Opinion

Serious MCLE Flaws Are Being Ignored

By Eugene Hyman

January 1, 1991, is a date that will be remembered by all providers of continuing legal education in the State of California. By dictate of the state Legislature, on that date California will join the ever-increasing number of states that require attorneys to participate in continuing legal education programs as a condition of licensure.

The CLE concept is not an entirely foreign one in California. The state Supreme Court has permitted certification of certain specialities, in one form or another, over the last decade. As one of the prerequisites for receiving and maintaining that certification, attorneys must continue their legal education.

The State Bar of California recently issued proposed CLE rules. They are now before the public for comment and eventually will be sent to the high court for adoption or modification. While the potential benefits of CLE have received much attention, the serious problems with the program have been all but ignored. CLE has been proposed by the Bar's board of governors as a method of reducing legal malpractice and attorney discipline problems. But the Bar has produced no evidence that states with mandatory CLE have lowered their malpractice claims or attorney discipline problems.

Currently, some 80 percent of California Bar dues is spent on attorney discipline. CLE is not likely to reduce this expense.

The most common cause of attorney discipline in California has nothing to do with ignorance of the law, but is the unfortunate consequence of alcohol, drug abuse, client abandonment and outright dishonesty. When was the last time that the legal newspapers or the Bar journal listed an attorney being disciplined, let alone disbarred, for being incompetent? Legal education is not going to solve the problem of substance abuse, nor will it make a dishonest attorney honest.

The most common form of legal malpractice involves overlooking relevant statutes. It seems doubtful that CLE will have much effect in reducing such oversights, which are caused by a lack of effort rather than a lack of education.

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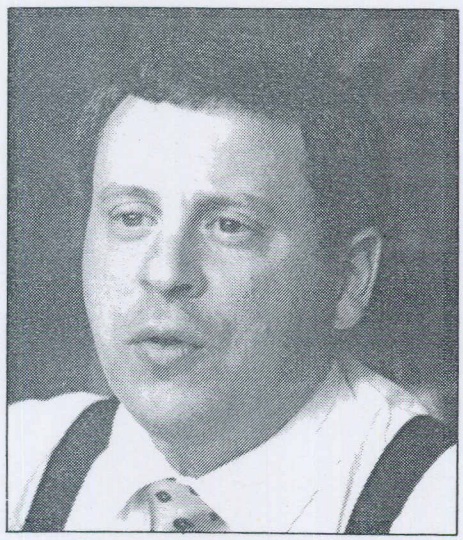

EFFECT ON MALPRACTICE COSTS

CLE probably will have little effect on most disciplinary problems and will do nothing to curb the escalating costs of attorney malpractice insurance. California physicians were promised that the Medical Insurance Control and Reform Act of 1978 would result in lower medical malpractice insurance premiums. This simply did not happen. The Legislature now has dealt with the legal profession's malpractice problem in the same manner. Probability dictates that the result will be the same.

The Legislature and Bar board missed an opportunity to be creative with the CLE program. For instance, CLE rules could have been drafted to require a discounting of legal malpractice insurance premiums based on the number of CLE hours taken.

Those who will be most disadvantaged by the new CLE system are public interest lawyers, solo practitioners and newly admitted attorneys. CLE programs are expensive. More affluent attorneys look forward to weekend CLE courses at resort locations such as Lake Tahoe, San Francisco, Monterey and San Diego, and see CLE courses as an opportunity to mix business with pleasure while deducting part or all of the cost from their taxes. Less affluent attorneys cannot always afford to spend time away from their practice, and their CLE costs will have to be passed on to the consumer.

While it is true that Bar fees will not be increased to cover the certification of qualified CLE programs, higher provider costs will be passed on to attorneys.

Monitoring of the various programs will be sporadic and questionable at best. Apparently, the designers of the legislation decided to apply a Darwinian marketplace process in which those providers dispensing poor or low-quality programs are ultimately eliminated from

The most offensive provisions of CLE law, however, pertain to those attorneys exempted from its mandate. The Legislature dictated that retired judges, state officers and elected officials, and full-time professors be exempt, as well as full-time employees of the state acting within the scope of their employment. The proposed rules also exclude active attorneys who do not practice in California.

EXEMPTIONS UNJUSTIFIED

The draft mandatory CLE rules pro-

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vide that of the 36 hours required within a three-year period:

- At least eight shall be in the area of legal ethics and/or law practice management, with at least four hours of the eight hours in legal ethics.
- At least one shall relate to prevention, detection and treatment of substance abuse and emotional distress.
- At least one shall relate to elimination of bias in the legal profession based on sex, color, race, religion, ancestry, physical disability, age, sexual orientation, etc.

If the hours specified above are important enough to be required of those who must participate in CLE, then why should retired or active judges, state attorneys, and attorneys elected to the Legislature be exempt from fulfilling them?

In addition, California law provides that an inactive member of the Bar may be appointed to the bench. If the concerns of CLE are real, then what is the justification for finding an inactive attorney qualified to sit as a judge? What is the justification for this difference in treatment other than the likelihood that one group has a stronger lobbyist who could obtain such exemptions?

For those attorneys who are presently certified specialists, CLE is already an important requirement for maintaining certification. The remaining majority of California attorneys should also participate, in some way, in the continuing educational process for the simple fact that law in California is a constantly changing process, and it is difficult to stay current in one field, let alone more than one.

While the objectives of CLE certainly are honorable, the proposed program is unlikely to reach the stated objectives of reducing malpractice and attorney discipline cases. It's likely to do more harm than good because of the increased costs and adverse bar and public sentiment given the large number of exemptions.

Rather than creating a process that is exemplary, the Legislature and Bar have created a mediocre program likely to continue the very problems that they proposed to eliminate.