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The Mandatory Continuing Legal Education (MCLE) Debate: Is it Improving Lawyer Competence or Just Busy Work?*

I. INTRODUCTION

An attorney's livelihood and success depends on his knowledge of the law, yet only thirty-eight states have Mandatory Continuing Legal Education (MCLE) requirements.¹ MCLE programs are mandated by the legislature in some states and by the state supreme court in others. State bar associations typically monitor the programs. Although the requirements are fundamentally the same nationwide, there are some noteworthy differences among states. Each state can learn something from the others as it either creates a new program or modifies its existing program to meet the purposes of MCLE and the needs of bar members.

Section II of this article relates the history of continuing legal education and the creation of modern MCLE programs. Section III considers the commonalities and differences among various states' requirements. The policy discussions of bar members and officials debating implementation of an MCLE program in one state can aid other states in deciding both whether to enact or modify MCLE and, if so, what requirements and exemptions should apply to the program. Learning from other states can decrease a state's risk of making similar mistakes and at the same time allow positive examples to be followed.

Section IV discusses a current California case and a Colorado case. The California MCLE requirements have been enforced, constitutionally challenged, suspended and now reinstated pending a ruling from the California Supreme Court. The pending California case, in light of past litigation in Colorado, points out important considerations in creating and implementing MCLE programs.

Section V focuses on arguments posed by MCLE opponents to explain their position. Section VI discusses the advantages and disadvantages of mandatory programs. Lastly, Section VII discusses how technology and

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1. See Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1145 n.1 (1995). The states with MCLE include: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

new ideas expand the ways practitioners can obtain MCLE credit. Many of these alternatives provide for less burdensome, more exciting legal education.

II. HISTORY OF MCLE

Continuing legal education (CLE) is not a new concept. It was originally implemented as a voluntary scheme after World War II to acclimate attorneys returning to practice after a lengthy absence in the military and to meet the needs of increased numbers in the profession.² In 1947, the American Bar Association established an organization to promote a national program that included correspondence courses and encouraged state and local bar associations to promote CLE.³ By 1975, two states, Minnesota and Iowa, turned continuing legal education into mandatory continuing legal education (MCLE). By 1980, a total of nine states mandated continuing legal education.⁴ The history of MCLE provides a prototype of what today's MCLE should be, giving insight into the original purpose, successes and stamina of programs. There is simply no need to completely reinvent the programs.

III. CURRENT MCLE PROGRAMS

The typical MCLE program requires attorneys to fulfill a specific number of hours within a reporting period and report those hours to the state bar association.⁵ While there are similarities among MCLE requirements across the nation, how the programs are structured is left to the discretion of the individual states, so there are some subtle and other not-so-subtle differences among programs.

States administer these programs in a variety of ways. Thus, the states that do not have continuing education requirements or that need to alter their requirements should study the examples, positive and negative, of those states that have already debated and settled the issues involved. Seven states in particular provide informative examples of the issues connected to the MCLE debate.

A. *California's Requirements*

California's current battle over its MCLE requirements provides a useful starting point for comparison of the range of options implemented by various state bar associations. California's requirement for MCLE, enacted

2. *See id.* at 1147.

3. *See id.* at 1148-49.

4. *See id.* at 1151.

5. *See id.*

in 1991, is currently being disputed as unconstitutional in *Warden v. California Bar Association* by an attorney that was placed on inactive status with the California Bar Association because of his failure to comply with the MCLE program.⁶ The Business and Professions Code mandates that active bar members complete at least thirty-six hours of legal education in a thirty-six-month period.⁷ Four hours must be in legal ethics and an additional four hours must be in either law practice management or legal ethics.⁸ Failure to adhere to the requirements puts a member on inactive status.

The controversy over this code section stems from the exemption extended to retired judges, officers and elected officials of the state, full-time law professors, and full-time state employees that are acting only within the scope of their employment.⁹ Until the California Supreme Court rules on *Warden*, the MCLE requirements and its above mentioned exemptions stand and all active members have to comply or risk not being able to practice law.¹⁰ California's exemption seems to be based less on logic and more on preferential treatment. This issue will be discussed further in Section IV (Important Litigation), where *Warden* is analyzed.

B. Texas

Texas' MCLE statute requires each bar member to complete fifteen hours of legal education each year, one of which must be devoted to legal ethics or professional responsibility.¹¹ The reporting year starts for each member at the beginning of his or her birthday month.¹² Surprisingly, the statute grants an exemption to attorneys who are employed as full-time attorneys for the legislature or one of its committees, offices, divisions or departments; the Legislative Reference Library; the state auditor's office; and the Sunset Advisory Commission.¹³ These exemptions appear similar to the debated exemptions in the California statute. The reason for acceptance in Texas and a debate in California could be that in Texas, unlike California, exempted members must be working as full-time attorneys in the legislature, not just as attorneys working in or for the legislature.

