

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 06-0163

IN RE THE RULES OF CONTINUING
LEGAL EDUCATION

NOTICE OF FILING
*AD HOC COMMITTEE'S
RATIONALES FOR ITS
CHANGE PROPOSALS*

Notice is hereby given that the undersigned hereby files a copy of the *AD HOC COMMITTEE'S RATIONALES FOR ITS CHANGE PROPOSALS* as attached and respectfully submitted to the Montana Supreme Court.

DATED this 22nd day of December, 2022.

For the Commission

/s/ K Paul Stahl

K Paul Stahl, Chair

Commission of Continuing Legal Education

AD HOC COMMITTEE'S RATIONALES FOR ITS CHANGE PROPOSALS

As noted in the “Background” section of the report of the ad hoc committee (hereinafter, “Committee”) to the Montana Supreme Court, after exploring and discussing what other states do with regard to mandatory Continuing Legal Education (“CLE”)^{1, 2}, the Committee reached consensus on substantive changes to Montana’s CLE Rules in three areas:

- Presumptive Accreditation (Proposed New Rule 10)
- Ethics (Proposed Rule 5B)
- Comity (Proposed New Rule 5D)

The proposed new Rule 10, replacing **presumptive accreditation** with clearer language, requires no further explanation.

With regard to the **ethics requirement**, new options for eligible courses were added to give Montana attorneys more options for meeting the requirement and to reflect trends in other states without adding to the number of credits required.³ The Committee concluded that, particularly with the broadened scope, the title “professional fitness and integrity” for this category more accurately captured its scope and intent than “ethics” does.

A major interest of the Court in establishing the Committee was greater **reciprocity in CLE requirements state-to-state**. This is the most complex of the issues the Committee studied, and a more extensive background and rationale may be helpful to the Court and to those wishing to comment to the Court on the proposed new Rule 5D.

Course Equivalency/Reciprocity

One of the areas the Court asked the Committee to explore was “course equivalency.” Also called “course reciprocity,” course equivalency is the assumption that if a particular course is accepted by State A, B, or C, Montana will accept it as well to meet its requirements. Only Alaska and North Dakota allow course reciprocity without any review. Four other states recognize course reciprocity under limited circumstances – through pre-arranged agreements with states and/or upon review for compliance with their rules. In short, sight-unseen course equivalency is very rare.

It is also very unpopular among CLE commissions nationwide. Establishing course equivalency requires staff to engage in additional rule-related scrutiny – over what constitutes an hour, what “interactive” means, etc. – in order to ensure that Montana’s rules are being applied consistently. Because staff are still doing course-by-course review, one of the benefits of reciprocity arrangements – more expeditious processing – does not accrue.

¹Appendix A provides an explanation of the plain meaning of “Continuing Legal Education” that informs the work of the CLE Administrator and the CLE Commission.

²Appendix B provides a summary of Mandatory Continuing Legal Education requirements throughout the United States.

³ Appendix C provides a summary of other states’ “ethics” requirements.

Full-Compliance Comity

“Full-compliance comity,” commonly called “comity,” is an agreement between two or more states that, if an attorney residing in another state has met all that state’s requirements for a reporting period, that attorney will be deemed to have fulfilled the other state’s CLE requirements, sight unseen. The Committee was intrigued by the following potential benefits of comity agreements:

1. It’s neighborly.
2. It’s a convenience for out-of-state lawyers admitted in Montana.
3. It reduces administrative time in the state awarding comity, since compliance is established by a certificate from the out-of-state CLE Administration.
4. It meets the Court’s interest in a more universal approach to CLE compliance.

However, potential concerns about comity include:

1. It may involve accepting a less stringent standard for non-resident lawyers than for resident lawyers.
2. It may involve accepting credit given for activities, programs and delivery methods that Montana CLE would not accredit.
3. Because some states require fewer total credits, fewer interactive credits, and fewer professional fitness and integrity “ethics” credits (formerly, “ethics” credits) than Montana, it could be considered unfair to Montana attorneys.
4. Most importantly, full-compliance comity may not provide the necessary assurances to the Montana public that lawyers from “comity” states are current in their knowledge and practice of the law and aware of their ethical obligations with regard to fitness and integrity.

