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The Scope of the Issue: Defining Continuing Legal Education

THE "L" IN "CLE" STANDS FOR "LEGAL"

Randall T. Shepard*

Abraham Lincoln once wrote that "'the best mode of obtaining a thorough knowledge of the law' . . . is very simple, though laborious, and tedious. It is only to get the books, read, and study them carefully Work, work, work, is the main thing."¹ Reading Lincoln's advice conjures a certain nostalgia for a simpler time in the law, when simply reading could provide sufficient knowledge of the law to practice competently. Today's world is otherwise. The expansion of statutory law, mountains of regulations, and the ever present specter of malpractice liability demand that we lawyers do something more. The nature of modern legal practice and our professional responsibilities demand that we take affirmative steps to keep ourselves abreast of the constant changes in the law.

To help in that process, most states have adopted some form of mandatory continuing legal education ("MCLE").² Because these requirements are so pervasive, they provoke a good deal of critique.³ This critique typically labels continuing legal education ("CLE") offerings as unnecessary, inconvenient, or possessing limited value to the

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¹ Abraham Lincoln, *Letter to John M. Brockman*, in COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., 1953), reprinted in OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 283 (Fred R. Shapiro ed., Oxford Univ. Press 1993).

² Forty states require participation in MCLE programs. See ABA Center for Continuing Legal Education, Summary of MCLE State Requirements, <http://www.abanet.org/cle/mcleview.html> (last visited Nov. 30, 2005).

³ Interestingly, those voicing criticism of MCLE continue to advance the same arguments that were made when MCLE was first advocated. Ralph G. Wellington, *MCLE: Does It Go Far Enough and What Are the Alternatives?*, in CLE AND THE LAWYER'S RESPONSIBILITIES IN AN EVOLVING PROFESSION: THE REPORT ON THE ARDEN HOUSE III CONFERENCE, NOVEMBER 13TH TO 16TH, 1987 359 (ALI-ABA 1988) [hereinafter CLE AND THE LAWYER'S RESPONSIBILITIES]. For a brief comparison of the historical continuity of arguments against MCLE, consider Jack Joseph, *Mandatory Continuing Legal Education—An Opponent's View*, 75 ILL. B.J. 256 (1987); James C. Mitchell, *Colossal Cave-In: Why Reform of MCLE was DOA*, ARIZ. ATT'Y, Feb. 2001, at 36 [hereinafter Mitchell, *MCLE was DOA*]; James C. Mitchell, *MCLE: The Joke's On Us*, ARIZ. ATT'Y, Aug.-Sept. 1999, at 27 [hereinafter Mitchell, *MCLE: The Joke's On Us*]; David A. Thomas, *Why Mandatory CLE Is a Mistake*, UTAH B. J., Jan. 1993, at 14.

majority of attorneys.⁴ Critics suggest that programs either fail to meet the demands of participating lawyers or fail to address what the critics view as “real” problems within the profession. In short, mandatory CLE is attacked as mere window dressing, designed only to give the external appearance of genuine concern for the quality of legal services.⁵

Some of this criticism might be muted if credits could be earned in classes that emphasize issues outside of the representation of clients. Indeed, the myriad of problems facing the profession, such as career dissatisfaction, incivility between members of the bar, and a work-life balance dangerously out of proportion, suggest that a plausible case exists for crediting courses that help individual lawyers address these conflicts. The case is so strong that several states have adopted CLE rules that permit, and in some cases require, participation in classes addressing non-legal subject matter to count for CLE credit.⁶

Other states, including Indiana, have remained committed to mandatory educational programs for lawyers that focus solely on the “legal” component of mandatory CLE. I write here to make the case for adhering to the notion that the “L” is for “Legal,” putting the matter in terms stronger than I actually believe, in order to sharpen the boundaries of the debate. It is useful to consider the history and theory of continuing legal education in this country in order to develop a better understanding of the necessity, goals, and limitations of mandatory CLE.

I. WHY WE DEVELOPED CLE IN THE FIRST PLACE

The history of continuing legal education in America can be legitimately traced back to the nineteenth century, but the idea in its modern form emerged following World War II.⁷ During these years, CLE programs gained unprecedented importance as thousands of

⁴ See Mitchell, *MCLE was DOA*, *supra* note 3; Mitchell, *MCLE: The Joke's On Us*, *supra* note 3.

