

# ARIZONA'S MCLE RULE AND THE

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*The dues lawyers pay and the requirements they fulfill in order to remain active members in good standing are often the subject of conversation—or consternation. Among those requirements is the satisfactory completion of mandatory continuing legal education.*

*In the past few years, Arizona bar leaders have been engaged in an examination of the dues and MCLE structure in regard to a particular group of lawyers: “senior” attorneys, as that term has variously been defined.*

*As we go to press, the State Bar Board of Governors is scrutinizing that structure. They may decide to leave the rubric as it stands, or they may recommend a change to the Arizona Supreme Court.*

*In the meantime, a longtime Arizona lawyer—and a member of the Bar’s Board of Governors—dug into records both old and recent to write for us a summary of the MCLE rule as it applies to all lawyers and subsequent alterations made in regard to senior lawyers. What follows is a roadmap of how we got here, which may be helpful as the Board examines its options.*

## CURRENT RULE 45 AND THE SENIOR EXEMPTION

In 1989, the Arizona Supreme Court adopted the Mandatory Continuing Legal Education (MCLE) requirement in Rule 45, Rules of the Supreme Court. “It requires all active, non-exempt Arizona attorneys to (1) complete a minimum of 15 hours of continuing legal education (CLE) (including a minimum of 3 hours of professional responsibility), and (2) file an affidavit of compliance on or before September 15th of each educational year.” Subsection (b), titled “Exemptions,” currently provides in part:

3. Active Members at Least 70 Years Old. *An active member who is at least 70 years old or who will have been a member for at least 45 years prior to June 30 shall be exempt from the requirements of section (a) for the educational year in question.* [Emphasis supplied]

## THE HISTORY OF THE RULE AND EXEMPTION

Rule 45 was adopted based on a petition (R-89-0014) for a rule change filed in the Supreme Court dated May 5, 1989, by the State Bar of Arizona. In the petition, the Bar’s former Executive Director, Bruce Hamilton, summarized the Bar’s previous consideration of MCLE:

As long ago as 1976, the [CLE] Committee [the Committee] of the [SBA] recommended [MCLE]. ... At that time, a sub-committee presented a tentative outline of rules. They were not adopted.

The matter was revisited in 1980 when the ... Committee gave a report to the Board of Governors [BOG] with pro and con positions. At that time, the concept was approved by the [BOG], but the proposed rule was sent back to the Committee for work and publication for comment. Further to that continuing effort, in 1981 letters were sent to various other states seeking information regarding costs, staff and

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# SENIOR EXEMPTION



equipment. After obtaining the information requested by the [BOG], the Committee again in September, 1981, proposed the concept to the [BOG which again voted it down]. Although not explicit, the vote was probably on the basis of cost rather than concept.

In early 1986, the [BOG] approved [MCLE] as a concept and asked the ... Committee to present to the [BOG] a proposal as to why [it] should be adopted in Arizona, and if it were to be adopted, an implementation plan. Pursuant to that request and authorization, the Committee prepared a plan and presented it to the [BOG where it again] was defeated in November, 1986, on a vote of 9 to 5.

In October, 1988, the ... Committee again voted unanimously to recommend [MCLE] for active members of the [SBA].<sup>1</sup>

At the November 18, 1988, State Bar Board of Governors meeting, then-State Bar President Thomas J. Zlaket reported that he had attended the 53rd Arizona Town Hall at the Grand Canyon, which had as its topic the civil justice system in Arizona. Although the majority of the town-hall participants were nonlawyers, they made six specific recommendations, including recommendation "4) that CLE be made mandatory."<sup>2</sup> During that same meeting, the minutes reflect the following discussion of MCLE:

Cary Sandman, Co-Chair of the ... Committee, appeared before the Board. Tom Zlaket summarized for the Board the Committee and Board's interaction on the subject of mandatory CLE over the past 12 years. Mr. Zlaket indicated that, although he was not present at the time of the vote two years ago, he would have opposed [MCLE] at that time. He indicated that he has changed his view after consultation with bar leaders of other states and now finds it indefensible for our "learned profession" not to have [an MCLE] requirement.



Further, he indicated that he was of the view that if the Board did not implement such a program in the near future, it would be mandated by the Arizona Supreme Court.

Cary Sandman indicated that the Committee is convinced that a mandatory requirement will increase attorneys' competence and, therefore, increase the public's confidence in the profession. He indicated that approximately 80% of the attorneys surveyed in other states which have mandatory CLE acknowledged that they have learned something from participating in the CLE process and that a like 80% believe the mandatory program should remain. He also stated that the videotaping of seminars and teleconferencing is enabling the CLE Department to lessen the concern regarding service to the out counties. He also noted that the Committee will further explore optional implementation rules, but is not leaning toward an "honor system" for [MCLE] whereby individual attorneys will select the CLE programs of their choice and certify their compliance. The Bar would simply maintain random audit authority to confirm attorneys' records as to compliance.

