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August 26, 2018

Ms. Elizabeth Brown
Clerk of the Court
Supreme Court of Nevada
201 S. Carson Street, Ste. 250
Carson City, NV 89701

Re: SCR 207-215 (CLE Structure)

Dear Ms. Brown:

The Nevada mandatory CLE program does not work – certainly not for its intended purpose, and possibly not at all. It also has negative repercussions that interfere with other goals and aspirations this Court has declared. The most recent changes have exacerbated the harm, worsened utility and availability, and discouraged scholarship, at enormously increased cost.

This Court should direct that the CLE Board revert to the prior fee structure, using its large "surplus" to fund any overages in operations, while directing that the CLE bureaucracy make whatever changes are necessary to operate within the limits of its budget rather than expanding the budget to fund an expanding bureaucracy. More of that surplus should be explicitly directed to fund a meaningful outside study and report of whether mandatory CLE actually accomplishes its intended purpose (or any purpose at all) and weigh whatever benefits are found to exist against the collective cost of maintaining the requirement; this Court's final decision should be based on the metrics provided by that study.

I. BACKGROUND AND PURPOSE

In 1982, this Court adopted rules now stating that "It is of primary importance to the state bar and to the public that attorneys continue their legal education throughout the period of their practice of law or judicial service."[1] The system created is mandatory, requiring attorneys to finance the system, and rendering their professional license subject to suspension or revocation for non-compliance. It is unknown what study or data, if any, went into that decision 36 years ago.

In other words, the policy objective of achieving "continued legal education" was considered to be of such importance that failure to achieve it disqualifies a lawyer from practice, but there is no known record of what data, if any, warranted that objective. To my knowledge, no attempt to quantify any actual advantage to the bar or the public from the system once it was created has ever been attempted, nor has any attempt been made to see if that advantage, if any, is justified by the enormous cost of its imposition.

The facial "purpose" of CLE is to enhance lawyer education. The *underlying* purpose is the benefit to the public of having lawyers available who are better educated so that legal services provided to the public will be of higher quality.

If CLE does not actually enhance lawyer education, or provide more highly educated lawyers to the public, its reasons for existing are not met. My observation and opinion is that Nevada's mandatory CLE program, as now constituted, serves little legitimate purpose at considerable expense, and should be evaluated, substantially reformed, or eliminated as a mandatory program.

II. WAYS IN WHICH THE CLE SYSTEM IS DYSFUNCTIONAL

The "mission statement" of the CLE Board is to ensure that Nevada lawyers "continue their education through a wide range of quality educational programs and to have and maintain the requisite knowledge and skills to fulfill their professional responsibilities."

The CLE program in Nevada has not actually accomplished this objective, as to the overwhelming majority of lawyers, in decades. Most lawyers treat CLE as a nuisance "box checking" exercise and expense.

More than seven years ago, I noted that a large number of lawyers sat through CLE doing other work (or reading, or sleeping), others signed in and simply left, never to return, and that "a lawyer can send

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[1] SCR 206.

in the money for CLE on disk, and throw the disks in a desk drawer. CLE credit is given so long as the check clears."[2]

Two proposals were made if mandatory CLE was to be retained: equally mandatory *testing* as part of each course to ensure those attending were at least present and paying some level of attention, and having the Bar add to the on-line biography of each lawyer what CLE that lawyer has attended, so members of the public "shopping" for lawyers can be informed of the kind of continuing education the attorneys have chosen to get.[3]

The CLE bureaucracy was copied, and did exactly nothing to enact either of those reforms – or any *other* meaningful change intended to actually try to better educate lawyers or inform and protect the public – for the next seven years.

Also in 2011, legal note 36[4] noted that the existing CLE system was even worse as to many judges, who appeared to have extremely little participation in the advanced education available in the specialized areas over which they preside, such as family law, criminal, civil, and business cases, and construction defects. This lack of substantive education by judges led to many legally defective orders resulting in (at least) wasted money and effort to correct them on appeal in error-correction cases that could have been avoided, or (at most) permanently unjust rulings where no one could afford to appeal.

That note suggested posting the same attendance information for judges as for lawyers, to inform the electorate, and perhaps increasing the necessary credentials to run for (or retain) a specialty bench seat of including certification of specialization in that field. No one anywhere ever made any effort to do any of those things.

Legal note 40[5] reported on efforts to cause the CLE bureaucracy to at least consider improvements in the efficacy of what it did. That note reported:

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[2] *See* Legal Note Vol. 33, "Make Lawyer CLE Meaningful" (Jan. 2011), attached as Exhibit 1. All referenced legal notes are posted at https://www.willicklawgroup.com/newsletters/.

