


Mandatory Continuing Legal Education: Productive or just PR?

David D. Shein
University of St. Thomas
Houston, TX

ALSB Conference: August 4, 2016

I: Introduction

- Mandatory Continuing Legal Education (MCLE) became a requirement of various state bar associations in the 1970s - 1990s. At the present time, only four states and the District of Columbia do not require MCLE.
 - MCLE was intended to ensure competency of bar members by emphasizing legal ethics training, and was highlighted as a benefit to consumers.
 - Attorneys who fail to comply with MCLE requirements for the state(s) in which they are licensed risk fines and suspension of their license.
 - This article presents a study of the impact (if any) of implementing MCLE across the United States.
- 

II: MCLE Arrives on the Scene

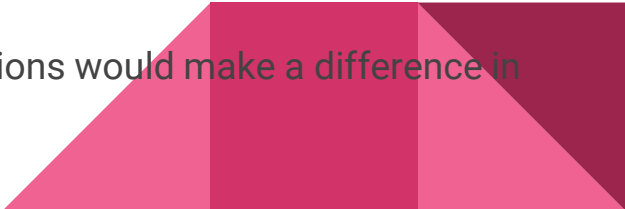
A: Initial Requirements

- Minnesota and Iowa adopted MCLE in 1975, followed by Washington and Wisconsin in 1977, Colorado and Wyoming in 1978, and Idaho in 1979. Most other states adopted MCLE requirements throughout the 1980s and 1990s.
- The rationale for imposing MCLE on licensed attorneys was:
 - to hone specific skills not taught in law school
 - to strengthen a lawyer's sense of professional responsibility
 - to lower the volume of legal malpractice claims



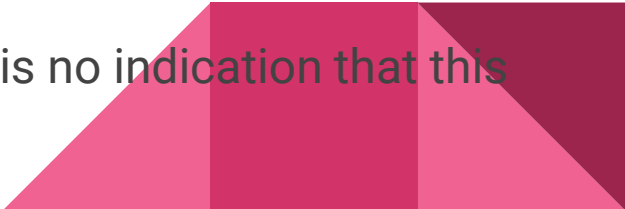
II: MCLE Arrives on the Scene (cont.)

A: Initial Requirements (cont.)

- In 1986, Supreme Court Chief Justice Warren E. Burger expressed concerns that the legal profession was moving away from professionalism. This in turn prompted the American Bar Association's 1986 report, "In the Spirit of Public Service."
 - The report contained a series of recommendations for the judiciary, law schools, and practicing attorneys.
 - It specifically called for mandatory continuing legal education, and suggested exams may be in order.
 - It contained no metrics to indicate whether the recommendations would make a difference in the actual delivery of legal services.
- 

II: MCLE Arrives on the Scene (cont.)

A: Initial Requirements (cont.)

- The Ad Hoc Committee on Continuing Legal Education of the New Jersey Bar was obliged to establish a compelling case **not** to introduce MCLE, and thus in 2010 New Jersey became the most recent state to require MCLE.
 - Connecticut, Maryland, Massachusetts, Michigan, South Dakota, and the District of Columbia are currently the only state bars that do not require MCLE. These jurisdictions do not exhibit a higher level of attorney discipline or legal malpractice claims that MCLE states.
 - Connecticut offers voluntary CLE courses, and there is no indication that this is not a beneficial practice.
- 


II: MCLE Arrives on the Scene (cont.)

B: Cost of Compliance for Experienced Attorneys

- There is no central source for cost of compliance with MCLE.
- A modest estimate of \$100 per credit hour gives us an estimated \$1500 out-of-pocket.
- A lawyer must spend a minimum of 15 hours just in completing the coursework required. At a modest billing rate of \$250 per hour, the value of this lost time would be worth \$3750. This does not include time spent in travelling to courses or in filing for credit, which can be substantial.
- Combined, this is equal to about 5% of the \$130,000 nationwide average income of attorneys.