After considerable discussion by the Board, Ed Hendricks moved and Dick McAnally seconded a motion to approve CLE as a mandatory program subject to final approval of the specifics of the program to be proposed by the CLE Committee. K. C. Stanford indicated that he felt bound to reaffirm the opposition from the Young Lawyers of two years ago and Bob Schmitt requested additional time before a vote to take the proposal back to his county for comment, indicating that otherwise he would feel duty bound to again vote no. The Board further debated certain potential specifics indicating a strong consensus for no large bureaucracy, the lowest possible costs and limited "policing" of the program. Susan Wintermute suggested a straw vote on the concept, leaving a final vote on the details for a later date. Justice Feldman reaffirmed his personal support for a mandatory rule and indicated that under the Court's rule-making policy, the proposed rule in whatever form will be circulated to bars, legislative leaders, etc., with an opportunity to file com-

ments and objections.

After further discussion as to whether or not to take an immediate vote, a straw vote or delay action, Boyd Johnson moved to table the vote to December, Bob Schmitt seconded and the motion carried with one dissenting vote cast by Fritz Aspey.

It was requested that Mr. Hamilton circulate to the Board all the materials reviewed two years earlier and Mr. Zlaket specifically requested that the Board and staff be prepared to discuss the following issues at the December meeting:

1. Should the Bar certify programs or allow self-certification?
2. How many hours per year should be required?
3. How often should attorneys be required to file affidavits for compliance?
4. Mandatory audits, random audits or no audit provision at all?
5. How will in-house and public agency programs, limited to their own employees, be qualified?
6. How formal need a CLE program be to qualify?
7. What sanctions, if any, shall apply?
8. Will credits be given for teaching CLE?
9. Credit for computer assisted education and teaching?
10. Should there be a grace period for new attorneys?
11. Discounted registration fees for out-county members?
12. Issues of cost, delivery and quality.
13. Should the [BOG] consider pre-paid CLE?
14. An implementation timetable.

It was agreed that in December, the Board will vote on the overall concept. If it passes, the Board will seek consensus on all of these other issues so as to give the CLE Committee guidance in drawing up the specific plan.<sup>3</sup>

Former SBA Executive Director Hamilton's summary of the process that resulted in the SBA filing its 1989 MCLE petition concludes:

After considerable study and debate, the [BOG] voted unanimously at their regular monthly meeting of December 16, 1988, "to endorse the concept of MCLE for attorneys in the State of Arizona and to enter into a dialogue with the Committee to address the specifics of the program before sending a proposed rule to the Supreme Court of Arizona." That dialogue was continued on an active basis at each subsequent monthly Board meeting resulting in the Board's vote on April 21, 1989, to submit the attached new Rule 45 and amendment to Rule 31 to the Supreme Court for adoption.

The July 1989 issue of *Arizona Attorney* included the Bar's MCLE petition and requested comments from its members. At its September 15, 1989, meeting, the BOG reviewed all comments that it received directly from its members as well as those from the Supreme Court. Then-State Bar President Tom Karas wrote a letter to Chief Justice Frank X. Gordon, Jr., summarizing the Board of Governors' modifications to its petition, which states in part:

Several members of the bar asked that attorneys over the age of 75 years be exempted from the rule, since they do not pay dues.

**RECOMMENDATION:** That the request be denied. All attorneys who practice law in Arizona have an equal responsibility to be current, regardless of age.<sup>4</sup>

Two attorneys (Harold L. Jerman of Phoenix and the late Ralph F. Brandt of Yuma) submitted comments directly to the Supreme Court arguing for an exemption from the MCLE requirement for seniors.

Mr. Jerman's handwritten letter to Noel Dessaint, Clerk of the Supreme Court, dated June 27, 1989, stated:

As a comment on the above referenced matter, I would like to suggest that consideration be given to [adding] another exemption covering those attorneys who after many years of practice are almost full retired, except for acting as "of counsel" or are doing a very limited or narrow



amount of actual practice (say 10 hours a week). Usually, the clients are those of longstanding and the actual legal work is performed by younger members of the firm.

To require these older lawyers to attend seminars, could force them into inactivity.<sup>5</sup>

Mr. Brandt's letter, dated June 28, 1989, to Noel Dessaint, Clerk of the Supreme Court, stated:

This comment on proposed Rule 45 is being sent to you as suggested in the "Arizona Attorney" July 1989.

I propose that (b) "Exemptions" 3 "Other Exemptions" be amended to read as follows:

"Upon application and showing of undue hardship, or the member reaching the age of 75 years, or has been a member for 50 years, and basically retired from the active practice the board may exempt an active member from the requirements ..."