The Committee studied how Montana’s requirements compare with the state-by-state requirements of the one comity consortium with which we are most familiar, involving the four states of Idaho, Oregon, Utah, and Washington.

State	Required Credits As Annual #	Annual “Ethics” Credits	Number of In-State Attorneys	Out-of-State Attorneys (% of State Bar)
Idaho	10	1	3,813	1,263 (25%)
Oregon	15	1.67	14,995	2,695 (15%)
Utah	12	1.5	9,658	1,510 (14%)
Washington	15	2	33,300	4,977 (13%)
Montana	15	2	3,175	859 (21%)

Observations:

1. For Idaho, the comity arrangement risks little in terms of fairness to in-state attorneys or public confidence for the following reasons:
 - a. Idaho requires 10 credits/year, significantly fewer than any of the other states in the consortium.

- b. Idaho requires 1 professional fitness and integrity credit/year, also fewer than any of the other states in the consortium.
- c. Idaho allows half of the required credits to be taken through self-study methods.
- d. Idaho allows another 5 credits to be taken online or through recordings with no interactivity requirement.

Thus, Idaho cuts down on administrative costs of processing 25% of the attorneys practicing in Idaho without sacrificing the rigor of its requirements or requiring more of Idaho attorneys than of out-of-state attorneys. The same cannot be said of the other states in the Northwest Consortium.

Because Washington, Oregon and Utah have so many more in-state attorneys to accredit, and out-of-state attorneys represent a significantly smaller portion of their workload, with Idaho attorneys an even smaller percentage, those three states may have concluded that a comity agreement with Idaho has some benefit (saving administrative time) and concerns about rigor apply only to a small percentage of Idaho attorneys seeking full compliance in their states.

That would not appear to be the case for Montana. Montana would be regarding as “comity” with Idaho compliance on the basis of 2/3 of the total credits Montana lawyers must accrue, 1/2 of the professional fitness and integrity credits, and virtually no expectation for interactive programming. Montana’s CLE Commission would have to be able to explain to Montana attorneys and the Montana public why such a difference is acceptable.

- 2. Oregon’s requirements, as well as Washington’s, in terms of the number and types of credits required, are similar to those of Montana. However:
 - a. Washington and Oregon’s professional fitness and integrity requirement is similar in quantity to Montana’s, but much more specific in types of subjects involved. Of the 5 total credits in this area required in a 3-year period, Oregon requires 1 credit specifically on substance abuse and 1 credit specifically on reporting child abuse. Oregon feels so strongly about the latter that it is required of attorneys from other “comity” states if attorneys have not met it.
 - b. Although Oregon and Washington both award credit for *pro bono* legal representation and for mentoring, Oregon’s requirements appear more restrictive than Washington’s in both areas. Montana does not award credit for either activity because education is not the primary purpose of either.
 - c. Oregon awards credit for service as bar counsel and on state and local professional responsibility committees, an ethics committee, a client security fund committee, and bar examiners. Idaho, Utah and Washington (as well as Montana) do not award credit for what Montana would deem service activities.

The Committee concluded that these occasional differences could be overlooked if the comity agreement overall (1) is fair to Montana attorneys, (2) provides the basic public assurance the

Commission promises, (3) cuts down on CLE administrators' workload (and thus on staffing costs), and (4) meets the spirit of the Court's interest in greater reciprocity.

In order to meet those conditions, the Committee devised a unique full-compliance comity approach, "comity-plus."

