Supreme Court of New Jersey

Ad Hoc Committee on Continuing Legal Education

Final Report and Recommendations

November 10, 2008

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I. Executive Summary

The New Jersey Supreme Court created the Ad Hoc Committee on Continuing Legal Education (the Committee) in March 2007 to determine whether it could find a compelling case against the establishment of mandatory continuing legal education (MCLE or CLE) in New Jersey, and if not, what such a program should include as its elements. The legal profession has an important stake in assuring the competence and professionalism of its practitioners in our rapidly changing and complex legal world. The vast majority of states require mandatory continuing education for lawyers. New Jersey requires continuing education in connection with nearly every calling worthy of a "professional" designation and for most occupations or trades that require state licensure. In light of those facts, the Committee concluded that it could not find a compelling case against MCLE.

Having answered that threshold question, the Committee offers the Court the following twenty recommendations. The Committee adopted them after inviting and considering widespread public comment that included public hearings, formal and informal meetings with stakeholders, and extensive written comments. The Committee intends that most of the recommendations be adopted as part of the initial MCLE program. As indicated, some issues should be considered after the Court has had the opportunity to review a full cycle of the initial program. The Committee's recommendations reflect the Committee's best collective judgment. The Committee acknowledges that reasonable minds can and do differ on this subject and its many elements, and expects that all such viewpoints will inform any future evaluation of the program.

Recommendation 1: The Committee recommends the following credit hour parameters:

A. Basis for 1.0 Credit Hour should be 50 minutes of instruction;

B. Twenty-four credits should be required every two years (biennial cycle);

C. Four hours of ethics/professionalism credits should be required during each biennial cycle; there should be no additional core requirements.

D. Except for ethics/professionalism credits, which should be completed each biennial cycle, and subject to limits on credits earned by full time and adjunct law professors, the Court should allow up to 6 credit hours to be carried over to the next cycle;

E. There should be no blanket rule regarding whether credits can be earned for courses conducted during a meal -- this matter should be left to the discretion of accredited providers; and,

F. All alternative verifiable learning formats should be permitted and encouraged, including but not limited to: writing, audiotape, videotape, teleconference, video conference, satellite simulcast, and the Internet. The use of alternative learning formats should be limited to 12 credit hours per cycle for formats that are not "live" or "interactive" as defined by the MCLE regulator.

Recommendation 2: The Committee recommends that MCLE credits be awarded for teaching on a 2:1 basis per two-year cycle and for writing on a 1:1 basis. Teaching credit should be earned only once for the same course during a cycle. The exact parameters of what would qualify for teaching and writing credits should be detailed in the Court's MCLE regulations and guidelines. As for writing, hours earned for writing should be counted toward, and limited by, the 12-credit limit provided under Recommendation 1F. Teaching should not be so limited. As noted later in this Report, the Committee recommends that the existing Board on Attorney Certification be designated as the MCLE regulator. [See Recommendation 6 for additional proposals as they would apply to law school professors.]

Recommendation 3: Subject to approval regulations set forth in Recommendation 9 and the other requirements offered in this Report, all attorneys should receive 1:1 credit for courses taken in accordance with the requirements of any other jurisdiction. As part of reciprocity, the Committee recommends that certified attorneys also receive 1:1 credit for their attendance at their approved courses.

Recommendation 4: The Committee recommends that attorneys participating in approved Inns of Court programs receive full credit towards MCLE requirements for hours of instruction up to 24 credit hours each biennial cycle.

Recommendation 5: The Committee recommends that the Supreme Court consider, after initial implementation of MCLE, whether it should grant credit to attorneys for *pro bono* work supervised by an accredited provider or for any other educational activity. These areas can be incorporated into the MCLE rules and regulations after implementation of the initial program.

Recommendation 6: All licensed New Jersey attorneys, both plenary and limited license in-house, should comply with the CLE requirements, including judges, law school professors, and in-house corporate counsel. Law school professors should

receive two hours of CLE credit for every hour of law school instruction that they give to students, and one hour of credit for every hour of published writing, up to a combined total of 12 credits per cycle. Credit for this type of activity should not be banked or carried forward to a successive cycle. Consistent with Rule 1:28-2(b) (Payment to the New Jersey Lawyers' Fund for Client Protection Exemptions), only attorneys who have been admitted to practice in New Jersey for fifty years or more, those on full-time active duty in the military, VISTA, or Peace Corps, and those retired completely from the practice of law should be exempted from the MCLE requirement. Hardship waivers should be available on a case-by-case basis by application to the Court's MCLE regulator.

Recommendation 7: The Skills and Methods Program should be discontinued. Newly admitted attorneys should be subject to the same MCLE requirements as all other attorneys, including a core ethics/professionalism requirement. Beyond such a program, the Committee sees no need for additional bridge-the-gap requirements.

Recommendation 8: CLE providers in New Jersey should seek prior approval from the MCLE regulator in order for their course offerings to qualify for MCLE credit. A provider should be entitled to seek either "approved service provider" status or seek credit for individual courses. It is recommended that the following be eligible to seek "approved service provider" status from the MCLE regulator: local, state, and specialty bar associations; for profit and non-profit legal education providers; Inns of Court; educational institutions, including but not limited to accredited law schools; and in-house providers, including law firms, profit and non-profit corporations, and governmental entities. Providers seeking approved service provider status or individual course accreditation should meet the course approval requirements as defined in Recommendations 9 and 10.

Recommendation 9: a) To obtain approved service provider status, the CLE provider-applicant should demonstrate that in the two years prior to applying for such status, the provider has offered at least five separate courses that comply with all requirements for course approval. The provider should be able to demonstrate a history of quality programming through a list of previously accredited courses. An approved provider's courses should be consistent with the standards created by the regulator for course content.

b) Approved provider status should carry with it presumptive approval of courses offered by the provider for a two-year period.

c) Providers should seek renewal of approved provider status every two years. Regulations should provide for the revocation of approved provider status for failure to comply with MCLE rules and regulations. In addition, the MCLE regulator should have discretion to decline approval of a specific course offered by the approved provider, regardless of any general presumptive approval of courses, such disapproval to apply prospectively and not to affect courses already given.

d) Approved providers should notify the MCLE regulator regarding all courses offered no later than 30 days after course date and include information on course content and method of presentation, date and location, faculty, a calculation of the credit hours, and any necessary contact information. Any advertising of credits should be in a manner recommended by the MCLE regulator.

e) Within 30 days of the course offering, approved providers should pay all required fees and report attendance to the MCLE entity. The provider should keep records of course approval and attorney attendance for three years. The provider should obtain attorney signatures on certificates of attendance for each course and keep these records for three years.

f) A service provider, such as a county bar association, in-house provider, etc., that has not previously offered a CLE course or the requisite number of courses indicated in subsection (a) should be eligible to become an approved service provider in accordance with regulations to be created. It is expected that the provider's courses will be able to be accredited on an individual basis until such time as the provider is granted approved provider status. Service providers that do not wish to seek approved provider status should be permitted to seek accreditation for individual courses; approval should be obtained not less than 30 days prior to the course offering.

g) Individual attorneys should be permitted to seek accreditation for teaching, writing, distance learning, web, audio, video and DVD courses and out-of-state courses. If certificates of attendance are available, the attorney should keep them for his or her records for three years following the completion of the cycle.

h) Retroactive credit or late submission for course accreditation should be considered on a case-by-case basis, subject to late fees.

Recommendation 10: The Committee recommends that the Court adopt the language and approach utilized by many MCLE states requiring providers to offer courses of intellectual content that are at least broadly related to the legal profession, provided in a suitable setting, conducted by adequate and competent faculty.

Providers also should offer, as appropriate, quality written materials on or before the course offering. As already noted, the approved service provider should provide, no later than 30 days after the course offering, information on the offered course, including faculty, name and purpose of the course, time-specific agenda, date, time and location, and the calculation of credits. Industry-wide forms should be accepted. A service provider seeking course accreditation should apply for credit for MCLE purposes as well as for accreditation of the course toward specialty certification: civil, criminal, workers compensation and matrimonial law. In accordance with regulations to be established, a provider denied course accreditation or approved service provider status should have the opportunity to appeal the regulator's decision. Course approval obtained by providers who are not pre-approved providers should be valid for one full year. Courses should be a minimum of one hour in length as defined by approved regulations to receive CLE credit.

Recommendation 11: The Supreme Court should establish a fee schedule for MCLE. The Committee recommends the following fees: service providers applying for approved service provider status should pay a $100 application fee. Approved service provider status should be valid for two years. Approved service provider status should be renewed every two years at the same $100 fee. In addition, all providers, including approved service providers, should pay $1 to $2 per credit, per course, for each New Jersey attorney attending the course. Attorneys seeking individual accreditation for courses or other educational activities not connected with a New Jersey approved provider should pay $1 or $2 per credit hour obtained. The income generated should attempt to fully fund the MCLE program. Unless good cause is shown, failure by a provider to submit attendance information on a course offering within thirty days of the date of the course should result in the assessment of a $50 late fee. A provider submitting a late request for course accreditation should be subject to the assessment of a $50 late fee. To address concerns regarding costs of CLE courses, approved service providers should be required to offer scholarships when practical, based on need. CLE providers are also encouraged to follow the model in Florida, where free video courses are offered each year and are able to be viewed in centralized locations.

Recommendation 12: A comprehensive and user friendly, on-line database system should be offered, similar to those offered in Pennsylvania, Tennessee, Florida and Texas, which enables an attorney to view courses being offered, to report CLE attendance, and to verify CLE compliance. The system also should enable the providers to report course offerings and CLE attendance, and seek course accreditation on-line. The on-line system should also facilitate the on-line payment of fees.

Recommendation 13: It is recommended that New Jersey adopt the method of reporting compliance that requires attorneys and service providers to report course attendance to the MCLE regulator. The service provider should report attendance for any attorney taking its approved course. The attorney should self-report educational activities taken through any other approved format.

Recommendation 14: The two-year compliance period should be divided into four "compliance groups," with two groups reporting each year. For example, if the first compliance group were required to report compliance in 2011, those born in January through March would report by June 30, 2011; those born in April through June would report by December 31, 2011; those born July through September would report by June 30, 2012; and those born October through December would report by December 31, 2012. New admittees' compliance reporting period would not begin to run until January 1 of the year following admission to the New Jersey Bar. It is further recommended that any MCLE program not start before 2010 to allow for adequate transition.

Recommendation 15: It is recommended that a compliance report be sent to an attorney 90 days prior to the expiration of his or her compliance period. It is further recommended that an attorney receive a notice of non-compliance within 30 days after the original compliance deadline and be assessed a $75 late fee and be given an additional 60 days to come into compliance. At the end of that 60 days, the attorney should be assessed an additional $100 late fee and be given a final 60 days to comply. Should the attorney fail to comply, procedures for administrative suspension should be started after notice to the lawyer. If the attorney is administratively suspended by the Court, a reinstatement fee should also be assessed of no more than $250.

Recommendation 16: For good cause shown, including illness or other special circumstances, attorneys should be given reasonable extensions of time to comply. Such applications should be reviewed on a case-by-case basis.

Recommendation 17: Rule 1:39 and regulations of the Board on Attorney Certification (BAC) provide for a hearing and petition process that should be amended to include and address the due process needs of any MCLE program.