The reasons are obvious. The board may grant the exemption upon a showing of basic retirement from an active practice, but the member not wanting to be reduced to "inactive." [Emphasis in original]<sup>6</sup>

On October 11, 1989, in a divided ruling, the Arizona Supreme Court adopted, as modified, the Bar's MCLE petition, effective as of July 1, 1989. Voting in favor of the rule were Chief Justice Frank X. Gordon, Jr., Vice Chief Justice Stanley G. Feldman, and Justices James Moeller and Robert J. Corcoran. Justice James Duke Cameron dissented. As adopted, Rule 45(b)(3) included an exemption for seniors taken nearly verbatim from Yuma attorney Ralph Brandt's proposal in his letter of comment. It exempted from compliance with Rule 45 active members at least 75 years old, or those who will have been a member for at least 50 years prior to June 30 of each year.

### THE 2000 AMENDMENT

In 1999, State Bar President Dee-Dee Samet appointed an MCLE Special Review Committee to review the MCLE Rule and Regulations. For the September 15, 2000, board meeting, MCLE administrator

Marnie Leinberger submitted a Board Reporting Form explaining the MCLE Special Review Committee's proposed changes to Rule 45. This form included a redlined version indicating the proposed rule changes.

The proposed changes in Rule 45 included (1) allowing members to include stress management as a category that qualifies for professional responsibility credit; (2) allowing electronic certification of MCLE compliance; (3) clarifying when a member is delinquent in complying with both the completion of the 15-hour per year educational MCLE requirements as well as the filing of an affidavit certifying compliance. It also included the following:

Rule 45(b)(3): *Age of exemption changed to parallel the age exemption of Bar dues.* [Emphasis supplied]<sup>7</sup>

The proposed MCLE rule change was considered by the board at its September 15, 2000, meeting as a Consent Agenda item. With respect to the Consent Agenda, the minutes reflect the following:

Nick Wallwork moves, Ed Novak seconded, and the motion carried unanimously to approve the remaining items on the Consent Agenda.

Board Members present and voting in favor of the proposal to amend Rule 45 by amending the MCLE senior exemption from applying to members "at least 75 years of age, who have been members for at least 50 years," to members "at least 70 years of age who have been members for at least 45 years," were: Kirk Karman, Nicholas Wallwork, Ernest Calderón, Pamela Treadwell-Rubin, Charles Wirken, Alan Bayham, Jr., Patricia Brown, Raymond Brown, Roger Contreras, Diane Drain, Helen Perry Grimwood, Perry Hicks, Edward Novak, Janet Phillips, Jim D. Smith, Thomas Thompson, Charlotte Wells, Dee-Dee Samet, Patricia White, Kay Kavanagh, Nancy Blitz, David Byers, Peter Dunn and Art Hamilton.

Based on the board's unanimous vote, Acting State Bar Executive Director Allen B. Shayo filed a petition (R-00-0023) in the Arizona Supreme Court to amend Rule 45, which included the following amendment to the senior exemption pro-

vided in Rule 45(b)(3).

### 3. Active Members at Least ~~75~~ 70 Years Old.

An active member who is at least ~~75~~ 70 years old or who will have been a member for at least ~~50~~ 45 years prior to June 30 shall be exempt from the requirements of section (a) for the educational year in question.

Neither the Arizona Supreme Court nor the State Bar received any comments pro or con on the seniors' MCLE exemption age reduction, and the court's order also approved the parties' proposed amendment adopted as submitted by the board by the Arizona Supreme Court on January 17, 2001, include a request for emergency adoption. The rule change became effective as of June 1, 2001.

### 2000 PROPOSAL TO REPEAL EXEMPTION

At the September 17, 2004, board meeting, Ed Novak, Chairman of the Finance Committee, reported on behalf of the committee that it had looked at making possible revisions to the dues statement. However, due to insufficient time to make any changes for the 2005 dues statement, the committee appointed Raymond Hanna to chair a subcommittee to review the matter.

At the April 15, 2005, board meeting, Mr. Novak reported that the Dues Subcommittee "continues to study the different categories of membership with focus on a reduction of retired members and those over 70+ years of age."

At the August 17, 2005, board meeting, Finance Committee Chairman Ray Hanna reported that the Dues Subcommittee:

was working diligently in consideration of changing the current structure and reviewed their various scenarios. The [Arizona Supreme] Court would require the [SBA]'s final proposal at the end of November, 2005 so a decision will need to be made in September. The Court will need the rule change requests in December in order to act upon them at their January, 2006 rule meeting.

At the September 16, 2005, board meeting, Larry McVey, that State Bar's Chief Financial Officer, reported on behalf of the



Finance Committee Chairman that the Dues Subcommittee was “in the process of redefining the categories and modifying some requirements of CLE on these members.”