⁵ See Mitchell, *MCLE was DOA*, *supra* note 3 (citing criticisms of MCLE received from other attorneys).

⁶ See *infra* note 31 and accompanying text.

⁷ See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 305-06 (1992) [hereinafter MACCRATE REPORT]; 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, 1147-48 (1995); Herschel H. Friday, *Continuing Legal Education: Historical Background, Recent Developments, and the Future*, 50 ST. JOHN'S L. REV. 502, 502-04 (1976); Task Force on Mandatory Continuing Legal Educ. in Ohio, *MCLE: The Rule Against Perpetuity—A Survey Research and Comparative Approach*, 3 OHIO N.U. L. REV. 915, 926-34 (1976); Wellington, *supra* note 3, at 359-61.

attorneys returning from their role in the war effort enrolled in "refresher" programs that re-introduced them to the practice of law.⁸ By 1947 the idea of CLE had gained sufficient attention that the American Bar Association ("ABA") partnered with the American Law Institute ("ALI") to provide for coordinated development and expansion of CLE programs across the nation.⁹

This joint effort, known by the acronym ALI-ABA, made great strides in advancing the idea of CLE programs as necessary components of lawyers' practices. The most visible achievements resulted from a series of conferences known as Arden House I, II, and III. These conferences, held in 1958, 1963, and 1987, sought to develop the necessary foundation and framework to support an effective CLE system in each state that adequately addressed the educational needs of attorneys at every stage of their professional career.¹⁰

The most important contribution of the Arden House conferences and other national meetings was to highlight the duty of the bar to provide continuing legal education opportunities and the duty of practitioners to use these as a means of meeting fundamental professional obligations.¹¹ This recognition of a connection between CLE and the duty of the legal profession to remain competent provided the impetus for expanding CLE programs throughout the United States.¹² Indeed, by the time of the Arden House III conference in 1987, a majority of states had both developed CLE programs and adopted mandatory CLE requirements.¹³

Underlying these developments was a commitment to the belief that the goal of CLE was attorney competence.¹⁴ Of course, as some of the participants in Arden House III noted, CLE was not a magical curative for all of the profession's ailments, but rather a regimen with the limited

⁸ MACCRATE REPORT, *supra* note 7, at 306.

⁹ *Id.*; Wellington, *supra* note 3, at 359-61.

¹⁰ See MACCRATE REPORT, *supra* note 7, at 307-08; *Call of the Conference, in CLE AND THE LAWYER'S RESPONSIBILITIES*, *supra* note 3.

¹¹ MACCRATE REPORT, *supra* note 7, at 309; Aliaga, *supra* note 7, at 1149-51. For recognition of the role of other national conferences, see *Call of the Conference, supra* note 10, at xvii-xviii; Wellington, *supra* note 3, at 360.

¹² *Call of the Conference, supra* note 10, at xvii; see also MACCRATE REPORT, *supra* note 7, at 309.

¹³ Wellington, *supra* note 3, at 360.

¹⁴ MACCRATE REPORT, *supra* note 7, at 309; Aliaga, *supra* note 7, at 1149.

aim of improving attorneys' legal knowledge that "complemented" other efforts to improve the profession.¹⁵

This view that CLE programs and mandatory participation rules exist to provide for the educational needs of attorneys found much support in the MacCrate Report, the product of deliberations by the Task Force on Law Schools and the Profession, sponsored by the ABA Section of Legal Education and Admissions to the Bar.¹⁶ Published in 1992, the report sought to eliminate the perceived gap between law schools and the practicing profession by emphasizing that "[b]oth communities are part of one profession."¹⁷ The "oneness" the report described was based upon the shared effort of both groups to provide for "the education and professional development of the members of a great profession."¹⁸ Most importantly, in recognizing the unity of the profession, the report stressed that legal education is not a single event, but rather proceeds "along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career."¹⁹

By recognizing the ongoing nature of legal education, the MacCrate Report solidified the link between organized continuing legal education programs and the development of legal skills and values in attorneys. When viewed collectively, the combined achievement of the MacCrate Report and the Arden House conferences was to outline the importance of both providing CLE and requiring participation in CLE activities. Specifically, the combined efforts demonstrated that structured educational programs were essential to maintaining the profession's ability to fulfill its most important duty: service to the public through competent legal representation.

