

REPORT #651

TAX SECTION

New York State Bar Association

Proposed Rules on Minimum Continuing
Legal Education for Attorneys
Draft #3 - February 1990

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March 23, 1990

Robert B. McKay, Esq.
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Special Committee to Consider Mandatory
Legal Education in New York State

Terry J. Brooks
Director of Continuing Legal Education

New York State Bar Association
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Re: Proposed Rule on Minimum
Continuing Legal
Education for Attorneys

Gentlemen:

I am writing on behalf of the Tax Section regarding Draft #3 of the Proposed Rule for implementation of Minimum Continuing Legal Education for Attorneys (February 1990) to be considered at the April 6-7, 1990, meeting of the House of Delegates. The House of Delegates asked that comments and proposed amendments to the Rule be submitted prior to March 15, the date of the Tax Section Executive Committee meeting. In view of the desirability of obtaining the views of the full Executive Committee, I trust that you will consider our comments timely.

The members of the Tax Section Executive Committee and other tax practitioners have expressed concerns regarding particular interpretations that

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might be made by the Commission in applying the Proposed Rule's general guidelines to specific situations. This letter explains the special concerns of the tax bar and proposes several amendments addressing these issues, as well as several technical or administrative aspects of the Proposed Rule.

The semiannual meetings of the Tax Section feature sophisticated, high-quality educational programs for tax specialists and address a broad range of areas of tax practice. These programs usually include speakers and - panelists from the Internal Revenue Service, United States Treasury Department, and New York State and New York City tax departments.

Although the generally high value of these programs for maintaining lawyers' ability to deal with current tax problems is generally recognized, we are concerned that several provisions of the Proposed Rule might be read to render the programs ineligible for continuing legal education credit. If these programs do not qualify, the high attendance they currently attract might drop significantly and their overall success would be adversely affected.

I enclose copies of the programs for our most recent annual and summer meetings. You will note that the bulk of these sessions are addressed to current developments in tax law and that many of the speakers are government representatives. I would also note that there generally is a host of material already available with respect to these subjects, including extensive Tax Section Reports. On the chance that you are not familiar with our reports, I enclose copies of two of our recent reports.

Section 6(d)(iii) of the Proposed Rule requires that course attendees "be provided with written course materials of a quality and quantity appropriate to the subject matter." Many Tax Section programs do not have written course materials specifically prepared for them because of the nature of the presentations. Panel discussions often deal with topics for which the audience has sufficient background not to need written materials in order to benefit from the discussion. Our meetings frequently deal with current, evolving topics, for example, proposed legislation and regulations, and there is often no "lead" time to prepare written materials that would still be relevant as of the meeting date. Government speakers generally will not participate in public discussions if required to present in writing their informal, but informed and valuable, speculative comments about, say, probable IRS or Treasury positions. In these situations, we would argue, no written materials would be appropriate other than, perhaps,

a bibliography of relevant, currently available material, if the Commission interprets the Rule to require written materials, other than a bibliography, for all programs and includes that requirement in regulations, it could deprive the State's tax practitioners of a most valuable aspect of the Section's educational programs.

In view of these concerns, we recommend that the language of section 6(d) (iii) be amended by deleting the phrase "written course materials of a quality and quantity appropriate to the subject matter," and by substituting the following language:

"... adequate materials, if any, of a quality and quantity appropriate to the subject matter and to the nature of the program;...."

We further suggest that the Comment pertaining to section 6 be expanded with the addition of the following statement:

"While attendees generally should be provided with written course materials, such as outlines or articles, there may be some programs where other types of materials, e.g., bibliographies, and copies of pending legislation or recent judicial decisions, may be appropriate. In some circumstances, e.g., presentations about sophisticated topics with which an audience of specialists should be familiar, the provision of materials is unnecessary."

Section 6(d)(iv) of the Proposed Rule further requires "a setting conducive to a good educational experience." It is unclear what type of setting is intended to be excluded by this language. The Tax Section Summer Meeting is normally held in a resort setting providing conference facilities which we consider "conducive to a good educational experience." We believe that other sections also hold meetings which have significant educational programs in resort settings. We are concerned that the Commission might interpret paragraph (iv) to exclude such a setting, since it is not apparent what other kind of setting might be excluded by this provision. A portion of each day at our summer meetings is set aside for social activity. Nonetheless, attendance at the educational sessions of the type described in the enclosed program has been excellent and the programs have been of high quality.

To clarify section 6 and alleviate our concern, we urge that the following language be added at the end of the first paragraph of the Comment after that section:

"... Settings conducive to a good educational experience are not limited to educational institutions or legal offices but can include appropriate conference centers and meeting facilities at hotels and other locations."

Alternatively, the Committee might consider describing the settings that it considers inappropriate.

The Tax Section believes that a continuing education program will best serve its intended purpose if there is appropriate reliance on the integrity and judgment of each lawyer. The purposes of our programs will not be served, for example, by imposing rules about the recording of attendance and maintenance of records that would be time-consuming or burdensome for attendees or sponsors, or that would require the creation of a large, expensive administrative bureaucracy.

