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MANDATORY CONTINUING LEGAL EDUCATION IN MINNESOTA: THE FIRST YEAR

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In April the lawyers of Minnesota marked the first anniversary of the order of the Minnesota Supreme Court[1] requiring completion of a minimum number of hours of formal course work in continuing legal education (CLE) as a condition to the continued right to practice law in Minnesota. During that first year the Minnesota program was inaugurated, amplified, administered, imitated, praised, misunderstood, criticized, and scorned. This *Symposium* provides an opportunity for a very preliminary evaluation of the experience of the first year and for some speculation on the directions which the program will take in the years ahead. These observations reflect solely the opinions of the author and have not been reviewed or approved by the other 12 members of our Board of Continuing Legal Education (Board), its executive director, or the members of the court which established the Board. Those 22 individuals would undoubtedly offer 22 different insights into the situation.

An objection frequently raised, although less so during the last year, by critics of mandatory CLE, both within and without the State of Minnesota, is that no clear need for the establishment of such a program has been demonstrated. Even as the discussion goes forward, the crushing weight of new statutory, administrative, and judicial law presses in on practicing attorneys from every direction. Apart from the most exotic or provincial specialties, I doubt that there are any lawyers in private practice in the United States whose daily work is not affected to some degree by such developments as the Employee Retirement Income Security Act of 1974,[2] the trend toward adoption of the Uniform Probate Code,[3]

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[1] *In re*: Rules Relating to Continuing Professional Education, No. 45,298 (Minn., Apr. 3, 1975).

[2] Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of INT. REV. CODE OF 1954), *discussed in Supplementary Conference on the Pension Reform Act of 1974*, N.Y.U. 33D INST. ON FED. TAX. 1 (1975).

[3] Among the states which have recently adopted the Uniform Probate Code are Arizona, ARIZ. REV. STAT. ANN. §§ 14-1102 *et seq.* (Spec. Pamphlet 1974), Colorado, COLO. REV. STAT. ANN. §§ 15-10-101 *et seq.* (1973), Idaho, IDAHO CODE §§ 15-1-101 *et seq.* (Supp. 1975), Montana, MONT. REV. CODES ANN. §§ 91A-1-101 *et seq.* (Spec. Unif. Probate Code Pamphlet 1975), and North Dakota, N.D. CENT. CODE §§ 30.1-01-01 *et seq.* (Spec. Unif. Probate Code Supp. 1975).

the movement of state legislatures toward no-fault automobile indemnity,[4] the Tax Reduction Act of 1975,[5] new "truth in lending" legislation,[6] frequent changes in and extensions of the regulation of the issuance and sale of securities,[7] and the dramatic shifting of legal theory and damage awards in the area of professional liability.[8] There are virtually no lawyers who are not affected — only lawyers who do not realize that they are affected.

The Fourth National Conference on Continuing Legal Education was held at the American Bar Center in Chicago on November 10-12, 1975. At this conference, judges, teachers, lawyers, administrators, and others interested in CLE programs reviewed the considerations which prompted the Minnesota program of mandatory CLE and the prospects for the spread and success of such programs. One of the conclusions set forth in the final position statement issued at that conference was the following:

> A majority of the conference participants are of the view that the case for mandatory programs is not sufficiently persuasive to support a recommendation that all states now adopt them. We believe that there are unanswered questions concerning the specific relationship between required programs of continuing legal education and the quality of legal service.
>
> We urge the organized bar in each state to study closely the results of the mandatory programs now being initiated as well as other means by which the quality of legal services available to all can be improved.[9]

From our standpoint in Minnesota, this "wait and see" position is satisfactory. We would agree that the programs in Minnesota,

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[4] For examples of recently enacted no-fault automobile indemnity statutes see CONN. GEN. STAT. ANN. §§ 38-319 *et seq.* (Supp. 1975), FLA. STAT. ANN. §§ 627.730 *et seq.* (1972), MICH. COMP. LAWS ANN. §§ 500.3101 *et seq.* (Supp. 1975), N.Y. INS. LAW §§ 670 *et seq.* (McKinney Supp. 1975), and UTAH CODE ANN. §§ 31-41-1 *et seq.* (1974), *as amended,* (Supp. 1975).

