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Douglass G. Boshkoff
Indiana University Maurer School of Law

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Some Thoughts Concerning Mandatory Continuing Legal Education in Indiana

By
Douglass G. Boshkoff

This article is a statement of opinion of the author, Douglass G. Boshkoff, professor of law and former Dean of Indiana University-Bloomington. It is published herewith as an interesting and thought provoking statement by a law teaching professional on a highly controversial subject.

Both Minnesota and Iowa have, by rule of court, recently adopted programs of mandatory continuing legal education (MCLE). Wisconsin has adopted, in principle, the concept of MCLE. Interest has been expressed in considering some form of MCLE for Indiana. Speaking to the Bar of this State in the September, 1975 issue of Res Gestae, former President Gerald Ewbank offered this opinion:

The Indiana State Bar Association should seriously consider whether [MCLE] is necessary or desirable in Indiana. In Indiana, with our outstanding system of continuing legal education, within the past two years over three thousand of the 5700 lawyers licensed to practice have voluntarily participated in continuing legal education programs. Indiana lawyers are meeting their responsibilities in keeping up with the changing times and the changing legal atmosphere.

Conversely, however, we must recognize that the public generally does not appreciate the many hours that we, as lawyers, voluntarily devote to this continuing legal education. And we must also recognize that although more than 60% of the lawyers of Indiana participate in continuing legal education, there is still a great body of licensed practitioners who by reason of lack of desire, or lack of interest, do not participate.

All these developments suggest we may soon have the opportunity to comment on concrete proposals. While well aware that there may be gains to be realized by making CLE mandatory, I have some thoughts that I would like to share with readers of Res Gestae. Though expressed in a number of different ways, my concern is primarily that we will see MCLE as a quick solution to our problems and rush into it without making a meaningful commitment to a substantial program of quality legal education.

What is MCLE? States which adopt MCLE programs will require a lawyer to participate in a given number of hours of CLE in a stated period of time. The sanction for failure to participate in the program may, but need not, be suspension from practice. Not all lawyers need be subject to the requirement.

Support for MCLE can come from two groups in our profession. Many lawyers believe that we are not as accomplished in the professional arts as we should be and see MCLE as a way of attacking our deficiencies. This was President Ewbanks' message. Others may not be as concerned with improving professional skills as they are with deflecting pressures generated by groups outside the profession.

Lawyers in the former category perceive the achievement and maintenance of professional competence as a life-long process. Graduation from law school and passage of the bar examination is no guarantee of competence at the moment of initial entry into the profession, nor does it guarantee that skills possessed at that time will improve or even remain at the same level through life. We all know that many lawyers make continuing and vigorous efforts to keep up with the world while, unfortunately, others do not pay attention to the need for continued professional development. Those who hope that MCLE will cause the laggards in our profession to disappear may be too sanguine about the inspirational and curative powers of education. Still, we may expect from this group of attorneys vigorous and constructive participation in program design and implementation.

Other lawyers may only regard MCLE as a necessary evil. Not wholeheartedly committed to the improvement of the profession nor even convinced that any improvement is necessary, they can view the program as only a public relations venture. Such lawyers believe that the public is dissatisfied with the level of achievement of many attorneys and is pre-

Douglas D. Boshkoff, former dean of Indiana University School of Law, Bloomington, is now professor there. He received his A.B. and LL.B. degrees from Harvard University. Teaching Fellow at Harvard Law School, 1957-59, he was assistant professor at Wayne State University Law School, 1959-60. In 1960, Mr. Boshkoff became associate professor at Wayne State. He was visiting professor at Boston College Law School, 1966-67. He joined the Indiana University faculty in 1962 as visiting associate professor of law. In 1965, he became full-time law professor. In 1972, Mr. Boshkoff was named dean of the law school. He is taking a leave of absence to work on a book and has continued his teaching at the law school.

Notes:
1 p. 317.
2 Minnesota requires 45 classroom hours in three years while Iowa requires 15 hours per year and permits carryover of hours in excess of 15 for three years.
3 Both the Minnesota and Iowa plans authorize individual exceptions. Iowa also has an inactive status.
pared to do something about it if the profession does not act quickly. And it is true that consumers of legal services are unhappy and are making their displeasure known. We should all recognize that consumerism is a potent force in contemporary society and it is having an impact on the legal profession and on the systems for delivery of legal services to the public. There is nothing wrong with reacting to this reality. At the same time, we must be careful of our predominant motive as we seek to construct an MCLE program. If we move primarily in order to deflect pressures from outside the profession, and to insulate the legal profession from non-legal scrutiny, then I predict that mediocrity will be the result. The program constructed in this frame of mind will be a sham, a fraud on the public, and a waste of time for all attorneys who are forced to sit in the classroom, for a program rooted in expediency will be no program at all.