Similarly, it would be unproductive to require a course to include subjects irrelevant to the central topic of a program. It is hoped that the educational requirement with respect to legal ethics and professional responsibility can be met without mandating that these subjects be a part of every program, even where it would be irrelevant to the overall content of the program.

We have from time to time included sessions relating to ethical considerations in our programs. It is my reaction, and I believe that of most experienced tax counsel, that the questions examined at such sessions have been parsed many times before in programs or in the tax literature and that repetition adds little to counsel's knowledge of the problems or instinct for ethical behavior.

With respect to the type of activity qualifying for credit towards the legal education requirement, we believe consideration should be given to crediting work that our Section members perform on the many scholarly reports that we prepare for government authorities. These reports usually comment on proposed legislation or regulations and entail extensive research, analysis, writing and editing. Although it may occasionally be difficult to determine the appropriate number of credits earned by each contributor to a report, we believe that the nature of the work, the time expenditure, and the widely-recognized value of these reports to government bodies make it imperative to allow credit for such work despite occasional difficulties in precisely measuring and attributing credits.

We recommend that section 2(b) of the Proposed Rule be amended by inserting after the phrase "writing for legal publications or legal periodicals," the following:

"scholarly writing and editing on a pro bono or similar basis for bar and similar professional organizations, institutes or publications,

As a general observation, it is likely that the educational activity of greatest benefit to lawyers with highly-specialized practices may be self-study. It will often consist of hours of daily reading and participation in discussion groups, rather than attendance at continuing legal education programs designed to attract an audience with broader practices. Consideration should be given to liberal rules for self-study by those attorneys with very limited, highly-specialized areas of practice.

Section 3(c) of Draft #3 provides that beginning with biennial registration dates on and after January 1, 1993, attorneys will be required to report on their continuing legal education activities for the previous 24 months. It is uncertain whether, when and in what form a final rule will be adopted. If the final rule is adopted after January 1, 1991, when the initial period has less than 24 months to run, we believe that the requirements for the initial period should be relaxed to require reporting with respect to 12 credits earned during the prior 12 months. We recommend that section 3(c) be amended to read as follows:

"(c) Reporting by attorneys subject to this rule shall begin on January first, nineteen hundred ninety-three. Attorneys shall be required to report on each of their respective biennial registration dates at least twenty-four hours of continuing legal education activities in the previous 24 months, as specified in section 2 of this rule; except that, on biennial registration dates occurring in the initial year of nineteen hundred ninety-three only, attorneys shall be required to report at least twelve hours of continuing legal education activities in the first 12 months."

Thank you for your consideration of our comments. The enclosure lists our recommended amendments to the Proposed Rule and Comments.

Yours very truly,

Arthur A. Feder
Chair

Enclosures:"

Draft Amendment to Proposed Rules and Comments

Report dated January 10, 1990: Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions

Report dated January 17, 1990: Built-in Gains and the Investment Adjustment Rules in the Consolidated Return Regulations

Program for the Tax Section Fall 1989 Program

Program for the Tax Section 113th Annual Meeting, January 1990

Minimum Continuing Legal Education for Attorneys

Draft #3 - February 1990

proposed Amendments to Rule and Comments

1. The language of section 6(d)(iii) should be amended by deleting the phrase "written course materials of a quality and quantity appropriate to the subject matter," and by substituting the following language:

"... adequate materials, if any, of a quality and quantity appropriate to the subject matter and to the nature of the program;...."

2. The Comment pertaining to section 6 should be expanded with the addition of the following statement:

"While attendees generally should be provided with written course materials, such as outlines or articles, there may be some programs where other types of materials, e.g., bibliographies and copies of pending legislation or recent judicial decisions, may be appropriate. In some circumstances, e.g., presentations about sophisticated topics with which an audience of specialists should be familiar, the provision of materials is unnecessary."

3. The following language should be added at the end of the first paragraph of the Comment following section 6:

"... Settings conducive to a good educational experience are not limited to educational institutions or legal offices but can include appropriate conference centers and meeting facilities at hotels and other locations."

4. Section 2(b) should be amended by inserting after the phrase "writing for legal publications or legal periodicals," the following:

"scholarly writing and editing on a pro bono or similar basis for bar and similar professional organizations, institutes or publications, "

5. If the initial period for complying with CLE requirements begins less than 24 months prior to January 1, 1993, section 3(c) should be amended to read as follows:

"(c) Reporting by attorneys subject to this rule shall begin on January first, nineteen hundred ninety-three. Attorneys shall be required to report on each of their respective biennial registration dates at least twenty-four hours of continuing legal education activities in the previous 24 months, as specified in section 2 of this rule; except that, on biennial registration dates occurring in the initial year of nineteen hundred ninety-three only, attorneys shall be required to report at least twelve hours of continuing legal education activities in the previous 12 months."