[3] This is the same reason that the Bar – eventually – agreed to post on its web site the lists of certified specialists in each specialization subject area; the idea is to serve members of the public looking to hire an attorney by providing information about lawyers that is relevant to the decision to hire a particular attorney, or not. *See* https://www.nvbar.org/member-services-3895/membership-information/attorney-specialization/certified-specialists/.

[4] *See* Vol. 36, "Judicial CLE" (Mar. 2011), attached as Exhibit 2.

[5] *See* Vol. 40, "Other Updates to Prior Notes" (Jun. 2011).

> there is "no appetite" by either the CLE Committee or the Board of Governors to make any potentially-useful information available to the public, as to either lawyers or judges. As to judges, the matter of what education they should have, and whether it should have any relevance to their jobs, is apparently "not up to CLE," but is in the hands of the AOC and the Judicial College.
>
> In other words, do-nothing and buck-passing. . . . Many members of the Board of Governors are intelligent, well-meaning folks. It is inexplicable what compels them, collectively, to be such an ossified obstruction to pretty much any progress or improvement on pretty much any subject the Bar administers. Regardless of the cause, however, the bureaucracy that is our Board of Governors will – as usual – do nothing that might actually improve the education of lawyers, the qualification of judges, or the information available to the public.
> . . . .
> Any meaningful reform – either for transparency and public information, or to make "CLE" actually have any meaning or value in the real world beyond an expensive but useless P.R. ploy – will have to come from the top.

In 2012, my firm and others tried to encourage reform by producing and presenting substantive and specialized CLE at ***no cost*** to attendees for the purpose of trying to improve the practice and drive down the fees charged by others, as explained in legal note 54.[6] We expressed the hope that if that approach was emulated by a sufficient number of others, enough of the profit motive could be taken out of the CLE racket to cause the CLE bureaucracy to focus on actually serving the legitimate interests of lawyers, public, and the courts.

Over the following six years, we produced low-to-no cost CLEs on a wide variety of family law topics, with any money beyond the cost of snacks going to Legal Aid. The "Basics" series (Jurisdiction, Child Custody, Relocation, Property Division, and Practical Mechanics of Family Trial Practice) was acclaimed by those attending, as was the 1-hour Lunch-and-Learn series addressing topics from pension division to the new local rules.

And others ***did*** emulate that model – experts throughout the Bar started putting on programs at no cost in their various specialty areas, significantly enhancing the actual education of lawyers in multiple fields at enormously lowered cost to Nevada lawyers.

But this did not generate any money for either the Bar or the CLE bureaucracy, which reacted like a bureaucracy does, seeking its own perpetuation and expansion at the expense of those it purports to serve. Shortly after lawyers started receiving better, more relevant education at a lower cost, the

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[6] *See* Vol. 54, "Putting Your Money Where Your Mouth Is: Cheap & Useful CLE" (Oct. 2012), attached as Exhibit 3.

CLE Board made the recently-enacted proposal resulting in decreased offerings and increased costs, as described below.

III. INTERFERENCE WITH OTHER POLICY OBJECTIVES

CLE does not exist in a vacuum. Just as this Court reports on its ever-increasing caseload and the necessary tradeoffs that reality requires, the lawyer in modern practice is required to juggle an extraordinary number and variety of pressures.

These consist of not just the legal work itself, but also billable requirements, marketing, staff and client management, ever-changing technology, and many other facets of the modern practice of law, all of which have be balanced against any other aspect of private life, mental and physical health management, etc.[7]

When the time and money pressure on lawyers is increased, both the time and the money must come from somewhere.[8] More than doubling the cost of mandatory CLE, and increasing the time required to 13 hours – just for attendance, so not including selecting, travel to and from, reporting, tabulating, etc. – necessarily puts pressure on every other potential activity calling for expenditure of time and money.

Consider the impact just on *pro bono.* Asking lawyers to take on "just one case" is seen in a very different light by lawyers who feel that they are ***already*** being forced to expend both time and money on activities that are irrelevant to their practice and consumptive of time they could choose to otherwise expend on profitable, or charitable, or recreational activities.

Not to put too fine a point on it, but every increase in the burden imposed by mandatory CLE is not just another stressor contributing to the ills set out in the footnote, but also inevitably and negatively impacts every *other* request made of lawyers – including their willingness to volunteer for *pro bono*.