[5] Pub. L. No. 94-12, 89 Stat. 26 (codified in scattered sections of INT. REV. CODE OF 1954).

[6] 15 U.S.C. §§ 1601 *et seq.* (1970), *as amended,* (Supp. IV, 1974). Subsequent amendments to the "truth in lending" legislation are discussed in National Consumer Law Center, Inc., *1974 Amendments to the Truth in Lending Act,* 8 CLEARINGHOUSE REV. 851 (1975), and Collins, *Current Developments in Truth in Lending and Other Consumer Credit Protection Legislation,* 2 OHIO N.U.L. REV. 477 (1975).

[7] *See, e.g.,* Fraidin, *Developments in Federal Securities Regulation — 1974,* 31 BUS. LAW. 653 (1976).

[8] The upsurge in medical malpractice litigation has been a source of increasing concern for both doctors and practicing attorneys. *See, e.g.,* Maltempo v. Cuthbert, 504 F.2d 325 (5th Cir. 1974); Mitchell v. Gilson, 233 Ga. 453, 211 S.E.2d 744 (1975); Wees v. Creighton Memorial St. Joseph's Hosp., 194 Neb. 295, 231 N.W.2d 570 (1975); Ballance v. Wentz, 286 N.C. 294, 210 S.E.2d 390 (1974); Francois v. Mokrohisky, 67 Wis. 2d 196, 266 N.W.2d 470 (1975).

[9] *National Conference on Continuing Legal Education Issues Final Statement with Recommendations,* 62 A.B.A.J. 210 (1976).

Iowa, and Wisconsin — and perhaps similar programs now under consideration in several other states[10] — may serve as pilots for analysis and evaluation by others. Constructive criticism will be welcome, and we expect that our program will undergo a continuing process of evaluation and modification. If the idea is so extraordinary, however, why have two-thirds of the states undertaken serious consideration of it? If the lawyers in a given state feel that a program of this nature is logical and desirable, why should it not be implemented as soon as possible? If lawyers regard a worthwhile program with aversion and disapproval, will some more distasteful program, perhaps poorly constructed or politically motivated, be thrust upon them by the courts, the legislatures, or the public?

Several thoughtful papers have been published suggesting that alternative methods be used to support and improve lawyer competence.[11] Among the alternatives suggested have been peer review systems, mandatory periodic examinations, stronger encouragement of voluntary continuing legal education, and adoption of programs for the specialization of attorneys. These alternatives enjoy considerable currency at the academic level and provide grist for interesting dialogue, particularly among the CLE "professionals." I would suggest that these various alternatives be "market tested." Our original study committee in Minnesota quickly became aware of the hazards of extensive theoretical discussion among persons closely associated with CLE. One of our decisions was to expose our deliberations to the thinking of practicing lawyers and judges at an early stage, and this practice has been continued. As a consequence, we learned that Minnesota lawyers emphatically reject periodic examinations and peer review programs, and a similar reaction might be expected in other states. It is not unreasonable to question the need for CLE programs or to challenge the effectiveness of mandatory programs. Until there has been some demonstrated enthusiasm for peer review systems or periodic examinations, similar to the enthusiasm demonstrated in Minnesota and

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[10] Proposals for mandatory CLE programs have been considered in California, Kansas, Iowa, Wisconsin, Colorado, Florida, Georgia, Idaho, Maryland, New Mexico, Oregon, South Dakota, and Washington. *See* Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (1975).

[11] *See, e.g.*, Berger & Barnett, *Rx for Continuing Education: Lawyer, Examine Thyself!*, 59 A.B.A.J. 877 (1973) (voluntary testing program); Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence*, 1974 UTAH L. REV. 463 (periodic relicensing of attorneys); Sherrer & Sherrer, *The Lawyer's Recognition Award: A Suggested Program for Upgrading and Structuring Continuing Legal Education*, 32 FED. B.J. 26 (1973) (recognition of attorneys who complete 150 hours of formal education within 3 years); Zepnick, *Proposed Pilot Program in Legal Specialization — Trial Advocacy*, TRIAL L.Q., Spring 1974, at 36 (establishment of New York State Trial Lawyers Association Board of Specialization in Trial Advocacy).

