are created when attorneys are assessed additional fees. Individual attorneys should be exempt from the provider application fee.*

The state bar expressed concern about the impact the 2015 Plan would have on attorneys seeking course approval from a non-accredited provider or a provider who elected to not pay the per attorney per credit hour fee. Nearly one-third of all attorneys sought individual course approval this past year and were subject to the respective per credit fee, in addition to the annual \$40 regulatory fee.

The 2019 Plan sets a flat fee for all providers and offers a discount to individual attorneys but does not eliminate the individual fee altogether, as is provided in states such as: Delaware, Idaho, Iowa, North Dakota, Montana, and Washington. Assessing individual attorney fees discourages participation in practice-specific CLE programming offered by providers that do not submit their courses for credit in Nevada.

The state bar questions the necessity of such a fee, other than to create revenue. Individual attorneys are not the for-profit CLE providers this plan was intended to tax.

B. CONCERNS SPECIFIC TO AMENDED PROVIDER PLAN

This past September, the MCLE Board provided a verbal report to the state bar's Board of Governors regarding the intended changes to the provider plan, namely converting to a flat-fee program based on the number of CLE credit hours sought. The Board of Governors provided no specific feedback at that time as program specifics were unknown. Upon review of the amended plan, the state bar offers the following concerns and objections:

- (1) *Amendments to Supreme Court Rule 208: Given the absence of a proposed budget or revenue assumptions provided in the 2019 Plan, the state bar objects to the authority sought under Supreme Court Rule 208.*

The MCLE Board seeks approval from the Court to grant authority to assess fees upon sponsors and attorneys according to regulations adopted by the MCLE Board. This authority, if granted, gives the MCLE Board carte blanche to continually adjust fees upward should revenue projections fail to meet ongoing expenditures.

- (2) *Accredited Sponsor Status: The state bar objects to the elimination of an Accredited Provider Status, questions how elimination of the status contributes to the stated goal of reducing operational expenses and proposes that the Accredited Provider Status remain and the process for notifying the MCLE Board of CLE programs remain unchanged.*

Under MCLE Board Regulations (current and past), the State Bar of Nevada has been considered an accredited sponsor of CLE programs. As an accredited sponsor, the state bar's obligation to the MCLE Board has been to notify the MCLE Board of courses it intended to provide, rather than seek approval. The 2019 Plan eliminates this status and requires every CLE course to be submitted for approval by the MCLE Board. There is no reasoning provided for this change.

The state bar questions the efficacy of the amendment as it would presumably add layers of bureaucracy and questions how this added administrative task fits into the decrease of staffing contemplated on page four of the Renewed Request for Amendment to ADKT 0499. This revised process also does not guarantee program approval within the 30 days filing requirement.

The state bar also suggests that the MCLE Board review its amended regulations as references to both the Program Notification Form (used by Accredited Providers) and Application Form (2019 Plan) are referenced.

- (3) *Fees for Program Credit Applications: The MCLE Board should adopt a flat fee for all program course approval applications and exempt all non-profit, government agencies, state and local bar associations and courts from the fee requirement.*

The state bar supports assessing a flat fee to cover the administrative expenses incurred by the MCLE Board to process course approval applications on behalf of for-profit CLE providers and suggests that a single fee apply regardless of the number of program credits offered. Alternatively, the MCLE Board should provide rationale for the range of fees proposed.

The state bar does not support charging program application fees to bar associations, courts, government entities and pro bono providers that do not operate for the sole purpose of revenue generation. These organizations do not operate under the same principles as for-profit

providers. In fact, Supreme Court Rule 86(9) specifically guides the state bar in its mandate to educate the profession. The rule states:

“The Board of Governors shall have the power to aid in the advance of science of jurisprudence and in the improvement of the administration of justice, to promote reform in the law and in judicial procedure, to uphold and elevate the standard of honor, of integrity and of courtesy in the legal profession, to *encourage higher and better education for membership in the profession* [emphasis added], and to promote a spirit of cordiality and true friendship among the members of the bar.”

