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Vol. 33 – Make Lawyer CLE Meaningful

by Marshal S. Willick | Jan 18, 2011 | Newsletter | 0 comments

Vol. 33 – Make Lawyer CLE Meaningful

A legal note from Marshal Willick about the inadequacy of CLE in Nevada to actually serve its intended purpose – and a couple of proposals for doing something about it.

Two things led to this note. First, one of my associates taught an introductory level family law class a year or two ago. He reported that most of those attending read newspapers or cruised the internet throughout the seminar – and that several others simply signed in and left, never to return. All of them had apparently signed up only because they had to "get their credits" before the end of the year.

These lawyers were missing the point of mandatory CLE, and to the degree that the bureaucracy administering CLE tolerates such behavior, it is part of the problem. At minimum, it is not furthering its stated purpose for existing.

The second reason for this note was the difficulty I recently had trying to be patient during a motion hearing as my opponent made jaw-droppingly inane assertions relating to the military retirement system (most of which he appeared to be just making up). Comedian Ron White was right when he famously asserted that "You can't fix stupid." However, we can do something to actually enhance the level of information that lawyers should be required to have – or be gone.

Making CLE meaningful will take a little gumption by those in positions of authority. It remains to

be seen whether there really is a commitment to stated policy, and if the willpower exists to do something to further that policy.

I. THE CONCEPT OF CONTINUING LEGAL EDUCATION

Nevada Supreme Court Rules 205 through 215 govern continuing legal education ("CLE") requirements for Nevada lawyers. "Purpose" is set out in rule 206:
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. Failure to do so constitutes grounds for action by the board, the court, and the state bar as provided herein. It is the purpose of these rules to establish minimum requirements of continuing legal education for attorneys subject to these rules and the means by which those requirements are to be enforced.

The very first Rule of Professional Conduct requires "competence." But the existing CLE rules require only "attendance" at accredited course of continuing legal education. Noticeably absent from those rules is any requirement that lawyers actual learn – or even listen to – anything being taught. In fact, a lawyer can send 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.

For many years, the statement of purpose quoted above has been ridiculed by some members of the Bar as mere lip-service, or, worse, just an excuse to raise some extra money in CLE fees. Rebutting that cynicism requires that the "continuing legal education" received actually improve the education of the members receiving it.

II. HOW COULD CLE BE MADE ACTUALLY MEANINGFUL?

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. There are lawyers who don't have any desire to learn anything. To them, "I've got my ticket" means achievement of a license to extract money from the public by way of access to a monopoly to which they make no meaningful contribution, and from which they seek no further knowledge. These lawyers will do the minimum required of them to maintain their access to the money-spigot. Both in common perception, and to my direct observation, some, and perhaps most, of current supposed "CLE" is a sham. Money changes hands, and "credits" are duly tracked and recorded. An entire sub-bureaucracy of the Bar is supported. And, to what effect?

Is there anyone who believes that the general educational level of the Nevada Bar is meaningfully improved through what most consider to be the charade of the current CLE system? If the answer to this question is "no" – which I believe it to be – the next question is what can and should be done about it.

The self-centered opportunism of some lawyers is beyond the skill of anyone to fix. But perhaps

even avaricious self-interest can be re-directed to serve the common good of ensuring that those with the monopoly of access to the legal system retain a currency of education and training deserving of profiting from that monopoly. And that is accomplished by raising the bar of "CLE" from mere attendance to demonstrated knowledge. In a word: testing.

III. WHY TEST CLE ATTENDEES?

There is an old saw in the literature of management and efficiency writers: "What gets measured gets done." If CLE is truly considered "of primary importance" as the Nevada Supreme Court and the State Bar have proclaimed, then they should do something about making sure that CLE actually accomplishes something. Or they should quietly repeal the requirement as hypocrisy, designed for appearance, and not for substance.

The current policy of "confidentiality" of who has attended what CLE facilitates the sham. The first stroke that should be issued is a rule change making the full records of CLE attendance of every member of the Bar open to public inspection – and posted on the State Bar website. Perhaps, just the embarrassment of being found out to be an uneducated dweeb in one's chosen field could be sufficient motivation for some to seek meaningful CLE training. And the public deserves to know the post-law-school education of the lawyers they seek to compare.

But, given the utter shamelessness of some members of the Bar, that is not enough. Con artists relying on lowest-common-denominator advertising to keep a line of suckers showing up at the door are unlikely to be motivated by mere public access to information showing that they don't actuallyknow anything except bean-counting.

IV. PRACTICALITIES

This is pretty simple. All CLE providers should be required to administer, grade, score, and report the results of a test covering the subject matter of the CLE course provided. No pass, no credit. This means a little more work for CLE providers, but nothing major.

In one fell swoop, the farce of those who check in but do not actually stay, and those who attend, but who pay zero attention, is solved.

Could there be continuing sham "CLE" that promises nothing but zero-effort credits? Sure. It becomes part of the job of the CLE Board to actually do its job by making sure those purporting to convey meaningful education are actually doing so.

If this proposal gains any traction, I expect some lawyers to howl how "unfair" it is that they be expected to actually learn anything at CLE, and the bureaucrats to bleat how "impossible" it would be to actually ensure that their job produces any meaningful improvement in the real world. I'm not terribly sympathetic to either.

Lawyers – holding a privileged license and monopoly – should either know what the hell they are doing, or stop pretending to be providers of "legal services." And as to the bureaucrats, they should actually really provide a service ultimately useful to the public, or our Bar dues should stop being used to fund their jobs.

These proposals may sound harsh. But that is the way to actually serve the public interest – which the Bar/Judicial complex should either do, or stop pretending that it is doing. In short, CLE should be made meaningful, or the mandatory CLE requirement should be eliminated because it is just a public relations sham and fund-raising device.