Recommendation 18: Rule 1:39 and regulations of the Board on Attorney Certification (Board of BAC) should be amended to include any MCLE program. The Board should be designated as the combined regulator that oversees the Court's MCLE and attorney certification programs.

Recommendation 19: The Committee estimates that New Jersey's MCLE and specialization program would need a combined staff of between 6 to 8 people. As recommended earlier, in regard to funding the program, the Committee recommends a fee structure that is straightforward and user-friendly, assessing a fee for approved service provider status as well as the $1 or $2 per credit, per course, per attorney paid by the service provider or the attorney depending on who is seeking the course credit and the funding requirements of the regulator. In addition, late fees and non-compliance fees should be assessed as suggested in Recommendation 15.

Recommendation 20: The Supreme Court should evaluate the MCLE program midway through the second biennial cycle; i.e., three years from program inception to determine whether it is achieving its goals and operating as intended.

II. Why Not MCLE?

> Our special calling requires persistent educational reinforcement and renewal. Seminars and lectures help us to retain what we already know and to expand the frontiers of our knowledge in a rapidly changing legal world that demands ever more specialized skills to handle ever more complex practice areas.
>
> *N.J. Supreme Court Justice Barry T. Albin*
> *September 28, 2007*

That sentiment, expressed by Justice Albin, aptly summarizes the argument in favor of mandatory continuing legal education (MCLE or CLE). Perhaps for that reason, forty-three states mandate some form of CLE for attorneys. New Jersey does not, except for newly-admitted attorneys and those attorneys who are certified in one of four specialty areas.[1] Against that broad backdrop, the New Jersey Supreme Court appointed the Ad Hoc Committee on Continuing Legal Education (the Committee) in March 2007. As indicated in the charge to the Committee, the Court "made a significant effort to have the membership of the Committee reflect a broad spectrum of backgrounds and experience." In its charge, the Court stated that "absent a compelling case to the contrary," it envisioned that New Jersey would join the overwhelming majority of states in requiring CLE. This Committee's first task, then,

[1] Puerto Rico also has a mandatory program. Alaska has a voluntary program that offers incentives for those who take a minimum of 12 credits of CLE per year. New Jersey, Massachusetts, Connecticut, Maryland, Michigan, South Dakota, the District of Columbia, and Nebraska do not have MCLE programs, although some do have voluntary programs or programs equivalent to New Jersey's Skills and Methods Program for newly admitted attorneys.

is to report whether we have found such compelling reasons against MCLE. We have not.

The law, like any other profession, has an important stake in assuring the competence of its practitioners. Society confers the social and economic benefits that flow from professional licensure in anticipation that the profession will establish standards of competence and character and will hold its members to account. Thus, in New Jersey, a license to practice law is not granted until the Bar applicant graduates from an accredited law school, passes a written Bar exam, survives character and fitness scrutiny, and commits to complete a post-admission three-year Skills and Methods Program.

No one would argue, however, that an attorney's education is complete, or that an acceptable level of competence has been attained, by passing the Bar exam and completing the skills and methods courses. The nature of the legal profession calls for continuous study. It is not just that the full body of law is beyond the ken of a lifetime of study. All attorneys carve out to a greater or lesser degree an area of practice entailing manageable parameters of learning. It is that the law, by its very nature, is in constant flux. On virtually a daily basis, legislative enactments and judicial decisions at the federal and state level establish or redefine rights, duties and expectations in every aspect of our social, economic and political relations. Even the most mundane transactions are fraught with ever-changing tort, contract, tax or

regulatory implications. Only by continuous education can an attorney hope to maintain the level of skill and knowledge justifying the privilege of a license. We take pride in being members of a "learned profession," but it is probably more apt to say that we are a "learning profession." Clark, Janis E., "Transition Education: One Step in a Lifetime of Learning for Lawyers," 40 Valparaiso Univ. L. Rev. 427 (2006). The former implies mastery of a static, defined body of knowledge; the latter recognizes the dynamic nature of the law and the lawyer's relationship to it.

Hence, the issue is not whether attorneys should, as a matter of professional responsibility, engage in CLE as a means of maintaining professional competence. Clearly, they should. Indeed, many already do so because they voluntarily elect CLE or are required to earn credits as a certified New Jersey attorney or as a holder of a law license in New York, Pennsylvania or any other MCLE jurisdiction.[2] The issue is whether CLE should be made mandatory or, in the Supreme Court's narrower charge, whether there are "compelling reasons" against such a mandatory system.

The Committee's outreach to the Bench and Bar for comments on mandatory CLE has been extensive. The Committee held three public hearings, invited written submissions by all major stakeholders, sent letters and email messages to affected communities and organizations encouraging their input, and established an email

[2] Of the 82,893 admitted attorneys in New Jersey, less than one third were admitted only in New Jersey. 31,794 (44.21%) were admitted in New York, and 20,173 (28.05%) in Pennsylvania. 2007 State of the Attorney Disciplinary System Report, New Jersey Office of Attorney Ethics.

address to facilitate the Committee's outreach efforts. In addition, the Committee's chair, vice chair, and some of its members, attended meetings with interested parties either at their request or at the Committee's suggestion in which many ideas were offered. Appendix A contains a list of those who formally submitted testimony or written comments as well as examples of other public outreach.

Responding attorneys, judges, Bar organizations and other interested parties have brought to the Committee's attention a variety of concerns regarding the structure and characteristics of any mandatory CLE program. The concerns include the number of credit hours to be required during any reporting period, affordability of course offerings, the availability of financial assistance, flexibility in the type of programs to be accredited, reciprocity for CLE credits earned in other jurisdictions, and avoidance of undue cost and bureaucracy in the provider-accreditation and attorney-compliance processes.

Those concerns were best summarized by the report of a study group assembled by the MCLE Committee of the Association of the Federal Bar of New Jersey (Federal Bar Association) in which it stated that some representatives of organized Bars are "'nervous' about the arrival of MCLE, particularly because of the cost and potential for inconvenience[.]" Nonetheless, the Trustees of the Federal Bar Association adopted its study group's report, which concluded:

> At present, 43 states including New York and Pennsylvania, where many Association members are admitted to practice, have mandatory CLE. The [study group] believes that a carefully-structured program will serve its purpose of helping lawyers keep abreast of legal developments in their fields of practice. The [study group] feels that it is in the best interest of New Jersey lawyers to join our neighboring states and require mandatory CLE within a structure that is meaningful, fair and not overly burdensome.

As part of its outreach, the Committee afforded extensive opportunities for objectors to state the case in opposition. The number of objectors, which included the Bergen County Bar Association, was small, perhaps because the Court's charge implies a pre-disposition toward mandatory CLE absent compelling reasons to the contrary. In other words, the charge places the burden of proof on objectors.

The principal argument in opposition to mandatory CLE is the absence of empirical data that it actually improves attorney competence or enhances professionalism, the twin objectives of any such program. The reasoning behind the argument is that, unable to mandate learning, the Supreme Court would mandate attendance in the *hope* that performance will improve. The gist of the argument is that any mandatory program will be burdensome, and absent empirical evidence that MCLE improves the quality of lawyers, no burden ought to be imposed.

Admittedly, empirical data affirming the effectiveness of mandatory CLE do not appear to exist. See Aliaga, Rocio T., "Framing the Debate on Mandatory

Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE," 8 Geo. J. Legal Ethics 1145, 1156-57 (1995). That fact has been acknowledged by almost every jurisdiction that has adopted mandatory CLE, perhaps in recognition that the critical problems associated with defining competence and developing a test regimen to measure for improved performance have not been resolved. Ibid.

In the absence of data either way regarding the effectiveness of MCLE, opponents offer the "you can lead a horse to water but can't make him drink" adage as folk wisdom against MCLE's likely effectiveness. In response, one writer has noted that if you lead everybody to water, most are likely to drink. Grigg, Lisa A., "The Mandatory Continuing Legal Education (MCLE) Debate: Is it Improving Lawyer Competence or Just Busy Work?" 12 BYU J. Pub. L. 417, 427 (1998).

The better answer might be that MCLE will benefit those who would have attended CLE voluntarily but for the press of other commitments. Ibid. MCLE will result in a reordering of priorities. As for other potential audiences, even the most apathetic attorney, being obliged to spend the money and energy to attend a mandatory program, is likely to learn something. This does not deny that some may absolutely refuse to learn, choosing to read the newspaper or indulge in any number of electronic distractions rather than pay attention to what is being taught. But the absolute refusal of some to learn does not undercut benefits to the many more open-

minded attendees who will act rationally and try to get something out of a program for which they or their employers have paid.

At bottom, the nexus between mandatory CLE and attorney improvement might be open to debate. Absent countervailing considerations, that debate should not prevent us from acting. That most other jurisdictions have adopted MCLE is not the most compelling reason for doing so in New Jersey, but it does count for something. The fact that the ABA House of Delegates adopted a resolution in 1986 supporting the concept for all active lawyers, coupled with the fact that 43 jurisdictions now have such a requirement, reflects a widely-held belief among the leaders of our profession that MCLE confers benefits that outweigh its burdens.

Moreover, the belief that mandatory education confers benefits informs policy decisions in other circumstances. As noted, New Jersey attorneys seeking to obtain or retain specialty certification under Rule 1:39 already are subject to MCLE requirements. The courts in many states require disciplined attorneys to attend CLE, anticipating that participation will help rectify unacceptable conduct. A challenge to Colorado's MCLE requirements was rejected by the 10th Circuit Court of Appeals, which held that "a state can require an attorney to take reasonable steps to maintain a suitable level of competence so long as such requirements have a rational connection with the attorney's fitness or capacity to practice law." Verner v. Colorado, 716 F. 2d 1352 (10th Cir. 1983).

Nor can the legal profession ignore the fact that mandatory continuing education is required by nearly every calling worthy of a "professional" designation and by most occupations or trades that require state licensure. These include: architects, electrical contractors, master plumbers, family therapy examiners, marriage counselors, alcohol and drug counselors, accountants, physicians, registered nurses, pharmacists, engineers, shorthand reporters, veterinarians, tax assessors, and real estate appraisers. There is no compelling basis on which attorneys should be exempt from a requirement common to these professions.

Finally, studies and surveys have shown that attorneys who participate in MCLE believe in its benefits. A note in the Georgetown Journal of Legal Ethics reports:

> Despite the lack of empirical support for the claim that competency increases when an attorney participates in an MCLE program and the burdens small-firm attorneys bear, the majority of attorneys in MCLE States favored their mandatory education requirement. In a 1991 study of MCLE jurisdictions, Texas attorneys overwhelmingly supported their MCLE program as a way to improve their Bar's competence. Even more significant was the finding that among Texas MCLE supporters, 84% believed that their own competence had been increased by attending CLE courses. A Utah survey made a similar finding in a survey of active license holders in the State: 70-80% believed that their professional competence was enhanced 'significantly or somewhat' by participation in CLE courses. These conclusions concur with the 1987 survey conducted . . . where the majority of respondents felt that participation in CLE had helped improve the quality of their work.

> Thus, it appears that subjectively, attorneys believe CLE is an effective tool for maintaining competence and would support an effort to establish such a program. This view has already been expressed by proponents of MCLE in the District of Columbia. (R. Aliaga, supra, p. 12, at 1161)

Given that continuing education is inherent in the concept of professionalism and the widely held view that voluntary continuing legal education is beneficial, what reasons, other than the absence of empirical data, mitigate against making CLE mandatory? We have found few, if any.