Texas allows for attorneys over the age of seventy to be exempt from MCLE compliance.¹⁴ There are two ways to view this exemption. Some

6. 62 Cal. Rptr. 2d 32 (Cal. Ct. App. 1997).

7. CAL. BUS. & PROF. CODE § 6070(a) (West 1990).

8. See *id.*

9. See *id.* § 6070(c).

10. See *id.* § 6070(a).

11. TEX. GOV'T CODE ANN. § 6(a)-(b) (West 1988).

12. See *id.* § 8.

13. See *id.* § 81.113.

14. See Tony Alvarado, *State of the Bar — From H to P*, 60 TEX. B. J. 374 (1997).

argue that this exemption is logical because it gives deference to those who have probably been practicing for many years and are close to retirement. Others argue that the exemption defies common sense because attorneys over seventy could be less capable than those under that age.

C. Arizona

The rules in Arizona, which became effective in 1989, call for all non-exempted, active bar members to complete at least fifteen hours of continuing legal education between July 1 and June 30 each year.¹⁵ Three of those required hours must be concerning professional responsibility.¹⁶ Exempted lawyers include inactive members, new members that are admitted halfway through the reporting year, members over seventy-five or that have been members for fifty years or more, members complying with other state MCLE requirements, and members with undue hardship.¹⁷ Judges, court clerks and other court personnel are also exempt because they must comply with special judicial education and training.¹⁸ These few exemptions seem to be reasonable. Unlike California, the Arizona rules do not relieve members because they have legislative power or because they have sufficient clout to avoid additional education.¹⁹

The late penalties for delinquent compliance start at \$25 for failure to complete the required hours within one month after the deadline and escalate to \$125 for failure to complete within two and half months of the deadline.²⁰ There is an additional fee up to \$150 for late filing of an affidavit of compliance.²¹ As with all states that require MCLE, the ultimate penalty is suspension or inactive status. The cost to be reinstated once compliance has been completed is \$100.²²

D. Utah

The rules in Utah require each attorney to complete twenty-four hours of CLE every two years, including a three hour program on professional responsibility and ethics.²³ At least fifteen of the hours must be from attendance at live programs,²⁴ and up to twelve hours can be from self-study,

15. ARIZ. SUP. CT. R. 45(a)1.

16. *See id.* 45(a)2.

17. *See id.* 45(b)1-6.

18. *See id.* 45(b)2. They are subject to the requirements of the Council on Judicial Education Training (COJET) and thus only have to file an affidavit of compliance with the state bar once they have completed the COJET requirements.

19. *See Warden v. California Bar Association*, 62 Cal. Rptr. 2d 32 (Cal. Ct. App. 1997).

20. *See ARIZ. SUP. CT. R. 45(d)1.*

21. *See id.* 45(d)2.

22. *See id.* 45(d)2(h).

23. UTAH SUP. CT. ST. BD. OF CLE R. 3.

24. *See id.* Reg. 4(d)-101(1)(e)(ii)(e).

which includes audio and video tapes and computer interactive telephonic programs. The penalty fee for late filing is \$50,²⁵ and the penalty for non-compliance is suspension by the state supreme court.²⁶

The only exemptions Utah allows are hardship or extenuating circumstance waivers when good cause is shown.²⁷ A deferral is allowed in the case of serious illness.²⁸

E. Idaho

Idaho requires all active lawyers to complete and report the required CLE credit hours from programs that have been approved. Programs are approved based on their intellectual and practical content so as to comply with the purpose of increasing professional competence.²⁹ Sessions must be conducted by an individual or group with practical or academic experience in the area being taught.³⁰ They can be taught in an educational setting, through in-house programs, and through self-study.³¹ The only exemption Idaho allows is for a lawyer licensed in another state who meets the other state's requirements.³²

F. Maine

Maine is unique in its continuing education rules. It requires lawyers to report CLE information with their annual registration but does not mandate that lawyers actually complete any CLE. Instead Maine lawyers need only "endeavor to complete twelve (12) credit hours annually."³³ The reporting requirement has only been in effect since 1994,³⁴ yet since that time the number of hours reported has increased by almost ten percent, from 43% to 51%.³⁵ This could be an indication that attorneys either reported more diligently or spent more time on CLE without being compelled to do so.

G. Louisiana

Lawyers in Louisiana are obligated to attend fifteen hours of legal education each calendar year.³⁶ The professional responsibility or ethics mini-

25. *See id.* 5-102

26. *See id.* 6.

