

# Colos

## Why Reform of MCLE Was DOA

**E**IGHTEEN MONTHS AGO, my article *MCLE: The Joke's On Us* sneaked into this magazine.<sup>1</sup> My point was already obvious to many attorneys: Forced continuing legal education is useless. Lawyers learn constantly, willingly. MCLE backers cannot produce a scintilla of evidence that a mandate helps attorney or client.<sup>2</sup>

A few colleagues would quietly agree, I figured. Imagine my surprise when the article triggered an avalanche of encouragement. Fan letters from lawyers suddenly outnumbered junk mailings from the MCLE industrial establishment.<sup>3</sup> The mail confirmed widespread contempt for a paternalistic boondoggle.

I got giddy. My hope soared. Member concern, encouraged by my scribbling, soon would prompt a clear-eyed examination of MCLE, finally ridding us of the nettlesome beast.

Yeah, right. And Julia Roberts wants to be my paralegal.



### The Money Pit

My correspondents see right through the MCLE facade. They smell the unseemly mating of cash cow and public relations bull.

"MCLE has never been anything but window dressing intended to convince the public that the profession is cleaning

itself up," one lawyer wrote. "And it's a way of expanding the Bar's empire."

"It is a farce," complained another. "I learn much more law by researching specific questions related to my clients' cases than I learn sitting through forced seminar attendance."

MCLE fundamentally misunderstands

# Sal Cave-In

by James C. Mitchell

what lawyers do, an attorney observed. “Practicing law is a continuing process of legal education. If you wait for a CLE course that educates you on the problem, you will probably be too late to accomplish anything of use to the client.”

Perhaps some lawyers benefit from half-baked education at gunpoint,<sup>4</sup> but why should the entire membership be punished for the unspecified shortcomings of an unidentified few? That’s easy, my correspondents felt. The MCLE revenue stream has swelled into a roaring revenue river.

“MCLE has become a money pit to maintain compliance rather than an opportunity to enhance our knowledge and skills,” a member complained.

Another attorney backed up that theory. “You get no credit for reading. You only get it for watching TV or listening to a tape. To be exact, you’re credited for *buying* the tape. I have no doubt (although I haven’t tried it) that they’d give you flak if you borrowed someone else’s tape rather than buying your own.”

How true. The Bar is not even bashful about gouging members. The 1998 member report bragged, “CLE seminars registered the highest surplus ever in 1998. A 33 percent profit was

achieved on all seminar expenses.”<sup>5</sup>

The cost problem cannot be taken lightly. Chief Justice Thomas Zlaket recently told out-of-state judges that attorneys are pricing themselves above the reach of ordinary citizens.<sup>6</sup> No wonder. In a *Wall Street Journal* column aptly titled “The Bar’s Back to School Scam,” a Justice Department attorney calculated that lawyers nationwide spend \$302 million on MCLE courses.<sup>7</sup> Throw in lost earnings from the hours blown on attendance, transportation, record-keeping and such, and the national total cost approaches \$440 million every year.<sup>8</sup> This is roughly the cost of Arizona’s alternative fuel debacle, except that the MCLE horror is repeated annually.<sup>9</sup> Inevitably, some of this needless expense is passed along to clients.

This theme—theft of time and money—ran through my letters and e-mails. Is it worth almost a half-billion dollars annually to force-feed a program that was never needed, has never been proven effective and survives mainly as a stealth scheme to surcharge Bar dues?

## The Great Divide

I had argued that MCLE weakens member confidence in the Bar. It’s worse than that, the mail revealed.

MCLE breeds deep resentment and suspicion. Bar big shots don’t give a hoot about the rank-and-file, my correspondents feel. Many believe that the Bar is paralyzed by a fear of offending powerful pooh-bahs.

“Unfortunately, because of the structure of the Arizona Bar, it’s hardly politic to criticize this program because it gives the impression of criticizing our Supreme Court justices,” a reader told me. “Yet somewhere in here we really need a reality check.”

A lawyer who had discussed the problem with colleagues wrote, “Most practitioners know that MCLE is an expensive joke, but not many will say so for attribution.”