Thus, the historical development of CLE as a national movement indicates a strong presumption that the courses taught be directed at the expansion of legal knowledge and the development of legal skills. This unquestionably justifies the integration of continuing legal education into the professional life of every lawyer, but it hardly explains why such education should be mandated, and only partially explains why the "L" should stand for "Legal." The answer to both questions lies a little

¹⁵ William Reece Smith, Jr., *Realizing the Promise of Professionalism*, in CLE AND THE LAWYER'S RESPONSIBILITIES, *supra* note 3, at 49-51; Wellington, *supra* note 3, at 367.

¹⁶ The MacCrate Report is properly known by its full title. *Supra* note 7.

¹⁷ MACCRATE REPORT, *supra* note 7, at 3.

¹⁸ *Id.*

¹⁹ *Id.*

deeper in the nature of legal education and the nature of what it is to be part of a profession.

II. WHY MANDATORY CLE IS NEEDED TO SUPPLEMENT ON THE JOB TRAINING: OR, WHY ISN'T CLASS OUT YET?

We now generally accept that the integration of CLE programs into the profession is not only appropriate, but also necessary to further the responsible practice of law. Even the staunchest opponents of mandatory CLE accept that continued education in some form is essential to the practice of law, but they still complain about mandatory participation.²⁰ Among those who criticize the mandatory nature of CLE, one complaint is frequently raised: Organized CLE is not necessary because attorneys can remain competent through either voluntary attendance at CLE programs or on the job training. The consistently modest attendance of attorneys at voluntary CLE programs undermines the claim that such programs would be successful at improving attorney competence on a profession-wide scale. It is still worth addressing the claim that on the job training can provide for all the legal education a practitioner needs following law school.

To be sure, there is little question that on the job training can be an effective way to develop legal skills and knowledge. The ongoing practice of law confers not only a familiarity with legal procedure, but through the accompanying research, substantive knowledge related to particular legal questions. Such learning is legal education in its purest form. Indeed, it is precisely this sort of learning that the Rules of Professional Conduct anticipate an attorney will engage in whenever she accepts a client's case.²¹ Why then is exposure to the law through legal practice not sufficient on its own to constitute the sort of ongoing education called for by the MacCrate Report and the Arden House conferences?

²⁰ Even James C. Mitchell, whose attacks on the idea of mandatory CLE are worth a read, if only for the biting sarcasm, concedes that "[i]t's not the 'CLE' that offends many of us. It's the 'M.'" Mitchell, *MCLE: The Joke's On Us*, *supra* note 3, at 27-28 (describing the benefits of a CLE course the author attended); see also TASK FORCE ON MANDATORY CONTINUING LEGAL EDUCATION, EVALUATION AND RECOMMENDATIONS ON MCLE FOR THE DISTRICT OF COLUMBIA BAR 33 (1995) [hereinafter DC BAR REPORT].

²¹ IND. R. PROF'L CONDUCT 1.1. The Comment to Rule 1.1 reminds us that competence "includes inquiry into and analysis of the factual and legal elements of the problem" and that if an attorney finds himself unable to represent a client because of perceived incompetence, "the requisite level of competence can be achieved by reasonable preparation." *Id.* at cmt. to 1.1.

The answer is that no matter how much legal research one does, on the job training, by its very nature, is an extremely limited means of developing legal knowledge. It is simply too dependent on outside forces to be reliable as the sole means of continuing enlightenment. The limitations of on the job training are especially acute for young attorneys, who are particularly susceptible to forces beyond their control. Many of us emerge from law school with the ability to “think like a lawyer,” but without necessary skills or knowledge practice competently.²² Even those who have taken advantage of practice skills classes or clinical programs often need help to effectively handle cases or clients on their own.²³

Yes, there probably was a time when young attorneys could learn these skills through a period of apprenticeship with an older, more experienced lawyer. As President James A. Garfield once postulated: “The ideal college is Mark Hopkins on one end of a log and a student on the other.”²⁴ There is neither the time nor the money for that in today’s legal economy. Young attorneys should expect to contribute promptly to the firm’s income; an apprenticeship period in which to learn how to “practice like a lawyer” is a bygone luxury.²⁵ Many senior attorneys are too busy with their own clients to spend time mentoring the new generation of lawyers in basic skills such as drafting.²⁶ The result is that a whole generation of lawyers could not develop legal skills through on the job training without running up substantial billable hours or putting their clients at risk of inadequate representation.