1. Comity: For lawyers whose address on file with the State Bar is outside Montana, Montana will accept, sight unseen, the number of credits, including the number of professional fitness and integrity credits, required for a certificate of compliance from any and all other mandatory CLE states. Full compliance in the residence state must be met before Montana will consider comity-plus compliance. The CLE administrator from the attorney's residence state must provide a verification of compliance and a list of the courses taken to demonstrate compliance. (This significantly reduces Montana CLE staff time while creating the flexibility and friendliness the Court would like to see.)
2. Plus: Montana will require the attorney to make up the difference, if any, between the number of total credits and the number of professional fitness and integrity credits required for compliance in the residence state and the number of total credits, including the number of professional fitness and integrity credits, required in Montana. (This levels the playing field for non-resident and resident attorneys and preserves the public confidence that is a major purpose of CLE.)
3. Montana will require an early submission date for comity-plus applications and place the burden on the attorney to have provided the appropriate documentation not only for certification in the residence state, but for any additional courses taken to come into full compliance with Montana's standards. (The earlier submission date will assist our staff in moving a sizable portion of compliance reviews to earlier in the year, allowing staff to respond to Montana attorneys more expeditiously later in the year.)
4. Montana will not dispute other states' definitions of "hour" or types of accredited activities. Montana will, however, insist that all courses taken to make up the difference between another state's requirements and Montana's meet Montana's requirements for eligibility and all must be interactive in nature. (This responds to the Court's wish for greater flexibility while providing another quality assurance to the public and the profession.)

To return to the example of the Northwest Consortium, if the "comity-plus" rule is adopted, Montana's comity arrangements with those states would require:

- For Idaho-compliant lawyers: 5 additional credits, one of which is in professional fitness and integrity
- For Oregon-compliant lawyers: Fully compliant (rounding up .33 professional fitness and integrity credit)
- For Utah-compliant lawyers: 3 additional credits, one of which is in professional fitness and integrity
- For Washington-compliant lawyers: Fully compliant

APPENDIX A What “CLE” Means

In addition to the principles guiding Montana’s Continuing Legal Education Commission in proposing and interpreting the rules adopted by the Montana Supreme Court, the plain meaning of the words “continuing,” “legal,” and “education” influence both interpretation and public and public perception of the rules.

A. The meaning of **Continuing** implies:

1. Learning that continues after law school graduation presupposes that the content is post-graduate level. (Example: The two-hour segment that explains the fundamentals of tort law in a 2-day session on mediation would not qualify for credit.)
2. The learning is ongoing, continually engaging the attorney in improved competence, greater awareness, deeper exploration. Forty-six states establish this expectation by requiring a certain number of credits every year/reporting cycle for the duration of an attorney’s active practice. (Non-confirming example: California does not require any CLE for attorneys employed in federal or state government positions that do not entail the practice of law.)

B. The meaning of **Legal** implies:

1. The learning experience must have significant legal content or application. Examples:
 - a. Wardrobe Wellness, a 1-hour sectional on “power dressing” for court, depositions, client interactions, would not be deemed to have significant legal content and thus would not be accredited in Montana.
 - b. Ten Ethical Tips from Hollywood Movies, a two-hour video using clips from movies as a memorable springboard for elucidation of ethical legal practices, would get CLE credit in Montana, but a two-hour video using clips from movies to make memorable points about ethical practices in any profession would not.
 - c. Opening remarks, luncheon speakers telling “war stories,” and the like are typically not awarded credit, in Montana and in other states, because they are not deemed to have significant legal content.
2. Courses that do not at first glance meet this requirement – e.g., recognizing substance abuse – are accredited if they are tailored to and directed toward an interactive audience of attorneys. Examples:
 - a. A course teaching a multi-profession audience how to use PowerPoint would not be deemed to have significant legal application in Montana, but if the audience consisted primarily of attorneys and the content featured legal application, it would.
 - b. A course on Indian Education for All as it related to the constitutional provision to preserve indigenous cultures would not receive credit if provided at a teachers conference with teachers the primary audience; however, if it were provided at a State Bar conference, the presumption of legal content would result in credit, due to

the tailored content, the attorney audience, and the interaction with other attorneys on the subject.