V. TIMING

This is one of those situations in which "the proof is in the pudding." If there is any appetite to make the Nevada "CLE" requirements actually mean anything, rule changes to accomplish that end could be proposed and submitted within thirty days, starting with open public access, and phasing in meaningful testing within the next year.

If nothing is done to improve the likelihood that "CLE" actually means that anyone actually learns anything, the silence will speak quite loudly, too.

VI. QUOTES OF THE ISSUE

"To know that we know what we know, and that we do not know what we do not know, that is true knowledge."
– Henry David Thoreau.

"The price one pays for pursuing any profession, or calling, is an intimate knowledge of its ugly side."
– James Baldwin

"Hypocrisy, the only evil that walks Invisible, except to God alone."
– J. Milton, Paradise Lost, book 3, line 683 (1667)

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Vol. 36 – Judicial CLEs (2)

by Marshal S. Willick | Mar 10, 2011 | Newsletter | 0 comments

Vol. 36 – Judicial CLEs (2)

A legal note from Marshal Willick about the current inadequate state of substantive education of the family court and other judiciary, and how it should be improved.

This note follows the discussion in legal note No. 33 of how to make CLE for lawyers more meaningful, and more useful to the public (posted at http://willicklawgroup.com/newsletters).

Daniel J. Boorstin once said that "The greatest obstacle to discovery is not ignorance – it is the illusion of knowledge." We can and should take every opportunity to increase the odds that the decisions reached in our courts are as legally sound and well-supported as possible.

Would we get better decisions if the judiciary received more advanced training? Is there any reason in the world that we should not expect our judicial officers to be at least as well educated in developments in the areas they adjudicate as the attorneys who practice in those courts?

I. CONTINUING LEGAL EDUCATION (CLE) APPLIES TO JUDGES

As detailed in legal note No. 33, the Nevada Supreme Court Rule stating the "purpose" of the CLE requirements proclaims 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."

In other words, district judges, like lawyers in private practice, are required to get CLE each year. If

the statement of purpose is not to be cynically perceived as mere lip-service, it is necessary that the "continuing legal education" received be relevant to the jobs actually done by judges.

And, for some, that education might well be necessary for competence. The only requirement to be a district court judge is ten years of admission to the Bar (and even that was a recent development). With the defeat of Question One, the populace has retained the selection of judges by way of colorful-poster lottery, so an incoming judge in family court need never have actually handled such a case, or know the difference between, say, the time rule and a tuna fish.

In the modern era, our courts have been increasingly self-specializing. In Clark Countywe now have dedicated courts not just for family law, but criminal, civil, and business cases, and even so narrow a focus as construction defects. All of those specialty courts require the jurists sitting in them to have mastery of their particular subject matter, in addition to the "regular" judicial requirements of impartiality, patience, diligence, etc.

One family court judge has stated that the job is the hardest he's ever had, requiring far more dedication than his work as a lawyer. Done as it should be done, he's right. The bench is not a place to "retire to" or vegetate at – judging is a job which, done correctly, requires not just diligent attention to the cases at hand, but also continuous learning on both substantive and procedural matters, so as to retain the capacity to fairly and competently adjudicate those cases.

II. WHY SHOULD ANYONE CARE?

I recently completed a writ proceeding in the Nevada Supreme Court dealing with the right of a former spouse of a PERS participant to survivorship benefits under the PERS retirement system. I had been hired by the former spouse to unravel a mess ten years in the making, consisting of dozens of hearings, really bad orders, and general confusion all around.

The record made it painfully clear that neither lawyer understood how the PERS retirement system worked, and the (now retired) judge was worse – his on-record comments reflected a knowledge of Nevada retirement benefits law predating the time he had taken office over a decade earlier, and obviously not supplemented since then.

It was this collective ignorance that permitted the lawyers and judge to engage in a years-long legal equivalent of a Monty Python skit of unfounded motions, ridiculous demands, and legally unenforceable orders – to the massive cost of both clients.

Judges should care about their ability to discern the difference between cogent legal argument and utter nonsense.

Lawyers should be concerned with whether those deciding cases have a clue what to do with issues under submission, in the hopes of minimizing the "random number generator" effect.

Clients should be keenly concerned with the substantive legal education of those ruling on their cases, both because they should not have to pay their lawyers to provide that education to the bench, and because they have a right to expect that the person deciding the fate of their freedom, fortunes, and families has done everything possible to be knowledgeable about the subjects at issue.

And in an era in which about half the litigants in family court do not have a lawyer, the need for independent judicial knowledge of all applicable law is even greater – the proper person litigants certainly are not going to know it. In what is now a majority of cases, apparently, the judge might be the only person in the courtroom with any legal education. In such circumstances, it would seem to be a good idea for the judge to actually know what the law on the subject might be.

The Supreme Court has a dog in this fight as well. With the defeat of Question Two, the formation of an intermediate court of appeals to handle most of the "error correction" cases has been put off for at least several years. The Court might be able to lessen the time it spends dealing with correcting errors that should not be made if it could improve the quality of the decision-making at the trial level. It might not be possible to command the development of wisdom, but there are steps that could be taken to increase the chances of relevant knowledge actually being known and applied.

III. WHAT'S AVAILABLE, AND WHO ATTENDS

At the State Bar of Nevada's Advanced Family Law Seminar in Las Vegas last December, 15 speakers gave rapid-fire presentations on a wide variety of cutting edge family law subjects, rangingfrom enterprise versus personal goodwill (Rad Smith) to bankruptcy complications (Shelley Krohn) to tax problems (Ken Burns and Neal Chambers). (For anyone interested, my materials for that seminar, "Selected Topics Concerning Enforcement of Judgments: Appeals, Stays and Liens," are posted at http://willicklawgroup.com/published_works).