Wisconsin for mandatory CLE, however, it is difficult to take such alternatives seriously.

With respect to increasing or improving the motivation of lawyers to continue their legal education voluntarily, the feeling in Minnesota was that very little incremental value would be realized in this manner. In recent years Minnesota lawyers have consistently had available to them CLE programs of high quality. Although these programs have generally been well attended, less than 50 percent of Minnesota lawyers attended with any frequency. It is striking to contrast this experience with the warm and broadly based endorsement of the mandatory CLE program by Minnesota lawyers. This would suggest that many lawyers recognize that CLE is something they ought to do, even if they have not consistently done so. Unfortunately, when lawyers fail to establish good habits in this regard, clients are likely to suffer more than the lawyers, and presumably, this is the rationale behind mandatory completion of law school education, mandatory passing of a bar examination, and mandatory compliance with the Code of Professional Responsibility.

Suggesting that a program of recognized specialization is an alternative to mandatory CLE misses the point. Specialization is involved with difficult policy questions such as whether certain attorneys may be designated, by themselves or by others, as better qualified or more skillful than their peers and whether and how such designation may be communicated to the general public. A mandatory CLE program by definition applies to all lawyers except those few who choose to exclude themselves from its operation. It transcends questions such as economic advantage, substantive practice areas, and practice in urban areas as opposed to rural areas. In Minnesota, for example, programs of specialization have been highly controversial and have failed to establish a broad base of support, while a substantial majority of Minnesota lawyers favor the mandatory CLE program. This would imply that they have not had difficulty in perceiving the difference. I would venture two predictions: First, within the next five years at least another dozen states will implement programs of mandatory CLE; and second, whether or not the first prediction is accurate, no state will adopt any of the suggested alternatives to mandatory CLE with the exception of specialization, which of course is not an alternative at all.

It may be instructive to mention briefly some of the administrative questions and problems which have arisen since our Board was appointed and administration of the program was commenced last April:

1. Several difficult problems have arisen with respect to partial credit for particular courses. Occasionally, a program of 2 or more days is directed partially at lawyers and partially at persons involved in other professions or occupations. How much credit should be given for a program on judicial administration which devotes time to such subjects as reorganization of the court systems and criminal sentencing on the one hand and architectural design of courthouses and salaries of maintenance workers on the other? A few of these questions have called for the wisdom of Solomon.

2. By December 31 our Board had approved more than 500 separate courses which were offered in various parts of the Western Hemisphere from July 1, 1974 to the present. Our intention is to publish regularly a printed list of the approved courses and distribute such lists to Minnesota lawyers. Printing and mailing costs will apparently be substantially greater than we had anticipated. We want to make this information as broadly available as possible, but we must also live within a budget.

3. A few controversies have arisen as a result of our declared policy that credit will not ordinarily be given for attendance at luncheons and dinners at which speeches are made. Some of our district bar associations and sections of the State Bar Association have periodic luncheon or dinner meetings at which topics of considerable value are discussed by clearly competent speakers. Should credit be given for "education" imparted under such circumstances? Should it make any difference if a cocktail hour precedes the meal?

4. How long is an hour? The members of our Board were unprepared for some of the reaction occasioned by our determination that an hour consists of 60 minutes. Some critics have suggested that we were being "too picky" and that some sort of "running time" should be used to measure the duration of a daylong program. For example, it has been suggested that a program which begins at 9 a.m. and ends at 5 p.m. should count for 7 hours even though everyone knows that intellectual capacity and biology require periodic interruptions. Our Board has simply assumed that if the sponsoring organization informs registrants that a session will recess at noon and resume at 2 p.m., that is exactly what will happen.

5. We have had several requests for "restricted status," that is, a severely limited license to practice law, which in turn relieves the attorney from complying with the CLE requirements. We expect more such requests as the first deadline for compliance, June 30, 1976, approaches. The Board and its executive director have attempted to be lenient in the granting of requests for restricted status.