The remaining objections are based on the Bar's concerns regarding the burdens of MCLE. The Committee has considered and tried, to the extent possible, to resolve these legitimate concerns, including those relating to convenient access to a variety of learning modalities, recognition of the opportunity cost of attending training, affordability, fairness in applicability, appropriateness of exemptions, and avoidance of excessive administrative structure and cost.

We acknowledge that reasonable minds can differ on the answer to the threshold question and that some Committee members might prefer no MCLE. We respect that view, and recognize that actual experience with MCLE in New Jersey might provide information supporting a different answer to the threshold question. That said, consistent with the Court's charge, the Committee as a whole believes that, at present, there are no compelling reasons to maintain New Jersey's status as one of only seven jurisdictions with no MCLE.

Having addressed the Court's threshold inquiry, the Committee dedicates the rest of this Report to providing the Court with a series of recommendations on all aspects of MCLE. To accomplish that task, the Committee organized itself into four subcommittees: Requirements, Applications, Service Providers, and Compliance. To enhance the transparency of its approach, the Committee published this structure in a notice to the Bar, which is included as Appendix B. The subcommittees met - sometimes separately, sometimes jointly with one or more subcommittees - and debated and considered the various issues to which they were assigned. They thereafter issued recommendations to a steering committee (consisting of each respective subcommittee chair, plus the chair and vice chair of the entire Committee), which in turn presented a comprehensive set of recommendations to the full Committee. The full Committee debated and considered each recommendation.

As a result of that debate and consideration, the Committee delivered a draft Report on May 20, 2008. The Court released the draft Report for public comment. In response, the Committee received a number of thoughtful comments, all of which were carefully considered and some of which are noted in the following pages. Those comments have been submitted to the Court separately. Although we will not respond to each individual comment, the Committee wishes to thank those who took the time and made the effort to offer us their views. This final Report is a better product because of the public testimony that the Committee received both before and

after publication of the draft Report. We thank the Chief Justice and Associate Justices of the New Jersey Supreme Court for the opportunity to present this final Report. We especially thank the members of the Committee's staff who diligently assisted us at every stage.

III. Requirements

A. Introduction

The Committee considered whether there should be mandatory core requirements, how many credits over what period of time should be required, and what types of learning opportunities should be given credit. It adopted as an overall goal providing opportunities for attorneys to remain current and improve their skills while ensuring that any MCLE program be fair, affordable, flexible, and not overly burdensome. In addition, the Committee believes that any MCLE program must have integrity and verifiability. The Committee is mindful of the fact that verification as well as other aspects of the program will fall within the purview of a standing committee or regulatory authority yet to be established by the Supreme Court.

B. Credit Hour/Mandatory Core Requirements

Recommendation 1: The Committee recommends the following credit hour parameters:

A. Basis for 1.0 Credit Hour should be 50 minutes of instruction;

B. Twenty-four credits should be required every two years (biennial cycle);

C. Four hours of ethics/professionalism credits should be required during each biennial cycle; there should be no additional core requirements.

D. Except for ethics/professionalism credits, which should be completed each biennial cycle, and subject to limits on teaching and writing credits earned by full time and adjunct law professors, the Court should allow up to 6 credit hours to be carried over to the next cycle;

E. There should be no blanket rule regarding whether credits can be earned for courses conducted during a meal -- this matter should be left to the discretion of accredited providers; and,

F. All alternative verifiable learning formats should be permitted and encouraged, including but not limited to: writing, audiotape, videotape, teleconference, video conference, satellite simulcast, and the Internet. The use of alternative learning formats should be limited to 12 credit hours per cycle for formats that are not "live" or "interactive" as defined by the MCLE regulator.

Comment. The Committee reviewed the credit hour requirements in other jurisdictions. Most jurisdictions require either 12 or 15 credits per year and run on a one, two, or three-year cycle. The Federal Bar Association recommends what amounts to 10-12 hours per year, and the New Jersey State Bar Association (NJSBA) recommends thirty credits over a 3-year period.[3]

The Committee discussed whether to adopt the 60 minute or 50 minute basis for 1.0 credit hour, noting that our neighboring states, Pennsylvania and New York, use the 60 minute and 50 minute hour, respectively; the rationale for the 50 minute hour is that one hour of course time usually includes assorted breaks.[4]

The Committee also considered how many "excess" credit hours an attorney would be allowed to carry over into the following cycle. Most jurisdictions allow

[3] *New Jersey State Bar Association Recommendations for Implementation of Mandatory Continuing Legal Education,* March 12, 2008.

[4] Of the 43 MCLE jurisdictions, nine (9) use the 50-minute hour, *Comparison of the Features of Mandatory Continuing Legal Education Rules in Effect as of July 2007*, New York State Bar Association (this publication is the source of much of the comparative information contained in this Report). The NJSBA recommends a 50-minute hour.

carry-over, with some allowing attorneys to carry over as many credits as are required in any given cycle.

The Committee considered whether credits should be earned during a meal and, in addition, the extent to which alternative formats of learning (Internet, for example) should be used to satisfy MCLE requirements. In addition, the Committee discussed whether MCLE should include mandatory core/area-specific requirements, in particular courses in ethics and professional responsibility/professionalism.

While deliberating on these issues the Committee was mindful of a number of concerns raised by the Bar and public, in particular those expressed at the three public hearings. There was consensus, with which the Committee agrees, that the program should not be unduly burdensome on attorneys. Attorneys are generally very busy professionals who work long hours. As dedicated as they are to the profession and their individual careers, they have families and responsibilities beyond their offices. The Committee understands these concerns and desires that MCLE be as fair and flexible as possible.

Flexibility is achieved in a number of ways, but none more accommodating than distance learning. The Committee recognizes that the live-lecture approach to learning historically has been the hallmark of CLE. The advancement of technology, and the ease with which distance learning is achieved, however, calls for alterative approaches to learning, as noted in a recent ABA committee report:

> We therefore, recognize the need for and promote alternate approaches to the delivery of CLE. We recognize that, in an age when time is compressed and demands are great, technology-based CLE overcomes barriers and maximizes the opportunity to increase lawyer education and competence. In the interest of promoting greater access and use of CLE and to further the goal of a well-educated bar and the delivery of higher quality legal services, we therefore encourage all MCLE jurisdictions to fully approve and accredit the range of formats comprising technology-based CLE. "Technology-Based CLE," American Bar Association, Standing Committee on Continuing Education of the Bar, MCLE Summit 2001, reprinted at 40 Valparaiso Univ. L. Rev. 545 (2006).

The Committee also recommends that all MCLE programs allow attorneys to learn in the modality that is most suitable to each of them, within reasonable limits. Some attorneys are traditional and prefer a live format, while others prefer a more technological approach to learning. The Committee recommends that New Jersey take a broad approach to learning and fully incorporate all alternative learning formats, whether audiotape, videotape, teleconference, video conference, satellite simulcast, or the Internet. So long as the course is presented by an accredited provider or accredited by the MCLE regulator and is subject to verification, all formats of learning should be accepted. The definition of verifiability should be determined by the MCLE regulator.

A wide use of learning formats will also reduce the expense of MCLE. The Committee took note of the Bar's predominant concern about the need to make MCLE as affordable as possible. Attorneys have varying amounts of time and money

to devote to MCLE. The Committee recognizes that MCLE may impose a financial burden on some attorneys and will require a commitment of time for all attorneys. The broad scope of learning formats recommended would allow many attorneys to satisfy their CLE requirements from their homes or offices, thus saving time and presumably reducing overall costs.

Notwithstanding the Committee's goal of flexibility, we note that most CLE jurisdictions impose some limit on the number of credits that can be earned by alternate learning formats or insist on other restrictions. The limits on credits range from 3 credits per year to 12 credits per two-year cycle. As an example of another restriction, a number of states require that there be a live moderator or instructor present in the case of audio, video and digital formats. Some jurisdictions do not allow at all for those formats. While the Committee does not agree with any such blanket prohibition, it does believe that an overall limit on credits is appropriate for New Jersey. We would set the limit at 12 credits per two-year cycle, the highest of the range within those states that impose such limits.

A live, classroom format assures an attendee complete interaction with both the instructor and fellow attendees. The Committee believes that such interaction – e.g., asking questions of instructors and listening to questions asked by fellow attendees, both or either of which might not be possible with some alternate formats -- will enhance the overall learning experience and thus increase the value of MCLE. The New Jersey State Bar Association and the Federal Bar Association, two major

stakeholders in any new system, each envisioned in their respective submissions to the Committee that some live instruction would be included in an otherwise indulgent mix of modalities. We thus recommend a system that generously permits alternate learning formats but encourages at least some component of live learning.

The Committee considered whether MCLE should encompass mandatory core or area-specific courses, such as ethics, professionalism, and domestic violence. One of the primary goals of MCLE is to promote ethics and improve professionalism. Moreover, every MCLE jurisdiction requires that attorneys satisfy one to three credits of legal ethics/professionalism per cycle.

At one public hearing, the New Jersey Coalition for Battered Women asked the Committee to require domestic violence training for all attorneys or, at a minimum, to require it for family law practitioners. This recommendation was echoed by the State Domestic Violence Working Group. Others advocated for substance abuse, malpractice prevention, and trust fund management as mandatory programs. A number of jurisdictions do mandate training in one or more such areas. The Committee acknowledges the arguments in favor of an area-specific MCLE curriculum, but declines to recommend a mandatory core curriculum beyond ethics/professionalism.

The Committee encourages attorneys to satisfy some of their MCLE requirements by taking courses that focus on such sensitive and timely areas as domestic violence and substance abuse. In addition, the Committee believes that

attorneys will pursue courses that are relevant to their areas of practice and strongly encourages them to do so. Moreover, the Committee is confident that attorneys will take the necessary courses to stay updated on New Jersey practice.

At the same time, the Committee recognizes the need to structure MCLE so as to provide maximum flexibility and freedom of choice to attorneys. Limiting core curriculum mandates will make it easier for attorneys to satisfy their requirements and facilitate the administration of MCLE. Therefore, the Committee recommends four (4) hours of ethics/professionalism each biennial cycle and does not recommend any additional core requirements. It suggests, however, that the Court revisit this subject after the first full cycle of MCLE in New Jersey.

Lastly, in response to a comment received, the Committee wishes to clarify what it means by "ethics/professionalism." By "ethics" we mean New Jersey legal ethics as codified in the New Jersey Rules of Professional Conduct, including but not limited to relevant cases or instruction on such subjects as lawyer advertising; trust account management; the *Wilson* disbarment rule; and avoiding all forms of professional misconduct, including conduct involving discrimination. The Committee perceives "professionalism" to be a more expansive term, which would include courses intended to foster an understanding of New Jersey practice or court rules to better equip attorneys to represent clients competently and in a civil manner in a range of areas. This would include but not be limited to courses on taking depositions, on

how to argue without being argumentative, and on how to represent clients zealously without compromising sound ethics.

We leave it to the MCLE regulator (identified in Recommendation 18) to determine whether the above terms should also include the ABA Model Rules and the ethics rules of other jurisdictions. We also suggest that the Court or its MCLE regulator consult with the Commission on Professionalism for additional input on this subject.

