

The MARYLAND LITIGATOR



MSBA LITIGATION SECTION

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MANDATORY CLE IN MARYLAND?

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*Butcher: "The first thing we do let's kill all the lawyers"
(King Henry VI, Part II) (Act IV, Scene 2).*

Why were those like Dick the Butcher, a follower of the anarchist Jack Cage, "head of an army of rebel and demagogue pandering to the ignorant," when seeking to overthrow the government, planning to strike first at the lawyers? Lawyers throughout history and today are the centrifugal force of a free society under the rule of law.

The legal profession has always been, for the most part, self-governing, particularly in this Country and in the State of Maryland. Self-governing or self-regulation has succeeded because the profession has imposed on itself the very highest standards. As leaders, lawyers impose these highest standards upon themselves, not for the purpose of maintaining self-regulation, which, no doubt, is coveted, but because we have professional responsibilities to our-

(continued on Page 11)

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A percentage of those who are opposed to the imposition of mandatory continuing legal education ("MCLE") have expressed philosophical objections to the concept and practical concerns regarding its imposition. Their philosophical objections are rooted in the belief that attorneys are professionals and are obligated to remain abreast of changes affecting each attorney's area of practice. Voluntary continuing legal education ("VCLE") provides an attorney with the flexibility to match his or her own knowledge deficit with a client need and a course that is being offered. Under the VCLE concept, flexibility is provided without the burden of meeting a time quota that may not be applicable in a given year or sequence of years. There is no evidence that the VCLE model has failed. In 1996-97, there were 26,278 attorneys admitted to practice in Maryland. The Attorney Grievance Commission (the AGC) received 1,523 complaints and of those complaints, 103 attorneys or .39% were disciplined. See AGC's 31st Annual Report, Exhibit A. In the year 2008-09, 1,532 complaints were received and 63 attorneys were disciplined, but the num-

(continued on Page 13)

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MAY 17 2010

MCLE - PRO...

(continued from page 1)

selves, our clients, the courts, and the community. Surely Shakespeare, through Jack the Butcher, knew that for rebellion to succeed, striking first at lawyers might bring down the rule of law and the free society so dependent on that rule.

A free society depends on its lawyers for protection. Lawyers are the palladium of liberty.

It is equally unhealthy for the profession, as it is for society, if the public loses confidence in the high quality of members of the legal profession. Lack of confidence erodes our ethos and our role as leaders. Thus the highest standards must be maintained and self-imposed. This has been so and should continue to be so.

To be professionals requires excellence in expertise and knowledge in order to foster trustworthiness and to enhance the role of the lawyer as a fiduciary - one who seeks to serve another, rather than him or herself. The foundation of excellent lawyering and serving the community rests upon continued education and intellectual growth for self-improvement, to better represent clients, and serve those who depend upon us. More so than ever before is the law growing at a dramatic pace.

A better-informed public poses ever more serious challenges to the historic workings of the law and the courts; even the sense that lawyering does not require any special training or knowledge appears to pervade the increase in self-representation. We, as lawyers, however, know that Rule changes and court opinions revise how complaints are to be crafted and new causes of action must be presented. New campaign finance laws, among other national, state and local legislation, creates more tension in the courts and between the various branches of government. Some would contend that defendants in criminal cases have expanded worries as public policy weighs heavier against them. Bankruptcy procedures in a fragile economy appear more complex than ever. There is always so much to learn and, for most, little time to devote to continuing education.

While the Maryland Bar has distinguished itself over many decades and continues to do so today, there is one blot on the record: the recalcitrance to support a mandatory policy of continuing legal education for lawyers. While forty-seven states and territories in the United States require lawyers to take CLE courses to continue in the practice of law, Maryland does not. In the past two years, Nebraska and New Jersey have adopted MCLE, demonstrating the trend in favor of mandatory education; in this regard, it is not the sheer

numbers that control, but the sense that lawyers must recapture the vision that the law must be studied in order to be effectively practiced.

The Maryland Bar is not only out of touch with most of the lawyers in the United States, it is also out of touch with public sentiment. As Daily Record editorial, dated January 10, 2010, in support of MCLE pointed out "... [a] Respected profession owes it to the citizens who place their faith in its professionals to assure that those professionals [are] fully credentialed in the first place and [continue] to educate themselves in their area of practice." Almost every other profession and occupation, including health care providers, accountants, and hair stylists, require continuing education. The recalcitrance of the Maryland bar to support MCLE is all the more perplexing considering that all judges in Maryland are mandated by order of Chief Judge Bell to take at least twelve hours of continuing education annually; ASTAR judges must complete at least 120 hours, in addition to an annual commitment of time.

Consider further that Rule 1.1 of the Maryland Rules of Professional Conduct requires lawyers to provide competent representation. Comment 6 to rule 1.1 provides, "[t]o maintain the requisite knowledge and skill a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements which the lawyer is subject."