Surveys were given to all attendees. 94% of those attending thought the subjects were beneficial, the materials were helpful, and the speakers were effective. 100% of those attending answered "yes" to the question "Do you believe it would be helpful for Family Court Judges to attend this CLE seminar?"

And the total number of family court judges, out of the 26 we now have in Nevada, who actually attended the seminar? One (Hon. Chuck Hoskin, who was one of the presenters).

This was not a fluke. At the 2009 Advanced Seminar, two judges showed up. And the Advanced Track CLE at Ely in March, 2010, was graced by a single Washoe County judge (for materials, see http://willicklawgroup.com/ely-2010-advanced-track-materials/). In 2011, Isaw two judges in attendance.

There is no reason to suppose this situation is confined to the family law area. Are the judges presiding over construction defect cases attending the seminars on that subject?
So, if continuing education of judges as well as lawyers is really of "primary importance," and family court judges are no-shows at advanced family law seminars, just what are the members of our judiciary doing to stay at the fore-front of knowledge? I have no idea. I asked, but apparently, information about what CLE judges (or anyone else) have attended is "confidential."

All the reasons set out in legal note No. 33 why CLE information about lawyers should be public apply equally – or perhaps much more – to judges. They are public officials, and the general public – including potential election opponents – deserves to know whether judges have sought and obtained meaningful education in the areas they adjudicate.

IV. A MOSTLY-REFUSED INVITATION

In August, 2009, I wrote a letter to the presiding judge of the Clark County family court detailing a number of ongoing problems, and suggesting solutions. One part of that letter stated:
Fourth, get the judges adequately trained as to the basic statutory and rule-based requirements of their jobs. It is just obscene that litigants – and counsel – are paying the cost of ignorance on matters as basic as jurisdiction, liens, and substantive statutes. If lawyers in practice can be compelled to maintain significant CLE requirements, the obligations of judges should be greater. They sought those positions, and basic competence in the operating statutes and rules should be not just expected, but demanded, of them. Any who cannot or will not gain that competence should be referred to judicial discipline for removal.Unsurprisingly, this missive was not particularly well-received by the bench. In fact, some had rather creative, if not anatomically appropriate, suggestions for where a proposal addressing judicial competence should be placed.

In fairness, the ensuing year did see a number of initiatives in which there was substantial judicial participation – formation of a (now depressingly moribund) Uniform Practices Committee, acceptance of proposals for lowering costs by using runners to pick up reports, permitting submission without oral argument of uncontested motions, adopting rational and less wasteful procedures for Orders to Show Cause, etc.

But there has been no outwardly-perceptible movement to more intensive substantive education of the judiciary, despite multiple advanced practitioners volunteering to supply whatever assistance, support, and education might be desired.

On one of the subjects discussed in 2009 – getting increased judicial recognition and addressing of "the real-world costs to real-world people of legal proceedings" – there was zero movement. An intermittent series of these notes (see Nos. 28 – "Attorney's Fees and Burden Shifting," and 30 – "Attorney Fees: Deferring & EDCR 5.11," posted at http://willicklawgroup.com/newsletters) was intended to convey some of that information, for whichever judicial officers might be paying

attention to them.

But when that subject was raised at the 2011 Ely conference (the referenced legal note was in the materials), not one of the 20+ judges assembled on the stage expressed a whiff of intent, attention, or even understanding of the concept of subjecting fee award requests to a logical, analytical, and consistent analysis from case to case.

V. PERCEPTIONS AND REALITY

Some lawyers – privately – deride the apparent lack of substantive legal knowledge of certain judges; unscrupulous lawyers attempt to capitalize on that lack of knowledge to obtain unjustifiable advantages. There is a perception by many members of the Bar – usually spoken out of earshot of anyone wearing black robes – that whatever CLE judges do take must be of the underwater basketweaving variety. That perception is quite sad. The reality, if so, would be far sadder. And the negative perception of judicial education has consequences, both within the Bar and in the general community. When the FamilyLaw Section proposed the creation of Specialist certification, there was a chicken-and-egg problem of how to get a group to create and administer the testing and certification of applicants. The Section suggested "grandfathering" two groups as Specialists – the (then) 13 Nevada Fellows of the American Academy of Matrimonial Lawyers, and the family court bench. When the proposal went to the Board of Governors, they accepted the former, but required deletion of the latter.

The point here is the perception that those on the family court bench were not already sufficiently expert in the subject matter to be considered Specialists. While it is a slow process, the best way toaddress an undesired perception is to ensure that the reality is otherwise. In other words, the best way to ensure that the Bar and public perceive the family court bench as experts in the field is to make sure that those on the bench actually are experts in the field.

In December, 2003, the Nevada Supreme Court first authorized the Nevada State Bar to certify legal specialists. It is unknown whether any judicial officer has applied for specialist recognition in any field, because the State Bar of Nevada has inexplicably failed for seven years to post the names of certified specialists on its web site. This is "inexplicable" because one of the primary reasons certification of specialists was approved in the first place was to give the public more information about the qualification of lawyers in various subjects.

As to family law, in the five years since the first specialization test was administered in 2006 (see http://willicklawgroup.com/specialization), not a single judge in Nevada has sought specialist certification.

Some have suggested altering the requirements for running for district court judge to include Specialist certification in the field addressed by that court. Since the Legislature has already

prescribed some eligibility requirements to hold judicial office, it appears that imposing such a requirement is within the legislative power. Most of those discussing the subject, however, do not perceive sufficient political will to make the selection criteria for judges more stringent. Perhaps, with the defeat of merit selection, this proposal deserves another look and further discussion.