27. *See id.*

28. *See id.* 6-105.

29. *See* IDAHO R. B. COMM'N. R. 403(a)(1) (West 1997).

30. *See id.* 403(a)(3).

31. *See id.* 403(a)(7). Self-study credits are limited to 15 credits during every three year reporting period.

32. *See id.* 410. *See also infra* the Multi-state reporting requirements section.

33. ME. B. R. OF PROF'L RESP. 3.11 (West 1997).

34. *See* Craig McEwen, *Is Voluntary CLE Increasing in Maine?*, 11 ME. B.J. 192.

35. *See id.*

36. *See* LA. SUP. CT. R. XXX CLE RULE 3(a) (West 1997).

mum is one hour out of the fifteen.³⁷ The only exemptions allow people with permanent disabilities to substitute an approved program for attendance at seminars and members with temporary hardships to get waivers. There are no exemptions for members of the Louisiana State Legislature, but they do receive eight hours of credit per year for that service.³⁸ Likewise anyone who serves on the Disciplinary Board of the bar association or in the judicial disciplinary systems receives four hours of credit, one of which applies to the ethics requirement.³⁹

Louisiana's non-compliance penalty includes a fee of \$100 for ineligibility, and a fee of \$100 for reinstatement.⁴⁰

IV. IMPORTANT LITIGATION

The way the courts rule on MCLE issues is an important source for those states creating or altering their MCLE programs. Although what one state holds is not binding on other states, the questions raised in one state can assist another in deciding how to draft its rules. Some of the questions raised, however, are federal constitution questions which bear on all states.

The California Supreme Court has yet to decide *Warden v. California Bar Association*. However, the court of appeals makes some very persuasive and logical arguments as to why the exemptions made in the California code should not be allowed to stand. The Colorado case that follows explains why MCLE requirements pass Constitutional muster when no exemptions are allowed.

A. *Warden v. State Bar of California*

Warden has refueled the MCLE debate in California. The California Supreme Court decided it would review the case in June of 1997, but has yet to hear it and make a ruling. Lew Warden, a California attorney, was placed on involuntary inactive status with the California State Bar Association for failure to comply with the state's MCLE requirements.⁴¹ Warden brought action against the state bar challenging the requirements on Fourteenth Amendment equal protection grounds. He claimed the exemptions granted to certain classifications of attorneys⁴² were not rationally related to the program's purpose of keeping attorneys representing individual cli-

37. See *id.* at 3(c).

38. See *id.* at 3.16.

39. See *id.* at 3.17 and 3.18.

40. See *Mandatory Continuing Legal Education Rules Amended by Supreme Court*, 44 LA. B.J., Oct. 1996, at 259, 260.

41. See *In the Matter of Lew Warden, Jr.*, 1994 WL 118053 (N.D. Cal. Mar. 18, 1994).

42. See *Warden v. California Bar Association*, 62 Cal. Rptr.2d 32, 33-34 (Cal. Ct. App. 1997). State officers and elected state officials, retired judges and full-time law professors are exempted. See *id.*

ents current.⁴³ The appellate court agreed, ruling that the MCLE, with its exemptions, was unconstitutional and that Warden should be restored to active status with the Bar.⁴⁴

The Bar claimed that the exemptions have a rational relation to its MCLE purpose, which is to educate the lawyers who represent individual clients in their practice.⁴⁵ The Court of Appeals, finding fault with the Bar's logic, pointed out that while there may be a rational basis for exempting lawyers who do not represent individual clients, there are still members of the exempt classes who do actively represent clients. Because there are state and elected officials, retired judges, and professors who in fact actively represent individual clients, there is no rational basis for these exemptions.⁴⁶ Full-time state and federal employees are the only ones who will lose their exemption if they perform any outside legal work.⁴⁷ Conversely, there are many lawyers who do not represent individual private clients that still have to comply. Lawyers are not exempt if they work for local governments or private corporations or if they are not professors but work for universities, colleges, or school districts, yet they do not represent individual clients either.⁴⁸

The reasoning for these exemptions is faulty. A state that is considering implementing a MCLE program should question California's exemptions before including them in their own program. States should consider whether it should be assumed that the members of the exempted classes do not need the benefits of continuing legal education that other lawyers do. States should also ask if it can be assumed that retired judges keep up with current legal information, or that state officials have no need for education in ethics.

Such exemptions should not be assumed. All attorneys who want to practice law can benefit from the MCLE programs. The legal profession is a challenging and dynamic world where new statutes and interpretations continually arise. Thus, to be competent, an attorney must continue to adapt and learn.⁴⁹ Many in the profession argue that continuing education is crucial to the adaptation and learning process.