The idea of MCLE is not new for the lawyers of Maryland. The MSBA recommended MCLE in 1995, but as recently as the Fall of 2009 took a different position after a survey of its members reflected that 70% of those responding voiced opposition to MCLE. The idea takes on fresh significance today, because the Professionalism Commission of the Court of Appeals of Maryland presented to the Court proposed rules for MCLE. Under the proposed rules active attorneys of the Maryland Bar would be required to complete only ten hours of MCLE annually. Exemptions are permitted. Although five of the ten required hours must be earned by attending accredited CLE courses, up to five of the ten required hours may be earned through the following means:

1. Participating in "in-house" seminars, courses, lectures, or other MCLE activity presented by law firms, governmental agencies, or similar entities;
2. Completing self-study courses involving the use of audio or video recordings or other technological means; or

(continued on Page 12)

MCLE - PRO...

(continued from page 11)

3. Other activities including: attendance at bar association, professional association, or inn of court meetings; non-paid scholarly writing and publication, teaching law school or MCLE; and similar activities. The complete proposed rules are posted on www.courts.state.md.us.

The basic reasons suggested for opposing MCLE and the responses can be summarized as follows:

■ *Lawyers have already completed law school and passed the Bar exam.* Lawyers, however, must continue to keep abreast of new developments as the Rules of Professional Conduct require.

■ *Lawyers attend CLE without being told.* Some do but many do not, as shown by a report of the Long-Range Planning Committee of the MSBA in which in survey results, lawyers reported taking more CLE because they were mandated by other States.

■ *Requiring MCLE is just another regulation in an over-regulated environment.* The amount of regulation in Maryland for lawyers may, in fact, be less than for cosmologists and certainly less than for doctors.

■ *The requirement is economically burdensome and consumes too much time.* Not so. With modern technology, attorneys can easily access teleconferences, web casts and pod casts at less cost than more traditional programs. The proposed rules include a hardship exemption for attorneys who demonstrate that completing MCLE would be unduly burdensome. Providing CLE through the various Bar associations would make those collegial groups more relevant with their members and mitigate the price, especially now, after the demise of MICPEL.

◆ For example, in the State of Kansas, an attorney may complete his or entire MCLE obligation by attending a one and a half day program conducted by the University of Missouri-Kansas City School of Law. The cost of this program is \$245. According to an administrator of the program, the course has caught on with Kansas lawyers, to the point that the University now provides more MCLE credits to Kansas attorneys than any other organization save the Kansas Bar Association, according to one of the University's CLE administrators.

◆ On the other hand, in the State of Illinois, an attorney can fulfill his or her MCLE obligations by attending free CLE courses. The Minimum Continuing Legal Education Board of Illinois maintains on its website a list of over 50 providers of free and low cost (\$20 per hour or less) CLE programs. No cost CLE providers include the Clerk of the Circuit Court of Cook County, the

Intellectual Property Colloquium, ADR Systems of America, LLC, the Illinois Lawyers' Assistance Program, and the Attorney Registration & Disciplinary Commission ("ARDC"). The ARDC held over 130 speeches and CLE events in 2007, and now offers CLE web casts on its website. Members of the Chicago Bar Association ("CBA") can subscribe to a "CLE Advantage" program, which, for \$125 per year, allows members to attend an unlimited

number of classes and seminars. According to the CBA's chair for CLE programs, the CBA had a substantial increase in membership, and in CLE attendance, after the CLE Advantage program was adopted.¹

■ *There is no evidence that MCLE improves the quality of attorney performance.* The short answer is that there is no evidence that MCLE does not improve lawyer competence. Common sense dictates that professionals who participate in CLE will learn and direct their learning to develop their character and expertise as lawyers.

■ *You cannot force someone to learn.* While that may be true, there are many lawyers who want to learn, but need the incentive that MCLE offers to continue learning and to understand that the Court of Appeals truly values lawyer competence.

Maryland lawyers should support the proposed rule, which imposes minimum burdens. The proposed MCLE rule requires fewer hours than every other jurisdiction. For example, Minnesota and Colorado, along with other states, require attorneys to complete forty-five hours of MCLE every three years. Missouri and Texas, among other jurisdictions, require 15 hours of MCLE per year.

(continued on Page 22)

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MCLE - CON...

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ber of active attorneys in Maryland increased to 34,569 making the percentage of attorneys disciplined .18%. See AGC's 34th Annual Report, Exhibit A. During that same thirteen year period the highest number of complaints received by the AGC was 1,844 in 2005-06 and the lowest was 1,319 in 1998-99. These statistics do not indicate a lack of professionalism throughout the Bar as a whole.