And a legislatively-imposed precondition for eligibility to run for office is not the only option. If the judiciary really believes that merit selection was and is a good idea, as I do, it would be possible for the judiciary itself to create a system of testing and certification under which any lawyer could get a judicial seat, but only those demonstrating specialist-level competence in the subject area affected by the position could keep it. But unless a legislator proposes new eligibility requirements, or the Supreme Court wants to address head-on the level of demonstrable knowledge possessed by judges, these ruminations will have to await another day.

VI. A MODEST PROPOSAL OR TWO

Some baby steps in the direction of substantive education of the bench are achievable without structural changes.

It should start with the judicial college, at which intensive substantive education in the subject matter a judge is expected to address should be a larger part of the curriculum. Judges, once elected, are required to go (see NRS 3.028), but more than one judicial officer has reported not getting that much out of the program. Wouldn't it be nice if judges leaving judicial college were completely conversant with the modern state of the art in every subject they were likely to touch?

Ideally, judicial officers should also be personally dedicated to life-long learning to give them the education they require to do their jobs as well as theymight. In the absence of that dedication, a poor substitute is the requirement to at least be present for such continuing education.Whether trial court judges are getting the steady stream of relevant education necessary to competently perform their job functions as the law evolves may be beyond the information available to the public – but it is not to the Nevada Supreme Court. The topic of substantive judicial education is relevant to the Court's obligation to administer the court system, and it is in the Court's own enlightened self-interest to reduce the number of appeals caused by avoidable trial court ignorance of relevant legal developments.

Accordingly, the Court should appoint a task force to review what CLE is actually being taken by judges throughout Nevada. It would be reassuring to discover that the Nevada judiciary has selffocused on keeping itself current on the state of the art in every specialty area. If, however, the cynical commentary by some members of the Bar proves even slightly justified, the Court should take action by increasing the relevance of continuing education mandatory for those seeking and holding the office of district court judge. In the long run, this would serve the public's interest in getting the most competent decisions possible, and might lessen the Court's own

workload.

VII. QUOTES OF THE ISSUE

"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

– Mark Twain

"Knowledge can be communicated, but not wisdom. One can find it, live it, be fortified by it, do wonders through it, but one cannot communicate and teach it."

– Hermann Hesse, Siddhartha.

"Nothing is more terrible than ignorance in action."

– Johann Wolfgang von Goethe (1749-1832).

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Vol. 54– Putting Your Money Where Your Mouth Is: Cheap & Useful CLE

by Marshal S. Willick | Oct 29, 2012 | Newsletter | 0 comments

Vol. 54– Putting Your Money Where Your Mouth Is: Cheap & Useful CLE

A legal note from Marshal Willick about actually doing something about (part of) the problem with Continuing Legal Education – by making it cheap, making it useful to those attending, and making it meaningful to fulfilling the purpose of CLE.

Earlier notes complained about the devolving of mandatory CLE into the meaningless extraction of funds – by third party providers and the State Bar itself – without any apparent concern for fulfilling the purpose of CLE. This note explains the little bit that this law firm can do and has done to address the problem by presenting useful CLE at no significant cost to attendees – and how much more remains to be done.

I. BACKGROUND: THE PROBLEMS WITH CLE AS WE KNOW IT

Legal Note Vol. 33, "Make Lawyer CLE Meaningful" (Jan. 17, 2011), noted the purpose declared by the Nevada Supreme Court in its formal Rules 205-215 of the (alleged) "primary importance" of ensuring that lawyers and judges continue their legal education throughout their years of practice or sitting on the bench.

It then stepped through the various ways that declaration was, in reality, a hypocritical farce. There are no metrics of any kind in place to ensure that those taking CLE courses learn, listen, or even attend the courses in question. "CLE on tape" is even worse – the only thing that matters to

the CLE bureaucracy is whether the check for the materials clears.

Two primary suggestions were made – that CLE providers be required to test attendees on the content of the courses, and that the Bar make public the record of all lawyers as to CLE courses taken, so that the public, shopping for lawyers, would have some idea of the currency and validity of attorneys' education. The note suggested that if the organized Bar was not willing to make sure that CLE actually accomplishes something, the requirement to accumulate CLE credits should be repealed as hypocrisy, designed for appearance, and not for substance.

The note concluded with the observation that "If ***nothing*** is done to improve the likelihood that "CLE" actually means that anyone actually learns anything, the silence will speak quite loudly, too." In the two years that have passed, the silence has been deafening.

Legal Note Vol. 36, "Judicial CLE" (March 10, 2011), turned to the topic of enhancing judicial competence – the other stated aim of the Supreme Court rules. It noted that some jurists were simply ignorant of the current law in the very subjects on which they ruled, and that few even attended advanced-level CLE pertaining to those subjects, creating problems of both substance and appearance.

Proposed solutions to those problems included substantive testing of judges to determine competency to retain their seats, as well as the same solution as for lawyers – publication of what, if any, continuing legal education they attended. The note also suggested that the judicial college actually start to include intensive substantive education in specialty areas for judges – say, for family court, or business court.

The response? Silence from the judicial college, but in fairness there has been a huge increase in the number of family court judges, at least, attending advanced-level CLE courses.

In a June, 2011, update (Legal Note Vol. 40, "Other Updates to Prior Notes"), the response from the CLE Committee, and the Bar Board of Governors, was reported as "Utter inactivity." The note reported that there was "no appetite" by either body to actually make CLE useful, ***or*** to increase the transparency of the bench and Bar by making any potentially-useful information available to the public.

Those interested in reviewing the full text of Legal Notes Vols. 33, 36, and 40, can find them posted at http://willicklawgroup.com/full-list-of-newsletters/.

The bottom line is that the CLE Committee, the Nevada State Bar Board of Governors, and apparently the court system, just don't give a tinker's damn* about making CLE meaningful or useful for lawyers, judges, or the public.