²² In fact, the worry that attorneys fresh from law school lacked basic legal skills was a significant motivator in the MacCrate Report’s argument for “bridge the gap” programs that taught such skills either in law school or immediately following admission to the bar. See MACCRATE REPORT, *supra* note 7, at 330–36.

²³ *Id.* at 5 (noting that many lawyers surveyed found their law school experience left them unprepared to practice law).

²⁴ James A. Garfield, *Speech at Delmonico Dinner, Dec. 28, 1871*, in ALLEN PESKIN, GARFIELD (1978), reprinted in THE COLUMBIA WORLD OF QUOTATIONS CD-ROM (Columbia Univ. Press 1996). In making this statement, President Garfield was complimenting his former professor, a long serving and highly renowned president of Williams College. *Id.* He was also pointing out that sometimes the most valuable education comes not from the institution, but from learned and dedicated teachers. *Id.* Garfield is also sometimes credited with a longer version of the quote: “Give me a log hut, with only a simple bench, Mark Hopkins on one end and I on the other, and you may have all the buildings, apparatus and libraries without him.” *Id.*

²⁵ See generally MARY ANN GLENDON, A NATION UNDER LAWYERS (Farrar, Straus & Giroux 1994).

²⁶ *Id.*

It was precisely this problem that led many states to accept mandatory educational programs for all newly admitted attorneys.²⁷ Like Indiana's "new attorney" programs and applied professionalism courses, these programs attempt to equip new lawyers with the basic skills necessary to practice competently. In the present legal marketplace, on the job training does not ensure that new lawyers can obtain these skills except through structured mandatory CLE programs.

The limitation of on the job training does not confine itself to new attorneys. Even the most learned and experienced older lawyer may find a given task daunting if the sole form of such learning comes on the job. On the job training is tightly connected to the demands of profit and clients. This poses two significant problems. First, such connection is extraordinarily narrow, designed only to serve the needs of the here and now, without developing a fuller appreciation of the law in question. While this may not be significant in many cases, competent practice frequently requires more than the superficial knowledge of a subject that can be gained while researching the case. The narrowness of on the job training limits its value for many future endeavors, except, of course, for future matters that closely mimic the earlier experience.²⁸

More importantly, on the job training is insufficient to keep the lawyer up to date with all the changes in the law across a spectrum of practice areas. Thus, while on the job learning may keep a lawyer informed of changes within her own specialties, if a client seeks representation for a matter modestly outside of a lawyer's field of specialization, there is risk to both the attorney and client. Even if we assume, as we should, that the lawyer will act appropriately and seek to make herself competent through education, and that given enough time she could become capable of rendering sound assistance, there is no guarantee that she will have sufficient time to become competent. Indeed, as the law becomes increasingly complex and adversarial, the study necessary to obtain an appropriate level of professional competence also increases.²⁹ Therefore, we cannot assume that "learning by doing," on its own, will educate the practitioner enough to professionally represent a client's interest, or even that the attorney will

²⁷ MACCRATE REPORT, *supra* note 7, at 285-87.

²⁸ As the Arden House III Report recognized, "[c]ontinuing legal education . . . can only hope to make a difference in the areas of law knowledge, legal skills, and practice structure." Wellington, *supra* note 3, at 363. If we accept these as the goals of legal education, whether through on the job training or MCLE, a program that fails to enhance these goals is, *ipso facto*, at least a partial failure.

²⁹ DC BAR REPORT, *supra* note 20, at 34-35.

be able to recognize his own lack of competence. In other words, the modern attorney who relies solely on on the job training runs the risk of damaging his client's interests either by inadequately representing the client or, despite his best efforts to become competent, by delaying redress of his client's rights.

