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Quality Advocacy and the Code of Professional Responsibility, Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing

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Quality Advocacy and the Code of Professional Responsibility, Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing

Cover Page Footnote
This article substantially embodies the text of the Sixth Annual John F. Sonnett Memorial Lecture delivered by Chief Justice Sheran at the Fordham University School of Law on December 9, 1975. For the sake of editorial convenience, the first person singular has been retained. However, the text of the article is the joint work of the authors. The authors wish to thank Timothy Baland, Law Clerk to the Chief Justice during 1975-1976, for his assistance in the preparation of this article. ** Chief Justice of the Supreme Court of the State of Minnesota, 1973-present; member of the firm of Lindquist & Venum, Minneapolis, Minnesota; 1970-1973; Associate Justice of the Supreme Court of the State of Minnesota, 1963-1970; graduate of the Law School of the University of Minnesota, 1939; member of the American College of Trial Lawyers, and the American Law Institute. *** Director of Continuing Education for State Court Personnel, Supreme Court of Minnesota, 1973-present; Project Director and Director of Research and Publications, National College of District Attorneys, 1971-1973; J.D., Stanford University Law School, 1968; member of the state bars of California, Oregon, and Minnesota.
At the Sixth Annual John F. Sonnett Memorial Lecture, Chief Justice Sheran of the Supreme Court of Minnesota presented a speech on Minnesota's decision to become the first state to mandate continuing legal education for all licensed attorneys and judges in the state. The purpose of the decision, which emphasizes the quality of advocacy in Minnesota, was to implement the concept of Canon 6 of the Code of Professional Responsibility which provides that a lawyer should represent a client competently. This Article discusses the considerations and the process which led to the adoption of the Minnesota plan.

I. INTRODUCTION

On April 3, 1975, the Supreme Court of Minnesota approved a program which requires all licensed attorneys and judges in the state to complete forty-five hours of postgraduate legal education every three years. Why did we take this action? How is our plan set up? How is it...
working so far? Questions like these need to be answered. Since Minnesota was the first state to make continuing legal education mandatory, and since other states are considering similar proposals, I welcome this opportunity to explain the origins and operation of the Minnesota Plan.

II. INTEREST IN MANDATORY CONTINUING LEGAL EDUCATION: NATIONAL TRENDS AND FACTORS

In recent years a number of factors have come together to raise the issue of the post-admission competence of attorneys. Traditional wisdom tells us that a lawyer's time is his stock in trade. This maxim is true, as far as it goes, but today's attorney needs to offer both society and his clients more than his time in order to deserve the title "Counselor at Law." To serve his clients adequately, a lawyer must be able to apply specialized knowledge in a skillful and effective way. Since the law changes constantly, this is not an easy task. In Minnesota, the more highly motivated and conscientious lawyers have traditionally availed themselves of voluntary continuing legal education (CLE) course offerings and other means of keeping current. For these attorneys, the advent of mandatory CLE simply formalizes practices which had previously been self-imposed. For attorneys whose skills have been eroded by time, or those who have not stayed up to date, mandatory CLE provides the incentive for doing what the times so clearly require.2

I mentioned that the law changes constantly. One can name almost any field of law and point to significant developments which have occurred in the last decade. For example, we now have no-fault auto insurance and fault-free divorce in many states.3 Criminal law and

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2. While Minnesota is the first state to require continuing education for attorneys, at least ten states have made continuing education a condition of relicensing for their physicians. N.Y. Times, Jan. 29, 1976, at 24, col. 5.

