

November 2011 Proposed Model Rules for MCLE Distance Learning Accreditation and for Course Accreditation Generally



Critical Issues Summit

*Equipping Our Lawyers:
Law School Education, Continuing Legal Education,
and Legal Practice in the 21st Century*

WORKING GROUP ON GOALS FOR CLE/MCLE RECOMMENDATIONS

PROPOSAL FOR MODEL MCLE RULES

In October 2009, ALI-ABA and ACLEA convened the Critical Issues Summit, “Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century.” The goal of the Summit was to develop recommendations for improving professional education across the “continuum” of the lawyer’s learning life (to borrow a concept from the highly influential 1992 MacCrate Report) to meet the challenges of 21st century practice. To participate in these discussions, the Summit organizers brought together representatives from all of the key constituencies in lawyer professional development—law schools, CLE providers, MCLE regulators, law firm professional development, the bench, and the organized bar.

The Summit deliberations resulted in 16 Final Recommendations for improving lawyer education and professional development. Summit Recommendations 6 through 10 specifically addressed MCLE regulation and the provision of CLE. (Reproduced in Appendix A; the entire set of Recommendations may be found at www.equippingourlawyers.org.) To advance these five Recommendations, the Summit organizers subsequently appointed a CLE/MCLE Working Group¹ to study the issues

¹ See Appendix B for the members of this Working Group. The opinions expressed in this proposal do not necessarily express the individual opinions of the members of this Working Group nor of the members’ Courts, state bars, law firms, companies, or employers.

surrounding them and to reach out to other constituencies involved in CLE and MCLE, including CLEReg (the national association of CLE regulators).

The Working Group determined to focus first on Summit Recommendation 7:

MCLE regulators, in collaboration with CLE providers and the practicing bar, should develop appropriate accreditation standards for all varieties of distance learning CLE programs while also updating and improving accreditation standards for in-person CLE programs.

After study and consultation, the Working Group now proposes two model rules for CLE and MCLE designed to fit into existing MCLE rule structures. Both of these model rules derive from Summit Recommendation 7's call to revisit the MCLE rules for accrediting distance learning and in-person CLE programs. The first model rule relates to distance learning, while the second relates to all forms of CLE. Comments following each rule place the rule in context and describe its purpose in more detail.

MODEL MCLE RULE FOR DISTANCE LEARNING (PROPOSED)

1. The Commission/Board shall approve for credit any continuing legal education activity or event that:
 - a. Meets the educational requirements of these Rules;
 - b. Permits the attorney to attend either in person or remotely;
 - c. Is presented live or as a recording;
 - d. [Includes a means of verifying the participant's attendance; and]
 - e. [Gives the participant the opportunity to ask written or oral questions of the faculty or another qualified commentator during or after the activity or event.]

COMMENT:

The distance learning made possible by technology has long been an issue for CLE providers and MCLE regulators alike. Drafters of the first MCLE rules in the 1970's, like CLE providers, focused almost exclusively on classroom learning. By the mid-1990's, the advent of new technologies caused lawyers to seek and providers to offer technology-based CLE. In turn, MCLE jurisdictions have amended their existing rules to recognize CLE delivered by new and evolving technological means.² Subsequent jurisdictions adopting MCLE recognized forms of distance learning in their requirements, but even those jurisdictions have had to amend their rules over time as new technologies have made new forms of distance learning available.

² Likewise, the ABA Model Rules for Continuing Legal Education were amended in 1996 to include credit for technology-based CLE. See http://www.americanbar.org/content/dam/aba/migrated/2011_build/cle/mcle/aba_model_rule_cle.authcheckdam.pdf In addition, in 1997, ALI-ABA and ACLEA jointly released their study, *MCLE: A Coordinated Approach* (American Law Institute, 2d ed., 2001), which expressly recommended that states accredit CLE in non-traditional formats, including distance learning.

Nearly all jurisdictions now allow lawyers to earn some of their required CLE credits by distance learning methods, and some of the largest MCLE jurisdictions permit all credits to be earned in this manner. However, over time the continuing need to amend MCLE rules to keep up with technology has led to a host of inconsistencies. Definitions of specific distance learning formats are extensive, often hard to understand, and typically prone to obsolescence as new technologies emerge. Jurisdictions vary not only over how they define different distance learning formats, but also which formats they will accredit and for how many hours of CLE credit. This process will not stop or slow down. New technologies will almost certainly continue to affect how lawyers learn, and spur lawyer demand for changes to CLE offerings and existing MCLE rules.