There seems to be no logic to California's exemptions. The legislative history of the California MCLE statute suggests the reasoning behind the legislature's actions was to appease those with political power. The ex-

43. *Id.* at 37.

44. *See id.* at 49.

45. *See id.* at 37.

46. *See id.* at 38.

47. *See id.* at 34 n.6.

48. *See id.* at 40.

49. *See* Ellen Lieberman, *Professional Responsibility and Continuing Legal Education*, 69 N.Y. St. B.J. May/June 1997, at 16.

emptions were not originally included in the statute, but were later added one at a time as requested by members of the California State Senate⁵⁰ and later by those who did not want to be dragged into the classroom.⁵¹ It was feared that MCLE would not pass the legislature without at least the first exemption for members of the California State Senate.⁵²

Until *Warden* is decided sometime in early 1998, the future of the California MCLE program is uncertain. Despite these negative effects in California, other states can learn from *Warden* and implement or amend their MCLE programs and exemptions appropriately. Attorneys in California were notified during the summer of 1997 that they must comply with the MCLE requirements, at least until the Supreme Court hands down its decision in *Warden*. The off-again-on-again enforcement has created a great deal of confusion for members of the California State Bar and may have led to discontentment with the mandatory program.

B. *Verner v. State of Colorado*

Another side of the constitutional issue was illustrated in a case where the MCLE requirements of Colorado were upheld. Whereas *Warden* asks whether certain exemptions are constitutional, *Verner* asks whether requiring continuing education itself is constitutional. The Tenth Circuit Court of Appeals held that a state can compel a lawyer to take reasonable steps to maintain a certain level of competency.⁵³ It found a rational connection between preserving an attorney's capacity and requiring reasonable steps to maintain that competency.⁵⁴ *Verner* sued the state of Colorado and Colorado's Supreme Court for suspending him for failure to comply with the state's MCLE statute. He claimed that the rule requiring registered attorneys to complete forty-five units of MCLE every three years was infringing on several of his constitutional rights.⁵⁵

According to the *Verner* court there is ample precedent showing that the state has the authority to enforce minimum levels of competency, citing the bar exam as a prerequisite to bar admission. Requiring attorneys to continue their legal education was held constitutional because the state has the authority to measure competency as long as it relates to a lawyer's suitability to practice law.

The *Warden* court used the *Verner* decision to demonstrate that Colorado's MCLE program is an example of required continuing education

50. See *Warden*, 62 Cal. Rptr.2d at 42.

51. See *id.* at 40 (quoting Bill 905, Off. Local Gov. Affairs, Enrolled Bill Rep. (Sept. 25, 1989) p. 2).

52. See *id.* at 38.

53. See *Verner v. State of Colorado*, 716 F.2d 1352, 1353 (10th Cir. 1983).

54. See *id.*; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

55. See *Verner*, 716 F.2d at 1352; COLO. R. Civ. P. 260.2(1).

which does not have irrational exemptions in violation of Equal Protection.⁵⁶ The combined message of *Warden* and *Verner* as they stand is that a state can require continuing legal education, but exemptions must be rationally related to MCLE's purpose.

V. THE REASONING OF MCLE OPPONENTS

Studies suggest that MCLE programs do not fulfill their objectives. The state legislature in California, when deciding to enact MCLE statutes, acknowledged a lack of statistical evidence showing any direct correlation between attorney competence and MCLE.⁵⁷ A District of Columbia task force⁵⁸ spent two years examining MCLE issues and published a nearly 200-page report that concluded there is no empirical data to demonstrate that MCLE courses improve competence.⁵⁹ In the end, the task force did recommend an MCLE program but the D.C. Bar Board of Governors did not recommend following it.⁶⁰

A. *Noncompliance Does Not Equate With Incompetence*

In *People v. Ngo* the defendant appealed his conviction on the basis of ineffective assistance of legal counsel when his attorney, before Ngo's sentencing, was placed on inactive status by the California Bar Association due to his failure to comply with MCLE. The Supreme Court of California held that being represented by an attorney who has been placed on inactive status for noncompliance with MCLE requirements does not necessarily mean that the defendant has been denied the right to representation by counsel.⁶¹

In effect, the court was saying that noncompliance does not necessarily equate with incompetence. While continuing education relates to professional competence, noncompliance does not "necessarily establish an attorney's professional incompetence or constitutionally deficient performance in representation."⁶² A lawyer can still provide adequate representation even though she has not completed the required hours and reported them. Admission to the state bar after passing the bar exam and fulfilling the other requirements (e.g. moral competency) deems an attorney competent to practice law.⁶³ Failing to take continuing legal education places an attorney in the category of non-compliance, not incompetence.

56. *Warden*, 62 Cal. Rptr.2d at 38.