Exhibit 3 to the Renewed Request for Amendment to ADKT 0499 lists those states which provide exemptions or fee reductions to bar associations and non-profit providers. The MCLE Board has provided no reason to not join with Alaska, Colorado, Idaho and Texas in this regard.

- (4) *Alternate Program Format Courses - Valid Date and Fees Charged: The 2019 Plan seeks to generate revenue by requiring annual approval of courses which were previously reviewed and approved – and requires a higher application fee than for the initial review. The 2019 Plan should apply a single flat fee apply for all alternative program formats and the fee should apply to programs available three years after the date they were first presented. The program application or notification fee for alternative program formats should be less than the live program application fee.*

Current and previous MCLE Board Regulations allowed for courses to be provided in alternate formats (online audio and video). Programs offered in an alternate format are valid for three years from the date the program was first presented. The 2019 Plan amends Regulation 4 and requires CLE providers to resubmit the recorded program for approval annually – and pay the corresponding fee. There is no reason provided for this change and the state bar questions the rationale for re-approving the same course year after year, other than to generate additional revenue.

The state bar also questions why the fee for alternate format course approval is double that of live programs, especially as the program content was already reviewed during the initial application process. There is no stated justification for requiring an annual re-review of recorded programs.

- (5) *TIP Mentor Credit and Bar Exam Preparation Exclusion: The state bar requests affirmation that TIP mentors will continue to receive credit for their service and that no application need to be filed annually. The state bar also recommends Regulation 18 be removed, as this is the only program specifically identified in the Regulations as not being eligible for credit.*

Attorneys serving as mentors in the Transitioning into Practice (TIP) program earn six CLE credits for each TIP cycle they complete and were exempted from the credit hour fee in the original

provider plan. The amended regulations make no mention of TIP mentors, yet bar examination preparation is specifically excluded in the newly formed Regulation 18.

C. ALTERNATE GOVERNANCE STRUCTURE

The State Bar of Nevada has engaged with the MCLE Board since 2014, offering recommendations related to the 2015 Plan, assisting with attorney communications, and, as of this year, taking the lead on collecting the \$40 annual CLE Board fee. The MCLE Board has the ultimate decision-making regarding the operations of its organization and implementation of a provider model. However, the concerns filed with the Court by organizations, including: the state bar, Clark County Bar Association, the Administrative Office of the Courts and the Federal Public Defender's Office, were ignored, resulting in a plan that lacked clarity and that failed to meet its stated objectives.

As a result, programs offered by these organizations have been most hurt by a program that was intended to recoup administrative expenses spent on behalf of for-profit providers. For example, the state bar has adjusted its CLE programming to limit courses to 1.5 hours, when the subject matter could easily span two hours or more. When the state bar submitted its October 2015 response to the 2015 Plan, it estimated fees totaling \$60,000 per year. Those fees, if assessed, would have crippled the bar's CLE program resulting in fewer low-cost options available to its members. The program fees proposed in the 2019 Plan have the potential to do the same.

Given the factors outlined in this response to the Renewed Request for Amendment to ADKT 0499, the state bar seeks the Court's approval to transfer all MCLE Board operations as of January 1, 2019 to the State Bar of Nevada. The alternate ("State Bar Plan") outlined below is expected to streamline operations, reduce expenditures and increase the availability of quality low-cost CLE programming offered by bar associations, government entities, the courts and pro bono legal service organizations. Any applicable fees would account for administrative expenditures on behalf of for-profit providers. An overview of the State Bar Plan is as follows:

(1) *MCLE Board*

The MCLE Board would continue to operate independently and fulfill its obligations under SCR 208, including approval of those courses offered by the State Bar of Nevada. The state bar envisions a governance structure like the Board of Bar Examiners, which reports to the Court and operates in consultation with the state bar's Board of Governors.

Like the Board of Bar Examiners, budgetary authority would rest with the Board of Governors and staff would become employees of the state bar with direct oversight by a designated supervisor within the State Bar of Nevada staff structure. The state bar would anticipate staff operating from office space provided in the state bar's offices in Reno and Las Vegas. Depending on the lease for the current MCLE Board building, state bar would attempt to negotiate a lease termination or sub-lease to another party.