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[7] As noted in the July, 2018, *Nevada Lawyer*, there are reasons that 18 percent of attorneys are problem drinkers (almost twice the general population), 19 percent of lawyers suffer from statistically significant elevated levels of depression (several times higher than the general population), 11.5 percent of lawyers have reported having had suicidal thoughts during their careers, and approximately 25 percent of lawyers are workaholics, again more than double that of the general population.

[8] Attorney Mauricio R. Hernandez researched the matter and stated on his blog that Nevada has the "5th highest cost to practice mandatory bar in the U.S." *See* https://lawmrh.wordpress.com/2017/05/04/lawyers-wait-on-an-unlucky-13th-hour-of-mandatory-cle-in-nevada/.

IV. EXACERBATION OF HARMS FROM MOST RECENT CHANGES

As detailed in legal note Vol. 66,[9] the most recent changes to the CLE structure have exacerbated every defect in the CLE system discussed above and introduced new harms not previously existing, while doing nothing of ***any*** positive effect for anyone or anything – except for satisfying the monetary appetite of the CLE bureaucracy. Some of the already-appearing increased deleterious effects are noted below.

A. The 1.5 Hour Maximum

The CLE Board sought to prevent anyone from "giving away" CLE credits without pumping money back to the CLE bureaucracy, and so imposed a 1.5 credit limit on those entities to which it grudgingly "granted exemptions" to having to tithe if they wished to provide free or discounted CLE credits.

Predictably, this has had the consequence of sacrificing actual education of lawyers to the goal of satisfying the arbitrary rule. For example, an associate of mine attended a CLE put on by the Clark County Bar on DUI law,[10] during which the presenters apologized, noting the materials certainly deserved and could easily fill 3 or 4 hours of instructions, but explaining that the new rules limited the Clark County Bar Association from giving more than 1.5 hours of CLE without being docked with mandatory payments to the CLE Board, so that was all they were going to offer.

The effect is to sacrifice actual education of lawyers to the budgetary demands of the CLE Board. It is an exactly backward prioritization.

B. The Fee for Scholarship

As detailed in legal note 66, the new structure charges academics who write scholarly articles in law reviews or other such publications $25 if they want the CLE Board to "recognize" their work. There is no conceivable justification for this charge; the CLE Board expends nothing whatsoever for such work, and the message to academics is that if you volunteer your time and expertise to help educate the Bar by writing an article for the NFLR or Nevada Lawyer, you have to pay for the privilege of doing so.

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[9] *See* Vol. 66, "The New CLE Fee Structure Stinks and Should Be Changed," (May 2018), attached as Exhibit 4.

[10] This CLE was entirely irrelevant to our practice; why he attended is discussed below.

This is an exacerbation of the "interference with policy objectives" already existing with the mandatory CLE program that is discussed above – the Nevada CLE Board, and the Bar, and this Court should be doing everything possible to ***encourage*** attorneys to devote their time and energy to providing helpful scholarship in the law – that serves the interests of the Bench, Bar, and public, and is just about the highest exercise of the CLE Board's mission statement that could be envisioned.

The new rule is directly counterproductive – it is hard to imagine a way to more actively ***discourage*** lawyers from volunteering their time and expertise to write scholarly articles than to tell them that after they spend all the time and effort to do so, they will have to pay to have that work "count."

C. The Added Fee for Actually Relevant Education

As noted way back in legal note 33 seven years ago, "Those lawyers who actually have a desire to improve their professional skills will seek out information and education necessary for that purpose – attending courses, doing reading, studying, and generally continuing to ***learn*** meaningfully of developments in their chosen field."

That is a ***good*** thing; both this Court's SCR and the Mission Statement of the CLE Board declares that such efforts should be encouraged, if not applauded.

The new policy is again directly counterproductive. In addition to the example detailed in legal note 66, a lawyer recently approached me about the added cost imposed for having attended an intensive week-long trial skills seminar in Texas. The seminar alone cost $3,850, and the attending lawyer spent many hundreds more to travel there, plus a couple thousand for food and lodging. The icing on the cake was that, to have that level of effort and expense partially "recognized" by the Nevada CLE Board, the lawyer was required to pay ***another*** $150.[11]

For what? As with "recognition" of scholarly articles, our CLE bureaucracy spent zero on administration, advertising, or anything else relating to that Texas seminar. The message to the attorney is that the Nevada CLE Board not only does not care to support an attorney who actually goes to the effort to obtain the highest-quality education and training available, but will actively penalize anyone doing so. It is hard to distinguish that "fee" from simple robbery. Again this policy is directly antithetical to the CLE Board's claimed reason for existing.