To be fair, some of these same risks apply to education through CLE. A class in a particular subject hardly establishes a lawyer's competence in that subject.³⁰ Of course, the goal of CLE is not to eliminate incompetence, but rather to increase competence. By exposing lawyers to a broader range of legal issues than they would ordinarily encounter, at the minimum, CLE makes attorneys aware of their own limits. Thus, CLE can help to safeguard client interests both by raising the attorney's level of awareness of the legal issues surrounding a client's question and by allowing the attorney to judge more accurately whether they should undertake representation of a client at all without exposing the client to delay and possible forfeiture of their claim. Consequently, CLE does something that on the job training can never do—it exposes the practitioner to a broad range of legal subjects and provides a basic understanding of those topics without exposing clients to the vagaries of learning by trial and error.

There is at least one more way in which CLE is superior to on the job training: it occurs with other members of the legal community. On the job training tends to occur within the relatively isolated universe of the law firm library, or today, at the desk in front of a computer. The training, no matter how thorough, frequently lacks the insight that other participants bring to the classroom experience. Respectable education does not take place in a vacuum, but rather within a community. Like the university classroom, the CLE classroom provides the opportunity to learn together and from one another, the opportunity to question, and the opportunity to share experiences. These sources of knowledge are rarely found sitting alone in a library or in front of the computer. Lawyers need to experience need the legal community as a community of learning. MCLE helps to provide the atmosphere in which that community can grow and flourish. Just as importantly, CLE programs remind us that the profession is a community and that no matter what our various positions, we all share a basic commitment both to education, to each other, and to justice. The development of those

³⁰ As the Arden House III Report notes, MCLE cannot assure attorney competence, only provide a supplemental method through which competence can be maintained. Wellington, *supra* note 3, at 363, 367–68.

shared values has meaning that extends far beyond the substantive knowledge we gain in the classroom, and those benefits cannot be overstated.

Just as on the job training is an insufficient substitute for CLE, continuing formal education is an incomplete substitute for the integration of the program with other forms of legal education. Still, CLE plays a vital role in maintaining lawyer competence, first because such education is necessary, and second because while MCLE is imperfect, it complements other forms of education by providing a structured learning environment for the legal community and serves functions that are not fulfilled by any other method of education.

III. HOW ELSE DO PRACTITIONERS WANT TO "SPEND" CLE OBLIGATIONS?

A. *Mental Health*

Classes under the mental health umbrella include such topics as stress management, time management, substance abuse issues, gambling addiction, and career satisfaction and renewal. Sixteen of the forty states requiring mandatory continuing legal education specifically award credit for courses on at least one of these topics.³¹ Among these sixteen states, it is common to bunch these topics under more common headings of legal education, such as professional responsibility.³² Some legal

³¹ See ARIZ. SUP. CT. R. 45(a)(2) (substance abuse and stress management); CAL. MCLE RULES & REGULATIONS § 2.1 (substance abuse and emotional distress); FLA. STATE B. R. 6-10.3(b) (substance abuse and mental illness awareness); KAN. CLE COMM'N R. 7.02(g) (time and stress management for new attorneys); LA. SUP. CT. R. H, XXX, 3(b) (substance abuse); MINN. CLE BD. R. 2(P) (career satisfaction and renewal, stress management, mental or emotional health, substance abuse, and gambling addiction); NEV. BD. OF CLE REG. 18(1)(k) (substance abuse); N.M. MCLE PROFESSIONALISM GUIDELINES (substance abuse, stress management, mental and emotional health); N.C. STATE B. STANDING COMM. RULES § 1501(c)(14) (substance abuse and mental conditions); OHIO RULES OF CT. IV § 3(a) (substance abuse); OR. STATE B. MCLE R. 3.400(a) (substance abuse); PENN. CLE R. 105(a)(iv) (substance abuse); R.I. MCLE REG. app. A (substance abuse and stress); WASH. CLE BD. R. 104(c) (substance abuse); W.V. MCLE R. 5.2 (substance abuse); WYO. CLE BD. R. 3(g) (substance abuse).