The state bar does not propose any amendments to the composition of the MCLE Board or the authority to make appointments to the Board.

(2) *Staffing*

The state bar has reviewed models in where the state bar has MCLE regulatory authority while also serving as a CLE provider (Alaska, Arizona¹, Hawaii, Idaho, New Mexico, Texas, Utah and Wyoming). In these states, MCLE regulatory duties are typically carried out by one to four full-time employees. (Texas, with 90,000+ attorneys, has seven full time MCLE staff; the Nevada MCLE Board has six full time staff.) These states benefit from the efficiencies created from shared reception, finance and information technology staff. After the initial transition, the state bar would anticipate modeling after New Mexico, which is of comparable size to Nevada, and operate with one regulatory manager and two administrative assistants. These staff would be responsible for: coordinating MCLE Board meetings, tracking and facilitating attorney credit reporting compliance, processing course approval requests, and making available courses approved for credit in Nevada.

(3) *Flat Fee Application*

The State Bar Plan would assess an application flat fee to CLE providers, with exemptions for non-profit organizations, government agencies, state and local bar associations and courts. Providers who seek to make recorded programs which were previously submitted for credit available online, would be assessed an administrative fee. These fees would account for needed staff time to review, submit for approval and communicate assigned course codes. Any changes to the fee structure would be made in consultation with the Court and the state bar's Board of Governors.

The State Bar Plan would also continue the longstanding Accredited Provider program status.

(4) *Proposed Budget*

The state bar anticipates MCLE program operational expenses to fall within the annual \$40 regulatory fee collected of each attorney.

The state bar has contracted with a new provider to collect annual license fees and manage annual attorney compliance reporting. This new database contains a module to track MCLE compliance and although the details of the module have not been thoroughly vetted, implementation is expected to have minimal expense. The new database can be functional within the first quarter of 2019.

A proposed budget, in comparison to the MCLE year-to-date financials and 2017 actual, is attached. As proposed, the state bar anticipates annual fees and dues amounting to \$518,700 (excluding unknown application fees). Expenses in the initial transition year (2019) are budgeted for \$337,745, decreasing to \$225,140 in 2020 and thereafter. Excess fees would be used to fulfill the reserves set by the Court in its 2016 Order or other initiatives, as directed by the Court.

¹ The State Bar of Arizona does not approve CLE programs; compliance with CLE requirements is carried out through annual audits.

ATTACHMENT: 2019 STATE BAR PLAN BUDGET¹

REVENUE	State Bar Plan			
	MCLE Board 2017 Actual	MCLE Board (2015 Plan) as of April 2018	2019 Transition Jan. – Dec.	2020 Projected Jan. – Dec.
Annual Dues	\$315,240	\$310,000	\$300,800	\$300,800
Extension Fees	\$123,340	\$98,445	\$98,400	\$98,400
Late Fees	\$202,410	\$105,836	\$105,800	\$105,800
Consent to Dismissal Fees	\$4,205	\$850	\$0	\$0
Reinstatement Fees	\$57,960	\$10,240	\$10,200	\$10,200
Accredited Provider Fees	\$15,900	\$3,450	\$3,500	\$3,500
Application Fees	N/A	\$13,515	Unknown	Unknown
Attendance Fees	N/A	\$45,219	\$0	\$0
Late Application Fees	N/A	\$2,250	Unknown	Unknown
Address Change Fees	N/A	\$150	\$0	\$0
Interest/Dividend Income	\$3,546	\$1,589	\$0	\$0
	\$722,601	\$591,544	\$518,700	\$518,700