It is true that not all attorneys who demonstrate a lack of professionalism are going to have a complaint against them registered with the AGC, but the AGC's database should provide the Commission on Professionalism (the Commission) with the information necessary to identify "at risk" populations within the Bar. Once the at risk populations are identified, a way to assist those populations could be implemented. If it is determined that MCLE is the best means of assisting those populations, a program could be tailored to their needs. For example, it is logical to assume that inexperienced attorneys are more likely to be at risk. If so, design a program that requires newly admitted attorneys to attend MCLE for the first five years they are practicing on a decreasing time scale (the time requirement becomes less each year). In the best case scenario, these types of programs would improve professionalism in the most at risk populations. In the worst case scenario, the statistics generated by these types of programs would give the Commission a better understanding of whether there is a need for MCLE and if so, how to implement it.

In the Commission's responses to the Frequently Asked Questions section of its webpage, it states that it is virtually impossible to obtain empirical evidence of whether MCLE is effective. Why is it not possible to obtain pre-MCLE and post-MCLE disciplinary statistics from jurisdictions which have implemented MCLE? If MCLE actually improves professionalism, one would assume that these statistics would demonstrate a decrease in complaints and a decrease in attorneys being disciplined.

MCLE, in its current proposed form, contains a set time requirement that does not vary based on an attorney's experience. It makes little sense to impose the same MCLE requirement on an attorney who has been practicing for thirty years as that which is imposed on an attorney who has been

practicing for three years. Most attorneys narrow their area of practice as their careers progress. As an attorney's area of practice narrows, his knowledge in that area increases. At a certain point, the attorney knows most of what there is to know in that area and, more importantly, knows where to find something very quickly if he or she is unsure. Once that tipping point is reached, a MCLE time quota is meaningless. In most cases, the attorney who has been practicing for thirty years is as knowledgeable as the instructor. In many cases,

he or she may know more than the instructor. Unlike other professions in which change takes place, seemingly, at glacial speed, the law changes at glacial speed and is inherently self-educating. An attorney who has reached that tipping point may only need to attend a class when there is a significant change to the law in his or her area of practice.

IT MAKES LITTLE SENSE

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There are practical problems a MCLE program would have to overcome. If past practices are continued, MCLE will place a more onerous burden on attorneys outside the Baltimore-Washington D.C. corridor. In the past, almost all VCLE courses were offered in that corridor. There is a significant travel requirement for attorneys who wish to attend a class and who live on the Eastern Shore, in Western Maryland or in Southern Maryland. For example, a lawyer living in Salisbury who attends a MCLE program in Baltimore will have to travel five hours to do so. Assuming that same lawyer attends two five hour programs a year in Baltimore to satisfy his MCLE requirement, he will lose ten hours to travel. If the lawyer's hourly rate is \$200 per hour, he will lose \$2000 to travel. He will also incur travel expenses in excess of \$250. Over the course of a forty year career, at present value, this amounts to at least \$80,000 lost in travel time and at least \$10,000 lost in travel expenses. MCLE will not place the same financial burden on attorneys who live in the vicinity of the Baltimore-Washington D.C. corridor. If MCLE is going to be imposed, this is an inequity that must be addressed.

The Commission disputes this point and offers "distance learning" as the solution. In general, distance learning is not the panacea that many believe it to be and professional educators sharply disagree about its merits. That aside, attorneys who engage in distance learning will suffer from office or home

(continued on Page 14)

MCLE - CON...

(continued from page 13)

distractions that will undermine any perceived advantage. It is not difficult to imagine an associate's distance learning being interrupted by a partner who needs something done immediately or a child or spouse interrupting an attorney engaged in class at home. This is not the case for those who are out of the office, away from home and in the classroom. They will be able to focus their complete attention on the course they are taking. For those reasons alone, distance learning is not equal to learning in a classroom setting. Attorneys outside the Baltimore-D.C. corridor should have access to the same quality of CLE as attorneys in that corridor without having to bear a more onerous burden to obtain it.

Another area of concern for some is the exemption of judges from the MCLE requirement that is imposed on attorneys. Requiring judges to participate in MCLE with attorneys will help facilitate judicial efficiency. If judges and attorneys receive the same information, justice would be administered more efficiently because each will know what the other is thinking, the problems confronted by each and communication between the two would improve. Perhaps most importantly, judicial presence in the classroom will serve as a form of quality control. If a class is not properly prepared, a complaint from a judge to the Commission is more likely to carry weight than a complaint from someone three years out of law school (who is not likely to complain anyway out of fear of offending the wrong person). There is also a perception that the Court of Appeals would be more receptive to modifying a MCLE requirement if judges find the courses unsatisfactory or the time requirement excessive.

The goal of improving the quality of legal representation we provide to our respective clients is a worthy one and one all lawyers should share. We owe it to our profession and our communities to ensure that our efforts are focused on realistically achieving that end.