6. The Minnesota Board of Continuing Legal Education discussed extensively the amount of credit to be given to attorneys who teach the approved courses. It is obvious that the teacher should receive more credit for an hour of presentation than the registrants receive. It was initially proposed that a faculty member receive an additional 3 hours of credit for each hour he actually presents material. In its final version, the rule removes any such limitation. A faculty member in an approved CLE program may claim credit for as many hours of preparation as are actually devoted by him to the task.

It may also be useful to mention certain problems which have *not* occurred since the inception of the program:

1. Obviously, some lawyers were and are opposed to the Minnesota CLE program. Nonetheless, the Board members and the executive director have been impressed by the almost universal acceptance of and cooperation with the program. Even lawyers who openly opposed the program have demonstrated their professionalism and good will by complying readily with its terms.

2. There has been very little criticism of the quality of the programs, at least those offered by established CLE organizations. On the contrary, several lawyers have remarked to me that CLE programs were more valuable than they had realized.

3. There has been very little criticism of either the cost of CLE programs or their general availability. This is true despite the fact that it has been necessary in several instances to turn away late registrants when programs were filled to capacity. Since it had been suggested in the earlier stages that it might be difficult for out-state lawyers to come to the Twin Cities to attend courses, I thought it ironic when one of my partners reported that he had sought too late to register for a course being offered

within one block of our offices in Minneapolis "because of the large number of country lawyers in attendance."

4. There has been virtually no criticism of or resistance to the program from corporate counsel or government lawyers even though the same requirements imposed upon private practitioners are imposed upon them. Actually, we anticipated no objections from these groups since both indicated their strong support during the evolution of the program.

The Minnesota program was a pioneering effort and, obviously, it is not perfect. Several areas in our rules which may deserve further study and possible amendment can be identified:

1. Perhaps our rules should permit limited carryovers of excess credits to a subsequent education period. I believe our Minnesota Board still feels that the 3-year education period is more practical for lawyers and more easily administered than a 1-year education period. Excess credits up to a possible maximum of 15 hours, however, might be carried over from one triennium to the next without violating the underlying premise of the program that legal education should be regular and continuing rather than spasmodic.

2. The Minnesota rules as originally proposed incorporated by title and description the position of "administrative director." These provisions were removed at our State Bar Association convention under the misapprehension that omission of this position would somehow achieve economy in the administration of the program. It was quickly apparent to the members of the Minnesota Supreme Court that such an officer must be appointed at the outset and furnished with suitable office and staff. Although the literal description of the position of executive director and the detail of his duties were not restored to the rules as adopted by the court, this position has in fact been capably filled, and that office directs the daily administration of the program. The Minnesota rules should be amended so that these provisions relating to the executive director are restored.

3. The composition of the Minnesota Board of Continuing Legal Education might be modified. Personally, after a year of experience, I believe that the 13-member Board might be reduced in size. Perhaps a Board of 9 or

10 members would be adequate. In addition, our present rules make the inclusion of nonlawyers permissive rather than mandatory. The three members of our Board who are not lawyers have made significant and valuable contributions to our work. I would think that such representation of nonlawyers might be made mandatory.

4. There have been several suggestions that lawyers over a certain age be excused or relieved from compliance with the requirements. In Minnesota it was our feeling that such exemptions would seriously impair the value and credibility of the program. The primary justification for the program is better service to the public. No one would seriously suggest that untrained persons over the age of 70 be allowed to fly airplanes or remove gallstones. Why should they be permitted to handle legal matters?

5. The provisions authorizing election of restricted status were inserted in the Minnesota rules shortly before their final adoption. The definition and perimeters of restricted status are somewhat awkward and inconsistent as written. I think it might be worthwhile if further study were given to the questions of who may apply for restricted status and what the scope of activity of a restricted attorney might be.

Although the initial Minnesota proposal contemplated education periods based on the calendar year, one of the last modifications of the program prior to adoption involved changing the education and reporting period to a fiscal year basis, with each year closing on June 30. Our preliminary reaction to the use of a June 30 fiscal year is quite favorable. Many lawyers find that December is an extremely busy time of the year even without the additional pressures of completing education requirements. Further, individual extensions of time which might otherwise offer relief from a deadline would not be particularly helpful at the end of the calendar year. Many lawyers become involved in the "tax season" in January and February. In addition, travel can be difficult in the Northern States during the winter months. It is our feeling that lawyers will find it more convenient to "catch up" on their education requirements in May and June if they have fallen behind schedule. Further, if a short extension is necessary, the months of July and August will normally lend themselves to educational activities without the difficulties attendant to winter travel. As it happens, our State Bar Association convention is regularly held in

the latter part of June, and it is expected that numerous CLE courses will be offered each year in conjunction with this convention. This will provide further assistance to Minnesota lawyers in completing their requirements.