CONTINUING LEGAL EDUCATION

procedure are hardly what they were ten years ago; in both tax and bankruptcy law, major changes appear imminent.4

That change occurs constantly can also be statistically established. Consider these figures: in 1930, the U.S. Code contained three and one-half million words; today it contains twenty million words. In the last bi-annual session of the California Legislature (1967), 1,725 laws were enacted. In the 1973-1974 annual sessions, the California Legislature produced 2,825 new laws. In Minnesota's last bi-annual session, 966 laws were passed; in 1973-1974, the number jumped to 1,365. Similar increases have occurred in the number of reported court decisions. In 1965, the West Publishing Company printed 208 Minnesota Supreme Court decisions. Last year, 381 decisions appeared. For all volumes in the West system, state and federal, just over 28,000 decisions were reported in 1965; by last year, the number had risen to 40,847.5

Ethical Consideration 6-1 of the Code of Professional Responsibility states that the lawyer "should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle."6 When one combines this precept with change of the magnitude just described, the conclusion is inescapable that some formal program of post-admission education is vitally important to the law's continued credibility as a learned profession. Additionally, unless the judicial system serves its functions adequately, others will act in our stead. In 1971, for example, a resolution was introduced in the California Senate calling for continuing education of professionals in various fields.7 There have been similar legislative rumblings in Minnesota,8 and Minnesota and California are hardly unique in this respect.


5. The statistics in this paragraph were provided by West Publishing Co., St. Paul, Minnesota.


7. Calif. S. Res. No. 211, introduced in the California Senate on October 18, 1971, by Senator George Deukmejian.

8. Between February and May 1975, eleven bills affecting the legal profession were introduced in the Minnesota State Legislature. See the recommendations and report of the Commission on Legal Services, Minnesota State Bar Association, Oct. 4, 1975, 32 Bench and Bar of Minnesota no. 4, 21-23 (Oct. 1975).
The need for attorney post-admission education programs has, in short, become self-evident. No one seriously suggests that our law schools—now training over 100,000 new attorneys⁹—can meet this need. While law school training is satisfactory for its purposes, the specific skills needed to serve the practical requirements of clients are, for the most part, learned "on the job," after admission to the bar. And, the fact that we need to do a better job with our post-admission educational programs, or at least extend their reach and coverage, is attested to by rising malpractice claims against attorneys.¹⁰ As in the medical field, there is no longer reluctance on the part of consumers of legal services to make claims for damages where the efforts of the attorney prove unsatisfactory. The fact that attorneys are now potentially liable for the nondisclosure of material information in S.E.C. registration cases is but one recent development in this area.¹¹

When one adds up all these factors—the Code's precepts, legislative intervention, increasing malpractice claims, high-volume legislative and judicial production coupled with rapid change—the question becomes not whether we should have formalized post-admission attorney education programs, but rather what form such programs should take. Many different proposals have been suggested.¹² A discussion of the various alternatives to mandatory continuing legal education is beyond the scope of tonight's lecture, but before leaving the topic I would at least like to list some of the possibilities that were considered in Minnesota. We looked into post-admission plans based upon: (1) systematized peer review, (2) voluntary self-assessment testing, (3) mandatory periodic testing as a basis for recertification, (4) specialization by a method of certification, as in California, or by representation of special competence, as in New Mexico, and (5) improvement of instructional techniques, standards, and course offerings in voluntary programs.


In concluding this portion of my remarks, let me remind you that Chief Justice Burger, in this same lecture series two years ago, decried the low state of trial advocacy and called for some system of certification of trial lawyers. The Chief Justice argued that advocates owe a duty of competence to their clients and to the courts. If this obligation exists for trial advocates, then it exists for all attorneys. In Minnesota, we concluded that mandatory continuing legal education is the best practical means to help insure that this duty is fulfilled.

III. INTEREST IN MANDATORY CONTINUING LEGAL EDUCATION: MINNESOTA DEVELOPMENTS

These various national developments and pressures—all spotlighting the need for more systematic approaches to the matter of attorney competence—took concrete shape in Minnesota during 1971. In that year, members of an advisory committee to Minnesota's voluntary CLE program read a New York Times article which told of several physicians in Oregon who lost their licenses to practice when they failed to comply with a mandatory continuing education program. This article suggested to the committee that it was time for serious investigation of ways to ensure the continuing competence of attorneys practicing in Minnesota. A special Study Committee was established to investigate mandatory CLE and other alternatives. Special attention was given to what other professional organizations were doing. A consensus gradually developed that mandatory continuing legal education was the best solution for Minnesota.