II: MCLE Arrives on the Scene (cont.)

B: Cost of Compliance for Experienced Attorneys (cont.)

- The legal profession requires a near-constant focus on changes in statutes, court rules, and case law relative to an attorney's area or areas of practice, and as a consequence attorneys are bombarded with updates and new material.
 - Thus attorneys must gain as much current knowledge as needed to be competent to practice, and then earn MCLE credits to please their respective state bars.
- 


II: MCLE Arrives on the Scene (cont.)

B: Cost of Compliance for Experienced Attorneys (cont.)

- Various authors have written about the cost of compliance.
 - Jack Joseph suggests that there is no empirical evidence that the illusory benefits of MCLE will justify the various costs imposed.
 - Douglas Shaw Palmer stated, “Lawyers everywhere are expected to maintain their competence by studying on their own in any way that serves their needs. If they fail to do so, and if they cause resulting harm, they are liable to punishment. Why then do the bar, governors and supreme courts try to compel study through CLE that allows credit only for attending classroom lectures, and none for self-study.
 - Other authors have argued that many attorneys spend more on MCLE requirements than on dues, and that the cost of MCLE in 2001 was over \$440m between the cost of the courses themselves and incidental expenses.

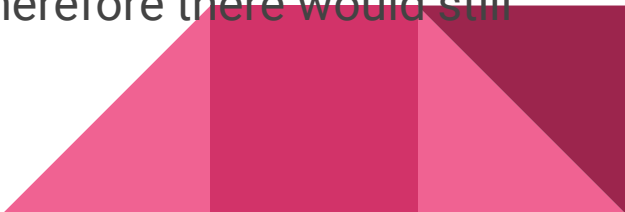
II: MCLE Arrives on the Scene (cont.)

C: Cost of Compliance for New Attorneys

- For new attorneys, the cost of MCLE has a much greater impact:
 - Law students are graduating with an average of \$100,000 in student loan debts.
 - Only 85.6% of 2011 graduates have jobs, which is the lowest percentage in nearly 20 years.
 - Only 56% of 2012 graduates found jobs within 9 months of graduation.
 - The US DoL's Bureau of Labor Statistics estimated a need for 98,500 legal jobs in 2008, but reduced that number to 73,600 due to the Great Recession.
 - The number of law school applications have dropped by half since 2010, and increasing numbers of new attorneys are suing their law schools over disappointment in the employment market.
- 


II: MCLE Arrives on the Scene (cont.)

D: State Bar Overhead

- There is no central index for the administrative costs born by each state bar.
 - Virginia's state bar employs at least two people. Their offices (similar to those of other state bars) are located in premium office space in their state's capitol city. Half a million dollars per year may be a reasonable figure, even for a modest operation like Virginia's.
 - If MCLE were to be eliminated in the future, it is likely that many state bars would continue to offer voluntary CLE classes, and therefore there would still be some costs.
- 


II: MCLE Arrives on the Scene (cont.)

D: State Bar Overhead (cont.)

- Given the larger volume of personnel required for MCLE administration in some states (at least 12 in Colorado, 5 in Ohio, etc.), a savings of half a million dollars per year in these states may be possible.
 - In Connecticut, potential administration costs for MCLE were mentioned as a reason why the state chose not to adopt it, but there has been a proposal that new attorneys take place in a “boot camp” type program.
- 

III: Legal Challenges to MCLE

A: Exemption of Judges, Law Professors, and Others

- *Warden v. State Bar of California*
 - An attorney sued the state bar for placing him on inactive status for failing to meet MCLE requirements.
 - One of the plaintiff's main arguments was that MCLE excluded a whole host of attorneys from coverage, including retired judges, full-time law professors, officers, and elected officials.
 - Warden initially won a summary judgement that suspended MCLE rules statewide.
 - The court ultimately ruled in favor of the California state bar. The judge questioned the exceptions, but determined they did not violate California's constitution.
 - This highlights the hypocrisy of MCLE's structure.
- 

III: Legal Challenges to MCLE (cont.)