³² See, e.g., MINN. CLE BD. R. 2(P) (professional development course); N.C. STATE B. STANDING COMM. RULES § 1501(c)(14) (professional responsibility); WYO. CLE BD. R. 3(g) (legal ethics). States whose rules do not explicitly provide credit for mental health courses may interpret their ethics credit requirements to include mental health. See E-mail from Gale Cartwright, Director, Virginia Mandatory Continuing Legal Education, to Julia Orzeske, Executive Director, Indiana Commission for Continuing Legal Education (Oct. 12, 2005, 05:12 P.M. EST) (on file with author).

scholars advocate that the mental health category of classes be further expanded to include human relations or interpersonal skills.³³

Indiana has elected not to explicitly endorse any of these topics as legal or nonlegal subject matter courses. Indiana Admission and Discipline Rule 29 specifically states that any portion of a course dealing with stress management will be denied credit.³⁴

Though these mental health classes doubtless benefit attorneys in their personal lives, which inevitably carries over to their professional lives, these classes nonetheless do not deserve legal education credit. One could propose other mental health-related classes that arguably enhance an attorney's professionalism, though the focus would still be the attorney's personal life.³⁵ Any argument for giving credit to these mental health classes would presumably have to include private psychiatric sessions because the goal there is to improve the attorney's mental and emotional state, which would inevitably transfer over to his/her profession. Do such experiences make us better people? They likely do, but it is difficult to see how they prepare us to better draft an estate plan than does a course in estate law and practice.

B. Law-making

For the purposes of this Article, law-making activity includes the work done by publicly elected or appointed officials at a state or federal level in their official capacity.³⁶ Rather than granting CLE credit for hours spent law making, a minority of MCLE states exempt these officials from CLE requirements.³⁷

³³ Amiram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 569, 583 (David B. Wexler & Bruce J. Winick eds., Carolina Academic Press 1996) ("[B]ar associations should consider approving continuing legal education credits for courses that focus on increasing interpersonal and psychological skills . . ."); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 *CLINICAL L. REV.* 259, 311 (1999).

³⁴ IND. ADMISSION & DISCIPLINE R. 29 § 3(b)(i)(e).

³⁵ Examples would be work/life balance classes on how a busy lawyer stays married, raises children, maintains a social life, etc.

³⁶ No states award CLE credit for policymaking, which is work done with organizations such as the American Law Institute, American Bar Association commissions, etc. Some states do credit local policymaking efforts. *See, e.g.*, LA. SUP. CT. R. XXX, Reg. 3.12 (Louisiana Law Institute); MISS. SUP. CT. MCLE R. 3.15 (Mississippi Supreme Court Advisory Committee on Rules).

³⁷ *See* ALA. SUP. CT. CLE R. 2(C.1) (U.S. and Alabama legislators); CAL. SUP. CT. R. 958(c) (California legislators); DEL. SUP. CT. CLE R. 4(C)(2) (state and federal legislators); LA. SUP. CT. R. XXX, (2), (4) (federal legislators); ME. STATE B. R. 12(a)(5)(H) (legislators); MISS. SUP.

In 1995, after several years of researching state continuing legal education arrangements, a CLE commission for the District of Columbia released a comprehensive report recommending that CLE be mandatory.³⁸ The commission did not recommend exempting legislators because a CLE system with minimal exceptions reduces resentment and pleas by those who are not exempt.³⁹ When the Indiana State Bar recommended mandatory CLE in 1986, it proposed exempting judges. The Indiana Supreme Court decided not to exempt judges for these very reasons.

A California practitioner suspended for failing to comply with the state's mandatory CLE requirements challenged the constitutionality of the exemption for legislators on equal protection grounds.⁴⁰ Using rational relationship review, the court upheld the rule, stating that it was rational for two reasons. First, legislators are less likely than attorneys to represent clients, and when they do, they are likely to represent clients in their area of expertise. Second, legislators review, modify, and implement laws and are presumed to be abreast of the current laws.⁴¹

A strong dissent questioned both of these justifications. The dissent could find no authority for the proposition that legislators are likely to represent clients in their area of expertise.⁴² Even if legislators are less likely to represent clients and more likely to practice in their area of expertise, they still need to be competent when they do so. As for the second rationale, the dissent wondered how much time legislators devote to "scholarly study of pending and enacted legislation," as opposed to the demands of campaigning, constituents, lobbyists, and legislative deal making.⁴³ In any event, most citizens know that