In response to inquiries from lawyers in other states concerning the feasibility of mandatory CLE, we have stressed the importance of two conditions which we feel must precede serious consideration of such a program: First, the program must be explained to and ultimately supported by a substantial majority of the lawyers in any state which might adopt it; and second, it is essential that the state already have in operation a well-organized and effective CLE program for lawyers.

In considering this matter in Minnesota, the members of our study committee became convinced at an early date that it would be pointless to approach our supreme court with such a proposal without solid backing from the lawyers themselves, the very persons to be regulated. It also became apparent that this base of support would not materialize unless the program and its rationale were presented to Minnesota lawyers and the lawyers given ample opportunity to discuss the program and reflect upon it. Our committee felt that a premature straw vote or referendum, without adequate opportunity for discussion and improvement of the proposals, would certainly fail. Therefore, more than a year was devoted to presenting the program to various audiences of Minnesota lawyers, ranging from formal presentations at the 1973 State Bar Association convention to informal discussions at district bar association meetings. As a consequence of this procedure, questions and objections were raised, the proposals were modified, and Minnesota lawyers were given the opportunity to participate actively in the design of the program. We feel that this open and mature approach was an indispensable factor in the development of the Minnesota program.

Many of the district bar associations to whom the proposals were presented spontaneously adopted resolutions of support without solicitation by members of the study committee. When the matter was presented at the 1974 Minnesota State Bar Association convention, it was overwhelmingly approved on a voice vote following extended exposition and discusssion. Thus, when the matter was presented to the Minnesota Supreme Court, the proponents were able to represent to the court that the program had solid support from the lawyers of Minnesota.

It is interesting and reassuring to note the results of the referendum on this matter conducted in Wisconsin pursuant to the direction of the Wisconsin Supreme Court. In numbers large enough to indicate an informed and interested response, Wisconsin lawyers supported the idea by more than a 70 percent majority. In light of the division of opinion among members of the Wisconsin Supreme Court on this matter, the affirmative response of the Wisconsin bar is heartening. By contrast, the Minnesota Supreme Court adopted our program unanimously.

The other important condition which must precede adoption of a mandatory CLE program is the existence of a fully functioning CLE program within the jurisdiction. Even before the adoption of our mandatory program, our Minnesota CLE office was conducting a busy schedule of high-grade legal education courses. This year the facilities of our CLE office have been heavily burdened with the increased demand, but they are responding well. In addition, one or two independent agencies have presented programs in Minnesota. In retrospect, it would have been disastrous to impose a program of mandatory education if the capability for large-scale continuing education of lawyers had not already been present within the State.

In conclusion, it must be noted that our Minnesota program has been helped immeasurably by a consistent spirit of intellectual courage and good will at every level. The officers and governors of the Minnesota State Bar Association who initiated the study demonstrated a concern for high standards in the profession. The member of the special Study Committee on Continuing Professional Competence showed a readiness to entertain and test new ideas, and in some instances there were important changes of viewpoint as the study progressed. The lawyers of Minnesota demonstrated their willingness to enter a new phase in the history of the profession without being intimidated by the prospect of novel techniques. The members of the Minnesota Supreme Court were willing to confront the problems and solutions laid before them and to act decisively even in the face of anticipated dissent from some quarters. Finally, Minnesotans who are not members of the bar have been quick to recognize and applaud the genuine efforts of lawyers to maintain professional standards and improve the level of legal services provided to the public.

All parties involved recognized the necessity for continuing review and evaluation of this program. No avenues of future de-

velopment have been closed off. The requirements for mandatory CLE may be raised, modified, or completely abandoned depending on the cumulative experience of a number of years. In any event, the Minnesota bar feels that it has made a positive statement concerning the responsibilities of lawyers to their clients and to their profession.