C. Credit for Teaching and Writing

Recommendation 2: The Committee recommends that MCLE credits be awarded for teaching on a 2:1 basis per two-year cycle and for writing on a 1:1 basis. Teaching credit should be earned only once for the same course during a cycle. The exact parameters of what would qualify for teaching and writing credits should be detailed in the Court's MCLE regulations and guidelines. As for writing, hours earned for writing should be counted toward, and limited by, the 12-credit limit provided under Recommendation 1F. Teaching should not be so limited. As noted later in this Report, the Committee recommends that the existing Board on Attorney Certification be designated as the MCLE regulator. [See Recommendation 6 for additional proposals as they would apply to law school professors.]

Comment. The Committee considered the extent to which MCLE credits should be awarded for teaching and writing; i.e., teaching a CLE course, writing for law journals and law reviews, writing course books for CLE courses and seminars, etc. A review of MCLE in other jurisdictions reveals that credit is generally given for teaching and writing, though the specific requirements vary.

Teaching credits in MCLE jurisdictions vary depending on a number of factors, including: preparation time; whether or not written materials are also prepared for the class; initial versus repeat presentations; paid versus non-paid teaching; and whether or not the attorney teaches the course solo or as part of a panel. The credit ratios range from 1:1 to 4:1, distinguishing between preparation time and actual teaching, and some jurisdictions impose a cap on the number of credits that can be earned in this fashion.

Credit for writing also depends on a number of factors, though not as varied as that for teaching, and a handful of jurisdictions do not award writing credit. Some of the factors include: publication; preparation time versus length of article; whether the article is written for compensation; principal authorship; and whether the article is intended for use in the legal community. As with credit for teaching, the ratios and caps vary among jurisdictions.

To recognize the investment of time for preparation that normally precedes a teaching engagement, the Committee recommends that attorneys be given credit for teaching CLE on a 2:1 basis per two-year cycle. The Committee further recommends that teaching credits for a particular course should be awarded only once during any given cycle. If the attorney teaches the course more than once during a cycle, the attorney would not earn teaching credit, but should be given credit for attendance on a 1:1 basis, just like any other participant. In addition, credit should be given for

writing on a 1:1 basis. The exact parameters of what would qualify for teaching and writing credits should be detailed in the state's MCLE regulations and guidelines.

For a discussion on how MCLE requirements apply to law school professors, please see Section IV (and Recommendation 6) of this Report.

D. Reciprocity

Recommendation 3: Subject to approval regulations set forth in Recommendation 9 and the other requirements offered in this Report, all attorneys should receive 1:1 credit for courses taken in accordance with the requirements of any other jurisdiction. As part of reciprocity, the Committee recommends that certified attorneys also receive 1:1 credit for their attendance at their approved courses.

Comment. Other jurisdictions, including New York and Pennsylvania, extend credit for courses taken in other MCLE jurisdictions, typically so long as they are consistent with their own rules and regulations. Consistent with our broad goals in favor of flexibility, New Jersey should also extend reciprocity on a 1:1 basis for courses taken in accordance with requirements in any other MCLE jurisdiction. If a course has not been previously accredited in another jurisdiction, the provider or attorney desiring credit should seek course approval from the New Jersey regulator in order to get the 1:1 credit. In addition, the Committee acknowledges that the New Jersey Board on Attorney Certification (BAC) may need to consider some initial inconsistencies between MCLE and its own rules and regulations.

E. Other CLE Credit Opportunities

Recommendation 4: The Committee recommends that attorneys participating in approved Inns of Court programs receive full credit towards MCLE requirements for hours of instruction up to 24 credit hours each biennial cycle.

Comment. The Committee considered other avenues that may be pursued by attorneys in meeting their MCLE requirements, including but not limited to Inns of Court. Historically, Inns of Court have provided excellent CLE programs to thousands of attorneys across the nation. New Jersey hosts a number of specialty practice Inns, including the Justice James H. Coleman, Jr., New Jersey Workers' Compensation Inn of Court, the Justice Marie L. Garibaldi American Inn of Court (ADR), and the Justice Stewart G. Pollock Environmental American Inn of Court, to name a few. As noted by a Trustee of The American Inns of Court: "The establishment of an optimal NJCLE program for all New Jersey attorneys is a great opportunity to advance legal excellence and professionalism within our state." (Frank A. Petro, Trustee, American Inns of Court Foundation)

The Committee recognizes that attorneys participating in Inns of Court work very hard, dedicate a substantial amount of time to their respective Inns, and greatly benefit from Inns of Court membership. The Committee supports their full integration into New Jersey's MCLE program.

<u>Recommendation 5</u>: The Committee recommends that the Supreme Court consider, after initial implementation of MCLE, whether it should grant credit to attorneys for *pro bono* work supervised by an accredited provider or for any other educational activity. These areas can be incorporated into the MCLE rules and regulations after implementation of the initial program.

<u>Comment</u>. The Committee discussed whether attorneys should receive MCLE credits for *pro bono* work, in particular *pro bono* work supervised by an accredited provider. Some members of the Committee strongly supported such *pro bono* credit as a way to encourage practical trial experience and skill development, while delivering needed services to the public. Others believed that *pro bono* representation, while laudable, should be treated no differently for CLE purposes than other forms of legal representation. After full debate on the subject, the Committee agreed that this matter should be considered anew after the initial implementation of MCLE. Furthermore, the Court may wish to review its *pro bono* assignment rules and applicable exemptions in the context of MCLE.

Please see Section VII of this Report for further discussion of this and other post-implementation issues.

IV. Applications

A. Introduction

As earlier stated in Section III of this Report, the overall goal of MCLE is to provide opportunities for attorneys to remain current and improve their skills. In addition, any MCLE program should be fair, affordable, flexible, and not overly burdensome. In that context, the Committee considered whether MCLE should be applied differently to different groups of attorneys and whether any particular group should be exempted from MCLE. The Committee also considered whether the present Skills and Methods Program should be continued for newly admitted attorneys, and, if so, what the interplay between that Program and MCLE should be.

B. Who Should be Covered?

Recommendation 6: All licensed New Jersey attorneys, both plenary and limited license in-house, should comply with the CLE requirements, including judges, law school professors, and in-house corporate counsel. Law school professors should receive two hours of CLE credit for every hour of law school instruction that they give to students, and one hour of credit for every hour of published writing, up to a combined total of 12 credits per cycle. Credit for this type of activity should not be banked or carried forward to a successive cycle. Consistent with Rule 1:28-2(b) (Payment to the New Jersey Lawyers' Fund for Client Protection Exemptions), only attorneys who have been admitted to practice in New Jersey for fifty years or more, those on full-time active duty in the military, VISTA, or Peace Corps, and those retired completely from the practice of law should be exempted from the MCLE requirement. Hardship waivers should be available on a case-by-case basis by application to the Court's MCLE regulator.

Comment.

1. Generally. In its deliberations, the Committee gave consideration to the application of MCLE to attorneys employed in every aspect of the profession, including but not limited to judges, certified attorneys, prosecutors, deputy attorneys general, public defenders, professors, in-house corporate counsel, and those in the military. Ultimately, with only a few exceptions, the Committee concluded that every attorney should be subject to the MCLE requirements, but that those requirements could be satisfied in different ways. The Committee's rationale is based on the simple but compelling principle that MCLE should be fairly, sensibly and uniformly applied, to the extent feasible, to all license holders. We will all share in the hoped-for benefits of MCLE; we each must do our part to shoulder its burden and costs.

The most compelling argument for exempting a particular group is that attorneys within the group already are engaged in significant, ongoing legal education and training. To the extent that is so, the Committee recommends that such education and training be qualified for CLE credit under the proposed system. As noted elsewhere, the Committee recommends that the broadest range of training and education methods be accepted as qualifying for CLE credit. Therefore, the focus of such groups should be on ensuring that they receive proper credit for their existing training and educational activities, rather than on seeking an exemption from the MCLE requirement.

2. Judges. Attorneys who sit as state and federal judges are among the groups most frequently mentioned as deserving an exemption. Advocates of judicial exemptions point to the initial training required of judges, as well as their continued attendance at judicial training programs. New Jersey Superior Court judges and Supreme Court justices, for instance, attend the Judicial College every November. Federal judges of the District Court of New Jersey are invited to attend the Third Circuit Judicial Conference each spring. It is anticipated that both the N.J. Administrative Office of the Courts, which administers the Judicial College, and the federal Third Circuit, would qualify as accredited CLE providers and their respective programs approved for credit. As a consequence, judges who attend these sessions will earn credit toward their MCLE requirement simply by adhering to their usual educational practices. In the event that MCLE applies to state judges, the Administrative Office of the Courts should review the Judicial College's course offerings to ensure that adequate courses are available to trial and appellate judges to permit them to satisfy their MCLE obligations.

Notwithstanding the Committee's recommendation that federal judges who hold a New Jersey law license ought to be included in any enacted system of CLE, the NJ Supreme Court might wish to consider, as a matter of comity, automatically approving any courses offered by the federal judiciary. The Court also might want to consider other modifications, after discussion with its federal colleagues, consistent with the existing respectful relationship between the state and

federal judiciaries. We note that a majority of MCLE jurisdictions exempt some combination of federal and state judges from MCLE requirements or provide special rules for the judiciary.

Those advocating a judicial exemption note judges' frequent appearances as lecturers and panelists before members of the Bar and other groups. The Committee anticipates that many of those appearances would qualify as accredited CLE programs, with attendees receiving credit toward their CLE requirement. In that event, the judges would receive credit for the appearance similar to any other presenter of an approved CLE program. Along those lines, the Committee suggests that the Supreme Court review the Code of Judicial Conduct with an eye towards facilitating participation by judges in broad-based CLE.

Among the entities commenting on exemptions, the Federal Bar Association recommended that MCLE be applied universally to all attorneys, including judges. That association expressed the view that the public should be assured that all lawyers are held to the same standards, and therefore recommended that all attorneys, whether in private or public practice, as well as all judges, should have the same MCLE requirements. After the Committee released its draft Report, the Federal Bar Association submitted an amended statement recommending that federal judges be exempted from MCLE based, in part, on the rule in other states. The Committee adheres to its initial view but again notes that, as a matter of comity, special accommodations to the federal judiciary might be appropriate, especially in light of

what appears to be an existing, well-utilized CLE infrastructure provided by the Federal Judicial Center.

3. Law Professors. The Committee appreciates that law school professors, both full-time and adjunct, conduct legal research to prepare their lectures. That work is similar to how CLE instructors would prepare their presentations. For that reason, professors should be able to count some of their efforts in their law school classrooms in satisfying their CLE credit requirement. However, unlimited reciprocity of credits would be tantamount to no MCLE requirement at all, given that law professors teach or write as part of their everyday employment. Accordingly, the Committee would limit the CLE credits earned by law professors for their regular teaching efforts as noted in this recommendation.

4. In-House Counsel. The Committee considered the proposal of the New Jersey Corporate Counsel Association (N.J. Corporate Counsel) that in-house counsel be exempted from MCLE, or, at minimum, that those in-house counsel who have been conferred only a limited license to practice be exempted. N.J. Corporate Counsel argued that because in-house counsel have sophisticated clients who monitor attorney performance, MCLE is unnecessary. In the alternative, N.J. Corporate Counsel recommended that in-house counsel with a limited New Jersey license should be governed only by the state in which they hold a plenary license to practice. The Committee carefully considered the submitted views. However, on balance and in keeping with an all-inclusive program, the Committee believes that all attorneys

practicing law in New Jersey, whether pursuant to a plenary or limited license, should be held to the same MCLE standards.