[* – note for philologists and Nevada legal historians: A "tinker," or "tinkler," was a repairman or

plumber who did metalwork in ages past. There's some debate over whether this phrase should be "tinker's dam," meaning a small dam to hold solder, made by tinkers when mending pans, rather than "tinker's damn" – a tinker's curse, considered of little significance because tinkers were reputed to swear habitually.

The former definition was seized on by defense counsel in Nevada as reported in 1884 in the *Reno Gazette* from the case of a Methodist preacher accused of profanity for using the term "tinker's dam," and allegedly defended on the basis that: "It isn't profane any more to say tinker's dam. The minister stated that a tinker's dam was a dam made by itinerant menders of tinware on a pewter plate to contain the solder." That definition, indeed, goes back at least as far as 1877, in the *Practical Dictionary of Mechanics* by Edward Knight: "Tinker's-dam – a wall of dough raised around a place which a plumber desires to flood with a coat of solder. The material can be but once used; being consequently thrown away as worthless."

But with due respect to defense counsel, it appears that Mr. Knight was a poor etymologist, who fell prey to the coy Victorian preference of "dam" over "damn." The phrase "a tinker's curse" (or cuss) is from even earlier, exemplifying the reputation tinkers had for habitual use of profanity. John Mactaggart's *The Scottish Gallovidian Encyclopedia*, 1824, for example, predates Knight's version: "A tinkler's curse she did na care what she did think or say." There are other such early references, suggesting the short migration from "curse" to "damn," and indicating that the proper spelling of the phrase is indeed "tinker's damn."]

II. FOLLOW THE MONEY

All studies known to date show no benefit whatsoever to imposition of mandatory CLE programs in terms of lawyer competency. What we have is a time-and-money-consuming bureaucracy that falsely portrays itself as providing a service important to the public, but actually does not make lawyers any better, or provide the public any useful information; in short, it does no ***actual*** good.

Why would the organized Bar – formed for the stated purpose of serving the Bar and public – demonstrate such gross incapacity to see that the emperor has no clothes? Because, even beyond the PR value of the ***appearance*** of doing something valuable, there's ***money*** to be made.

The Bar charges a minimum of $40 per credit hour for its on-line and remote-view CLE, and between $40 and $50 per credit for its live classes. Multiply that by 10 mandatory credits per year, per lawyer, and some 7,000 lawyers in the State, and you have the kind of $3 ***Million*** annual cash pool that blinds a bureaucracy to such irrelevant considerations as actually doing any good for anyone involved.

Of course, private companies smell the cabbage as well. The likes of NBI, PESI, etc., charge even more – some $55 per credit hour or more – hoping to get their piece of the action. It's a sweet

deal – cheap bulk mailings of cheap fold-out brochures (who ***doesn't*** throw out a couple dozen of these every week?) or even cheaper e-mail blasts, coupled with volunteer speakers paid a pittance in "honorariums," result in a healthy profit margin.

In short, the practice of mandatory CLE, as it exists in Nevada in 2012, has all the nobility of a mafia "protection" racket; it is a shake-down exercise providing no actual service except freedom from the harm that would befall anybody who doesn't pay.

III. "LIGHTING A SINGLE CANDLE" – WHAT WE CAN, AND WILL, DO ABOUT IT

So long as the current mandatory CLE model remains in place, the most good we can do for the most people – bench, Bar, and public – is by offering substantive CLE on useful topics that should increase actual lawyer competence, at a cost as close to zero as possible.

We are offering a series of CLE courses in family law topics designed to be as substantively useful as possible to practitioners. And we are offering them at $30 for 3 credit hours – a price sufficient to cover the cost of drinks and snacks at the seminar, with all additional funds donated to the Legal Aid Center of Southern Nevada.

The first of these will be the popular "The Basics of Family Law Jurisdiction," on Thursday, November 1, 2012, from 1:00-4:15 p.m., at Zenoff Hall, 601 N. Pecos Road (behind Family Court).

Covered topics will include the law and mechanics of establishing initial and modification jurisdiction for child custody, child support, divorce, property and alimony determinations, and retirement benefits division, as well as the jurisdiction of the family courts. In addition to the written materials, attendees will receive practice-aids intended to assist in jurisdictional cases, and examination of hypothetical fact patterns. The format will be seminar style, encouraging questions and active participation.

To register for this CLE, please contact the Willick Law Group at 702-438-4100 or see http://www.lacsn.org/images/stories/Willick_CLE_Nov_2012_Flyer.pdf.

Future topics will include: Child Custody, Relocation, Pension and Property Division, and Practical Mechanics of Family Trial Practice.

By putting on this series of CLE seminars, we intend to do what we can to elevate the practice, while also hopefully depressing the overall price-point of CLE everywhere. It is possible that, if this is emulated by a sufficient number of others, enough of the profit motive can be taken out of the CLE racket to cause the Bar to actually look at it less as a cash cow than as a program that could and should be altered to actually serve the legitimate interests of lawyers, public, and the courts. Hope springs eternal.

IV. CONCLUSIONS

The State Bar and its internal CLE machine long ago lost all sight of the purpose of CLE, and spawned a bureaucracy now solely concerned with its own perpetuation, expansion, and increase in revenue and budget. As currently constituted, the Nevada mandatory CLE system does nothing measurable to improve the competence of lawyers or judges, and the Bar's shroud of secrecy prevents the public from getting any potentially-useful information about which lawyers and judges have taken which courses. It's all about funding – and apparently nothing but.

In light of this dysfunctional reality, the best that can be done is to provide actually useful CLE for a very low cost, and try to coerce the system indirectly.

We hope that our seminars prove useful for all of those purposes – providing useful education, making a charitable donation to a worthwhile cause, and exerting some pressure on the CLE bureaucracy toward reform.