This is terrible. In an age of multidisciplinary, multijurisdictional and even unauthorized practice of law, state regulators struggle to remain relevant. Yet they claim a nearly divine right to alienate their members by imposing a patently silly servitude.

In fact, multijurisdictional practice already has rendered Arizona’s MCLE rule excessive *and* discriminatory. Let’s say that you live and practice in Beverly Hills, California, and you also are admitted in Arizona. Your biggest client has a major regional office in Phoenix.

You shuttle over to Arizona for a few days every month and occasionally try a case here. Must you comply with Arizona's MCLE requirement of 15 hours per year?

Nope. You can have an Arizona license, devote your entire practice to Arizona matters, serve a client's Arizona interests, work in Arizona, even appear in Arizona courts, but you need only meet California's MCLE requirement.<sup>10</sup> That is 25 hours every three years, or about 8.3 hours annually, barely more than *half* our burden.<sup>11</sup>

Your firm probably concocts laughter programs—*An Ethical Evening With Ally McBeal*, say—and pays the tab, so you never write a check or leave your building. Meanwhile, the solo practitioner here, providing bread-and-butter legal services for regular Arizona folks, suffers through and pays for 15 hours.

How gullible can we get? It's almost enough to make you rent a mail drop in Blythe.

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## “[L]et us working stiffs have our say.... Hold a straight ‘up or down’ vote on the mandate.”

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### Excuses, Excuses

Some colleagues warned that I would face a dreaded MCLE audit as retaliation for my speaking up. That hasn't happened yet.<sup>12</sup> In fact, when I took my complaints personally to Bar officers and wannabes, those who responded gave polite answers. Polite, but predictable. Their jerking knees registered 6.4 on the Richter scale.

Most leaders spat up the usual aspirational hooey, running the gamut from clueless to clearly irrational. Some, though, got downright creative. One e-mailed, “Each state initially tests its attorneys for competency through its bar exam. The attorneys are then admitted to practice and, were it not for the CLE mandate, no further test of the attorney's

competency would exist.”

Don't laugh at that “further test” delusion. Zealots in Chicago's Bar Association actually threatened *mandatory periodic retesting* of licensed attorneys if MCLE failed to win approval.<sup>13</sup> In other words, submit to a bad idea to avoid being clobbered with something worse.

A Bar leader suggested that I meet my CLE requirement by attending the annual convention. In the surreal world of MCLE apologists, that makes perfect sense. Why waste 15 hours when I can squander four days? At Phoenician rates, yet.

MCLE instills public confidence, another leader told me. He was serious. Would his clients' confidence grow if they knew he “earned” three hours of ethics credit for watching Danny DeVito chase ambulances?<sup>14</sup>

Trust me—and Lexis–Nexis—on this: There is no citizen clamor for MCLE. None. Zero. A search of the *Arizona Republic* and *Arizona Daily Star* archives shows that this issue makes nary a blip on the public radar. MCLE hits the news only when a lawyer sues to junk it.<sup>15</sup> If the mandate dies, civic grief counseling will not be necessary.

### The Empire Strikes Back

As it happened, then-President Dee-Dee Samet was already planning a review of MCLE when my article appeared. “We eat, sleep and read CLE all the time,” she said.<sup>16</sup> Samet appointed a committee of distinguished lawyers to study the program.

What transpired next substantiated my correspondents' worst fears. The study committee never considered the fundamental questions: Is MCLE necessary? Does it serve its asserted purpose? Is it worth the time and money?

Why, you ask, did the committee abstain from the only work that mattered? The current Supreme Court will not budge on the issue, I was told, so the committee concentrated its attention elsewhere. The Board of Governors did nothing to help. In other words, our leadership caved in.

I understand that the Bar is a creature of the Supreme Court,<sup>17</sup> but this creepy codependency guts member concern. Our masters have perfected a circular

evasion of responsibility. The Bar can claim it won't consider meaningful change because the Supreme Court's mind is made up, and the Supreme Court need not consider change because Bar bosses don't demand any.

The committee, therefore, just tinkered. Rather than fix anything important, it fine-tuned the fiasco.<sup>18</sup> Even then, its best proposals were doomed, either because they exposed fallacies in the CLE mandate or threatened to stanch the flow of cash.

