

# Continuing Legal Education Needs a Rework

BY THE HONORABLE RICHARD DIETZ

**A**s an appellate judge, I'm exempt from the State Bar's continuing legal education requirements. So I'll be honest—I haven't been paying much attention to CLE. But late last year, appellate lawyers started telling me that their usual CLE programs were postponed or cancelled because of the pandemic and they didn't know where to get their hours. With the generous help of my colleagues on the court of appeals, we threw together a six-hour free CLE course and put it on the court website.



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It wasn't a flashy program because we didn't have much time. We spent a few late nights cranking out PowerPoint slides and then recorded it on our webcams. I wasn't sure how the program would be received, but it proved popular. More than 1,000 lawyers participated. But when I started getting feedback on the program, I saw a troubling pattern. The participants were largely a collection of lawyers in rural areas, public and non-profit attorneys, and minorities in the profession. And they all told me the same story. It wasn't just the pandemic, they always struggled to find affordable CLE.

My experience exposed an unfortunate truth about our state's continuing legal education system: it's not working. CLE providers have become predatory; the system itself has become discriminatory; and our failure to address these issues is undermining core values of our profession.

Your initial reaction to this might be skepticism—after all, if this were true, surely someone would have done something about it by now. But there are many interest groups that profit (often literally) from the current system and don't want it to change. We need to acknowledge that there are better, less harmful ways to educate lawyers.

Let me start at the beginning. Why do we

have continuing legal education? Mandatory CLE was born a half-century ago, amidst concern in legal communities nationwide that "the rising number of new attorneys had led to a decrease in the quality of lawyering."<sup>1</sup> A speech by Chief Justice Warren Burger, later published in the *Fordham Law Review*, often is credited as a key catalyst for mandatory CLE initiatives.<sup>2</sup> Chief Justice Burger believed newly practicing attorneys lacked essential legal skills, especially courtroom skills, and that one solution was post-law school training "under the tutelage of experts, not by trial and error at clients' expense."<sup>3</sup>

The early proponents of mandatory CLE

had good intentions. They viewed the continuing education of practicing attorneys as a shared responsibility of law schools, the bar, and the judiciary.<sup>4</sup> They imagined CLE as a collaborative process where the insights of more experienced attorneys freely could be shared for the betterment of the profession.

In North Carolina, that vision is not reality. CLE isn't collaborative, it isn't freely shared, and it certainly isn't free. Many (purportedly) nonprofit CLE providers aggressively push their own paid CLE offerings and refuse to promote other opportunities. Meanwhile, lawyers are flooded with advertisements from for-profit companies scrambling to offer the cheapest, simplest way to pick up those mandatory hours.

To make matters worse, the CLE system puts an arbitrary one-year expiration date on CLE. So, for example, a free video CLE on the art of cross-examination from a legendary trial lawyer—with practice tips that are effectively timeless—needs reapproval every year. That takes time and effort. The system inadvertently rewards sophisticated providers who treat CLE like a business, and hinders those who would offer it solely as a public service.

So what's going on here? The truth is that CLE is no longer about helping the profession or improving the competence of lawyers. Today, CLE is all about making money. Every year the mandatory CLE for our state's lawyers raises somewhere between 10 and 20 million dollars in revenue for various businesses and organizations.<sup>5</sup> On top of that, the State Bar charges a fee for every CLE hour to fund various legal initiatives. That fee is either paid directly by lawyers or passed on to them in CLE pricing, making it, in effect, a second million dollar licensing tax on the profession.

Of course, if CLE actually worked—that is, if it made lawyers more competent—perhaps we could justify the costs, the resources, even the bad incentives. But CLE doesn't work. For years, neutral academics and empiricists (meaning those not working at the behest of CLE proponents) have tried to find evidence that CLE makes lawyers more competent, lowers malpractice premiums, or leads to fewer disciplinary cases. The data simply don't support these claims.<sup>6</sup>

This shouldn't surprise you. Remember those concerns from a half-century ago about a surge of newly practicing attorneys lacking essential skills? Those concerns seem rather antiquated today, when law schools are

falling over themselves to emphasize practical skills, offer for-credit externships or residencies, and create legal clinics for every conceivable practice area. And what about lawyers who, despite graduating from law school, passing a complicated licensing exam, and then gaining experience on the job, still need training in basic competencies? They are unlikely to enroll in the sort of sophisticated, engaging CLE offerings that would fix the problem—the sort of CLE that the original architects of the system envisioned. After all, those CLEs tend to cost hundreds—sometimes thousands—of dollars. Instead, it is reasonable to expect these lawyers (like so many others) to search out the cheapest, most convenient options to hit their required hours and move on.

Worse yet, the transformation of CLE into a money-making enterprise has made the system unfair and discriminatory. CLE favors wealthy, white urban elites. Many large law firms, for example, contract with CLE providers so that their attorneys can get their CLE through presentations at the office without paying anything out of pocket. Indeed, big firms often view CLE as a business tool, hosting free CLE events at hotels or country clubs advertised primarily to in-house counsel of the firm's current and potential clients.

By contrast, solo practitioners, lawyers at smaller firms and organizations, and many public sector lawyers pay for CLE themselves. Particularly for newer attorneys still building their practice, quality CLE is a financial hardship. And because a disproportionate number of lawyers in these practice settings are minorities,<sup>7</sup> these financial burdens hurt minority lawyers more than their white counterparts.

CLE also favors well-connected urban lawyers. There are far more CLE offerings, in far more subject matter areas, in our state's urban regions. For many lawyers, it isn't feasible to spend an entire day traveling to and from Raleigh or Charlotte for a one-hour lunch CLE. The State Bar recently lifted its long-time cap on the number of CLE hours that can be done online, but it's not clear how many providers will move their programs online. After all, these programs often are part of a larger event or conference that require in-person attendees to be profitable.