A: Exemption of Judges, Law Professors, and Others (cont.)

- Texas Exemptions

- Texas exempts full-time attorneys working for the state legislature, and some other administrative positions. Clearly if MCLE is so important to competence and ethical behavior, it makes little sense to exempt such high-profile and important positions.
- Recently, Texas' state bar removed its existing exemption for lawyers over the age of 70. Assuming the average attorney graduated law school at age 26, these attorneys would have been practicing law for over 40 years by the time they reached the age of 70.
- The idea behind removing the exemption must be that such attorneys really need 15 hours of law classes per year to be good attorneys. This assumption demonstrates bluntly vapid thinking.

III: Legal Challenges to MCLE (cont.)

B: MCLE and Residency Requirements

- *Tolchin v. Supreme Court*

- The New Jersey state bar required that all new attorneys attend a 40-hour, in-person course offered in New Jersey, and that all attorneys practicing in New Jersey maintain a New Jersey office.
- Tolchin, a New York resident who passed and was sworn in to the New Jersey bar, challenged these requirements under the Commerce Clause and the Equal Protection Clause of the 14th Amendment of the U.S. Constitution.
- Tolchin argued that the requirements were excessive in light of the burden on interstate commerce, and thus his constitutional protections had been violated.
- He lost at trial court on summary judgement. The district court held that, in light of the balancing test, the procedures of the state bar were facially neutral.

III: Legal Challenges to MCLE (cont.)


B: MCLE and Residency Requirements (cont.)

- *Tolchin v. Supreme Court* (cont.)
 - The U.S. Appeals court held that the test must be both facially neutral and create a neutral result, and that the Commerce Clause prohibits economic protectionism.
 - However, as both New Jersey attorneys as well as out of state attorneys must maintain an office in the state, the court ruled there is no preference shown to the in-state residents.
 - Although Tolchin argued that attendance at the required course served no valid educational function, the court ruled that he failed to raise a genuine issue of material fact as to whether the mandatory attendance requirement is rationally connected to its intended benefits. Therefore, it did not establish that it burdened interstate commerce.
 - Many states allow non-resident bar members to attend MCLE courses in other states, and give them reciprocal credit.

III: Legal Challenges to MCLE (cont.)

B: MCLE and Residency Requirements (cont.)

- Other Court Challenges

- In *Greenberg v. State Bar*, the Appeals Court rejected a First Amendment claim that MCLE subjected lawyers to compulsory government re-education programs and partisan political propaganda, ruling that the goal of MCLE was rationally related to consumer protection.
 - In *Warden v. State Bar*, attorneys challenged MCLE on equal protection grounds, claiming exemptions for retired judges, full time law professors, and elected officials were arbitrary and invalid. The Court found that the rational justification for these exemptions (that these classes of attorneys were less likely to represent clients) had a conceivable legislative purpose.
- 

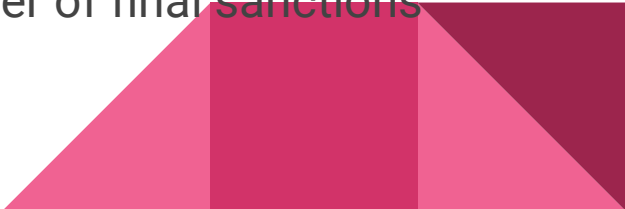
III: Legal Challenges to MCLE (cont.)

B: MCLE and Residency Requirements (cont.)

- Other Court Challenges (cont.)
 - According to Toni Massaro and Thomas O'Brien, "...the constitutional rights of professionals faced with increased regulation are very limited. Substantive due process and equal protection rights provide almost no protection against ill-conceived or economically inefficient regulations. Although procedural due process rights provide greater protection, significant procedural safeguards are triggered only when the continuing competency measure is subjective and focuses on an individual professional. Otherwise, procedural rights provide meager protection against unreasonable regulations."
 - Thus is it difficult for attorneys, or even other licensed professionals, to challenge state regulations such as MCLE.