The preliminary report of the Study Committee was a major topic of discussion at the 1973 State Bar Convention. Out of that convention came a resolution that 1974 would be a "year of communication" on the subject. As a result, approximately twenty meetings between committee members and local bar groups were held all across the state. At the July 1974 State Bar Convention, the delegates voted overwhelmingly to approve the committee's proposed rule instituting a mandatory CLE program. Hearings were held that fall and winter at the Minnesota

14. As David Brink has written: "In today's more complex, demanding, and consumer-oriented society, what are the true priorities for action by the organized bar? In other times some principal priorities were for social and fraternal purposes or to resist incursions by less responsible and skilled groups. While these may continue as proper goals, today's legitimate bar association activities can best be ascertained in terms of the lawyer's duties. These are, in decreasing order of importance, duties to the public, duties to the profession, duties to the organized bar, and duties to the individual." Brink, Who Will Regulate the Bar?, 61 A.B.A.J. 936, 938 (1975). Mr. Brink, a member of the Board of Governors of the American Bar Association, is a Minneapolis attorney who was instrumental in the creation of the Minnesota plan.
15. N.Y. Times, Jan. 9, 1972, at 63, cols. 6-8.
Supreme Court; judges as well as attorneys were brought within the ambit of the rule, and on April 3, 1975, Minnesota became the first state to adopt mandatory continuing legal education.

The fact that the initiative for a mandatory program came from the State Bar Association, and the fact that there was substantial support for such a program throughout the bar, weighed heavily in the court's decision to adopt mandatory CLE.

Another important consideration was the fact that in Minnesota there existed strong voluntary CLE programs for both attorneys and judges. Courses for attorneys in the state had been conducted since 1965 by Minnesota Continuing Legal Education, a cooperative program of the Minnesota State Bar Association and the Continuing Education and Extension Office of the University of Minnesota. In terms of the state's attorney population of about 7,500, Minnesota CLE is probably the most active state organization. In 1974-1975, for example, it sponsored thirty-seven different courses, for which more than 7,100 individuals registered.

Judges and other court personnel in Minnesota have been offered individualized educational programs since 1973 under the auspices of the Office of Continuing Education for State Court Personnel. The office, unique in the nation, offers courses and a forum for professional interchange among judges, clerks, court administrators, prosecutors, defense counsel and law enforcement personnel. Recent programs have ranged from seminars on the new Minnesota Rules of Criminal Procedure to a session on judicial writing co-sponsored with the Wisconsin Supreme Court's Judicial Education Center.

Another important factor leading to the institution of mandatory CLE was the developing legislative interest in the area. During the 1975 session of the Minnesota Legislature, eleven different bills were introduced affecting matters of interest to attorneys. Among the bills were measures which would have: (1) permitted specialization identification, (2) repealed the attorney's lien law, (3) required attorneys to post fees, (4) barred attorneys from serving in the legislature, (5) permitted lay persons and corporations to practice law, (6) segregated

16. See Final Report of the Study Committee on Continuing Professional Competence, Minnesota State Bar Association, Mar. 16, 1974, 30 Bench and Bar of Minnesota no. 9, 21 (Mar. 1974), where the following comment appears in response to the Committee's rhetorical question as to why Minnesota should be the first state to mandate continuing education for lawyers: "[T]he existing [voluntary] program of continuing legal education in Minnesota is an excellent one. On a per capita lawyer basis, the Minnesota program ranks favorably nationally. The availability of this excellent existing program makes Minnesota a logical candidate for the introduction of mandatory continuing legal education." Id. at 24.

17. See note 8 supra.
attorneys into solicitor and barrister classifications, and (7) allowed the
director of consumer affairs to investigate charges against attorneys.