57. See *People v. Ngo*, 924 P.2d 97 (1996).

58. See Aliaga, *supra* note 1, at 1169.

59. See *id.* at 1153.

60. See *id.* at 1146.

61. See *Ngo*, 924 P.2d at 97.

62. *Id.* at 101.

63. See *id.*

B. Exempting Retired Judges and Current Legislators

Another argument is directly related to the California exemption for members of the legislature. If the legislature truly believes there is a direct correlation between competence as an attorney and the MCLE requirements it imposes, then why is the legislature's in-house counsel exempt from these competence requirements? This would mean that the legislature is exposing itself to incompetent representation⁶⁴ by not requiring its attorneys to complete the necessary education.

Retired judges who continue to practice should not be assumed to know everything about the law, especially when there are constantly changes in the law. The need for current information is equally valuable to all attorneys.

VI. ADVANTAGES AND DISADVANTAGES OF CONTINUING EDUCATION

A. Dwindling List of MCLE Providers

As states enacted MCLE requirements many bars and private companies saw an opportunity for financial gain. In California the state and local bar associations thought of MCLE as a way to increase funding and as a potential financial windfall.⁶⁵ Local bar associations, however, face trouble in financing MCLE programs; other MCLE providers are backing out.⁶⁶ This leaves limited choices for attorneys, which could mean that MCLE credit could become increasingly expensive and inconvenient. Two of the national providers which still present MCLE seminars are The Rutter Group and the Association of Legal Administrators and Legal Secretaries, Inc.⁶⁷ There are still many ways to fulfill the requirements. Alternatives to these dwindling choices are discussed later in Part VII, Section A.

On the other hand, some lawyers who appreciated CLE before it became mandatory are receiving the benefit of a larger variety and occurrence of courses as well as a better quality than previously available.⁶⁸ Courses that were not offered before are now being offered and are offered in more remote areas and at more convenient times.

64. See *id.*

65. See Arleen Jacobius, *The Dry Well of MCLE*, CAL. LAW., Nov. 1996, at 15.

66. See *id.*

67. See KAREN D. KADUSHIN, CALIFORNIA PRACTICE GUIDE LAW PRACTICE MANAGEMENT ch 5-A (1992).

68. See Charlotte Morrison Greer, *MCLE Serves Not Only the Profession, But the Public*, ARK. LAW., Spring 1996, at 8.

B. *Are Non-Believers Really Benefitting?*

While most attorneys believe MCLE is beneficial, there are plenty that are non-believers. For those attorneys who are being forced to do something they do not want to do, MCLE may not be assisting them to become more competent, ethical and professionally responsible. However, the ABA and a majority of the state bar associations must disagree or they would not have instituted the mandated CLE courses that have been around since the late 1930s. As one MCLE supporter states, "Those that argue against MCLE sometimes quote the old saying 'You can lead a horse to water, but you can't make it drink.' Maybe not, but if you take the whole herd, most of them are going to have a drink."⁶⁹ It remains true that the anti-MCLE lawyers are not going to benefit to the degree that those who are proponents or at least those who are apathetic will, but even the anti-MCLE practitioners run the risk of learning something. MCLE probably benefits the most those who would have gone but just could not make time for it, but now must.⁷⁰ The result is that more lawyers are receiving an education.

These arguments used by MCLE opponents may be challenging but are not persuasive. Even if no statistics prove MCLE improves competence, there are numerous attorneys who are sued, suspended or disbarred for incompetence or unethical behavior in every state every year. Something must be done. MCLE certainly will not hurt competence and may even help improve it.

VII. REFORMING MCLE

State bar associations recognize the need to amend their MCLE programs. New ideas provide for better education and service for members. MCLE requirements must be adaptable; if not, then they will not be able to perform their proper function and will be as useless as their opponents deem them to be. The results of litigation, proven programs, and new technologies are sources for a state implementing or reforming its MCLE program to meet the needs of its bar members.

A. *Alternative Ideas For Credits*

Some states do not allow for any way to receive MCLE credits except through approved sessions taught by approved CLE teachers. For example, Louisiana does not permit members to earn credit from video taped lectures unless there is an approved teacher monitoring the session who is

69. *Id.* at 8.

70. *See id.*

available to answer the attendees' questions.⁷¹ Many states do not have such strict requirements and are open to suggestions from members, other states, and MCLE providers for new, exciting and challenging ways to earn MCLE credit.