Some tough questions have to be faced in MCLE program design. Possibly the most difficult is the question of how to define successful completion of the required courses. Paul Wolkin has pointed out:

Few will dispute that mere attendance at continuing legal education courses will not necessarily enhance competence. Presence is not evidence of learning. Attendance may be passive or active. What is heard in the classroom, without advance preparation, classroom participation, review, and application, is unlikely to be retained. Under the proposed or adopted systems, the number of hours of attendance being prescribed is so minimal that it is difficult to perceive any long-lasting benefits related to enhancing competence. Two or three half-days of course attendance a year or at the end of a year meets the standards. The subject matter of a program may or may not bear any relation to the particular needs of the lawyer. There are no testing procedures for trying to determine how much has been acquired in the way of additional knowledge or techniques. Self-serving statements of attendance suffice as evidence of fulfillment of requirements.

His accurate characterization of the situation is disturbing. Lawyers would react violently and, to my way of thinking, with good cause if law schools suddenly decided to accept affidavits of attendance as the sole evidence of satisfactory course completion. Is there anything different in the MCLE situation? I think not. The case for MCLE rests on the assumption that lawyer training is, in some instances, inadequate. Let us assume that this is true. If we know that some lawyers are not competent, and if we propose MCLE as the way of remediating the perceived deficiency, how can we shy away from asking whether the course work has done the job? Remember that the lawyers most affected by the MCLE requirement will be those who have neither the inclination nor the interest to participate in our current voluntary CLE programs. How can we assume that the magic of an MCLE requirement has suddenly changed the intellectual aspirations of this group? We cannot. This means that we must establish some standard of competency which the instruction is supposed to insure and then test to see whether the standard has been met.

Failure to meet the established standard of competency need not necessarily involve immediate suspension of the right to practice law. The unsuccessful examinee might be permitted to retake the examination or might be permitted to take another course with a different subject matter. Another option would be to make all examination scores available to the public and let the consumer of legal services make the decision on lawyer competency. And these alternatives are only a few of the possibilities. No matter what is done, there is no way to get around the fact that some lawyers will not meet the performance standard. This is an unavoidable effect of MCLE. Remember that the reason for proposing MCLE was to deal with the problem of the substandard attorney. There has to be some way of identifying such a person and creating an incentive for this person to change its ways and upgrade its skills. This incentive need not be a desire to avoid the stigma of failure but it must be something. Affidavit completion is no incentive at all.

I am also concerned whether we will be able to secure an adequate definition of the goals of MCLE, always assuming that we wish to do more than merely deflect outside pressures. Two equally legitimate goals are upgrading the skills of every single practitioner in the state and bringing all practitioners up to a certain minimum performance standard. In either instance, are we going to recognize the de facto specialization of a large segment of the legal profession? No matter how goals are defined, we have some very difficult programming problems.

MCLE for all lawyers must either (1) permit lawyers to test out of the program by achieving a certain score on an examination administered to all practitioners, (2) offer low level and advanced courses in each subject matter area, (3) be pitched at a level which will be so low that it will bore persons with experience in a particular field, or (4) be offered on such a

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4 Witness the increased interest in prepaid legal service plans and the recent attacks on minimum fee schedules and restrictions on advertising.


6 Neglect and not acting with competence were seen as two major categories of attorney misconduct by grievants who filed complaints with the Disciplinary Commission during the twelve month period ending 9/30/75. See Indiana Supreme Court Disciplinary Commission Annual Report Rest Gestoee, December 1975, p. 459.

7 There are over 6300 lawyers now admitted to practice in Indiana. William Glynn, Director of ICLEF reports that approximately 4100 have attended ICLEF sessions during the past two years. Not a bad record, but where were the other 2200?

8 It would be unfair to suggest that every non-attender is a laggard. But I do think it fair to suggest that MCLE is mainly directed at the missing 2200.

9 For a review of incentives in other mandatory continuing professional education programs see Parker, Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence, 1974 Utah L. Rev. 463.

Mandatory Legal Education

continued

high level that the novice will be bewildered and fall by the wayside. We have had the problem of different learning levels in law school for a long time and have not been particularly successful in dealing with it. Some students, either because of experience or aptitude will be ready to start at a higher level or move more rapidly through the material. How are such divergent interests to be accommodated in an MCLE program? Alternative number 1 is the most efficient and low cost solution but it is not without its shortcomings, principally problems of status. Classes for slow readers and poor mathematicians are not popular in grades 1 through 12. The same status issues and tensions that one encounters in grade school will exist in MCLE if alternative 1 is adopted. Alternative 2 also raises some status questions and requires more teaching staff than alternative 1.

We can see the goals issues in a different context when we look at the relationship between specialization and MCLE. It is possible to design survey courses or narrow specialty offerings. Each will appeal to different groups of attorneys. Are we going to accept the judgment of each individual lawyer as to the subject matter area of course enrollment or are we going to have required courses in elementary or advanced subjects? A serious commitment to the improvement of professional competence calls for a resolution of this issue. How much improvement can we expect in the skills of the trial lawyer if it presents attendance at a two day estate planning seminar in satisfaction of the MCLE requirement? And of what use is a course in criminal procedure to a corporate specialist who has not seen the inside of the courtroom for many years?