The bills were wide-ranging in their potential impact; moreover,
they were introduced by one of the state's most influential senators
during a period when fallout from Watergate and a heightened sense of
consumerism had combined to create a potentially volatile atmosphere
in the legislature. I believe the bar in Minnesota took the position that
a mandatory educational program under the control of the judiciary
was preferable to one which might be imposed by the legislature, and
the initiative of the bar in the matter was a natural consequence of that
position.\^\footnote{18}

Also of interest was the fact that the State Medical Association in
Minnesota had formally approved a program which conditions associa-
tion membership on attendance at educational sessions. Minnesota
dentists have operated under statutory competency requirements since
1969; legislation requiring continuing education for nurses in Minne-
sota was passed in 1975.\footnote{19}

I mention these developments to give you a sense of the situation that
existed during the fall and winter of 1974-1975 when our court was
considering this matter. Though we were the first court to order
mandatory CLE, our decision is not altogether remarkable considering
the circumstances which I have outlined. Yet, at the same time, we
were cognizant of the pioneering aspects of our decision, and I
personally was always aware that we ought not to make mandatory
that which could be achieved as well, or almost as well, voluntarily. In
the end, we adopted mandatory continuing legal education, but it was
not an easy decision.

IV. THE MINNESOTA PLAN IN OPERATION

On the basis of our experience to date with mandatory continuing
legal education, it appears that the critical factor in its success is the
work of the Board in supervising the operation of the program. The
Minnesota State Board of Continuing Legal Education is a thirteen-

\footnote{18. Even if it had been the legislature which mandated continuing legal education, the
enactment would no doubt have been subject to strong constitutional challenge. See Sharood v.
Hatfield, 296 Minn. 416, 423, 210 N.W.2d 275, 279 (1973), which held that legislation affecting
the right of the Minnesota Supreme Court to regulate the practice of law in the state was an
unconstitutional usurpation of powers reserved to the judicial branch.}

\footnote{19. 11 Minn. Stat. Ann. § 150A.09(2) (1970) requires dentists in the state to take at least
twenty hours of continuing education course instruction every five years. Minn. Session Laws, ch.
240 (1975) provides for a program of mandatory continuing education for nurses in the state.
Rules and regulations affecting the nurses are to be ready for legislative review by January 1,
1977; the program becomes effective January 1, 1978.}
member agency composed of a chairperson, three laymen and nine lawyers, including one judge of general jurisdiction. The Supreme Court appoints the chairperson and all members of the Board, as well as an Executive Director who serves as the administrator of the program. The Board has general supervisory authority over the operation of the rules. 20

The Executive Director initially determines whether courses submitted to the Board should be accredited and, if so, for how many hours. The Board thereafter reviews course approvals and disapprovals and may elect to overrule the Executive Director's decisions. 21

The Board's decisions are made in light of written standards. 22

20. See April 3d Order, supra note 1. Supreme Court Rule 2 reads in pertinent part as follows:

"There is hereby established a State Board of Continuing Legal Education, to be appointed by this Court, consisting of 12 members and a chairperson. Three of the members of the Board other than the chairperson may be persons who are not members of the Bar of this state. Each other member of the Board, with the exception of one who shall be a District Judge, shall be a member of the Bar of this state who practices in Minnesota with his principal office located in this state. . . . The chairperson of the Board shall be appointed by the Court for such time as it shall designate and shall serve at the pleasure of this Court. . . .

"The Board shall have general supervisory authority over the administration of these rules. The Board shall accredit courses and programs which will satisfy the educational requirements of these rules and shall discover and encourage the offering of such courses and programs.

"The Board shall at all times be subject to the direction and supervision of this Court in all matters."

21. Rule 108, Rules of Minnesota Board of Continuing Legal Education (adopted and effective Nov. 6, 1975) [hereinafter cited as Board Rules], reads as follows:

"(a) Determinations. The Executive Director shall, in response to written requests for approval of courses, awarding of credit for attending or teaching in approved courses, waivers, extensions of time deadlines, or interpretation of these Rules, make a written response giving appropriate reasons for the determination. The Executive Director may seek a determination of the Board before making a response. At each Board meeting the Executive Director shall report to the Board on all determinations made since the Board's last meeting together with observations and comments relating to other matters under the Board's jurisdiction.

"(b) Review. The Board shall review any adverse determination of the Executive Director. The lawyer or sponsoring agency affected may present information to the Board in writing or in person or both. If the Board finds that the Executive Director has incorrectly interpreted the facts or the Rules it may take such action as may be appropriate. The Board shall advise the lawyer or sponsoring agency of its findings and any action taken."