1. Multi-state reporting

States can cooperate to simplify the compliance process. Currently, Idaho, Oregon, Utah and Washington have an MCLE compliance agreement for attorneys who practice in two or more of those states. Prior to the agreement, attorneys had to report to and comply with the MCLE requirements of each state. This was a confusing and time consuming process. Now, to simplify the process, an attorney can designate one of these states as her reporting state, certify compliance with that state, and the other states will accept it as compliance of their MCLE requirements.⁷²

2. Interactive CD-ROM

One way technology has brought MCLE to attorneys is through CD-ROM. Transmedia has several CD-ROM courses that can be used for MCLE credit. Among the titles available are *Objection!* and *Civil Objection!*, available for \$299 each,⁷³ and *Expert Witness!*, which sells for \$149.⁷⁴ These computer programs require you to interact by pressing keys to accept or object to questions asked by opposing counsel in a matter of seconds during a simulated trial. Completing the "game" can earn a lawyer twelve credits.⁷⁵ This alternative is not without its drawbacks.

First, some programs do not even require any attorney interaction. The attorney can just let the program run and still get credit.⁷⁶ This, of course, defeats the purpose of MCLE. Second, the computer programs are intense. "Because you must respond to questions every few seconds (and respond to them correctly) in order to move the course along, [the programs] are much more demanding than most MCLE programs."⁷⁷ Third, with some software, to receive the MCLE credits a proctor must monitor the attorney and must send a signed assurance that the attorney was indeed interactive with the software.⁷⁸ Other CD-Roms have built in monitoring that prints

71. See LA SUP. CT. R. XXX CLE R. 3(a) Reg. 3.13.

72. See Annette Strauser, *State Bars Work Together Keeping Track of MCLE Credits Is Easier Now*, ADVOCATE (IDAHO), July 1997, at 16.

73. See Sandra Rosenzweig, *A Credit To our Profession MCLE Participatory Credit in the Privacy of Your Own Sauna*, CAL. LAW., Jan. 1997, at 54.

74. See Strauser, *supra* note 72, at 16.

75. Rosenzweig, *supra* note 73, at 54.

76. See *id.* at 63.

77. *Id.* at 54.

78. See *id.*

out the results of the attorney's session and provides a certificate to mail in.⁷⁹ Regardless of these drawbacks, continuing education through computer programs is still a more convenient way to earn credit because it can be done on the attorney's timetable, without significantly interfering with her work load.

3. *Surfing for credit and going on-line*

Similar to the CD-ROM technology, credit can be obtained through courses on the Internet. While MCLE seminars and conferences conducted on-line is a fairly new concept and available in a few states,⁸⁰ it could eliminate some problems associated with face-to-face seminars, such as eliminating travel time,⁸¹ conflicting schedules, and limited space.

4. *Credit and a fabulous tan*

Another way to earn credit, but in a more vacation-type atmosphere, is at a convention. The Federal Bar Association had its annual meeting in San Juan, Puerto Rico in 1997. Obtaining MCLE credit was as easy as filling out a section on the registration form. California, for example, allowed attorneys who attended the San Juan convention to satisfy up to eleven hours of credit, three of which applied toward the ethics requirement.⁸² MCLE opponents are not as likely to complain about seminars while on vacation as they would regular seminars.

5. *Participation in hypothetical role play*

Another useful way to receive MCLE credits is through sessions that allow for discussion and role playing of hypothetical situations. Attorneys practice the proper way to handle various situations. The idea of these sessions is to replace theory with practical application. Such a forum serves to address situations that violate ethical rules and can lead to disciplinary actions.⁸³

The various alternatives suggested allow lawyers to learn in a more convenient and fun atmosphere. Such approaches may make a difference in practitioners' attitudes toward MCLE.

79. See *id.* at 62.

80. See Alvarado, *supra* note 14, at 374. Texas has implemented an experimental on-line, interactive program, approved in 1996, which allows for MCLE credit. This program provides for private on-line forums that are tailored to the needs of specific law firms, legal departments and bar associations. See *id.*

81. See Robert Craig Waters, *An Internet Primer*, 44 FED. LAW. 1997, Mar.-Apr. 1997, at 72, 75.

82. See *Convention Preview*, 44 FED. LAW. 1997, June 1997, at 46, 47.

83. See Erik Hromadka, *Revised Disciplinary Rules Strive to Improve the Process and the Profession's Image*, RES GESTAE, June 1996, at 18, 22.