For example, one recommendation would have allowed attorneys to substitute three hours of pro bono work for three hours of MCLE. Pretty radical, eh? Replace unproductive clockwatching with valuable service for people in need.<sup>19</sup>

I loved the idea. It conceded that several of our MCLE hours are not necessary to maintain competence and integrity. But when a final report emerged from the Board of Governors, even that droplet of common sense had evaporated. So had other changes that would have saved members time, frustration and money.

No wonder, then, that members feel excluded and insulted. One wrote, “I think Arizona attorneys need an answer from the State Bar. Can we be trusted to keep up to date on the law? If the answer is ‘yes,’ then we should do away with the continuing education requirement (although courses could still be offered through the State Bar). If the answer is ‘no,’ then the State Bar would essentially be acknowledging that Arizona is filled with rogue attorneys who only do the minimum and would not keep current on the law. I would object to such a finding.”

### What Can We Do?

My correspondents offered many suggestions for breaking down the barriers to reform. Several urged running for the Board of Governors. Good idea, but the Bar's cozy succession process discourages insurgency. By the time we Forces of Light gained power, we'd be retired. Hello, young lawyers, wherever you are: Get involved now, or you'll be pushing this boulder uphill for all the decades of your careers.

A few members want legislators to

regulate the practice of law. That sounds appealing, because the legislature is theoretically responsive to constituents, unlike the Bar and judiciary. Alas, I keep recalling the German word *schlimmbesserung*: an intended improvement that makes things worse.<sup>20</sup> Although many attorneys now despair of justice from within, I'd prefer a new edition of the Spanish Inquisition than to let the Arizona legislature into our professional lives.<sup>21</sup>

Still, we may need some radical remedy. The Bar and MCLE, like all institutions and programs in which fallible humans invest their ego, tend to grow unchecked.

Consider this. The Bar's de jure responsibilities are admissions and discipline. Its de facto principal function today is cracking the MCLE whip. But our supposedly professional organization now hustles credit cards, hawks health plans, shills for book and software publishers, runs a commercially cluttered Web site, discounts rental cars, sponsors a TV news segment, wrings demographic data from readers of this magazine and occupies the summit of a downtown Phoenix office tower.

I expect a State Bar Store to open in the outlet malls soon, selling *Younger on Depositions* videos and Judge Judy talking dolls. At some point, we may have to say "enough" and demand a return to basics.


For now, just curbing the MCLE dog looks difficult. Our overseers, having labored mightily and brought forth *faux* fixes, probably won't feign interest in us again. The Bar's attitude toward MCLE critics reminds me of The Blessed Reverend, a Los Angeles cemetery owner who lusted for profitable use of his hallowed ground. "We've gotta get these stiff's off my property!" he snarled.<sup>22</sup>

Here's a better idea. Why not let us working stiff's have our say? "If the State Bar really feels that the majority of attorneys think the system valuable," one member wrote to me, "let's put it up for a membership vote." California recently polled its lawyers on MCLE. Their vote ran 2-to-1 against the mandate.<sup>23</sup>

Let's do it here. Send out ballots with our dues bills or MCLE affidavits. Include pro and con statements from

legitimate advocates. Hold a straight "up or down" vote on the mandate. Require universal participation; voting should represent all of us, not just the leaders and groupies who often distort organizational priorities.

Justice Oliver Wendell Holmes, Jr., wrote, "The best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>24</sup> We lawyers are the market for this make-work. We should decide.

I trust Arizona attorneys. I'll risk listening to them. Will MCLE's enforcers do the same? Will they allow their "truth" to take the test? 