22. Rule 101, Board Rules, supra note 21, reads as follows:

"The following standards shall be met by any course for which credit or approval is sought.

a. The course shall have significant intellectual or practical content.

b. The course shall deal primarily with matter directly related to the practice of law or to the professional responsibility or ethical obligations of the participants.

c. Each faculty member shall be qualified by practical or academic experience to teach the subject he or she covers. Legal subjects should normally be taught by lawyers.

d. While written materials need not be distributed for every course, thorough, high quality, readable, carefully prepared written materials should be distributed to all participants at or before the time the course is offered whenever practicable."
Chief among them is a requirement that the course relate primarily to the practice of law or the lawyer's professional responsibility. Other standards urge the sponsoring agency to provide an atmosphere conducive to a sound educational experience. Ideally, all courses are offered in well-lighted, comfortable facilities. Each participant should have a writing surface. Typically, each course is accompanied by carefully prepared written materials that are distributed to the participants no later than at the time of registration. The faculty must be well-qualified by education and experience to teach the subjects covered.

So far, the Board has approved 750 courses. Sponsors range from large, well-known organizations like the Practicing Law Institute, American Law Institute and Minnesota Continuing Legal Education, to small, recently organized groups like the Minnesota Practice Institute, a for-profit private offshoot of Minnesota Bar Review, Inc. In between, one finds courses sponsored by local bar associations. "In-house" training seminars for attorneys in larger law firms have also been accredited.23

Most of the courses submitted to the Board have been approved, although revisions have sometimes been made in the number of credit hours allowed. Courses have been rejected when they were oriented more toward business than legal considerations or were not sufficiently keyed to legal practice. For example, a course on accounting and real estate transactions was not accredited. A television series on the subject of bankruptcy was refused approval because it was not conducted in an academic setting.

Course offerings coupled with social occasions are also disfavored under the rules, although the last convention of the bar association did feature four seminars totalling twenty hours of course work. These

23. The information in this paragraph was provided by The Office of the Executive Director, Minnesota State Board of Continuing Legal Education. This information represents the situation in Minnesota as of January 1, 1976.
sessions were conducted in facilities separated from the convention itself.

Courses certified by the State Board differ in scope, as well as subject matter, from those subjects traditionally taught in law schools. Law school instruction typically provides in-depth analysis of legal problems and trends. The CLE programs are primarily refresher courses in relatively narrow areas of the law, which are designed to update the participant on subjects with which he has some familiarity; only about twenty percent of the sessions present information which is completely new to the average practitioner.

Approved courses fall into two basic categories: about ninety percent are refresher courses designed to bring participants up to date in specific areas; the remainder emphasize performance techniques rather than information. Within these two categories, the range of courses is impressive. Recent Minnesota CLE offerings, for example, have included courses on Basic Securities Law, Professional Responsibility, and a seminar on Advising the Client in Tax Fraud Cases. A legislative wrap-up seminar and a course on the new Minnesota Probate Code were among the courses offered at the last State Bar Convention; a Patent and Trademark seminar is scheduled for early 1976.

Since mandatory continuing legal education went into effect, the number of course offerings and registrations has risen dramatically. Minnesota CLE presented eighteen courses in the first four months of its last fiscal year; in the corresponding period this year, twenty-seven courses have been offered—a fifty percent increase. Registrations have jumped from 3,370 in the first four months last year to 5,900 during the same period this year; if one counts some 1,200 registrations which were not accepted because courses were over-subscribed, then total registrations in the first four months of this fiscal year already equal the number achieved in all of 1974-1975.24

Attorneys who do not wish to fulfill the requirements of our mandatory plan can choose "restricted status." An attorney so classified can still represent certain close relatives or a single employer in Minnesota. The Board can grant a waiver of the rules or an extension of time in which to comply in cases of hardship or in other extenuating circumstances. Absent restricted status or hardship, non-compliance results in an investigation and hearing conducted by the Board, followed by a report to the Supreme Court, where "appropriate disposition" is to be made.25

24. These statistics were provided by John B. Wirt, Director, Minnesota Continuing Legal Education.

25. Restricted status is provided for by Rule 3, April 3d Order, supra note 1. Supreme Court Rule 3 in pertinent part reads as follows:
V. THE STATUS OF MANDATORY CONTINUING LEGAL EDUCATION IN OTHER STATES