The State Bar also gives CLE presenters up to six hours of CLE credit for every one hour they teach. Hitting the required CLE hours becomes trivial for influential urban

## CLE Board Conducting Rules Review

The North Carolina Board of Continuing Legal Education recently began a comprehensive review of its rules and regulations with the goal of making the CLE process more user-friendly and efficient for North Carolina lawyers and for the administration of the program. Rules under review include the length of the CLE reporting period, credit-hour fees, the annual report filing requirement, and many others. The board will conduct its review over the next few months and any recommended changes will be proposed through the State Bar's standard rulemaking process. Any proposed rule changes will be communicated to members well in advance of any rules going into effect. Livestreams of CLE Board meetings are available on the State Bar's YouTube channel, [youtube.com/northcarolinastatebar](https://youtube.com/northcarolinastatebar).

lawyers who can teach a CLE session at a conference, stay for the other sessions, and finish their entire yearly CLE in a day. Lawyers without this sort of access are left scrambling to find options as the CLE year draws to a close. Providers prey on these unfortunate lawyers by offering convenient "catch-up" programs in January and February—for a price.

So what can we, as a profession, do to fix these problems? I have some ideas. And the good news is I'm not alone. In preparing this article, I spoke to the State Bar's CLE director and was impressed with the Bar's commitment to improving the CLE system. The bad news is, there will be opposition to change. After all, anything that makes CLE less costly and more accessible will mean millions of dollars in lost profit for providers.

Ultimately, I believe the CLE system needs radical reform. But for now, there are some straightforward changes that can address the biggest issues. Here are a few proposals.

First, we need to upgrade the State Bar's CLE website to improve its search functionality. The current website is clunky and

doesn't let attorneys filter CLE offerings by price. We need to make it easy for lawyers to search for free or low-cost CLE options, especially the online options, directly on the CLE website.

Second, we need to extend the arbitrary expiration dates on CLE. Online CLE like the one I mentioned earlier on the art of cross-examination, with advice that is effectively timeless, should be approved for five or ten years at a time, on the condition that the creator notify the Bar if the law changes and the program needs to be updated or removed. We need to create a lasting library of quality, accessible CLE and stop rewarding the providers who profit off our need to churn out more CLE every year.

Finally, we need to follow the lead of other states and start counting some *pro bono* time as CLE. In private practice, I spent hundreds of hours every year on *pro bono* work. The practical training and experience I gained from every single hour spent on my

*pro bono* cases was worth more than any CLE I've ever taken. I doubt my situation is unique. Many lawyers will get far more training out of *pro bono* work than they ever could sitting through a CLE lecture.

Some states have started to count time spent on *pro bono* as an alternative to traditional CLE. This solves many of the costs, access, and fairness issues with CLE and, at the same time, helps address unmet legal needs. This alternative to traditional CLE is nothing but upside and we should embrace it.

I've offered a few ideas to fix our CLE system, but there are surely many others. We need to come together to talk about them. Our state's continuing legal education system isn't fair, and it isn't working as intended. As a self-governing profession, we owe it to ourselves and to the public to confront these realities and find solutions. ■

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## Endnotes

1. Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 La. L. Rev. 547, 550 (2018).
2. Cheri A. Harris, *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 Val. U. L. Rev. 359, 361 (2006).
3. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 230 (1973).
4. William R. Rakes, *Conclaves on Legal Education: Catalyst for Improvement of the Profession*, 72 Notre Dame L. Rev. 1119, 1120 (1997).
5. See Claudine V. Pease-Wingenter, *Halting the Profession's Female Brain Drain While Increasing the Provision of Legal Services to the Poor: A Proposal to Revamp and Expand Emeritus Attorney Programs*, 37 Okla. City U. L. Rev. 433, 459 (2012) (calculating average mandatory CLE costs as \$30-\$50 per credit hour).
6. Sirota, *supra* note 1, at 554; Donald S. Murphy & Thomas Schwen, *The Future: Transitioning from Training Lawyers to Improving Their Performance*, 40 Val. U. L. Rev. 521 (2006).
7. American Bar Association, *2020 ABA Profile of the Legal Profession*, at 43.

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## State Bar Outlook (cont.)

lawyers do not know that they need. Cheyenne Chambers has shared her perspective on the need for this training in her article, "Actions Speak Louder than Apologies" on page 14 of this edition of the *Journal*.

The third item of MCLE interest is the publication for comment, in the "Rule Amendments" section of a proposed new comment to Rule of Professional Conduct 1.1 on the duty of competency. The comment observes that competency "includes a lawyer's awareness of implicit bias and cultural differences...that might affect the lawyer's

representation of the client." Although an echo of the new MCLE requirement that awaits approval by the Supreme Court, the proposal to add this comment to Rule 1.1 derived separately, if simultaneously, from the deliberations of the Ethics Committee. The confluence of these two initiatives is indicative of their importance for our profession at this moment in time.

Here are three opportunities for the members of the Bar to voice their opinions and to offer creative solutions. By doing so, you will participate not only in shaping the educational requirements to practice law in North Carolina, you will also participate in shaping the message to the public those requirements convey about our values as a profession. So, send your comments and recommendations to me or Peter Bolac, State Bar assistant director and director of CLE (amine@ncbar.gov; pbolac@ncbar.gov); comments on Rule 1.1 may also be sent to ethicscomments@ncbar.gov. Any comments we receive on the proposed new MCLE requirement will be shared with the members of the Supreme Court. ■

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