V. QUOTES OF THE ISSUE

"You will never understand bureaucracies until you understand that for bureaucrats procedure is everything and outcomes are nothing."
– Thomas Sowell

"In any bureaucracy, the people devoted to the benefit of the bureaucracy itself always get in control, and those dedicated to the goals the bureaucracy is supposed to accomplish have less and less influence, and sometimes are eliminated entirely."
– Jerry Pournelle (Pournelle's Law of Bureaucracy)

"Bureaucracy destroys initiative. There is little that bureaucrats hate more than innovation, especially innovation that produces better results than the old routines. Improvements always make those at the top of the heap look inept. Who enjoys appearing inept?"
– Frank Herbert, *Heretics of Dune*

"If you are going to sin, sin against God, not the bureaucracy. God will forgive you but the bureaucracy won't."
– Hyman G. Rickover

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Vol. 66 – The New CLE Fee Structure Stinks and Should Be Changed

by Marshal S. Willick | May 25, 2018 | Newsletter | 0 comments

A legal note from Marshal Willick about how Nevada's CLE system has been made destructive to both education and scholarship while increasing dramatically in cost, and why only the Nevada Supreme Court – which ultimately is responsible for this mess – can do anything about solving it.

The cost of CLE in Nevada just increased by an order of magnitude while the number and variety of available offerings has been greatly curtailed, and scholarship is being actively punished.

I. WHAT CHANGED AND WHY

The Nevada Board of Continuing Legal Education was created in 1982; it is distinct from – but intertwined with – the Nevada Bar Board of Governors ("BOG"). In 2014, in a "turf" squabble, the CLE Board asked the Supreme Court to reduce the number of CLE Board members appointed by the BOG since the Bar was a "provider" and the CLE Board complained of a conflict of interest.

The CLE Board declared that to do its job, it had to be a "stand-alone" entity that was "financially self-sustaining" so as to "avoid or eliminate conflicts of interest." It complained that the number of lawyers and fees only "grows slowly" but the Board's "profitability erodes as operating expenses [primarily its own salaries and benefits] increase over time." It complained that in 2014, the CLE Board expended $15,000 more than it received from fees, while quietly noting a "reserve" from prior fees received of over $600,000.

So the CLE Board submitted ADKT 499 to change its "business plan" from reliance on annual

attorney CLE fees (and late fees), claiming (at the beginning, anyway) its intent to get the "hugely profitable" CLE providers to start funding the cost of mandatory CLE to "reduce or eliminate fees for the lawyers." It apparently never occurred to the CLE Board to explain why it should seek to be "profitable."

The new plan was supposed to ***replace*** lawyer CLE fees by imposing on "accredited" CLE providers an annual fee of $500 plus $5 for each credit hour earned by every attendee, with another $5 per credit to be paid by each lawyer. For "non-accredited" providers, the new business plan charged a $25 "application fee" per program plus $5 per credit hour per attorney to be paid by the CLE provider, with another $5 per credit to be paid by each lawyer.

Begrudgingly, the fees would not apply to providers "that are non-profit and do not charge attorneys for attending their programs," or to "Federal, State, and local governmental agencies, nor for legal aid, provided they do not charge attorneys."

The CLE Board predicted that the change would improve CLE in Nevada because "higher quality providers will accept new fees to continue operating in Nevada, while others will exit the State." No explanation was suggested as to what denoted "quality" or how that had anything to do with being large for-profit enterprises.

The CLE Board also promised to increase efficiency and economy through use of electronic communications to replace paper, to streamline its processes, and to save staff time by ceasing to "cajole" or "hand-hold" lawyers and instead greatly increase financial penalties imposed against lawyers for non-compliance, predicting that doing so would actually ***decrease*** the total of those fees by increasing lawyer compliance.

The Bar opposed the reorganization and parts of the new CLE "business plan," but agreed to collect the annual CLE fees along with annual Bar dues so that fewer lawyers would be confused and end up having to pay the very expensive "late fee" penalty that constituted 40% of the funding of the CLE Board.

After public comment, a hearing, and several rounds of written input, mainly from the BOG and other bar associations, the Supreme Court approved both the reorganization and the new business plan.

II. THE REAL WORLD AND CONSEQUENCES, INTENDED AND OTHERWISE

Many Nevada lawyers have complained about the CLE "industry" for years, noting that it was ***already*** much too expensive, and that for many lawyers it was a totally hollow exercise which generated money for both the Bar and the CLE Board but had no discernable effect on actually improving lawyer competence.

For example, see Legal Notes Vol. 33, "Make Lawyer CLE Meaningful" (Jan. 2011); Vol. 36, "Judicial CLE" (Mar. 2011); Vol. 40, "Other Updates to Prior Notes" (Jun. 2011), and Vol. 54, "Putting Your Money Where Your Mouth Is: Cheap & Useful CLE" (Oct. 2012), all posted at https://www.willicklawgroup.com/newsletters/.

Those notes stepped through the history of CLE in Nevada, detailing how it had devolved from the aspiration of promoting lawyer competence into the meaningless extraction of funds to fund the CLE bureaucracy, and how both the Bar and the CLE Board had ignored the obvious reforms that would make it ***actually*** useful to the public.

We detailed the huge sums involuntarily extracted from lawyers and being fed to the Bar, to the CLE Board, and to private companies, and protested that since all known studies showed no actual improvement to lawyer competency from mandatory CLE, what Nevada had created was a time-and-money-consuming bureaucracy that falsely portrayed itself as providing a service important to the public, but which actually did not make lawyers better ***or*** provide the public any useful information, and so did no ***actual*** good.

We explained how my firm was going to try 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.

And 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.

But this did not generate any money for the CLE bureaucracy, which reacted like a bureaucracy does, seeking its own perpetuation and expansion at the expense of those it purports to serve.