5. Limited Special Exemptions. There are attorneys, however, that the Committee believes should, consistent with existing rules, be exempted from the general MCLE requirement; i.e.,: attorneys who have practiced for fifty years or more; those on full-time active duty with the armed forces, VISTA or the Peace Corps; and those who are retired completely from the practice of law. The Committee notes that the Supreme Court already has exempted those attorneys from the annual assessments required to be paid to the New Jersey Lawyers' Fund for Client Protection pursuant to Rule 1:28-2(b). That rule also refers to "inactive" attorneys but does not otherwise define the term. In response to those comments received from license holders who consider themselves "inactive" but who do not fit within the current text of Rule 1:28-2(b), the Committee suggests that the Court consider defining "inactive" and creating a registry of inactive attorneys who also would be exempt from MCLE.

In particular, attorneys on full-time active duty in the military, VISTA and the Peace Corps should be fully exempt from MCLE. This would include members of the reserve forces engaged in service on active duty. Such attorneys are fully occupied in serving their country, and should not be distracted from such service. In addition, these attorneys often will be required to spend long periods of time outside the country, making compliance extremely difficult, if not impossible.

Finally, the Committee anticipates that there will be provision for waivers due to special circumstances such as illness or injury. The Committee believes waivers should be decided by the Court and its MCLE regulator on a case-by-case basis.

C. Newly Licensed Attorneys – Bridge the Gap

Recommendation 7: The Skills and Methods Program should be discontinued. Newly admitted attorneys should be subject to the same MCLE requirements as all other attorneys, including a core ethics/professionalism requirement. Beyond such a program, the Committee sees no need for additional bridge-the-gap requirements.

Comment. The Court asked the Committee to consider how MCLE would affect or interact with the existing three-year Skills and Methods Program (the Program). The Committee reviewed the 2005 Report of the Ad Hoc Committee on the Skills and Methods Course and considered public testimony and written comments regarding the Program.

Bridge-the-gap education is designed to facilitate the transition from law student to professional attorney status by exposure to areas of the law likely to be encountered in general practice. Newly admitted attorneys are required to complete the Skills and Methods Program within the parameters established by the New Jersey Board of Bar Examiners. Rule 1:26.

The present Program entails attendance at lecture-style courses of instruction, receipt of written materials, and completion of certain exercises. Newly admitted attorneys complain most frequently about the large class sizes, the lecture format, and the lack of electives during the first year's curriculum. The prior Program review committee recommended significant changes in the Program. In light of the

comprehensive MCLE program being recommended, this Committee believes that the existing Program should be discontinued in its entirety.

The Committee received some valuable suggestions related to its proposed elimination of Skills & Methods, including a suggestion to mandate certain "bridge the gap" courses for newly admitted attorneys on topics such as the New Jersey Constitution, New Jersey "Best Practices," and other New Jersey-specific areas. As we noted in the draft Report, the Committee believes that newly admitted attorneys should be trusted to select CLE courses that best suit their needs and interests, including those that might focus on drafting documents and other practical subject matters. Moreover, many of the newly admitted attorneys already may have taken such courses while in law school, while others will be familiar with drafting and court rules as a result of prior experience.

Our approach is consistent with our desire to ensure maximum flexibility and freedom of choice as discussed earlier. Although we are not prepared to recommend a mandated menu of courses (other than in the areas of Ethics and Professionalism, as discussed elsewhere), the Committee agrees that there will continue to be both a need and a demand for courses that highlight the unique aspects of litigation (civil and criminal) and transactional practice in New Jersey. The Committee believes the market should and will respond to that need, as service providers recognize the opportunity and offer basic programs designed for newly

admitted attorneys, both as to general practice and specific disciplines. The Committee recommends that the Court, if it accepts our proposal, revisit this issue after the initial two-year period of MCLE has passed, for the purpose of assessing the actual availability of "bridge the gap" courses and the enrollment in them by newly admitted attorneys.

V. Service Providers

A. Introduction

As part of its overall charge, the Committee focused on a host of issues related to service providers, including who should be qualified as MCLE providers; the course and provider approval process; a procedure for appealing accreditation denials; service provider requirements for reporting attorney attendance; out-of-state course approval; monitoring of MCLE programs; fees to the service providers for approval of their courses; requiring the service providers to offer scholarships or free course offerings; and, technology needs. The Committee's deliberations included consideration of all public comment and a review of other MCLE state programs, including those in California, Florida, Texas, Pennsylvania, North Carolina, Tennessee, and New York.

B. Approved Service Providers

Recommendation 8: CLE providers in New Jersey should seek prior approval from the MCLE regulator in order for their course offerings to qualify for MCLE credit. A provider should be entitled to seek either "approved service provider" status or seek credit for individual courses. It is recommended that the following be eligible to seek "approved service provider" status from the MCLE regulator: local, state, and specialty bar associations; for profit and non-profit legal education providers; Inns of Court; educational institutions including but not limited to accredited law schools; and in-house providers, including law firms, profit and non-profit corporations, and governmental entities. Providers seeking approved service provider status or individual course accreditation should meet the course approval requirements as defined in Recommendations 9 and 10.

Comment. MCLE states have numerous and varied approved service providers. The majority of states approve courses offered by private legal education entities, bar associations (including specialty bars), Inns of Court, and accredited law schools. Fewer states grant credit to in-house, web, and specialty providers. The overwhelming sentiment from those who commented on the proposal for MCLE in New Jersey is that the program should be designed to permit the widest range of institutional modalities to gain service provider status, including independent study. This Recommendation is consistent with that sentiment. Most of those providers listed above have been offering CLE in New Jersey for quite some time and will readily qualify for approved provider status. Consequently, there is no real need for a one-year phase-in as suggested by the NJSBA.

C. Provider Approval Process

Recommendation 9: a) To obtain approved service provider status, the CLE provider-applicant should demonstrate that in the two years prior to applying for such status, the provider has offered at least five separate courses that comply with all requirements for course approval. The provider should be able to demonstrate a history of quality programming through a list of previously accredited courses. An approved provider's courses should be consistent with the standards created by the regulator for course content.

b) Approved provider status should carry with it presumptive approval of courses offered by the provider for a two-year period.

c) Providers should seek renewal of approved provider status every two years. Regulations should provide for the revocation of approved provider status for failure to comply with MCLE rules and regulations. In addition, the MCLE regulator should have discretion to decline approval of a specific course offered by the approved provider, regardless of any general presumptive approval of courses, such disapproval to apply prospectively and not to affect courses already given.

d) Approved providers should notify the MCLE regulator regarding all courses no later than 30 days after course date and include information on course content and method of presentation, date and location, faculty, a calculation of the credit hours, and any necessary contact information. Any advertising of credits either approved or pending should be in a manner recommended by the MCLE regulator.

e) Within 30 days of the course offering, approved providers should pay all required fees and report attendance to the MCLE entity. The provider should keep records of course approval and attorney attendance for three years. The provider should obtain attorney signatures on certificates of attendance for each course and keep these records for three years.

f) A service provider, such as a county bar association, in-house provider, etc., that has not previously offered a CLE course or the requisite number of courses indicated in subsection (a) should be eligible to become an approved service provider in accordance with regulations to be created. It is expected that the provider's courses will be able to be accredited on an individual basis

until such time as the provider is granted approved provider status. Service providers that do not wish to seek approved provider status should be permitted to seek accreditation for individual courses; approval should be obtained not less than 30 days prior to the course offering.

g) Individual attorneys should be permitted to seek accreditation for teaching, writing, distance learning, web, audio, video and DVD courses and out-of-state courses. If certificates of attendance are available, the attorney should keep them for his or her records for three years following the completion of the cycle.

h) Retroactive credit or late submission for course accreditation should be considered on a case-by-case basis, subject to late fees.

Comment. Many MCLE states permit a provider-applicant to obtain "approved provider" status. All "approved provider" courses are deemed presumptively approved, although any individual course may be disqualified from accreditation if it fails to meet the regulations relating to course approval. Some states offering approved provider status nonetheless require the sponsor to apply for accreditation of each educational course. Such a requirement defeats the administrative benefits to the provider and regulator of approved provider status.

Generally, the provider must apply to the MCLE regulator for approved service provider status, which if conferred can continue from one year to five years, depending on the state. After the expiration of the approval period, reapplication for continued approved service provider status is necessary. Approved provider status may be revoked by the MCLE regulator for failure to comply with the state's MCLE rules and regulations.

Pennsylvania, Texas, and New York require applicants for approved provider status to have been engaged in continuing legal education during the two years (three years for New York) immediately preceding the application, and to have been sponsored at least five (ten in Texas and eight in New York) separate courses that comply with the MCLE regulator's requirements for course approval.

In Texas, the approved service provider is often required to provide the MCLE regulator with specific information on the course being given and announce its offering, including the faculty, content, date, location and instruction time within 30 days of the course date and must pay any required provider fees. Service providers are generally required to keep records of all course approvals and attorney attendance for a specific number of years. Providers are to advertise the course and its accreditation of hours or report that it is pending approval, in language required by the MCLE regulator.

Other states, including Tennessee, Florida and New Mexico, require that providers seek accreditation for each course. In addition, most states, including North Carolina and California, permit non-approved providers to apply for individual course accreditation. Most states require a provider seeking individual course accreditation to request such approval at least 30 to 45 days prior to the course offering. Several states permit attorneys to apply individually for credit for a non-approved course, including those taken out-of-state. Attorneys must retain certificates of attendance if they are made available. Some states require the attorney

to provide these certificates for self-study or distance learning when reporting the course to the MCLE regulator.

The majority of MCLE states require that the approved service provider or the individual course provider offer some form of certificate of attendance to the attorney. Numerous states require that the provider report attendance to the MCLE regulator within 30 days of the course offering. Some states, including Pennsylvania, charge providers late fees for failure to submit attendance lists when required or, like Florida, charge late fees for late submission of a request for course accreditation.

D. Course Approval, Appeal, and Monitoring

Recommendation 10: The Committee recommends that the Court adopt the language and approach utilized by many MCLE states requiring providers to offer courses of intellectual content that are at least broadly related to the legal profession, provided in a suitable setting, conducted by adequate and competent faculty. Providers also should offer, as appropriate, quality written materials on or before the course offering. As already noted, the approved service provider should provide, no later than 30 days after the course offering, information on the offered course, including faculty, name and purpose of the course, time-specific agenda, date, time and location, and the calculation of credits. Industry-wide forms should be accepted. A service provider seeking course accreditation should apply for credit for MCLE purposes as well as for accreditation of the course toward specialty certification: civil, criminal, workers compensation and matrimonial law. In accordance with regulations to be established, a provider denied course accreditation or approved service provider status should have the opportunity to appeal the regulator's decision. Course approval obtained by providers who are not pre-approved providers should be valid for one full year. Courses should be a minimum of one hour in length as defined by approved regulations to receive CLE credit.