At the October 21, 2005, board meeting, Finance Committee Chairman Ray Hanna reported on the subcommittee proposal:

A supplemental report will be sent to the board prior to the November meeting where a vote will be requested. The board discussed the proposal. Whitney Cunningham requested additional information be returned to the board regarding the cost involved in the over 70 discipline.

At its November 18, 2005, meeting, the board voted to submit a petition to the Arizona Supreme Court that included the complete elimination of the seniors' MCLE exemption.<sup>8</sup>

Petition R-05-0034 was filed December 7, 2005, on behalf of the Bar by its Chief Bar Counsel, Robert B. Van Wyck. It stated in part:

In conjunction with the State Bar's request to modify the dues structure relating to members over 70 and retired members ... the Board of Governors seeks modifications to the rules governing membership, [MCLE] and reinstatement.

...  
[T]he Bar proposes to remove the MCLE exemption for members over 70 years old. MCLE helps to insure that members stay on top of recent changes in the law, to prevent our members from entering the lawyer regulation system, and to further the Bar's long-term goal of providing the best legal services to our citizens as is possible. MCLE requirements provide public protection and should be in place for all active practitioners, regardless of age.

At the January 20, 2006 board meeting, the minutes state:


Frank Lewis as spokesman for the group of over 70's members that met with Alan Bayham and Robert Van Wyck regarding their concerns with Petition

R-05-0034 that was filed with the Arizona Supreme Court. Mr. Lewis gave a summary of his background as a lawyer and then proceeded to review the concerns of those members over 70. Mr. Lewis stated that he had requested specific data at the meeting and it has been promised to him. After receiving this information, the group plans to file a Petition to request it be remanded to the State Bar. The major points of concern are 1) mandatory MCLE and 2) dues over 70.

At its February 2006 meeting the amended minutes state:

INQUIRY RE: BOARD'S RECONSIDERATION OF ARIZONA SUPREME COURT PETITION R05-0034

Richard Coffinger stated that in light of the strong objection to the petition expressed by many of the members of the SBA over 70 years of age, which includes approximately 900 members, he believes the Board should immediately reconsider this petition. He then asked Pres. Grimwood (who also serves as the BOG's Parliamentarian), whether, since the matter was not on the meeting's agenda, it would be proper for the BOG to reconsider the petition at that meeting. President Grimwood responded that it would not be proper for the BOG to reconsider the petition at that meeting. She also stated that the Board needed to determine whether the group of attorneys over 70 years of age constituted a “Section” (similar to the Young lawyer's Section), a “Committee,” or some other subdivision of the SBA. Mr. Coffinger requested President Grimwood to include reconsideration of the petition as an Action/Vote Item on the agenda for the February meeting.

At its June 14, 2006, meeting, at the State Bar convention, the board passed a motion made by Whitney Cunningham, seconded by Jim Smith, “to withdraw its petition to the Arizona Supreme Court, which sought to change dues and MCLE requirements for a variety of different membership categories (including the elimination of the exemption for active members over 70).”<sup>9</sup> 

### endnotes

1. Arizona Supreme Court, Case R-89-0014, “Petition to Adopt Rule 45 and to Amend Rule 31,” filed May 5, 1989, by State Bar of Arizona Executive Director, Bruce Hamilton.
2. State Bar Board of Governors Minutes, “President's Report,” pp. 1 and 2. The other recommendations were that the Bar foster attorney specialization to benefit the public; that there be stronger enforcement of disciplinary rules; that misleading advertising be halted; that there be curtailment of discovery abuse; and that lawyers devote more time to *pro bono* work.
3. State Bar Board of Governors Minutes, Nov. 18, 1988, “Open Session,” pp. 382-384.
4. Sept. 18, 1989, letter from State Bar President Tom Karas to Chief Justice Frank X. Gordon, Jr.
5. Letter dated June 27, 1989, from Harold L. Jerman to Noel Dessaint, Clerk, Arizona Supreme Court.
6. Letter dated June 28, 1989, from Ralph F. Brandt to Noel Dessaint, Clerk, Arizona Supreme Court.
7. For more than 20 years, the State Bar has had an informal policy of waiving dues for active members over age 70.
8. The Board of Governors approved filing the petition for rule change without receiving public input, especially from the affected senior Bar members, in part, as a result of the Arizona Supreme Court's recently enacted deadline for filing petitions for rule change. In 2005, the Supreme Court amended Rule 28, titled “Procedure for Adoption, Amendment or Repeal of Rules.” The Comment to the 2005 amendment states in part:  
Under the annual schedule, rule change petitions filed by November 20, will be circulated by December 20 for public comment. Comments to the petitions will be due by May 20, and the petitioner's reply to comments will be due June 30. Thereafter, the court will consider the petitions in September. Any new rules or amendments adopted in September will be effective January 1 of the following year.
9. State Bar Board of Governors Minutes, June 14, 2006, p. 2870.