So ***now***, if you want to give away your time, experience, and expertise for the benefit of others, you are required to submit a $25 "application" fee ***and*** pay another $5 for every credit that every attendee receives. In other words, for the privilege of volunteering to do all the work to provide a

one-hour CLE for 30 people, you have to pay the CLE Board $175. If 100 people happen to show up, it will cost you $525. Lord help you if 1,000 people want to hear what you have to teach.

Who is exempted from paying these fees? The Bar, its sections, and specialty Bars, but only if all proceeds go to legal aid, or to TIP mentors, or the credits offered are 1.5 hours or less. Or if the provider is the government, or a non-profit agency. Otherwise, too bad. The full set of "how we intend to take more money from you" regulations is set out at https://www.nvcleboard.org /formsinformation.asp#.

And this was by no means accidental. The CLE Board, in the debate leading up to adoption of the new regulations, stated in its submissions that it fully ***intended*** to cause the "exit of low volume non-accredited providers." In other words, prevent lawyers from teaching other lawyers for free.

The CLE Board brushed aside the fact that large for-profit providers would ***obviously*** pass along to their captive lawyer market the increased fees and costs and that the lawyers would end up paying a lot more every year, saying "Overall, the Board expects no more than a modest effect on provider pricing, as anecdotal input suggests."

In other words, the CLE Board very deliberately wanted to destroy the ability of lawyers to provide free CLE, because it was not good for the ***bureaucracy's*** income growth, actual damage to the education of members of the Bar be damned. And they knew all along that their new plan would not "reduce fees" to lawyers but would instead greatly increase them, and they didn't care about that, either.

III. YOU EVEN HAVE TO PAY THEM TO PAY SOMEONE ELSE

The regulations are unclear on the point, but apparently you have to pay the CLE Board if you actually want to obtain specialized education and training in your field.

A divorce lawyer gets the highest-possible quality of education from programs put on by the American Academy of Matrimonial Lawyers. But if you go to the 3-day annual CLE in Chicago – paying to travel there, to register, and to stay out of town for three days – you apparently ***also*** have to pay the CLE Board $5.00 for every credit you already paid to get.

So the AAML annual meeting, with its 10.5 hours of general and ethics credit, will cost every attendee ***another*** $52.50. Every year. On top of the cost of anything earned in Nevada (you have to pay $5 for most credits earned here, too).

The system has been altered so that the more any lawyer seeks out specialized training and education to actually be better, the more expensive it will be. Low-quality, irrelevant, and outdated CLE can be found which is cheap, but of course signing up for such won't actually make any lawyer any more competent. The incentives are backward.

IV. THE DELIBERATE DISCOURAGEMENT OF SCHOLARSHIP AND PUBLICATION

Every major legal publication in Nevada works hard to attract quality substantive articles – The Nevada Family Law Report, the Nevada Lawyer, the Clark County *Communique*, the Washoe County *Writ*, etc.

One of the few tangible benefits for spending the dozens of hours of research, writing, and editing it takes to create such articles has always been the ability to obtain CLE credit for helping to teach other members of the Bar through such publications.

Now, it will also cost you. Regulation 9 of the new CLE rules imposes a $25 fee to get credit for writing scholarly articles – so 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 that, too.

It is hard to imagine a way to more actively ***discourage*** lawyers from volunteering their time and expertise to write scholarly articles. And this thought apparently did not even cross the mind of anyone involved in adoption of the new rules – it appears nowhere in the written record of ADKT 499.

V. THE NEW POLICY IS WRONG AND COUNTERPRODUCTIVE

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."

But every aspect of the new model ***discourages*** providing quality education or scholarship, and ***decreases*** what is available to Nevada lawyers who want to actually improve their knowledge and skills. Costs are increased for ***every*** lawyer, and the more a lawyer actually cares about getting the ***best possible*** education and training, the more it will cost that lawyer.

Every impact of the new plan is directly antithetical to the CLE Board's supposed reason for existing – but it does feed more money to its bureaucracy. The priorities for those involved in the discussion seem crystal clear.

It is not as if the Supreme Court has not previously been presented with budget impacts related to CLE. In 2016, the Court approved an expansion of CLE from 12 to 13 hours annually, so that every lawyer, every year, had to get a credit related to substance abuse and mental health. We were already the ***fifth most-expensive***-to-remain-in-practice Bar ***before*** that change.

Justice Pickering dissented from the addition, noting the minimum $1 million in cost/lost productivity that change would cost, and the entire lack of ***any*** empirical evidence that it would actually do any good.

It seems likely that with that new "business plan" being adopted, the CLE Board will make Nevada number one – in cost to remain in practice on zero evidence of any actual benefit to the bench, Bar, or public. Hooray.

VI. RESPONSES BY THE BAR AND SECTION LEADERSHIP HAVE BEEN INADEQUATE

Essentially ***every*** entity that participated in the debate over ADKT 499 was solely interested in looking out for its own budget and programs, with scant attention or concern for the lawyers who would end up paying the freight (or their clients, on whom the increased cost of the lawyers remaining in practice ultimately descends). Each entity was focused on trying to secure exemptions from the new fees – for itself.

The State Bar submissions at least claimed to be concerned for the general Bar membership – in addition to the Bar's own fees and programs, of course – but with all the numbers thrown out during the debate for over two years, ***no one*** involved apparently took the time to project what the new policy would actually cost each individual lawyer.

More than anything else, the written submissions looked like Russell Long's famous summary of input to how tax policy is made in Washington:

Don't tax you,
Don't tax me,
Tax that fellow behind the tree.
(William B. Mead, "Congress Tackles the Income Tax" (Money, July, 1973)).

As with the debacle that is e-filing in Clark County, which has been extensively detailed in these notes, it has apparently never occurred to anyone involved that the proper response to increased efficiency, automation, and technology is to ***lower the cost to the user***. If the size of the Bar membership (apparently about 8,000), and the fees that all those members pay, is only growing "incrementally," then the growth of the bureaucracy's budget should be likewise constrained to "incremental" increase.