B. Courses

1. Professional responsibility and ethics

The public views the legal profession less favorably than most attorneys and most state bars would wish. Even within the profession, attorneys indicate a lack of civility as a major problem.⁸⁴ Being the brunt of jokes is the least of the problems lawyers face. More serious problems include lack of professionalism and civility which are even more prevalent than incompetence or dishonesty.⁸⁵ Complaints against attorneys have increased more in the last ten years than the number practicing lawyers,⁸⁶ and in some cases the number of grievances is at an all time high.⁸⁷ This suggests a breakdown somewhere in learning ethics and applying them. Part of the problem could be that a gap is developing because law schools are about pure theory while law firms are about pure commerce. Ethical learning and practice seem to slip through the cracks in between.⁸⁸ The best way to fill the gap is through MCLE.

a. *MacCrate Report*. The American Bar Association sponsored a Task Force in 1992 titled, "Law Schools and the Profession: Narrowing the Gap," chaired by former President of the ABA Robert MacCrate (the MacCrate Report). It identified four basic values of professional responsibility to which lawyers should aspire. The values are: "1) providing competent representation; 2) striving to promote justice, fairness and morality; 3) striving to improve the profession and 4) professional self-development."⁸⁹ This report helped to solidify the ABA's commitment to recommending MCLE programming.

b. *Differing approaches*. The ABA and various state bar associations are talking seriously about what can be done to enforce the four values emphasized in the MacCrate Report. Michigan hired through bar dues a public relations firm to provide enhanced access to the media.⁹⁰ This,

84. See Dan McAuliffe, *Board of Governors Extends Professionalism Course to All Members*, ARIZ. ATT'Y, July 1997, at 36.

85. See Frank X. Neuner, Jr., *Mandatory Professionalism: A Cure For An Infectious Disease*, LA. B.J., June 1997, at 18.

86. See *id.* at 21. Number of practicing lawyers in Louisiana has increased 43 percent and complaints against those lawyers have increased 82 percent. *Id.*

87. See Hromadka, *supra* note 83, at 19.

88. See William R. Rakes, *Conclaves on Legal Education: Catalyst For Improvement of the Profession*, 72 NOTRE DAME L. REV. 1119, 1122 (1997) (citing Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992)).

89. Lieberman, *supra* note 49, at 16. See also *Legal Education & Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS.

90. See Gerald W. Boston, *Chemical Dependency in Legal Education: Problems and Strategies*, 76 MICH. B. J., Mar. 1997, at 298, 301.

however, only treats a symptom and does not focus on preventing the problem. The root of the problem is attorney behavior.

At least twenty-one bar associations have recognized that the public perception is based, with good reason, on how attorneys behave. The way to solve the problem is to provide better training for attorneys through MCLE programs aimed at professionalism and ethics. Topics that could be recognized as professionalism credit include lawyer's responsibility as an officer of the court, responsibility to treat fellow lawyers and clients with respect, to avoid misuse and abuse of discovery and litigation, to protect the image of the profession, to fulfill public service responsibility, and to be informed about methods of dispute resolution.⁹¹ This additional training can be done without raising the overall hour requirements.⁹²

Arizona's proposal would compel a professionalism course to be completed by the end of 2002 without adding any hours to current requirements.⁹³ In Maine, 9.6% of the total program hours provided for MCLE deal with issues of professional responsibility.⁹⁴ It is hoped that this will help attorneys to be mindful of "their professional obligations to ethical practice."⁹⁵

2. *Remedy for discrimination*

One proposal for using MCLE as a way to solve the lack of professional responsibility and lack of ethics in the legal profession is to use continuing legal education as a remedy in law firm employment violations. The Glass Ceilings Report⁹⁶ is one of many studies that has exposed discrimination against women in the legal profession. The report suggested using mandatory attendance by law firm managers and lawyers at seminars conducted by discrimination law experts as proposed in New York, in an effort to counteract ignorance in legal employment discrimination.⁹⁷ Suggested programs include overviews of laws barring sexual discrimination, ethical rules, and diversity training for employees.⁹⁸ This is not a completely foreign concept. Some courts, when deliberating over lifting sanctions, already take into consideration the scope and content of continuing legal education courses that a suspended lawyer has taken.⁹⁹ The next step

91. See Neuner, *supra* note 85, at 21.

92. See *id.* at 20.

93. See McAuliffe, *supra* note 84, at 36.

94. See 1996 Annual Reports: Annual Report for Continuing Legal Education: January 1996 - December 1996, 12 ME. B.J., July 1997, at 232, 235.

95. Hromadka, *supra* note 83, at 21.

96. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal profession*, 64 FORDHAM L. REV. 291 (1995).

97. *Id.*

98. See *id.* at 600.

99. See Aliaga, *supra* note 1, at 1162 (mentioning *In re Webster*, 647 So.2d 816 (Fla. 1994)).

could logically be for courts to require disciplined attorneys to attend MCLE courses as a condition to reinstatement.¹⁰⁰ This would be especially useful in situations where specific courses offered are relevant to the reasons for the disciplinary action.