Minnesota is the only state with a mandatory CLE program presently in operation; Iowa joins us in January. The Wisconsin Supreme Court has approved in principle a mandatory plan similar to Iowa's, and in North Dakota a proposed rule based upon Minnesota's has the unanimous backing of the North Dakota State Bar Association and is about to be submitted to that state's Supreme Court for consideration. The Supreme Courts of New Mexico, Utah, and Washington also have proposals for mandatory CLE under consideration.26

In a handful of other states—California, Idaho, Kansas, and Maryland—final drafts of plans are pending before the State Bar Associations. In Kansas, a mandatory system won Kansas Bar Association Executive Council approval a year ago. Since then, a motion by the Association asking the State Supreme Court to adopt mandatory CLE has been made and then tabled; the future of the project depends upon what kind of consensus develops.

In California, legislative pressure relative to lawyer competence dates back to 1971. The Board of Governors of the California Bar Association has now approved in principle a proposal which calls for

"A restricted attorney shall not be required to maintain the educational requirements provided by these rules. Other than himself, he may not represent any person in any legal matter or proceedings within the State of Minnesota except a full-time employer, spouse, son, daughter, father, mother, brother, sister, father-in-law, mother-in-law, brother-in-law, or sister-in-law. Judges, referees, judicial officers, or magistrates of any court of record of the State of Minnesota, or attorneys serving as legal counsel in any governmental unit of the State of Minnesota, are not eligible to apply for restricted status until they retire or leave their position."

Rule 3 also provides for waivers and extensions:

"In individual cases, the Board may grant waivers or extensions of the minimum educational or the reporting requirements."

Rule 4 covers non-compliance procedures:

"If an active attorney fails to complete the minimum educational or the reporting requirements to the satisfaction of the Board, the Board shall report such failure to the Supreme Court for appropriate disposition.

"The Board of Continuing Legal Education, before reporting any matter to the Court, shall investigate the facts in order to make a report on the reasons for noncompliance including affording the lawyer involved a hearing, upon his request, in accordance with the principles of the due process of law. The Board shall, however, before reporting any noncompliance to the Court, attempt to resolve all matters on a confidential basis." The Board has adopted rules to carry out the directives of the Court's April 3d Order. See Board Rule 109, supra note 21.

26. The facts stated in this paragraph and throughout the balance of Part V come from letters received by the Chief Justice during October and November 1975 in response to state-by-state inquiries on his part as to the current status of continuing legal education in each state. Responses were received from all jurisdictions, including Puerto Rico and the District of Columbia. Information in Part V relative to the current situation in Wisconsin, Iowa, and North Dakota was confirmed by phone conversation in December 1975. See also Parker, supra note 12, at 484-86.
the periodic relicensing of attorneys conditioned upon either their accumulation of approved educational credits, or their professional re-examination. California's tentative plan calls for sixty credits every five years, with a certain minimum number of credit hours to be devoted to specific subject areas, including ethics. Alternatively, an attorney could maintain his license to practice by successfully passing a state bar examination within the two years preceding the expiration of his license.  

Wisconsin's experience with mandatory CLE is worth mentioning in more detail. The Wisconsin Supreme Court held a public hearing on the matter in March 1975. In May, it announced its support for the principle of compulsory CLE, even though only four of the seven justices voted to adopt the resolution which committed the court to adopting rules instituting mandatory CLE within a reasonable time. Also in May, again by a 4-3 decision, the Wisconsin Supreme Court ordered that an advisory referendum on the issue of mandatory CLE be held, with all active lawyers in the state (about 7,700) eligible to vote. The results of the referendum are now in, with 3,905 ballots in favor of mandatory CLE and 1,551 against. Whether the court would have backed away from its resolution to adopt a mandatory system had the results of the referendum been less one-sided is an open question. Also of interest is the 4-3 vote and the decision to issue a statement lending the prestige of the court to the concept of mandatory CLE when the members of the court were themselves split on the merits of such action.  