IV: Indicators of Success or Failure of MCLE

A: MCLE Does Not Reduce Lawyer Discipline

- One could anticipate that attorneys who participate in MCLE courses would be subject to less discipline. Although there is no central index for attorney discipline, the available data suggests that MCLE has had no impact on the number of attorneys who have been disciplined by their respective state bars.
 - Texas had, in 2002, roughly 75,000 active lawyers and a state bar budget for attorney discipline of \$6.5 million. By 2009 it had roughly 86,000 active lawyers and a budget of \$7.4 million. The total number of final sanctions against lawyers remained constant in that time.
- 

IV: Indicators of Success or Failure . . . (cont.)

A: MCLE Does Not Reduce Lawyer Discipline (cont.)

Table 1: Mandatory CLE States								
Percentage of Complaints per Licensed Attorney								
State:	1998	2006	2014		State:	1998	2006	2014
AL	13.6%	9.7%	8.3%		DE	20.1%	13.32%	4.4%
AK	10.7%	6.6%	8%		FL	16%	12.5%	11.4%
AZ	22.2%	14.7%	19.6%		GA	8.4%	9%	5.1%
CA	6%	9.8%	-		HI	16.1%	11.5%	6.6%
CO	8.2%	20.92%	13.7%		ID	15.4%	11.7%	7.2%

IV: Indicators of Success or Failure . . . (cont.)

A: MCLE Does Not Reduce Lawyer Discipline (cont.)

IL	8.4%	7.1%	7.3%		MN	6%	4.8%	5%
IN	11.4%	9.6%	9.1%		MS	5.9%	4.6%	5.6%
IA	8.2%	11.1%	7.8%		MO	7.3%	8.3%	6.3%
KS	78.5%	9.2%	-		NV	29.2%	19.9%	139.6%
KY	4.5%	8.5%	5.9%		NH	10.1%	-	3.7%
LA	17.2%	13.1%	9.7%		NJ	10.8%	9.2%	4.8%
ME	5%	7.2%	5.6%		NM	22.3%	8.5%	10.1%

IV: Indicators of Success or Failure . . . (cont.)

A: MCLE Does Not Reduce Lawyer Discipline (cont.)

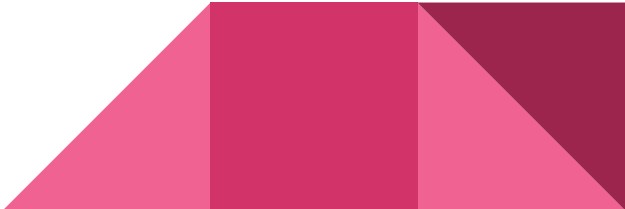
Table 1: Mandatory CLE States (cont.)

NY	16.1%	10%	6.3%		RI	11.1%	8.5%	7%
NC	11%	7.2%	4.5%		SC	13.1%	-	16.9%
ND	11%	10.3%	-		TN	14.2%	6.8%	5.9%
OH	20.9%	12.9%	-		TX	13.3%	9.37%	7.8%
OK	11.1%	3%	7.5%		VT	11.8%	13.8%	9%
OR	12.1%	17.1%	13%		VA	13.4%	17.1%	11.5%
PA	9.1%	8.1%	6.5%		WA	15.2%	9.8%	7.9%

IV: Indicators of Success or Failure . . . (cont.)

A: MCLE Does Not Reduce Lawyer Discipline (cont.)

WI	7.1%	9.3%	10.1%		WY	18.4%	5.7%	7.3%
1998 Avg:	14.3%	2006 Avg:	10.3%	2014 Avg:	11.8%			



IV: Indicators of Success or Failure . . . (cont.)

A: MCLE Does Not Reduce Lawyer Discipline (cont.)