3. *New attorney requirements*

The MacCrate Report recognized that skills and values important to a competent lawyer develop along a continuum starting before law school and continuing throughout the lawyer's career.¹⁰¹ The need for continuing education from the commencement of an attorney's career was recognized as early as the 1930s when the Practising Law Institute (PLI) implemented courses to teach new attorneys the practical skills and ethical attributes of an effective lawyer.¹⁰²

Continuing education is valuable to all attorneys but even more so to those making the transition from law school.¹⁰³ Members of some state bar associations are in agreement that an emphasis in continuing education needs to be placed on new attorneys and that specific requirements for MCLE need to be placed on recent law school graduates during their first three years of practice. Arizona, for example, requires new attorneys to complete a course of professionalism as a condition to practicing law in Arizona.¹⁰⁴ Utah requires lawyers newly admitted to the bar to complete its "New Lawyer Continuing Legal Education Program" within a year.¹⁰⁵

New York, which expects to apply MCLE to all attorneys sometime in 1998, implemented a MCLE requirement for newly admitted attorneys in October 1997.¹⁰⁶ It mandates sixteen hours per year for the first two years of admittance to the bar. Three of these hours must be instruction in ethics, professional responsibility, and values. Seven hours are in practice management and a variety of professional practice areas.¹⁰⁷ The District of Columbia rejected MCLE requirements for its members but adopted mandatory courses on the District's legal system and its Rules of Professional

and other cases from differing states where the courts denied reinstatement because of lack of proper continuing education).

100. See *id.* at 1162.

101. See Lieberman, *supra* note 49, at 16 (quoting the MacCrate Report).

102. See Aliaga, *supra* note 1, at 1148.

103. See Lieberman, *supra* note 49, at 16.

104. See McAuliffe, *supra* note 84, at 36; ARIZ. SUP. CT. R. 34(e).

105. UTAH SUP. CT. R. 15.

106. See *The New Mandatory Continuing Legal Education Requirement for Newly Admitted Attorneys in the State of New York* (visited Jan. 31, 1998) <<http://www.nysba.org/cle/mandatorycle/-brdgrule>>.

107. See JOINT R. OF APP. DIV. OF THE SC 22 NYCRR, PART 1510.

conduct for new attorneys¹⁰⁸ to be completed within twelve months of being admitted to the bar.¹⁰⁹

4. *Drug and alcohol prevention and rehabilitation*

Substance abuse is a growing concern in all professions. The American Bar Association and some state bar associations are trying to curb chemical dependencies in the legal profession; the abuse rate is significantly higher in the legal profession than in the general workplace.¹¹⁰ Although statistics vary, it is estimated that 20% of lawyers have a problem compared to 10% of the general population.¹¹¹ An American Bar Association study conducted in California and New York determined that up to 70% of disciplinary cases involved alcoholism.¹¹² "The effect of substance abuse is so devastating upon the practice of law and is so potentially damaging to clients' interests that all lawyers should be trained to recognize the early symptoms, to understand that the disease is treatable."¹¹³ Providing education through lectures to inform attorneys of the dangers and preventions of substance abuse should become part of the professional responsibilities and ethics portions of MCLE requirements for each state.

VIII. CONCLUSION

MCLE is important for all attorneys. The advantages outweigh the disadvantages. In California, the current litigation is not over requiring MCLE as a basis for improving competence. Rather, the concern is that certain classes of attorneys should not be deemed any more competent than other attorneys in the state and should, therefore, not be exempted from MCLE. Many of the states have recognized the decline of the legal profession that is evidenced by the negative perception both in and out of the profession. Various state bar associations have thus attempted to solve the problem by continually educating their attorneys.

As the bar associations have mandated continuing education aimed at a variety of ills, they have continued to change and adapt their requirements as new needs have become apparent. These requirements constrain

108. See Aliaga, *supra* note 1, at 1146.

109. See *id.* at 1169.

110. See Boston, *supra* note 90, at 298 (citing Huie and Spilis, "Preparing of the Unexpected: Leave for Treatment of Chemical Dependency," 51:10 OR. ST. B. BULL., Aug.-Sept. 1991, at 35).

111. See Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L.J. 1263 (1993).

112. See Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 268 (1997) (citing G. Andrew H. Benjamin, Bruce D. Sales & Elaine J. Darling, *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCHOL. REV. 113, 115 (1992)).

113. Boston, *supra* note 90, at 300.

lawyers to improve their conduct. The mandates start with the basics of training new attorneys in practical matters and go as far as to counsel attorneys with drug and alcohol problems. Civility and discipline for all attorneys are also being addressed. These programs are essential to the legal profession generally and to a lawyer's career specifically. Continuing education compensates for the fact that attorneys can not learn everything they need to know in three years of law school or perhaps even in thirty years of practice.

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