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[11] The CLE Board reported to the lawyer that for some never-explained reason it would "recognize" 30 credits out of the 56 or so actually earned and further informed the lawyer that as a "one time favor" the Board would waive the additional "$25 fee for attending a program that is not 'pre-approved' by them."

D. The Discouragement of Experts Sharing Knowledge

As detailed in legal note 66, the CLE Board has very deliberately sought to squash the practice of subject matter experts in Nevada giving away their expertise to their fellow attorneys for free, because it does not provide any money to the bureaucracy. This particular item of stupidity deserves to be called out for singular condemnation.

The CLE Board, and this Court, should be doing everything possible to ***encourage*** the most experienced and recognized experts in our legal community to give back in the form of sharing their knowledge and experience with younger lawyers – doing so is the epitome of public service and directly benefits the Bench, the Bar, ***and*** the public. Yet our CLE bureaucracy admitted that part of its purpose in enacting the new fee structure was to cause the "exit of low volume non-accredited providers." In other words, to prevent lawyers from teaching other lawyers for free.

That policy objective is so obviously wrong-headed in every way that if the existing CLE Board cannot be made to recognize and correct its error, it should be abolished and replaced with a Bar employee charged with the simple administrative task of tabulating credits without having any incentive to try empire-building.

Among the positive effects of such free CLE (which the CLE Board wants to eliminate) is that the existence of such free CLE exerted pressure on the for-profit CLE providers to lower the fees they charged for whatever they offered and improve the quality of those offerings in order to attract customers. By eliminating that free "competition," the CLE Board has served the interest of the for-profit companies and permitted them to lower quality and jack up costs, as explained below.

Any rule set going forward should specifically exempt ***any*** provider of CLE information who makes no profit from providing legal education from paying any fee whatsoever for the "privilege" of taking the time and trouble to prepare and present that legal education.[12]

E. The Increasing Irrelevance of Selected CLE Under the New Program

As discussed above, the CLE Board quite deliberately wanted to replace "low volume unaccredited providers" who would give away meaningful actual education with large for-profit companies, irrespective of the relevance of *their* offerings, because the companies could be expected to pay money to the CLE Board.

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[12] As detailed in the legal note, if the provider charges some small fee to pay the cost of the space, or provide snacks to those attending, the same policy should apply.

And the process has already started, with a vengeance. The vacuum created once experts were told they would have to pay for the privilege of teaching others for free is being filled by multiple corporations who are calibrating how much ***additional*** money they can get from Nevada lawyers to allow them to "check the CLE box" for the year. And much of their product is utter dreck.

Attached as exhibit 5 are two spam CLE offering advertisements that popped up in my inbox in the past week or so. They are by no means the most extreme examples, but they illustrate what has happened now that our CLE Board has squashed "low volume non-accredited providers" for them – these companies can extract lots of extra money from Nevada lawyers.

One offers "unlimited access" for "only $249 per year" – or individual courses at "just" $149 per every two credits ($968.50 per year). The other offers about-to-expire, out-of-state, virtually useless recordings[13] for just $69.99.[14] This race to the bottom in terms of quality is ongoing, with the choice presented to Nevada lawyers increasingly between "cheap" and "possibly useful." It should come as no great shock to anyone that most lawyers are choosing "cheap," shrugging off the utter irrelevance of the discount offerings to anything to do with their actual practices.

This is the "other shoe" to the new bad policy discussed above of discouraging lawyers from getting the best possible high-quality education by making them pay yet again after they have paid to get meaningful education. Instead, lawyers are encouraged to get utterly irrelevant "credits" as long as it is cheap to keep their costs down. The CLE Board's new policies operate to directly discourage actually meaningful lawyer education, but as far as can be seen the Board does not care about this at all as long as for-profit providers encouraged to be all there is in the market send money to the bureaucracy.

V. RECOMMENDED REFORMS IF MANDATORY CLE IS RETAINED

If mandatory CLE is to be retained, in the short or longer term, then at minimum the counterproductive policies identified above should be corrected.

Additionally, what would actually make CLE *meaningful* has not changed since 2011 – a requirement of content testing of attendees to verify actually attending and some minimal level of

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[13] "Bundle Courses Include: Ethics of IRS Enforcement; Issues in Legal Ethics; Trial Advocacy: Direct Examination; Avoiding the $1.5 Billion Mistake: Article 9 Lessons Learned from the GM Bankruptcy; Offer in Compromise: What You Need to Know; Pitfalls of Substance Abuse; Steps to Take with An Eggshell Audit; Law of Corporation Information: New Issues on Old Foundations; Fundamentals of Patent Prosecution; Fundamentals of Civil Litigation in Federal Court."