Comment. A number of MCLE states require, and the Committee recommends, that to be approved for CLE credit, a course or other educational activity should be significantly intellectual and offer practical content designed to maintain the attorney's professional competence as a lawyer; provide an organized program for learning; be related to the legal profession; and be conducted by a qualified individual or group. Courses or educational activities offered in another field of expertise that are related to law should also be eligible to be accredited, such as accounting for lawyers. Courses should have (but not necessarily be required to have) thorough written materials available on or before the date of the course. Courses should be given in a suitable setting conducive to learning; and offer promotional

materials with detailed information on the course offering, including date, time, location, faculty, and calculation of credit hours based on educational time only (excluding any breaks, meals or introductory remarks). Approved service providers with presumptive approval usually need only offer information on the course date, time, location, credit hours and a time-specific agenda.

In California and Florida, the provider seeking MCLE credit for its course must also request specialization credit, if applicable (for example, if the course is on hazardous waste litigation, the provider would not only seek MCLE credit but would seek credit in the applicable specialization area or areas). Those seeking individual credit for courses (non-approved sponsor or attorney) must submit all information in respect of the course, including a time-specific agenda, purpose of the course and course outline, date, time, location, credit calculation, faculty information, and a copy of written materials.

Generally, MCLE states provide for the ability to revoke approval if the course offering does not comply with the standards of the MCLE regulator. Most states use specific industry-wide course approval/course reporting forms. Course accreditation is usually good for one full year.

The New Jersey Board on Attorney Certification (BAC) currently approves each course; there is no approved-provider status. However, BAC broadly approves courses given by service providers offering quality programming in the relevant specialty fields. BAC requires those seeking course approval to provide a time-

specific agenda, the date, time and location of the course, a description of the course, information of faculty, and the requested number of credits for the specialty area. BAC accepts the industry-wide CLE approval/reporting forms. As in many MCLE states, including Tennessee, Florida, North Carolina, and California, the BAC staff is able to apply the regulations, policies and procedures for approving credit. Staff makes the determination of the approval of the course, referring only problematic or questionable courses to the Board for determination of credit. As most MCLE states do and BAC currently does, staff should be approving courses, unless questions require a referral to the MCLE regulator for a vote on accreditation. Initially, the MCLE regulator should review and grant or deny approved service provider status. Once a significant provider list is generated, staff should be able to determine such status, referring only problem applications to the regulator. As noted later in the this Report, the Committee recommends that BAC serve as the MCLE regulator based on its current experience in approving CLE courses. The Committee more fully discusses its rationale for that recommendation in the Compliance section of this report.

In Texas and New York, the program must be a minimum of one-half hour in length to receive any credit. In addition, states provide for a method of evaluating the courses, usually by requiring the sponsor to provide evaluation forms to the attorneys in attendance at a course. Texas requires that the service provider allow for the free attendance by a member of the MCLE staff who may attend to monitor a course.

Texas also provides for review of attendee complaints. By Texas regulation, the provider must remedy such complaints or risk revocation of approved provider status.

The New Jersey MCLE regulator should consider additional issues when drafting its regulations. Some of those considerations are as follows. Specific language should be adopted regarding the advertising of course approval, for example: "This course has been approved for ___ credits by the Court's MCLE regulator." If a course offered by a non-approved service provider is still pending approval at the time it is advertised, the following language is recommended "Approval for this course is currently pending before the [regulating entity]." Credit should be earned for general MCLE purposes and for applicable specialty certification areas, if applicable. Those seeking individual course approval (non-approved provider or individual attorney), should provide more detailed information on the course, including a description of course content and purpose, information on faculty, time-specific agenda, calculation of credit, and written materials. Providers, including attorney applicants, should be able to use the industry-wide course accreditation forms when reporting courses to or seeking course accreditation from the regulator.

There should be regulations regarding the revocation of course approval for failure to comply with the regulator's CLE requirements. Evaluation forms should be required to be provided to attendees by the sponsor. There should be language requiring service providers to remedy valid complaints.

E. Fees, Costs, and Scholarships

Recommendation 11: The Supreme Court should establish a fee schedule for MCLE. The Committee recommends the following fees: service providers applying for approved service provider status should pay a $100 application fee. Approved service provider status should be valid for two years. Approved service provider status should be renewed every two years at the same $100 fee. In addition, all providers, including approved service providers, should pay $1 to $2 per credit, per course, for each New Jersey attorney attending the course. Attorneys seeking individual accreditation for courses or other educational activities not connected with a New Jersey approved provider should pay $1 or $2 per credit hour obtained. The income generated should attempt to fully fund the MCLE program. Unless good cause is shown, failure by a provider to submit attendance information on a course offering within thirty days of the date of the course should result in the assessment of a $50 late fee. A provider submitting a late request for course accreditation should be subject to the assessment of a $50 late fee. To address concerns regarding costs of CLE courses, approved service providers should be required to offer scholarships when practical, based on need. CLE providers are also encouraged to follow the model in Florida, where free video courses are offered each year and are able to be viewed in centralized locations.

Comment. Fees charged to service providers, individual attorneys and non-approved providers vary among the states. Those MCLE states that offer approved service provider status charge between $50 and $250 to the provider seeking the status. MCLE states requiring individual course approval charge as little as $25 and as much as $150 per course for accreditation. Other states require the service provider to pay a sum of money per credit for each attorney attending the course. Some states charge late fees to providers that do not timely seek approval or that fail to timely report attendance to the MCLE entity. A few states, including New York, require approved service providers to offer scholarships based on financial need in the form

of reduced cost for a course, or free attendance at a course. The Florida Bar offers 9 to 11 credits per year of free education courses at local law libraries.

To encourage timely submissions for credit or timely notice of courses to be offered by a provider that is not a pre-approved provider, those failing to submit information on the course less than thirty days prior to the offering of the course should pay a $50 late fee, unless good cause is shown. Because of the significant concerns regarding the costs to the attorney in attending MCLE courses, approved sponsors should be required to offer scholarships for attendance at their courses, depending on the size of the course offering and the cost of the course. The offer of scholarships should address many of the Bar's valid economic concerns. Sponsors should be encouraged to follow Florida's model of offering free courses each year that can be viewed at centralized locations.

It is a significant challenge to outline an adequate funding scheme to cover all expenses of a New Jersey MCLE program. Many of New Jersey's attorneys also have Bar membership in Pennsylvania or New York and will be able to meet their New Jersey MCLE requirement by taking courses only in those states. In addition, under the Committee's recommendations, attorneys would be permitted to take courses through independent study or earn credit by writing, with no service provider seeking accreditation or reporting attendance. As such, the best way to fund the program would be to charge a fee of $1 or $2 per credit per course, in addition to the fee charged for approved service provider status. (The amount, $1 or $2, will depend on

the immediate needs of the MCLE regulator. It may be prudent to start with the $2 charge and lower the fee once the funding stream is secure.)

Generally, under the Committee's recommended system, the service providers will be paying the bulk of those fees for attorneys attending the courses they offer. For example, Pennsylvania approved approximately 600,000 CLE credits in 2006. At $2 per credit, that would generate $1.2 million dollars in fees paid by providers. However, if the provider is in NY or PA and the course is given in either of those states, the provider might opt not to seek accreditation in New Jersey. In those cases, it would be the attorney attending the out-of-state course who would have to pay the fee to receive credit in New Jersey for taking the course. This fee must be considered an administrative fee assessed in exchange for the privilege of being able to receive MCLE credit for out-of-state courses. For example, an attorney taking 12 credits out-of state would have to pay $24 to the New Jersey MCLE regulator to receive credit in New Jersey for those out-of-state courses, assuming the out-of-state provider was not an approved New Jersey provider or a provider that sought and obtained approval for an individual course in New Jersey.

This same rationale also applies to distance learning, independent study courses, and writing. The system is designed to require the service providers to pay the bulk of the fees needed to fund the program. However, lawyers wishing to obtain credit for out-of state or distance learning and other independent-study type courses should have to bear some of that funding burden for that option. The Committee hopes that

NY and PA providers, mindful of this recommendation, will more often than not seek approved provider status in New Jersey as a market incentive to attract New Jersey Bar members.

Lastly, in response to its draft Report, the Committee received many thoughtful comments regarding fees and costs, especially those submitted by the Office of Public Defender. These comments suggest that our recommended fee schedule might cause an undue burden in certain circumstances. Although we adhere to our initial recommendation, we leave it to the Court or MCLE regulator to determine whether or to what extent any aspect of our suggested fee structure should be relaxed or modified because of verified and exceptional hardships suffered by certain governmental attorneys or entities, public-interest entities, or similarly situated private attorneys or entities.

F. Technology

Recommendation 12: A comprehensive and user friendly, on-line database system should be offered, similar to those offered in Pennsylvania, Tennessee, Florida and Texas, which enables an attorney to view courses being offered, to report CLE attendance, and to verify CLE compliance. The system also should enable the providers to report course offerings and CLE attendance, and seek course accreditation on-line. The on-line system should also facilitate the on-line payment of fees.

Comment. The Committee recommends the expansive use of technology. Such needs will depend on the type of tracking the MCLE regulator will utilize. In addition, any technology will more than likely have to interface with the judiciary's current attorney registry system. Most MCLE states provide a web portal to report CLE, track compliance, learn of course offerings, apply for course credit, and to report attorney attendance. In many states, the web based system is through a unified Bar association, which is not available in New Jersey. Examples of effective and comprehensive technology systems include those utilized in Tennessee, Pennsylvania, Florida, Texas, Ohio, and California. Any web based ability to report attendance and to seek course approval should be encouraged as it is considerably more cost effective.

VI. Compliance

A. Compliance Reporting Method

Recommendation 13: It is recommended that New Jersey adopt the method of reporting compliance that requires attorneys and service providers to report course attendance to the MCLE regulator. The service provider should report attendance for any attorney taking its approved course. The attorney should self-report educational activities taken through any other approved format.

Comment. The Committee reviewed the public testimony and comments as well as the experience of other MCLE states, including California, New York, Tennessee, North Carolina, Florida, Texas, and Pennsylvania.

Important to any discussion relating to compliance is how CLE is to be tracked. In the MCLE industry, there are basically two types of tracking models: "self-reporting" and "transcript." These are terms of art used in the continuing legal education arena to distinguish who has CLE attendance reporting responsibilities. Under the self-reporting model, the attorney keeps track of all CLE courses, whether taken from an approved CLE service provider or obtained through self-study, distance learning or out-of-state courses. The service provider is not required to report attorney attendance at its courses to the MCLE regulator. Rather, the attorney must retain certificates of attendance for his or her records. When the attorney reports his or her compliance to the CLE regulating entity at the conclusion of the required compliance period, whether that is yearly or longer, the attorney is required to file some form of affidavit or certification with the CLE regulating entity stating

that he or she has complied with the MCLE requirement. Most states following the self-reporting model rely on random audits, using attorney and service provider records, to determine attorney compliance levels. Generally, CLE providers in those states are required to maintain attendance records for a number of years, in case of an audit.

California and New York follow the "self-reporting" model of compliance reporting. It is noteworthy that these two states have extraordinarily large attorney populations compared to the remaining MCLE states, including New Jersey. As of 2007, New York has approximately 229,000 attorneys and California has approximately 158,000, compared with New Jersey's approximately 83,000 attorneys. In New York, an attorney self-reports compliance by merely checking off a box on the attorney's biennial registration form, which states that the attorney has complied with New York's MCLE requirement. In California, the attorney obtains on-line and returns a post-card like form that states that the attorney has complied with the MCLE requirement. To assure compliance, both New York and California are authorized to perform random audits. Because the MCLE regulator has not kept track of the attorney's CLE attendance, determining compliance can become a time-consuming process for staff who must back-check each course listed by the attorney. Inaccurate record-keeping can be a significant problem. Audits have shown that some attorneys fail to keep proper track of their course attendance, resulting in difficulty proving non-compliance. Most of the non-compliance sanctions in

California result from attorneys who have either admitted their failure to comply in their affidavit or who failed to submit the required affidavit. Very few are sanctioned for failing to take the required number of credits.