Table 2: Non-Mandatory CLE States								
Percentage of Complaints per Licensed Attorney								
State:	1998	2006	2014		State:	1998	2006	2014
CT	4.07%	3.4%	-		MI	12.18%	9.41%	6.3%
DC	3.62%	2.2%	1.4%		NE	8.79%	8.79%	5.8%
MD	7.08%	5.7%	5.5%		SD	-	5.3%	3%
MA	5.72%	2%	1.4%					
1998 Avg:		6.91%	2006 Avg:		5.3%	2014 Avg:		3.81%

IV: Indicators of Success or Failure . . . (cont.)

A: MCLE Does Not Reduce Lawyer Discipline (cont.)

- Examining the data by comparing states with MCLE and states that do not require MCLE, the states that do not require MCLE actually have on average a lower incidence per 1,000 lawyers of disciplinary cases.
- In fact, the data show that in each of the sampled years, 1998, 2006 and 2014, the states where CLE is not mandatory had a lower rate of attorney complaints.



IV: Indicators of Success or Failure . . . (cont.)

B: MCLE Does Not Reduce Legal Malpractice Suits

- There is no comprehensive, national index showing legal malpractice claims by state and over time, but there is significant anecdotal evidence that MCLE has no impact on reducing malpractice claims.
- Anecdotal Evidence:
 - A recent study by a committee of the State Bar of Texas concluded that MCLE does not improve legal services, nor does it reduce malpractice claims.
 - An earlier study focussing on attorneys in Florida concluded that legal malpractice is rampant and cannot be ignored, in spite of the American Bar Association's (ABA's) insistence to the contrary.

IV: Indicators of Success or Failure . . . (cont.)

B: MCLE Does Not Reduce Legal Malpractice Suits (cont.)

- Anecdotal Evidence (cont.):
 - The ABA's "Profile of Legal Malpractice Claims: 2008-2011" shows an increased number of claims reported since the 2007 and 2003 editions. This seems to indicate an increase in malpractice activity given that the increase in the number of reported cases far exceeds the increase in the number of licensed attorneys during the same time period.
 - Kritzer and Vidmar noted that the majority of legal malpractice claims are due to issues like "bad clients" and other non-fault issues as opposed to incompetent legal work. No amount of MCLE will fix such non-fault issues. The article compares median and mean amounts paid for Florida malpractice claims between 1981 and 2014. The significantly upward sloping trend for both the median and the mean do not show any positive impact from Florida's adoption of MCLE in 1988.

IV: Indicators of Success or Failure . . . (cont.)


B: MCLE Does Not Reduce Legal Malpractice Suits (cont.)

- Anecdotal Evidence (cont.):
 - In their annual reports on trends in legal malpractice claims, Ames and Gough indicated a sharp uptick in claims volume and cost of claims following the economic crash of 2008. While the volume has since moderated, the cost has continued to increase sharply. Attorney incompetence was not cited as a significant concern; the key risk was "conflict of interest" claims.



IV: Indicators of Success or Failure . . . (cont.)

C: MCLE Does Not Improve the Public Perception of Attorneys

- According to the annual Gallup Poll of Honesty and Ethics in the Professions, in 1976 attorneys were rated very high or high by only 25% of the survey respondents.
 - In 2015, attorneys were rated very high or high by only 21% of survey respondents.
 - The fact that the number is little changed, or even slightly more negative, underscores that if MCLE was designed to improve the image of attorneys with the public, this objective has not been met.
- 

V: MCLE Today

The Changing Legal Marketplace:

- Making CLE mandatory has not met a single goal when measured by the available objective metrics for the 20th century legal profession. It is very unlikely that the existing MCLE structure will meet the increasing demands of the 21st century legal profession.
- Although many authors credit the Great Recession with causing or expediting changes in the legal profession, major changes were already being discussed prior to this event.