Sixteen states are not actively considering mandatory continuing legal education at present. New York and New Jersey are in this group. In twenty-six other states the subject of mandatory post-admission education is under study by bar associations or committees, and it can be expected that the experiences of the states which already have mandatory CLE will be instructive. In Michigan, for example, an entire issue of the State Bar Journal was devoted to a discussion of the topic. Hearings are being scheduled around that state, much as was done in Minnesota, so that a consensus might develop before any action is taken.

27. Letter from James H. Kovacs, Program Director, California Board of Legal Specialization, to Chief Justice Robert J. Sheran of Minnesota, October 8, 1975.
30. Id. at 761.
VI. OBJECTIONS TO MANDATORY CONTINUING LEGAL EDUCATION

Numerous objections to mandatory continuing legal education have been raised.\(^1\) They fall into two main categories: (1) that one or another of the various alternatives to mandatory CLE is more likely to insure professional competence, and (2) that mandatory plans like Minnesota's are either misguided or not sufficiently rigorous in what they require.

I have already referred in passing to some of the main alternatives to mandatory CLE, and I have outlined the reasons why Minnesota decided as it did. A more complete analysis of the merits and disadvantages of the alternatives to mandatory CLE is beyond the scope of this lecture. I would, however, like to comment briefly on some of the criticisms in the second category.

It has been suggested, for example, that lawyers attending mandatory post-admission educational courses should be tested to determine whether they have assimilated the course material. Some argue that the programs are excessively lenient in permitting the lawyers to prove attendance at mandatory educational courses merely by stating the time and place of the course attended. It has been suggested that some authority other than the lawyer himself should determine his needs and prescribe the courses necessary to answer them. It seems to me that these are not arguments against the idea of mandatory education as such, but are, instead, arguments that its principles should be extended farther than has so far been considered advisable. If experience proves that testing, monitoring, and course prescription are needed and will serve a useful purpose, there is nothing in the concept of mandatory education which will prevent use of these additives.

The claim has been made that mandatory programs will dilute the healthy educational impact of voluntary programs. The point is made that an attorney who voluntarily attends a course does so because he is highly motivated and that motivation is the key to the learning process. It does not follow, however, that the advent of compulsory

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31. The most widely available compilation of the objections to mandatory continuing legal education appears in Wolkin, A Better Way to Keep Lawyers Competent, 61 A.B.A.J. 574 (1975) and Wolkin, More on a Better Way to Keep Lawyers Competent, 61 A.B.A.J. 1064 (1975). Criticisms of mandatory CLE also surface at conferences on the topic. See, e.g., Bingaman, Lawyers' Competence: Mandatory Continuing Legal Education; Carroll, The Economics of Continuing Legal Education. These latter two papers were included in materials made available to participants at the A.B.A. sponsored National Conference on Continuing Legal Education, held November 10-12, 1975, in Chicago. Parker also mentions various objections to mandatory CLE. Parker, supra note 12, at 477. The sources listed in this note provide the basic research material for Part VI of this Article.
CLE means the end of motivation. On the contrary, it would appear that lawyers who are presently attending continuing legal education courses voluntarily will be even more likely to go back to school under a mandatory system, because, in effect, the importance of what they have been doing all along has been officially recognized.

Another argument is that mandatory CLE emphasizes appearance at the expense of reality, that the result achieved is "cosmetic" rather than substantive. Mandatory CLE is seen as an overreaction to "consumer demands" upon the profession. But, in my view, we should expect that the public will approve a plan requiring refresher education for attorneys. At a time when the legal profession is so often criticized and misunderstood, a program should not be rejected simply because it is responsive to public demand. To the extent that lawyers accept mandatory educational programs purely for the sake of the appearance of things, the solution, it seems to me, is to make the fact conform with the appearance rather than to reject the program out of hand.