Under the transcript method of reporting MCLE, the service provider or the individual attorney reports CLE attendance to the MCLE regulator, depending on the course or educational activity. The service provider reports attorney attendance at courses to the MCLE regulator. In addition, the attorney reports to the MCLE regulator his or her attendance at out-of-state courses, time spent on writings/publications, and course credits obtained through distance learning (e.g. internet, audio, video, and DVD). The CLE regulator maintains a centralized database of all information on each attorney from the information that is reported to it by the attorney or the service provider. Sometime prior to the expiration of an attorney's compliance period, the MCLE regulator sends the attorney a "transcript" of all courses that the attorney or service providers reported to the regulator during the attorney's compliance period. Generally, the attorney is asked to review the transcript to determine its accuracy and to make any necessary corrections. The transcript also serves to inform the attorney if he or she is in compliance at that point, leaving a not yet compliant attorney a window of time to remedy the delinquency or request an extension of time, if offered, before any late or non-compliance fees are assessed.

The majority of MCLE states follow the transcript model, including Pennsylvania, Florida and Texas, which have attorney populations similar to New

Jersey. In those states, the CLE regulator's staff processes service provider and course approval, collects data on all CLE courses, compliance review, and technological/website work.

New Jersey currently has a clean slate, affording the Committee the opportunity to select a system of compliance reporting that suits the needs and overall purpose of the program while at the same time addressing the concerns of the Bar. The Committee is recommending a broadly inclusive standard for those educational modalities deemed suitable for accreditation, including Inns of Court, out-of-state courses, publications, teaching, distance learning, video, DVD, and audio recordings. Some of these modalities necessarily entail self-reporting, i.e., courses an attorney takes out-of-state or through independent or self-study. Other courses are efficiently tracked by providers. In light of the likely wide range of approved programming, the Committee believes that the uniform tracking system recommended here is the best method to capture all forms of CLE attendance.

Members of the Bar testifying before or providing comments to the Committee were in favor of pure self-reporting over the tracking method. The principle objection to a uniform tracking system seems to rest on the idea that this method of compliance signals a lack of trust in the members of the Bar.

In making its recommendation, the Committee does not intend to suggest that attorneys cannot be trusted to properly report compliance. Rather, it is the Committee's view that a centralized repository, maintained by the MCLE regulator,

containing information on each attorney's CLE would be the best way to manage the compliance-reporting aspect of a mandatory education program. Indeed, the system recommended here -- which would accept a broad range of providers, courses and educational modalities, specifically courses taken by an attorney through the Internet, phone conferencing, audio, video and DVD formats, as well as out-of-state courses and publications – relies significantly on the trust and professionalism of the Bar to self-report a wide array of MCLE credits. A centralized system will offer a more efficient and uniform method of compliance that can adequately respond to the many anticipated technologically advanced CLE formats. Of equal importance is the fact that a uniform tracking system will relieve attorneys of the burden of keeping track of all educational activities obtained and will reduce the likelihood of non-compliance through inadvertent record-keeping.

Lastly, in response to the draft Report, several stakeholders offered or repeated their views in favor of a system of pure self-reporting. The Committee continues to respect those views. It also continues to believe, however, that the uniform tracking system is the best method for New Jersey for the reasons already noted. We adhere to the view that our recommended system will be less burdensome to attorneys than pure self-reporting by virtue of the fact that the transcript method places the bulk of reporting on the shoulders of service providers (who should be better able to absorb administrative costs than many attorneys or firms, especially small firms), while incorporating elements of self-reporting within a uniform framework.

B. Other Requirements

Recommendation 14: The two-year compliance period should be divided into four "compliance groups," with two groups reporting each year. For example, if the first compliance group were required to report compliance in 2011, those born in January through March would report by June 30, 2011; those born in April through June would report by December 31, 2011; those born July through September would report by June 30, 2012; and those born October through December would report by December 31, 2012. New admittees' compliance reporting period would not begin to run until January 1 of the year following admission to the New Jersey Bar. It is further recommended that any MCLE program not start before 2010 to allow for adequate transition.

Comment. The CLE compliance process includes the compliance reporting date, the compliance notification procedure, exemptions and extensions to compliance, fees, and the enforcement and appeal procedure. Staggering reporting over four compliance periods over two years would spread our large attorney population into two compliance groups per year, allowing staff to address adequately all enforcement and non-compliance issues in sufficient time before the next compliance group reports. If the Committee's recommendation is adopted and the program began in 2010, and compliance reporting deadlines were to begin in 2012, the first compliance group, those born from January through March, would be required to report compliance at the end of June 2012. However, it is more than likely that to phase-in the new system, the first group will have to report compliance after the first full year of the program and will most likely require reporting for the first compliance group at a pro-rated amount (12 credits out of 24). Once that first

phase-in year of reporting is completed those attorneys would not report again for two years and they would have to report 24 credits over that period.

For those newly admitted to the Bar, compliance reporting would not begin until January 1 of the year following admission to the Bar. For example, an attorney admitted to the Bar in May of 2011 and born in March would not have to begin complying with the CLE requirement until January 1, 2012 and his or her first compliance reporting deadline would be in June 2014. The one-year reporting phase-in also may apply to new admittees only in that phase-in year.

In reviewing many of the existing state programs, the Committee found that compliance reporting periods range from every year to every three years. Elsewhere in this Report, the Committee has recommended that the new MCLE program provide a two-year compliance reporting period of the requisite 24 credits of CLE. The two-year period would give the attorney sufficient time to complete his or her CLE requirement while allowing for personal schedules that might affect one's ability to meet 12 credits in one year.

In respect of reporting at the conclusion of the compliance period, the states have a range of procedures. Some states have a yearly compliance period where compliance reports for all attorneys are filed on one certain date during that year: North Carolina – 2/28 or 2/29, Indiana - 12/31, New Mexico – 2/28 or 2/29, and Tennessee –January 31. California, which has a three-year compliance period, has three "compliance groups," divided by alphabet (A-G, H-M, and N-Z). On a rotating

basis, a different group reports by January 31 each year. Pennsylvania, which has a yearly reporting period, divides into three groups by date: April 30, August 31, and December 31. New York has a two-year compliance period where the affidavit of compliance is filed with the biennial attorney registration form that is received by birth date. Texas has a two-year compliance cycle where each attorney must report compliance by the end of the month of their birth.

The NJSBA has recommended the monthly birth-date method of reporting. The Committee considered that suggestion but concluded that reporting compliance each month actually would be more burdensome administratively because those who are non-compliant would run into the next compliance group. Two six-month groups over two years, based on birth date, would enable the MCLE regulator to address all issues relating to non-compliance before the next compliance group reports.

Recommendation 15: It is recommended that a compliance report be sent to an attorney 90 days prior to the expiration of his or her compliance period. It is further recommended that an attorney receive a notice of non-compliance within 30 days after the original compliance deadline and be assessed a $75 late fee and be given an additional 60 days to come into compliance. At the end of that 60 days, the attorney should be assessed an additional $100 late fee and be given a final 60 days to comply. Should the attorney fail to comply, procedures for administrative suspension should be started after notice to the lawyer. If the attorney is administratively suspended by the Court, a reinstatement fee should also be assessed of no more than $250.

Comment. Most states that use a transcript method of reporting mail out a compliance notification report or transcript within 30 to 90 days prior to the compliance deadline to apprise the attorneys of their current CLE and give them time

to get into compliance before the actual compliance deadline arrives. It is recommended that New Jersey require a 90-day compliance notification window like Florida and Pennsylvania. That would give an attorney notice and sufficient time to become compliant, thereby avoiding any non-compliance assessments and sanctions.

Once the compliance deadline passes, there will be a percentage of attorneys who are non-compliant. Most states send out a notice of non-compliance and assess late fees, delinquency fees, or both, giving attorneys a certain amount of time to pay their late assessments and come into compliance. Time for final compliance ranges from 30 days to 6 months before a recommendation is made for either automatic suspension or for administrative sanctions by the Supreme Court of the state. Under the Committee's recommendation, a New Jersey non-compliant attorney would be given a total of 5 months to come into compliance, which would allow the MCLE regulatory staff to address those non-compliance issues prior to the next compliance deadline period beginning at the end of June.

Assessments are charged to encourage compliance; if no late fees are assessed, attorneys have no incentive to swiftly become compliant. States vary in the number and amount of late fees assessed. In addition, there is a wide range of charges for reinstatement after administrative suspension. The key is to maintain a fee structure that encourages compliance but is not unduly financially or administratively burdensome.

Recommendation 16: For good cause shown, including illness or other special circumstances, attorneys should be given reasonable extensions of time to comply. Such applications should be reviewed on a case-by-case basis.

Comment. Most states provide some sort of extensions of time for compliance.

Recommendation 17: Rule 1:39 and regulations of the Board on Attorney Certification (BAC) provide for a hearing and petition process that should be amended to include and address the due process needs of any MCLE program.

Comment. With any enforcement system, there should also be due process safeguards. Other than administrative sanctions imposed by a Supreme Court or automatic suspensions for non-compliance (e.g., Florida and Texas), most if not all states provide non-compliant attorneys the opportunity to be heard before the regulating entity. If relief is not received, attorneys are entitled to petition the unified State Bar Board of Governors, the MCLE regulator, or the Supreme Court, depending on the procedures of the state. Florida also provides a confidentiality rule for both CLE and legal specialization, similar to that provided in Rule 1:39-9 of the Rules Governing the Board on Attorney Certification. The similarity in purpose and procedure with the existing attorney certification program is one of several persuasive reasons to consider folding the MCLE program into the already existing attorney certification program, as more fully recommended below.

C. Standing Committee to Oversee MCLE Program

Recommendation 18: Rule 1:39 and regulations of the Board on Attorney Certification (Board of BAC) should be amended to include any MCLE program. The Board should be designated as the combined regulator that oversees the Court's MCLE and attorney certification programs.

Comment. Currently, BAC serves as the policy and appellate arm of the attorney certification program. This should remain the same for MCLE, allowing any hearings to be before the Board. Each area of certification has an advisory committee that performs the core work of the program, including reviewing applications for certification and recertification, creating and grading examinations, etc. Similarly, another advisory committee should be created to administer the approval of MCLE courses and service providers, etc., enforcing the rules and regulations adopted for MCLE. Currently the chairperson of each advisory committee sits on the Board in addition to other members.

The Certified Attorneys' section of the NJSBA and the Essex County Bar Foundation submitted written comments recommending that any new MCLE program be administered by BAC through the already existing attorney certification program. Not surprisingly, several MCLE states that also have attorney specialization programs run both programs under one combined entity. This is so in Tennessee, Florida, South Carolina, New Mexico, Arizona, and North Carolina. In addition, while not combined in name, the executive directors/administrators of the MCLE programs in Indiana and California are also the executive directors/administrators of the

attorney specialization programs. They are separate in name mainly because they obtain revenue from different funding streams of their unified state bar association, yet they share location and often some staff, including the administrator.