In light of these concerns, we propose a model rule that avoids any designation of specific technologies or platforms. Instead, we opt for articulating broad and key educational criteria in the rule, and then allowing technology and CLE providers to meet them in evolving ways.³ Consequently, this rule would permit any form of distance learning to be used for CLE, provided it could meet the criteria of attendance verification and the ability to ask questions of faculty or other qualified commentators. (We recognize that many states do not require attendance verification or the ability to ask questions as conditions for accrediting for distance learning. Accordingly, the rule is structured so that these conditions can be omitted by any adopting jurisdiction.) We leave it to CLE providers and their technology to meet the challenge of having their formats comply with those criteria—and we have no doubt that they will.⁴

Thus, rather than maintaining two sets of rules and regulations – one set pertaining to in-person CLE and the other to technology-based CLE – this model rule combines both and allows additional conditions for the latter, if desired. It also defines technology-based CLE broadly, and eliminates the distinction between live and recorded formats for distance education.

The breadth of the proposed rule makes it easier to fit into existing MCLE rule structures. The proposed rule also permits credit for presenting at live or remote CLE events and for using various technology-based “self-study” methods, as long as the underlying criteria are met in each of those circumstances.

³ This is substantially similar to the approach taken by California’s MCLE regulations. See *California Rules of the State Bar*, Title 2, Div. 4, Rule 2.80: “A member may claim MCLE credit for attending a MCLE activity, such as a lecture, panel discussion, or law school class, in person or by technological means.” See also Texas MCLE Regulation 2.1.1(a), at www.texasbar.com/Content/NavigationMenu/ForLawyers/MCLE/MCLERules/MCLERegulations.pdf.

⁴ As stated in *MCLE: A Coordinated Approach* (American Law Institute, 2d ed., 2001), “The touchstone of the new methods, and the old methods, is quality. . . . [R]egulatory bodies should give maximum attention to well-understood indicia of quality and, within those boundaries, to maximum encouragement of opportunities for constructive innovation.”

MODEL MCLE RULE FOR STANDARDS OF ACCREDITATION (PROPOSED)

[To be added to existing MCLE rules that outline standards for accrediting CLE activities]

(A) The CLE course or activity must define its learning objectives and its sponsor must describe how those objectives will be met.

COMMENT:

Most MCLE jurisdictions define the educational content necessary for approval of any given CLE activity in fairly general terms. The ABA Model Rule for Continuing Legal Education,⁵ which serves as an exemplar for many jurisdictions, calls for the following in its section on approval of specific MCLE:

- (a) The course or activity must be of intellectual or practical content and, where possible, include a professional responsibility component;
- (b) The course or activity must contribute directly to lawyers' professional competence or skills, or to their education with respect to their professional or ethical obligations;...

There is certainly nothing to be critical of in these criteria. We feel, however, that to make CLE a true educational experience, it is necessary to go beyond these standards. Modern educational theory and practice require the construction of learning objectives and means for obtaining those objectives. The Summit's call to re-evaluate the standards for accrediting CLE (regardless of whether it is taken in person or remotely) surely requires an examination of how we can apply the accepted education practice of identifying learning objectives to CLE.

The MIT Teaching and Learning Laboratory notes that learning objectives are much more than "simply a list of the topics to be covered in the course." Learning objectives

should describe what students should know or be able to do at the end of the course that they couldn't do before. Learning objectives should be about student performance. Good learning objectives shouldn't be too abstract ("the students will understand what good literature is"); too narrow ("the students will know what a ground is"); or be restricted to lower-level cognitive skills ("the students will be able to name the countries in Africa.").

Each individual learning objective should support the overarching goal of the course, that is, *the thread that unites all the topics that will be*

⁵ Available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/cle/mcle/aba_model_rule_cle.authcheckdam.pdf

*covered and all the skills students should have mastered by the end of the semester.*⁶

As far as we are aware, no MCLE rules currently require providers to both define learning objectives and then describe how those objectives will be met. This formulation is an explicit compromise designed to balance between existing fairly vague accreditation standards and potentially more formal educational structures, including testing. Our hope is that this rule will encourage more CLE providers to plan their offerings with greater focus on educational objectives, while providing regulators with a means to examine those objectives, without either being overwhelmed by the process of doing so.

⁶<http://web.mit.edu/tll/teaching-materials/learning-objectives/index-learning-objectives.html>. [Emphasis in original]

APPENDIX A

Critical Issues Summit Final Recommendations Relating to CLE and MCLE

- 6. CLE providers, MCLE regulators, the practicing bar, and the bench should create communication frameworks for mandatory CLE rules to ensure that all parties share an understanding of the content of the rules, their needed evolution, and their effects.**

Reporter's Comment: The goal of this recommendation is to ensure that all interested constituencies participate in a dialogue about how to make the MCLE rules more effective in improving the profession and protecting the public it serves.