What about costs? Won't mandatory CLE be inordinately expensive? In Minnesota, the budget for the administrative operation of the program is estimated at $35,000 per annum. We have raised this money by adding an extra $5.00 to each attorney's annual registration fee. For courses which are locally sponsored and presented, the cost of a day's instruction (five and one-half to six and one-half credit hours) averages about $40.00, or $8.00 an hour. This means that an attorney who receives fifteen credits per year would spend about $120-$150 each year in course registration fees. To this, of course, must be added any travel expenses and the cost of time away from the office, but, however one adds up the figures, it is difficult to conclude that mandatory CLE is inordinately expensive or likely to work financial hardship on most attorneys.

It is argued that a mandatory program imposes hardships on certain lawyers—for example, the aged practitioner, or legal scholars and judges who, by the nature of their work, are already involved in a post-admission educational process far more rigorous than that prescribed by a mandatory plan of continuing legal education. The "hardship" argument is also raised in connection with corporate counsel or military legal personnel whose responsibilities or assignments require them to locate in states other than where they are admitted to practice. It is my impression that these cases are exaggerated. To the extent that they are real, methods of accommodating any problems

32. Minnesota had 7,484 registered attorneys as of December 31, 1975. This information was provided by the Minnesota Supreme Court Office of Attorney Admissions and Registrations.
which occur can be easily enough employed. In Minnesota, for example, an attorney may choose "restricted status" and still represent certain close relatives or a single employer.

The idea that mandatory CLE somehow infringes upon an attorney's independence or freedom of choice is an often-voiced, but to me unconvincing, objection to mandatory CLE. To become an attorney, one must graduate from an accredited law school and, in most states, pass a bar examination. Once admitted, an attorney is constrained by the Code of Professional Responsibility as adopted in his state. Chief Justice Burger has suggested that attorneys not be admitted to practice in the federal courts unless they first satisfy certain minimal requirements of experience and competence, and the Second Circuit is studying proposed rules to this effect.\(^3\) No matter how independent they may be, lawyers will accept regulation when the need is clear.

Other arguments sometimes encountered are these: that mandatory CLE emphasizes the quantity rather than the quality of course offerings; that mandatory CLE will not provide courses for lawyers who have particular, specialized needs; that lawyers will not be discriminating in their selection of courses under a mandatory CLE program; that mandatory CLE will place greater stress on exposition than participation and that therefore the educational exchange will be less effective.

On the latter point, I don't believe that a mandatory program will have any effect on the ratio of expository to participatory courses. Competition among sponsors should ensure quality as well as quantity in course offerings. Specialized courses are in fact regularly offered in Minnesota. And it seems to me that a lawyer who spends his time and money to attend legal seminars will, out of self-interest alone, be careful in his selection and alert in his participation.

Obviously, there are risks in mandating a program where experience is as limited as is the case with post-admission legal education. On the other hand, it may be that many of the apprehensions voiced with respect to mandatory CLE have been overstated. In any event, in Minnesota, we decided that the need, coupled with the prospect of

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success, was worth the risk of disappointment. At worst, we should be able to improve our programs in light of practical experience.

VII. CONCLUSION: THE SYMBOLIC ASPECTS OF MANDATORY CONTINUING LEGAL EDUCATION

There is a measure of symbolism involved in the mandatory continuing legal education movement. Those who oppose mandatory CLE see it as a symbol of unjustified interference with an attorney's independence, on the theory that the lawyers should be left free to determine for themselves an ongoing course of study. This reasoning is troublesome. First, it assumes a measure of independence for attorneys that does not exist. Second, we know from experience that the freedom to prescribe one's own course of study too often results in little being done to maintain professional competence. Of course, the sensitivity of the legal matters with which lawyers and judges deal requires that they have a certain amount of autonomy in arriving at their professional judgments. But their freedom must necessarily be circumscribed, if required in the public interest. Events in Minnesota brought us to the conclusion that the public interest and the good of the profession required action on the issue of maintaining professional competence; mandatory continuing education was the result.

Those who favor mandatory continuing legal education also find it symbolic. To them it symbolizes a commitment to the proposition that the lawyer has a duty to remain competent for the duration of his practice. The importance of this obligation cannot be overemphasized, for unless he remains competent, an attorney cannot hope to satisfactorily perform his duties to the public, the profession, his clients, or himself. The Minnesota Plan reflects our judgment that an obligatory process is a timely and effective means for achieving this crucial objective.