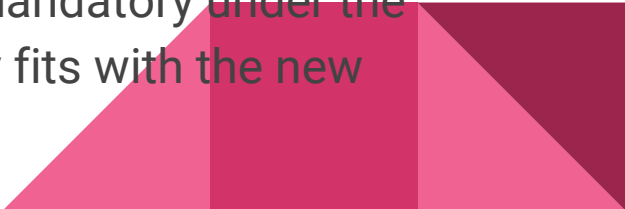
V: MCLE Today (cont.)

The Changing Legal Marketplace (cont.):

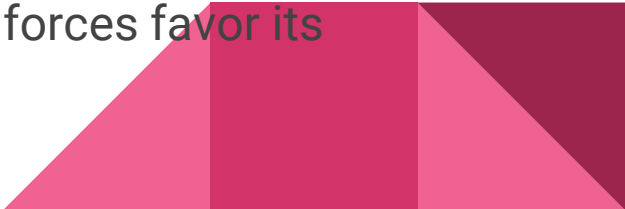
- In 2006, Quintin Johnstone suggested some underlying causes of changes in the U.S. legal profession:
 - Recent changes in consumer demand for legal services
 - Increased need for interstate legal services for individuals and businesses
 - Difficulty getting help in rural areas, or for the impoverished, despite more law graduates than the legal marketplace can absorb
 - The increase in number of lawyers and non-lawyer legal service providers (such as document preparation firms, accounting firms, real estate practitioners, banks, and tax preparation firms), which has led to increased competition among lawyers, and between lawyers and non-lawyers
 - Recent changes in regulation of legal service providers

V: MCLE Today (cont.)

The Changing Legal Marketplace (cont.):

- These changes in the legal profession have accelerated following the 2008 economic crisis.
 - Adapting to the 21st century realities, attorneys and law firms will need to work more efficiently and be more connected to their clients than ever before.
 - Obtaining the needed CLE to be responsive to client needs and thereby be competitive in an increasingly competitive legal services market will require greater flexibility. The need to make obtaining CLE mandatory under the arbitrary supervision of state bar associations hardly fits with the new realities.
- 

V: Conclusion and Plan for the Future

- As the reporting of the latest court decisions and statutory developments flows nearly instantaneously through the Internet, the need for formal CLE becomes less clear.
 - Law school education is criticized as disconnected from "real" law practice, and so the idea of requiring clerkships or "boot camps" may continue to be supported for new lawyers. The need for mandatory CLE, never supported by rational data, is even less supported in the modern era.
 - The persistence of MCLE in the face of both failed objectives and the changing law profession leads one to question what forces favor its continuation.
- 

V: Conclusion and Plan for the Future (cont.)

- Two forces appear to be working at preserving the status quo:
 - The various state bar associations may be concerned that if CLE is not mandatory attorneys will not flock to annual meetings and similar events. As such meetings often provide an economical way to network with other attorneys (an increasing need in an era of increased competition and specialization), it is likely attorneys will continue to attend. The programs and structure of such meetings should indeed change to meet the demands of a changing legal profession.
 - Independent providers of CLE courses would naturally be against returning CLE to a voluntary status. Increased numbers of CLE courses (many of questionable quality) have paralleled the move to mandatory MCLE. While a state bar may offer a year of MCLE for a few hundred dollars, private vendors sometimes offer as little as one hour for the same price. State bar associations can get past this obstacle by renewing their commitment to members and reducing the cost of maintaining a bar card.

V: Conclusion and Plan for the Future (cont.)

- In 1977, during the early days of the implementation of MCLE in the United States, US District Judge Marvin E. Frankel opined:
As to those who are not conscientious, nobody has adduced the slightest reason to believe that inadequate service by lawyers and judges would or will be improved by fifteen hours a year of presence at miscellaneous lectures of some sort or other. All agree that competent professionals don't need the compulsion; the thought that incompetents will benefit is so improbable on its face as to make the across-the-board command a fantastic species of overkill. To be sure, some will take courses they would not have taken, and some will learn something. The price, however, is unacceptable.
- Sadly, the admonition of Judge Frankel 40 years ago was not heeded, and he was all too correct in his prediction.