John Wirt, director of Minnesota Continuing Legal Education reports on this matter as follows:

The Minnesota Rule requires no specific subjects in which courses must be taken. The matter was discussed, but the final conclusion was that individuals will normally enroll in subjects that have the greatest appeal and value to them, which, in most instances, will also be those areas of the law in which most of their practice occurs. There was also recognition of the fact that the varieties of practice are so great that it would be virtually impossible to identify a core of essentials that everyone ought to have.

As a battle-scarred veteran of the Rule 13 wars, I cannot refrain from pointing out that the course selection issue is present in the MCLE field. Reconciling the design of an MCLE curriculum with the right of practitioners to select courses without limitations may be impossible in Indiana.

An MCLE program will require far greater personnel resources than our current CLE program which is now staffed primarily by volunteer attorneys. Let us assume that each Indiana lawyer is required to attend 15 hours of classroom work per year. Let us further assume that the average class size is 100 persons so that 60 15-hour sessions will satisfy the demand of 6300 practitioners in any given year. Finally, assume that the teacher can teach a 3-hour segment. This will mean that 315 teachers (68 x 15/3) will have to be found each year among members of the practicing bar. Not every lawyer has the talent to teach in such a program, nor has every qualified lawyer the time to devote to a teaching obligation. If examinations are required, examination scores will become very important. It can be expected that attending lawyers will demand high quality instruction, worsening the teacher-selection problem, because students usually believe that good teachers can show students how to score well on examinations.

There are many ways to use teaching resources effectively. Videotape and cassette presentations come to mind. I am sure that faculty members at all 4 law schools in the State would be willing to help out. Credit can be given for work completed at CLE courses in other states. However, the point I am trying to make is that staffing, always a serious matter, becomes a crucial consideration when one moves from CLE to MCLE. If you are going to require completion of an educational program as a condition of continued eligibility for the practice of law then you must make sure that there are enough spaces in the program, at the right time, at the

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MARCH 1976
right place, for all participating lawyers. There can be no closing the
doors when all seats in the room are
taken. John Wirt's experience in Min-
nesota is again helpful in understand-
ing the problem:  

The most frequently and easily
overlooked problem associated with
compulsory CLE proposals is that
of the manufacture and delivery of
the product. It avails little to ab-
ruptly demand substantially more
of a delivery system than it was de-
signed to deliver. There is not one
state CLE organization in the coun-
try at the present time equipped,
staffed, or financed to cope
adequately with the increased demands
that would be placed on it by con-
verting from a voluntary to a com-
pulsory system. From Minnesota,
the first state to "go mandatory",
the effects have been, if predictable,
evertheless startling and over-
whelming. In the first four months
of the current academic-fiscal year
beginning July 1, 1975, course reg-
istrations are up 60 percent over
the same period last year. Several
courses have been filled to room
capacity weeks before presentation,
necessitating, where possible, a sec-
ond presentation. Where resched-
uling has not been possible, a justi-
fiable amount of irritation has built
up. Costs are also up significantly,
as is income, but office and storage
space and staffing have remained
virtually identical to what they were
a year ago. Even with this dramatic
increase, the Minnesota CLE pro-
gram will only be meeting 70 per-
cent of the mandated yearly re-
quirement, meaning that the local
organization will have to greatly in-
crease its delivery capability or, al-
ternatively, have its home state at-
torneys rely more and more on
imported programs from national
and regional CLE organizations.
There are two other alternatives:
first, due to the unavailability of the
service, local lawyers will be forced
to fulfill their requirements at
locations further from home at sub-
stantially increased cost; and sec-
ond, the proprietary CLE sponsor-
ing organizations will find a fertile

bed in which to flourish. Trends in
both of these directions are already
evident in Minnesota . . .

I am not now convinced that MCLE
is the best way, or even a practical
way, to up-grade professional skills.
Yet that is not the point I have been
trying to make in this article. I wish
to suggest here that MCLE, if it is to
have any chance of success, if it is not
to be a sham, will require commit-
ment and sacrifice on the part of all
practitioners to an extent that I be-
lieve is not fully appreciated by many.
It will not be easy to articulate edu-
cational goals and insist on the type
of a program that will give us a good
chance of reaching these goals. Com-
promise, window-dressing and com-
mitment to a minimal program will
be hard to avoid. Something signifi-
cant may be accomplished if these
temptations for mediocrity can be
resisted.

Even a good MCLE program can-
not bear the whole burden. It is sim-
ply too much to place the respon-
sibility for upgrading professional skills
on any one type of professional con-
trol. All segments of our legal society
must participate. Law schools and
bar examiners must re-examine the
roles that they are obligated to per-
form in determining initial eligibility
to practice law. MCLE is not going
to be effective if screening agencies
do not live up to their responsibilities.
Judges have a large role to play as
they insist on conformity to high pro-
fessional standards, as do all partici-
pants in the disciplinary process.
An effective program of peer control
means that we do not admit to the
profession those who are unqualified,
we take steps to encourage profes-
sional development through MCLE
and other devices and, when our efforts are
ineffectual, we withdraw the right to
practice law. There is thus clearly
the opportunity for all of us to par-
ticipate in many ways in the effort to
increase professional standards and
performance.

247 ALI-ABA CLE Review No. 2, p. 2. (Jan. 9,
1976).