[14] It is unclear whether this includes the extra $5 per credit that every attendee must now send to the CLE Board.

paying attention, and posting on the internet of what CLE courses lawyers and judges have taken as a service to the public, just as certified specialist status is posted, and for exactly the same reason.[15]

VI. THE NEED FOR A DATA-DRIVEN REPORT AND RECOMMENDATION

As set out above, there has not apparently been any effort in at least 36 years to determine whether Nevada's mandatory CLE program actually does any good in educating lawyers or improving services provided to the public, or anything else.

And as noted in legal note 66, the CLE Board admits sitting on a "surplus" of some $600,000 – which it hopes to increase. As discussed there, no CLE entity should seek to have or increase a surplus of any kind.

Putting that to the side for the moment, the Court should direct that some reasonable portion of that cash – say $200,000 – be sequestered to fund an outside study and report of whether mandatory CLE actually accomplishes its intended purpose, or any purpose at all, to be accomplished by a meaningful survey of Nevada lawyers to see if the anecdotal reports above (lawyers choose irrelevant CLE when it is cheap, less *pro bono* work is done because of the CLE requirement, etc.) are statistically borne out, and by a review of the available literature and review of the several states that have apparently elected to abolish their mandatory CLE programs as ineffective for any constructive purpose.[16]

Any decisions made by this Court should be based on the metrics provided by that study, not by the "P.R. value" of a pretense of appearing to do something about lawyer competence and public information that does not actually accomplish either.

If it turns out that Nevada's mandatory CLE program is a multi-million-dollar per year scam actually doing no good for anyone but costing lots of people time and money for no productive purpose, the plug should be pulled, and CLE in Nevada should be returned to an optional matter. It seems quite possible that those who actually would seek out relevant education and training would continue to do so whether CLE was mandatory or not, and that the others would likewise be unaffected since they are not now doing anything actually improving their competence or providing any good for the

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[15] This would take very close to zero time and effort; all that is required is the coding required to link the existing CLE on-line listing to each lawyer's Bar profile.

[16] *See, e.g.*, Mauricio R. Hernandez, *supra* n.8, and blog by Attorney Mauricio R. Hernandez: https://lawmrh.wordpress.com/2017/07/27/overwrought-and-over-exaggerated-but-no-matter-over-prescribed-cle-is-always-the-regulators-fix/.

lawyer-hiring public, but simply churning cash to a bureaucracy for no productive purpose at the ultimate expense of those lawyers and their clients.

Either way, the Bar should be compelled to post what CLE courses are taken by lawyers, because whether CLE is optional or mandatory, that information is still relevant for those seeking out lawyers with updated education and training in their respective fields.

VII. CONCLUSIONS

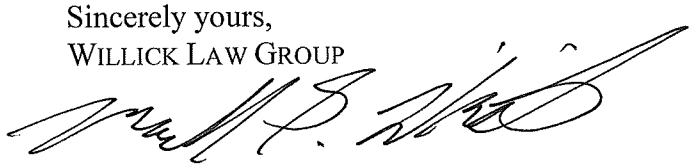
The stated purpose of CLE – improvement in lawyer education and benefit to the public of that continuing education – has not actually been served for many years, and the new regulations have made the alleged reasons for mandatory CLE less well served than ever before.

The reports submitted by the CLE Board leading up to the new regulations start with the unwarranted arrogance that the CLE bureaucracy is indispensable and that it takes priority over actually serving its own mission statement, not to mention any cost/benefit evaluation of its services. The new regulations flow from the flawed premise that whatever money is necessary must be collected to support the bureaucracy, rather than that the bureaucracy should conform its actions and budget to serve its stated mission at the lowest possible cost to the time and money of the Bar membership.

It is time to step back and find out whether the imposition of mandatory CLE on all Nevada lawyers actually does anything to improve the educational competence of those lawyers. If not, it should be discontinued. If so, this Court should explicitly weigh whatever benefits the data reveals against the massive cost of time and money incurred to produce it, and make a data-driven policy decision accordingly.

In the meantime, the prior flat-fee structure should be re-instated, the worst of the policies identified above should be immediately eliminated, and some plan to actually serve both competence and public information should be put into place.

Sincerely yours,
WILLICK LAW GROUP



Marshal S. Willick, Esq.

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