If that is not "adequate," require the CLE Board to piggy-back on existing State Bar mailings, notices, and staff for functions and communications that can be combined for the purpose of ***lowering*** costs.

VII. AN ACTUAL SOLUTION TO THE "PROBLEM"

It is worth circling back to the policy that is supposedly being served by creation of this CLE bureaucracy and the massive money it takes to run it: improving lawyer competence, ultimately for the benefit of the public hiring those lawyers.

The actual "solutions" that would serve that policy goal are simple and cheap, as detailed in Legal

Notes 33 and 54 seven years ago: If you want to ensure that lawyers are actually learning something at CLE, require providers to test them on the subject matter of the course. If you want the public to hire the best trained and most educated lawyers, have the Bar publicly post the CLE record of all lawyers so that the public can see the currency and validity of attorneys' continuing education.

What is ***not*** helpful to either lawyers ***or*** the public is to fund an ever-better-paid CLE bureaucracy primarily fixated on its own perpetuation and growth.

VIII. CONCLUSIONS

By my estimate, the cost of CLE in Nevada just (at least) doubled, while the number and variety of available offerings has been drastically reduced. Half a dozen companies have pulled out of Nevada entirely, and free CLE offered by law firms has essentially disappeared. Our CLE Board is actively discouraging anyone from wanting to provide either education to others, or scholarship and authorship. The new policy is counterproductive in virtually every imaginable way.

Only the Nevada Supreme Court can do anything about this. The CLE Board will never do anything to reduce its own budget and growth, and neither will the Bar. Both of those entities report to the Court, which should start with figuring out what end results it is trying to produce, and then target policies and directives to actually achieve them.

Given the enormous costs in both time and money, it may be time to re-evaluate the value of the entire system. Getting empirical evidence as to whether mandatory CLE actually does any good would seem to be a good first step.

At bare minimum, policies that discourage volunteering and scholarship should be reversed. There should be no fee of any kind for providing CLE without charging for it, and there should be no fee of any kind for seeking credit for scholarly articles and publications. It would be a good idea to have some kind of sliding scale beyond that, so that folks that have a modest charge to attendees (for example, to finance lunch or renting space) are not punished for providing a public service.

Overall, the concept is that the CLE Board should be focused on facilitating the actual providing of useful information and training to members of the Bar at the lowest possible cost, rather than maximizing revenues to perpetuate its own bureaucracy.

The CLE Board long ago lost all sight of the ***purpose*** of CLE, and the bureaucracy spawned is now solely concerned with its own perpetuation, expansion, and increase in budget. As currently constituted, the Nevada mandatory CLE system does nothing measurable to improve the competence of lawyers or judges, and the Bar does nothing to let the public get any potentially

useful information from or about it. CLE is now about nothing but funding.

There is no defensible rationale for what has metastasized into the current hot mess. The State Bar, on behalf of the general membership, should ask the Court to assess the efficacy and impacts of mandatory CLE, and the Court, on behalf of the lawyers and the public, should do so.

IX. QUOTES OF THE ISSUE

"In any bureaucracy, the people devoted to the benefit of the bureaucracy itself always get in control, and those dedicated to the goals the bureaucracy is supposed to accomplish have less and less influence, and sometimes are eliminated entirely."
– Jerry Pournelle (Pournelle's Law of Bureaucracy)

"Bureaucracies force us to practice nonsense. And if you rehearse nonsense, you may one day find yourself the victim of it."
– Laurence Gonzales, *Everyday Survival: Why Smart People Do Stupid Things*

"Bureaucracies are inherently antidemocratic. Bureaucrats derive their power from their position in the structure, not from their relations with the people they are supposed to serve. The people are not masters of the bureaucracy, but its clients."
– Alan Keyes

"You will never understand bureaucracies until you understand that for bureaucrats procedure is everything and outcomes are nothing."
– Thomas Sowell

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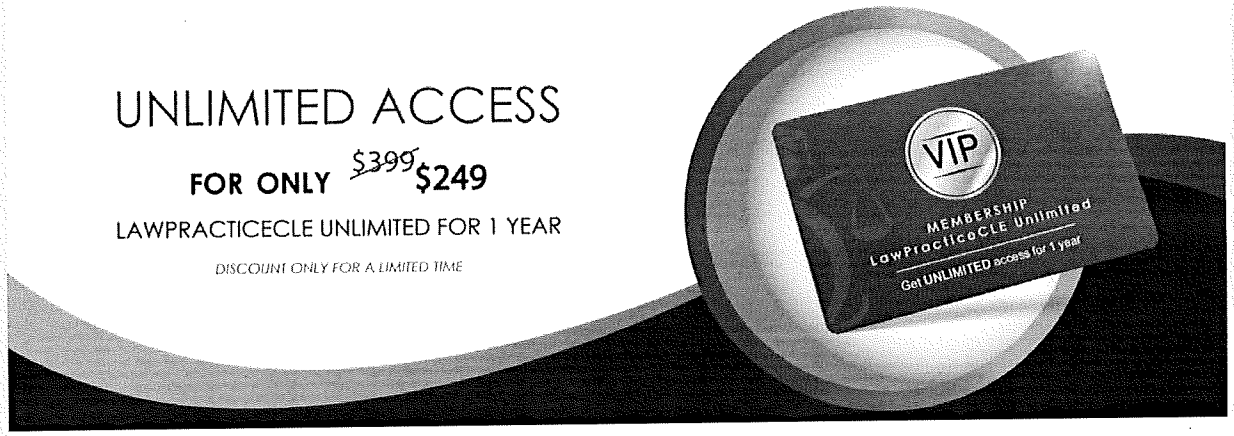

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