EXPENSES	State Bar Plan			
	MCLE Board 2017 Actual	MCLE Board (2015 Plan) as of April 2018	2019 Transition Jan. – Dec.	2020 Projected Jan. – Dec.
Salaries, Taxes & Benefits	\$493,129	\$148,055	\$238,800 ²	\$154,000
Applied Overhead	N/A	N/A	\$33,500	\$33,500
Advertising/Promotional	\$7,904	\$1,834	\$0	\$0
Accounting/Professional Services	\$10,628	\$10,000	\$0	\$0
Bank Charges/Credit Card Fees	\$16,206	\$13,389	\$16,200	\$16,200
Board Expenses	\$1,333	\$0	\$500	\$500
CLE Regulators	\$2,065	\$1,650	\$2,000	\$2,000
Computer Repairs/Maintenance	\$29,559	\$21,895	\$29,559 ³	\$13,440
Donations	\$300	\$0	\$0	\$0
Insurance	\$791	\$636	\$0	\$0
Office Supplies	\$6,793	\$1,931	\$500	\$500
Operating Supplies & Equip.	\$3,787	\$1,871	\$0	\$0
Postage	\$6,505	\$4,944	\$0	\$0
Printing/Large Mailing Costs	\$7,765	\$306	\$0	\$0
Rental Expense	\$57,620	\$19,440	\$57,620 ⁴	\$0
Repairs & Maintenance	\$3,566	\$1,683	\$3,566	\$0
Transition Costs	\$28,457	\$0	\$0	\$0
Travel/Staff Expenses	\$16,930	\$1,052	\$5,000	\$5,000
	\$693,338	\$228,686	\$387,745	\$225,140

¹ MCLE Board 2017 actual revenue and expenses and 2018 revenue and expenses as of April are provided as a comparison. 2018 MCLE Board financial statements do not include total year budget for comparison.

² Salaries, taxes and benefits for current MCLE Board staff for three months; decreased staffing levels for 9 months.

³ Current MCLE Board compliance tracking database; expense based on continued use for one year.

⁴ Depending on MCLE Board contract for rental space, this expense may continue until lease expiration/sub-leasing in place.

BUDGET EXPLANATIONS:

REVENUE	
Annual Dues	Based on 7,520 active in-state attorneys @ \$40
Extension Fees	Based on April 2018 MCLE Financial Statement
Late Fees	Based on April 2018 MCLE Financial Statement
Consent to Dismissal Fees	Based on April 2018 MCLE Financial Statement
Reinstatement Fees	Based on April 2018 MCLE Financial Statement
Accredited Provider Fees	Based on April 2018 MCLE Financial Statement
Application Fees	Unable to determine; underlying data not provided in 2019 MCLE Board Plan
Attendance Fees	No proposed per attorney, per credit hour fee
Late Application Fees	Unable to determine; underlying data not provided in 2019 MCLE Board Plan
Address Change Fees	Address changes streamlined with SBN
Interest/Dividend Income	None anticipated; SBN investments are not attributed to individual departments

EXPENSES	
Salaries, Taxes & Benefits	Based on SBN salary range for one manager and two administrative assistants.
Applied Overhead	Based on SBN calculated applied overhead percentages.
Advertising/Promotional	SBN communications are made electronically; no anticipated print expenses.
Accounting/Professional Services	Included in applied overhead.
Bank Charges/Credit Card Fees	Based on April 2018 MCLE Financial Statement
Board Expenses	Meetings to be conducted by videoconference; expenses related to lunches, etc.
CLE Regulators	Planned attendance for 1 Board member to CLE Regulators meeting.
Computer Repairs/Maintenance	Based on monthly SBN database expenses, divided by department. \$1,120/mo.
Donations	None anticipated.
Insurance	Included in applied overhead.
Office Supplies	Minimal expenses for needed supplies; based on typical SBN department expenses.
Operating Supplies & Equip.	None anticipated.
Postage	Non-compliance notices sent with SBN annual fees and reporting notices.
Printing/Large Mailing Costs	None anticipated; SBN uses electronic communications.
Rental Expense	Space sharing at SBN offices; does not account for any lease termination fees.
Repairs & Maintenance	Included in applied overhead.
Transition Costs	Possible database transition expense for 2019 only; amount unknown.
Travel/Staff Expenses	Planned travel x 1 staff between Las Vegas and Reno during transition/ongoing.