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*Jim Mitchell promises to reply to all e-mails of praise and support, and the brickbats, too. His address is James.C.Mitchell@azbar.org.*

#### ENDNOTES

1. ARIZ. ATTORNEY, Aug.-Sept. 1999, at 27.
2. Since my article appeared, no one has offered credible proof of MCLE's value. For the most comprehensive, evenhanded analysis of the debate, see Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. OF LEGAL ETHICS 1145 (1995).
3. This felicitous paraphrase of President Eisenhower's valedictory caution was coined by George Kraw, a San Jose, California, attorney and eloquent MCLE critic.
4. See Robert Schmidt, *Are School Days Ahead for D.C. Lawyers?* LEGAL TIMES, Feb. 13, 1995, at S29 (studies suggest that forced learning is unproductive).
5. State Bar of Arizona, 1998 Member Report, at 5 (online at <http://www.azbar.org/StateBarInfo/annualreport98.pdf>, visited Oct. 16, 2000).
6. David Hawpe, *How Courts Can Better Serve Their Customers*, COURIER-JOURNAL (Louisville, Ky.), June 18, 2000, at 1D. See also Hal Mattern, *State Chief Justice Tries to Tell People Court Isn't Like TV*, ARIZ. REPUBLIC, May 14, 1999, at B4.
7. Paul-Noel Chretien, WALL ST. J., Jan. 17, 1996, at A15. One can safely assume that the number of lawyers has increased since Chretien wrote, so expense estimates based on his figures are conservative.
8. Of course, some money is spent voluntarily. Expenditures freely made by attorneys who know the needs of their clients are useful, in sharp contrast to arbitrary seat-time fees.
9. David Parrish & Ryan Konig, *Alt-Fuels Mess Has Hidden Expenses*, ARIZ. REPUBLIC, Nov. 5, 2000, at A1. See also Editorial, *\$450,000,000 Ripoff*, ARIZ. DAILY STAR, Sept. 15, 2000, at B6.

10. Rule 45(b)(5), ARIZ.R.S.CT. "I am a member of the State Bar of Arizona who is admitted and resides in another MCLE jurisdiction and I am in compliance with the MCLE requirements of that jurisdiction for the educational year in question." Affidavit of Compliance for 1999-2000, Non-Resident Member Filing.
11. CAL. BUS. & PROF. CODE § 6070 (West 2000).
12. To repeat a disclaimer from my first article: This criticism is directed at the mandate, not at our fine CLE staffers. They remain courteous and helpful to me, despite my bad attitude.
13. Molly McDonough, *Mandatory CLE Rears Its Pointy Little Head*, CHICAGO DAILY L. BULL., May 15, 1998, at 1 (worth citing just for the title). A law professor argued that MCLE courses often amount to nothing more than expensive junkets, and testing would be more beneficial to the public because lawyers would have to keep up with new developments and professional responsibility. *Id.*
14. THE RAINMAKER (Paramount 1997). Excerpts seen during *An Ethical Afternoon at the Movies*, Scottsdale, Dec. 8, 1999.
15. See, e.g., Howard Fischer, *City Lawyer Challenges Arizona Mandate for Continuing Education*, ARIZ. DAILY STAR, Sept. 2, 1997, at 1B.
16. Lisa Sperry, *Woman on the Move: Dee-Dee Samet Becomes President of the State Bar*, ARIZ. ATTORNEY, July 1999, at 6, 40.
17. Rule 31, ARIZ.R.S.CT.
18. A personal disclosure: Because I teach news media law to undergraduates at the University of Arizona, I expect to get a break under the new teaching credit rule. A friend has joked that this proposal passed because almost nobody would benefit from it, but it might shut me up.
19. Not that radical, apparently. New York recently approved pro bono work for as much as three MCLE credit hours per year. N.Y. App. Div., Rules of Court § 1500.22 (2000). See John Caher, *State Board Adopts CLE Rules Allowing for Pro Bono Credit*, N.Y.L.J., March 6, 2000, at 1.
20. The colloquialism is especially popular in bureaucracies. See, e.g., LEN DEIGHTON, *LONDON MATCH* 67 (1985).
21. My apologies to Henry Higgins. ALAN JAY LERNER & FREDERICK LOEWE, *I'm An Ordinary Man*, MY FAIR LADY (film version, Warner Bros. 1964).
22. EVELYN WAUGH, *THE LOVED ONE* (1948). An over-the-top movie (Filmways-MGM 1965) of the novel features Jonathan Winters as The Blessed Reverend.
23. CAL. BAR J., Oct. 1999 (online at <http://www.calbar.org/2cbj/99nov/page1-2.htm>, visited Aug. 2, 2000). Soon after that poll, California cut its MCLE requirement from 36 hours every three years (already less punishing than our 45 hours) to 25.
24. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).