C. The meaning of **Education** implies:

1. Educational experiences are organized to impart specific skills or knowledge. They are planned and delivered by professionals with the expertise to impart that knowledge, using materials effectively to reinforce the teaching.
2. Education is not incidental to the experience seeking accreditation; rather, education is the central purpose of the activity and is evident in the activity's design and delivery.
Examples:
 - a. Many professionals learn in the course of their practice. A teacher may learn to recognize and adapt her practice to autistic students by teaching a student with autism. She would not receive credits applicable to her recertification for that experience. Similarly, a lawyer who learns to recognize the signs of trauma through a guardian ad litem case she assumed would not receive CLE credit for the knowledge she acquired through that experience.
 - b. Alternatively, perhaps a few states would award an attorney CLE credit for a section offered at a teachers convention on ACE (adverse childhood experiences and their effects on children) that she took in order to better serve such a client. Montana would not award credit because, although it met the definitions of "continuing" and "education," it did not have significant legal content. A few states allow credit for CLE in other disciplines – accounting, medicine – that is demonstrably related to an attorney's specialty. They typically require that the specialty have been formally recognized in some way.
 - c. Self-study meets this criterion if it also meets the criteria associated with "continuing" and "legal."
3. Although some activities do not meet criteria C1 and C2, above, when the activities rely on concerted self-study on the part of the attorney in order to provide learning for other attorneys, Montana considers them educational in nature. Conforming and non-conforming examples:
 - a. Writing published in a legal journal is awarded up to 5 CLE self-study credits in Montana.
 - b. Preparing to teach a CLE offering is awarded up to 5 CLE self-study credits in Montana.
 - c. Pro bono representation and service on Bar or Court committees, including the CLE Commission, do not receive credit in Montana, or in most states.

APPENDIX B

Mandatory Continuing Legal Education: State-by-State Data¹

1. All states but Maryland, Massachusetts, Michigan and South Dakota have mandatory CLE.²
2. The **number of credits/year required** typically ranges from 12 to 15/year.
3. All states but the following require **60 minutes for 1 credit hour**:
 - Arizona – no stipulation of minutes on record
 - Colorado, Florida, Kansas, Missouri, New York, Oklahoma, Rhode Island, and West Virginia allow 50 minutes to constitute a credit hour.
4. All states require **ethics/professional responsibility**, typically amounting to 2-3 credits/year.
5. Six states have **course approval reciprocity/presumptive accreditation** under the following conditions: (The conditions suggest the lack of a common understanding of “reciprocity.”)
 - Alaska – if program was accredited by any other MCLE jurisdiction
 - Arkansas, Florida – if program meets their rules
 - California – with certain, unspecified states
 - North Dakota – if program was accredited by another MCLE jurisdiction and sponsor submits application (because actual credits may differ)
 - South Carolina – only for courses held in and approved by North Carolina and Georgia
6. Reportedly, a few states have identified enough similarity in the requirements of other states to grant full CLE compliance reciprocity through **comity agreements** – i.e., an attorney who has met all the CLE requirements of one state will be deemed to have fulfilled the requirements of another state.
7. All states award **credit for teaching CLE courses**. Many restrict the number of credits by providing a per-credit ratio and/or a cap. A few allow credit for teaching law school classes or teaching law-related sectionals in non-CLE activities – e.g., Law Day presentations.
8. All states award credit for **CLE offered in online formats**, but most limit the number of credits applicable to the total required.
9. All but 7 states award **credits for writing published in legal journals**. Montana allows up to 5 credits for such writing.
10. Thirty states allow **self-study credit**, and most of these (23 of 30, including Montana) limit the number of credits applicable to the total credits required.

¹ The data used for these notes comes from the Continuing Legal Education Regulators Association, supplemented when helpful by Simple Legal’s overview of state-by-state CLE requirements (<https://www.simplelegal.com/blog/a-complete-guide-to-continuing-legal-education-requirements-by-state>). Information on #6 comes from Montana’s CLE Administrator.

² When the phrase “all states” is used in the rest of this document, it means all states requiring CLE, a total of 46.² When the phrase “all states” is used in the rest of this document, it means all states requiring CLE, a total of 46.