- 7. MCLE regulators, in collaboration with CLE providers and the practicing bar, should develop appropriate accreditation standards for all varieties of distance learning CLE programs while also updating and improving accreditation standards for in-person CLE programs.**

Reporter's Comment: Distance learning encompasses a myriad of media, including but not limited to live and archived telephone seminars, live and archived audio and video webcasts, audio and video replays, and private and public uses of CDs. Over the past decade, distance learning has become an integral part of CLE, and its broad use and unique characteristics demand consideration for appropriate accreditation standards. How much of a lawyer's mandatory CLE requirement should be met through distance learning? Some think that all lawyers should have to participate in at least some in-person CLE because of the inherent value of face-to-face interchanges. Others argue that well-planned and well-executed distance learning media can yield equally effective learning results and, therefore, should not have accreditation limits. Summit participants agreed that accreditation standards for more traditional, in-person CLE programs also need to evolve to reflect ongoing CLE experience and research findings on effective approaches to adult learning.

- 8. MCLE regulators should accredit training in the content or skills necessary to effectively practice law, even if such content or skills are not directly related to substantive law.**

Reporter's Comment: This recommendation speaks to the not-uncommon

mandatory CLE provision that denies accreditation to CLE courses on practice management, computer usage, or other skills lawyers need but that do not relate directly to substantive law. The rationale in some states for such limitations has been that CLE should encourage legal skills and knowledge, not practice management skills. Participants at the Summit argued that effective client service requires lawyers to be good managers of their time and offices, skilled managers of the financial aspects of running a practice, and knowledgeable in areas that do not necessarily involve substantive law. Several conferees involved in lawyer disciplinary matters noted that the percentage of cases involving lawyers' shortcomings in personal and practice management far outweighs the percentage of cases involving lack of substantive law awareness. This fact argues in favor of mandatory CLE rules that encourage lawyers to develop skills in practice management, practice development, client communication, and the like.

9. MCLE regulators and CLE providers should work together to develop and implement means of measuring the effectiveness of CLE offerings.

Reporter's Comment: Lawyers have traditionally been skeptical of testing in any form. And even the best-crafted evaluation forms are of limited value in substantiating the amount of learning taking place in CLE programs or in determining whether other approaches to learning might be more effective or efficient. Moreover, as was noted at the Summit, what really matters is whether the lawyer has the practice competencies needed for the work he or she is doing, not when or how the competencies were acquired. This argues for measuring competencies throughout careers, not by hours served in class.

10. Recognizing that law firms and other legal employers are significant and regular providers of CLE, MCLE regulators should provide them with the same opportunities to gain accreditation of their programs as those afforded to external CLE providers.

Reporter's Comment: Some jurisdictions deny or limit mandatory CLE credit for in-house training programs. It was the consensus of the Summit participants that lawyer training should be encouraged in many settings as long as it meets the basic criteria of effective teaching and learning to produce better qualified and better performing lawyers.

APPENDIX B

Critical Issues Summit CLE/MCLE Working Group Members

Doug	Ashworth	Director, Transition into Law Program, State Bar of Georgia	douga@gabar.org
Julene	Franki	Executive Director, ALI-ABA	jfranki@ali-aba.org
Sandy	Geller	Executive Vice President, Practising Law Institute	sgeller@pli.edu
Peter	Glowacki	Midwest Director of Training and Development, Sidley Austin LLP	pglowacki@sidley.com
Karen	Johnson	Director, MCLE Board of the Supreme Court of Illinois	klj@mcleboard.org
Dennis	Kennedy	MasterCard Legal Department	Dennis_Kennedy@MasterCard.com
Stephanie	Kimbro	Principal, Kimbro Legal Services LLC	slk@kimbrolaw.com
Dan	Levering	Administrator, Pennsylvania CLE Board	dlevering@pacle.org
Dimity	Orlet	CLE Director and Assistant Counsel, Cincinnati Bar Association	dvorlet@cincybar.org
Donna	Passons	Executive Director, ACLEA	donna@clesolutions.com
Vincent	Polley	Principal, Knowconnect PLLC	vpolley@knowconnect.com
Hon. Jean Hoefler	Toal	Chief Justice, South Carolina Supreme Court	jtoal@sccourts.org ; mpinkney@sccourts.org
Peter	Vogel	Partner, Gardere Wynne Sewell LLP	pvogel@gardere.com
Steve	Weise	Partner, Proskauer LLP	sweise@proskauer.com