Ct. MCLE R. 2(g) (federal legislators); MONT. SUP. CT. CLE R. 2(E) (state legislator); N.C. STATE B. STANDING COMM. RULES § 1517(b) (state and federal legislators); R.I. SUP. CT. MCLE R. 5.04 (state and federal legislators); TENN. SUP. CT. R. 21 § 2.06 (state and federal legislators); TEX. STATE B. RULES Article XII § 4(H) (state and federal legislators); WASH. CLE BD. REG. 110(d) (state legislators); WYO. CLE BD. R. 8(c) (elected officials). Tennessee, Louisiana, and Mississippi specifically grant CLE credit for time spent reviewing proposed legislation, rules, or regulations as a member of a governmental commission. LA. SUP. CT. R. XXX, Reg. 3.19 (Louisiana State Bar's ethics advisory committee); MISS. SUP. CT. MCLE R. 3.15 (Mississippi Supreme Court Advisory Committee on Rules); TENN. SUP. CT. R. 21 § 4.07(a). Indiana specifically denies any credit for legislative, lobbying, or other law-making activities. IND. ADMISSION & DISCIPLINE R. 29 § 3(b)(vii).

³⁸ See D.C. BAR REPORT, *supra* note 20.

³⁹ *Id.* at 181-82.

⁴⁰ *Warden v. State B. of Cal.*, 982 P.2d 154, 156, 12 Cal.4th 628, 633 (Cal. 1999).

⁴¹ *Id.* at 165-66, 12 Cal.4th at 646-47.

⁴² *Id.* at 173, 12 Cal.4th at 658 (Kennard, J., dissenting).

⁴³ *Id.*

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legislative enactments constitute only a portion of the collective body of law that affects society.⁴⁴

Though a provision exempting law writing from mandatory CLE survived rational relationship review, this does not mean that it is the best policy decision. To be sure, exempting such attorneys from CLE requirements might deprive those attorneys of necessary classes on practical lawyer skills, new laws from other sources, professional responsibility, and the like.

C. *Pro Bono*

Pro bono publico service is *uncompensated* professional service to those of limited means or to public service or charitable organizations.⁴⁵ While granting CLE for pro bono services would not be a fee in the usual sense of the word, the Indiana Rules of Professional Conduct certainly did not intend for this to be the case in Indiana.

A common argument for crediting pro bono service is that legal aid programs and the pro bono services of the bar have not adequately met the legal needs of the poor.⁴⁶ Granting CLE credit for pro bono services would give lawyers more incentive to perform such services, thus “killing two birds with one stone.”⁴⁷ Eight states have decided to provide such incentive and grant CLE credit for approved pro bono services.⁴⁸

⁴⁴ *Id.*

⁴⁵ IND. R. PROF'L CONDUCT 6.1, cmt. 1.

⁴⁶ NEW YORK STATE UNIFIED COURT SYSTEM, THE FUTURE OF PRO BONO IN NEW YORK, VOLUME ONE: REPORT ON THE 2002 PRO BONO ACTIVITIES OF THE NEW YORK STATE BAR 2 (2004); Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 435 (2003); Jason M. Thiemann, Note, *The Past, the Present, and the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law*, 26 HAMLINE J. PUB. L. & POL'Y 331, 369 (2005).

⁴⁷ See Rhode, *supra* note 46, at 435 (arguing for CLE credit for pro bono training programs); Thiemann, *supra* note 46, at 369. While Texas does not grant CLE credit for pro bono services, it does give credit for attendance at pro bono training programs. See E-mail from Nancy R. Smith, Director, Texas Mandatory Continuing Legal Education Department, to Julia Orzeske, Executive Director, Indiana Commission for Continuing Legal Education (Oct. 12, 2005, 14:28 EST) (on file with author).

⁴⁸ COLO. SUP. CT. R. 260.8; DEL. SUP. CT. CLE R. 8(D); GA. STATE B. R. 8-104(B)(4); N. Y. CLE BD. REGULATIONS & GUIDELINES § 3(D)(11); ORE. STATE B. MCLE R. 3.6 (exemption for “Active Pro Bono” status); TENN. SUP. CT. R. 21 § 4.07(c); WASH. CLE BD. REG. 103(g); WYO. CLE BD. R. 4(g). Texas rules do not explicitly mention credit for pro bono services, but Texas does give credit for pro bono training programs. See E-mail from Nancy R. Smith, *supra* note 47.