11. All states award credit for **replay of video, audio, digital presentations**, but 20 require that a monitor and/or at least 2 other attorneys be present. Most of the others, Montana included, consider replays as self-study and limit the number of hours applicable to total credits required.
12. All states but Nebraska and Vermont allow credit for **Law Practice Management**. Many, like Montana, require that the course be directed to lawyers. Some explicitly exclude marketing courses. Only 6 states explicitly give CLE credit for Marketing/Profitability courses.
13. Twelve states give CLE credit for **participating/judging in moot court, mock trials**. The number of credits is usually limited to between 1-3 per reporting period. It is often considered part of the allowable credits for self-study or pro-bono/community outreach.
14. All states award **CLE credit for multi-disciplinary content**, but only 11 do so without qualification. The remainder – 35 states -- specify that the course must have **significant legal content or application** to that lawyer's practice.
15. All states but Vermont award **CLE credit for technology-specific courses related to the practice of law**.
16. Fourteen states give CLE credit for **service to the bar or the court** (bar examiners, bar/court committees, court-appointed non-compensated work).
17. Twelve states clearly award CLE credit for **pro bono legal representation**.
 - Two additional states may award such credit; their statements are unclear.
 - Georgia does not award CLE credit for pro bono legal representation but does provide vouchers to waive CLE fees for lawyers who have completed pro bono work.
18. Fifteen states, including Montana under specific conditions, award credit for **mentorship programs** – sometimes for the mentor, sometimes for the mentee, sometimes for both. Most of these states specify that the mentorship program must be an organized one under the supervision of some respected provider – e.g., a law school or state bar.
19. These categories of professionals are **exempt from all CLE requirements** in some states:
 - 33 states, including Montana, exempt **judges** from CLE requirements.
 - 18 states, including Montana, exempt **legislators** from CLE requirements.
 - 5 states (Georgia, Nevada, Oklahoma, Rhode Island, Wyoming) exempt **State Bar Examiners**.
 - 1 state (California) exempts **state and federal employees not practicing law**.
 - 1 state (Oklahoma) exempts **members of the state bar's board or bar committees**.
 - 1 state (Rhode Island) exempts **members of the Character & Fitness Committee**.

APPENDIX C

CLE “Ethics” Requirements: What Other States Do

Four states do not make continuing legal education mandatory. Of the remaining 46:

- All states require CLE credits, typically the equivalent of 1-2 credits annually, in a category usually described as **Ethics, Professionalism, or Professional Responsibilities**¹.
 - Individual states vary widely in the subjects they include under this category. Utah, for instance, specifically requires one credit in professionalism and civility. Oregon specifically requires 1 credit in recognizing and reporting abuse, both of children and of the elderly.²

- Seven states (15.2%) – Delaware, Illinois, Maine, Missouri, New York, Oregon, Washington – require a stipulated number of credits (usually 1/year) in **Diversity, Inclusion and Elimination of Bias**.ⁱ
 - An additional ten states (21.7%) do not require these credits specifically but accept them to meet their ethics credit requirements.
 - One state would consider accepting CLE programs in this area for credit if they meet the state’s existing rules.
 - Maine not only requires 1 credit annually of Avoidance of Harassment and Discrimination in the Legal Profession, but requires that the CLE offering be attended “in person.”

- Five states (10.9%) – Nevada, North Carolina, Oregon, South Carolina, Virginia – require a stipulated number of credits (usually 1/year) in **Substance Abuse/Mental Illness**.
 - A sixth state, Washington, proposed a rule change requiring it, effective this year.
 - An additional eleven states (24%) do not require these credits but accept them to meet their ethics credit requirements.
 - Three states would consider awarding CLE credit in this area if the course meets their existing rules.

¹ Some states use different and sometimes narrower titles for this category – e.g., “Avoidance of Harassment and Discrimination,” “Access to Justice.”

² Oregon feels so strongly about this requirement that, while it has a reciprocal acceptance of compliance (comity) agreement with Washington, Idaho, and Utah, this additional requirement must be met by attorneys from those states.