While giving CLE credit for pro bono services may improve the quantity of legal representation for the poor, this arrangement would not further the professional competence goals of mandatory CLE.⁴⁹ Those attorneys desiring to kill two birds with one stone would miss out on the experience and expertise that comes with using another stone. In other words, these attorneys would not be gaining the professional competence that can flow from attending CLE classes.

D. Office Management

Advocates of CLE flexibility urge credit for two types of law office management courses, and Indiana credits them both. First, Indiana credits courses on the ethical aspects of law office management, such as trust accounting, client contact, and use of staff and resources.⁵⁰ Second, Indiana gives credit for so-called "non-legal subject matter courses," which include law firm management courses that enhance an attorney's individual practice.⁵¹ Examples would be courses training attorneys in online filing and legal research. General office management courses, such as dealing in profit enhancement or marketing of services, are denied credit.⁵²

Eighteen of the forty mandatory continuing legal education states give credit for law office management courses and/or general office management courses.⁵³ The indirect nature of the benefit to clients from general office management courses like "Law Office Economics" and "Computer Operating Systems for Lawyers" warrants against awarding credit.

IV. THE "L" STANDS FOR LEGAL

The ultimate justification for mandatory continuing legal education is the straightforward fact that we belong to the legal profession. We hold ourselves out to the public as members of a learned organization

⁴⁹ Any perceived problems with the state of pro bono services can be addressed by other means, such as tax incentives, charitable contributions, etc. See Thiemann, *supra* note 46, at 369.

⁵⁰ IND. ADMISSION & DISCIPLINE R. 29 § 3(b)(i)(e).

⁵¹ *Id.* § 3(b)(ii).

⁵² *Id.*

⁵³ ARIZ. SUP. CT. R. 45(a)(2); CAL. SUP. CT. R. 958 § 6071(a); DEL. SUP. CT. R. 4(B)(1); KAN. SUP. CT. R. 802A(b); LA. SUP. CT. R. XXX, 3(b); MINN. CLE BD. R. 5(A)(2); MO. SUP. CT. R. 15.04(b); NEV. CLE BD. REG. 3(2); N.M. MCLE PROFESSIONALISM GUIDELINES; N.H. SUP. CT. R. 53.5(A)(1); N.C. STATE B. STANDING COMM. RULES § 1501(b); OHIO RULES OF CT. REG. 414.4(F); OR. STATE B. MCLE R. 3.400(a); R. I. MCLE REG. app. A; TEX. STATE B. RULES Article XII § 4(A); W. VA. MCLE R. 5.2; WASH. CLE BD. REG. 104(c); WYO. CLE BD. R. 3(g).

and officers of the judicial system.⁵⁴ With this presentation comes the obligation to represent our clients' interests competently. The duty we assume in this regard implies that at some point, each attorney should "pause from the pressures of his or her own practice and focus his or her attention in some systematic fashion on the broader question of what steps, if any, that attorney should be taking . . . to assure that he or she is maintaining and enhancing competence."⁵⁵

By mandating CLE, the organized bench and bar hope that in addition to actually improving substantive knowledge of the law, the programs cause each lawyer to take that moment and assess his or her level of competence. In this respect, mandatory CLE serves the same function as the bar exam and other admissions requirements. It helps insure that practitioners strive to meet some minimum level of competence, and that they consider the significance of their position and the steps required to validate the public's trust. The need to validate that trust helps to justify mandatory CLE and explains our obligation to take those educational requirements seriously. It also helps to explain why the "L" in MCLE stands for "Legal."

As a profession, the law serves the public, not the practitioner. In other words, our obligation to improve our competence is an obligation to assist others, not to benefit ourselves. Awarding CLE credit for programs and activities that benefit attorneys directly and clients incidentally undermines our efforts to validate the public's trust.

In short, if we wish to maintain the integrity of our profession, we must strive to maintain our *legal* competence, and not fall prey to alternative satisfaction. Only by doing so can we adequately serve the public, and live up to the splendid traditions that define the legal profession. That is, if we elect to require ourselves to undertake regular training, that training must be tightly aimed at improving our ability to handle the legal needs of clients.⁵⁶

⁵⁴ DC BAR REPORT, *supra* note 20, at 34.

⁵⁵ *Id.* at 35-36.