Attorney specialization and MCLE share a fundamental common purpose - to increase the competence level of the Bar. Both seek a shared approach of dealing with lawyers regarding mandatory education. In addition, the administrative challenges are basically the same; both require significant record-keeping and application processing, as well as review and appeal processes. The work of the staff and administrator would be quite similar, and in relation to MCLE approval and service provider submissions, often duplicative. That is evidenced by the fact that the BAC and its staff already have significant experience in approving MCLE providers and courses and in reviewing for compliance.

Many of the same service providers that seek course accreditation from BAC also would be seeking credit for courses under any mandatory CLE program. Moreover, and of great importance, the attorney certification program relies heavily on income derived from its CLE accreditation process for its fiscal health. Thus, whatever structure ultimately is chosen, the attorney certification program's fiscal health must not be overlooked in that process.

The Board already has existing rules and regulations regarding mandatory CLE for certified attorneys. Combining the MCLE and specialization under one umbrella would serve to avoid any overlap and conflict between the MCLE and certification

programs, including primarily course accreditation. Courses accredited for MCLE can, at the same time, also be reviewed for certification credit as is done in Florida and California.

Similarly, in the start up of MCLE, the initial work would be able to be performed by the umbrella of BAC and its current staff; then as revenue is generated from course approval/attendance, any staff increases readily can be made, while needed computer technology and supplies can be funded through continued payments from service providers. Once the MCLE program commences and the initial approval of service providers and courses is made by the members of the advisory committee, there will be fewer and fewer decisions for that committee to make. By then, the policies and practices already will be in existence for the staff to apply to MCLE course accreditation. The committee's decisions would then be more related to policy than actual course accreditation and provider approval. For example, in Tennessee, the commission overseeing that state's CLE makes no more than four decisions per year and those decisions do not relate to operational matters.

D. Costs and Staffing

Recommendation 19: The Committee estimates that New Jersey's MCLE and specialization program would need a combined staff of between 6 to 8 people. As recommended earlier, in regard to funding the program, the Committee recommends a fee structure that is straightforward and user-friendly, assessing a fee for approved service provider status as well as the $1 or $2 per credit, per course, per attorney paid by the service provider or the attorney depending on who is seeking the course credit and the funding requirements of the regulator. In addition, late fees and non-compliance fees should be assessed as suggested in Recommendation 15.

Comment. For transcript states, staffing and administrative operations are funded through the assessment of provider/attorney fees for course approval, late fees, non-compliance fees, and reinstatement fees. Tennessee employs a staff of six, which manages both their MCLE and attorney specialization programs, as well as other programs, such as the Client Security Fund. Tennessee also has an extensive, user-friendly on-line reporting system. Tennessee charges the provider $2 per credit hour per attorney attending the course or $1 per credit hour if the provider reports through the use of the internet. There are approximately 14,500 attorneys in that state who must take 15 MCLE credits per year. The income from those fees alone generate between $217,500 and $435,000. (An additional sizable portion of income is generated from late and other non-compliance fees.)

In New Jersey, based on 12 credits per year and approximately 83,000 attorneys, the revenue generated would be between $996,000 and $1,992,000. That figure should support any staffing and operational needs of the system recommended

here. Moreover, this projection does not include any late, non-compliance, or reinstatement fees, which also generate significant income. Nor does it include the fee assessed for approved provider status. North Carolina, like Tennessee, charges per credit hour per attorney. North Carolina's charge is $1.25.

Considerably more income would be generated if one were to follow the Pennsylvania fee model, as Pennsylvania has about 23 different fees. PACLE states that about 31% of its income is derived from delinquency/late fees.

Florida charges a flat fee of $150 per course to the CLE provider; $45 for local bar association courses; and a $75 late submission or rush request fee. There are also non-compliance fees, including a $150 delinquency removal fee. Florida has a staff of eight, four who handle attorney certification exclusively.

Another aspect impacting the funding structure is staffing. Pennsylvania has a staff of about 12, including 4 employees to administer their extensive website reporting system. Of interest, New Mexico pays for the use of Pennsylvania's computer system to track New Mexico attorneys' MCLE. North Carolina has a staff of four plus it executive director. Indiana has a staff of about 5, with total salaries of about $250,000 (the executive director is paid for work with the MCLE entity and also paid as director of the attorney specialization program.) Tennessee has a staff of 6, including the executive director, and the staff functions on MCLE and attorney specialization, as well as two other Court programs. Florida, which also runs MCLE

and attorney specialization together, has a staff of 10; 4 for MCLE, 4 for specialization and 2 receptionists.

As BAC already has an existing staff of 3 who approve CLE courses and review compliance, it appears that the Board could start with an addition of 3 to its staff for the first year, with time after that first year to consider whether more staffing is needed and affordable. This will depend on the amount of course and service provider accreditations, the number of attorneys who are non-compliant, the number of attorneys relying on out-of-state and independent study courses, and the quality and sophistication of the technology employed.

VII. Implementation Issues, Program Evaluation, and Impact on the Bar

Recommendation 20: The Supreme Court should evaluate the MCLE program midway through the second biennial cycle, i.e., three years from program inception to determine whether it is achieving its goals and operating as intended.

Comment. The Committee has made a number of recommendations, including those relating to credit requirements, learning formats, exemptions, fees, compliance reporting, providers and course approvals. We did so with the benefit of substantial public input and invaluable assistance from our staff. Nothing is a perfect substitute for actual experience, however. With that thought in mind, the Committee recommends that the Court or its MCLE regulator evaluate the program, midway through the second cycle, which would be three years from inception of the recommended system. The review that we envision would seek to determine whether the program is achieving its goals and operating without unintended consequences.

More specifically, the Committee has made a set of recommendations regarding learning formats and the types of activities that should be eligible for CLE credit. Beyond what the Committee has recommended, the NJSBA and the Federal Bar Association have suggested that other activities should earn credit, such as serving on Ethics or Fee Arbitration Committees; serving on other Supreme Court committees and advisory groups; participating in Law Day and moot court programs; and preparing and grading Bar exams. As noted in Recommendation 5 and its related

Comment, the Committee also discussed the possibility that attorneys might earn credits for *pro bono* work. All of those subjects reflect worthy and important efforts, and should be included in the subsequent review that the Committee suggests here.

In the more immediate future, the Committee acknowledges that the MCLE regulator will need to consider a host of transition issues, assuming the Court proceeds along the lines recommended. As just one example, the regulator might want to consider how to treat courses that attorneys might have taken in the months just prior to the start-up of the program or during any transition period, as well as whether attorneys or providers should be given financial or fee credit for courses taken or offered in that same timeframe. Similarly, if the Court accepts the Committee's recommendation to eliminate the Skills and Methods Program as part of a broader MCLE system, then the regulator might want to consider whether such elimination should be phased-in within an established transition period.

Similarly, the Committee also acknowledges that one of the principal impacts of any new system will be cost. The Committee hopes and anticipates that competitive market forces will help to ensure that service providers offer readily available, inexpensive courses. Ultimately, the cost of the system must be seen within the context of benefits. We have noted in Section II how MCLE can be beneficial in terms of professional development. In addition, an increase number of CLE courses offered by state and local bar associations could prompt more attorneys to be

involved in Bar functions, which the Committee would consider a beneficial byproduct of MCLE.

Lastly, the Committee hopes that there will be a positive response to MCLE as attorneys become more accustomed to its requirements. That assumption is buttressed by an on-line survey completed in Tennessee in 2006 (similar to surveys performed in 1991 and 1999), concluding that attorneys generally think that CLE is a positive aspect of their profession. As the Committee noted, again in Section II, a very large percentage of New Jersey attorneys already comply with MCLE because of licensure requirements in other states or because of the present Skills and Methods Program or attorney certification program. That fact, coupled with the generous reciprocity recommendations contained in this Report, should lessen the overall burden and impact of MCLE. On balance, the Committee believes that the net effect will be positive to the Bench and Bar and to the public that they ultimately serve.

APPENDIX A

Public Outreach

Public Testimony:

- Mark J. Gross, Esq., President, Essex County Bar Association
- Arthur Miller, Esq., former President, Middlesex County Bar Foundation
- Lewis Stein, Esq.
- Lucinda Long, Esq.,
- Dominick Carmagnola, Esq., Sidney Reitman Labor and Employment Law American Inn of Court
- Thomas Quinn, Esq.
- Lynn Miller, Esq., President-Elect, Middlesex County Bar Association
- Richard Badolato, Esq.
- Stuart Mack, Director, Center for Government Services, Edward J. Bloustein School of Planning and Public Policy, Rutgers University
- Ed O'Donnel, Esq.
- Frank Petro, Esq., National Trustee American Inns of Court Foundation
- Larry Maron, Esq., Executive Director, New Jersey Institute for Continuing Legal Education (ICLE)
- Ramon Santiago, Esq.
- Gerald H. Baker, Esq.
- Philip P. Crowley, Esq., Vice-President, New Jersey Corporate Counsel Association (NJCCA)
- Lynne Fontaine Newsome, President, New Jersey State Bar Association (NJSBA)
- Christine Heer, Esq., New Jersey Coalition for Battered Women
- Robert Steinbaum, Publisher, New Jersey Law Journal
- Hon. William A. Dreier, Chair, Board of Trustees, New Jersey Institute for Continuing Legal Education (ICLE)
- Charles J.X. Kahwaty, Chair, Bergen County Bar Association
- Cathe D. McAuliffe, President, Bergen County Bar Association
- Ken Meyer, President, eCE Partners
- William Kane, Director, New Jersey Lawyers Assistance Program (NJLAP)

Written Comments:

- E. John Wherry, Jr., Esq.
- Robert J. Pinizzotto, Esq., President, New Jersey State Municipal Prosecutors' Association
- Robert J. Pless, Esq.
- Susan M. Lyons, Esq.
- Charles E. Waldron, President, Mercer County Bar Association
- Martin L. Bearg, Esq., LL.M.
- Roma K. Oster, Esq.
- Mitchell S. Cohen, Esq.

- A. Jared Silverman, Esq.
- Douglas E. Schwartz, Esq.
- David W. Collins, Esq.
- Norman Shaw, Esq.
- Thomas P. Kelly, III, Esq.
- Donald K. Moore, Esq.
- Robert C. Maida, Esq.
- Dan Levering, Administrator, Pennsylvania CLE Board
- State Domestic Violence Working Group
- Office of Public Defender
- Amos Gern, President, ATLA-NJ
- Hon. John T. McNeill, III, JSC
- Charles J.X. Kahwaty, Esq., Bergen County Bar Association
- Robert Ramsey, Esq.
- Gerald P. DeVeaux, Esq.
- Joseph A. McCormick, Jr., Camden County Bar Association
- Hon. Angelo DiCamillo, JSC
- Jeffrey J. Greenbaum, President, The Association of the Federal Bar of New Jersey
- Lynn Fontaine Newsome, President, New Jersey State Bar Association
- Honorable William A. Dreier, Chair, Board of Trustees, Institute for Continuing Legal Education

E-Mails:

- Lewis Goldshore, Esq.
- Kern Augustine, Esq.
- Regina Waynes Joseph, Esq., Garden State Bar Association
- Lisa D. Taylor, Esq.
- Leonard Fondetto, Esq.
- E. John Wherry, Jr., Esq.

Meetings with Committee Members and/or Staff:

- Dan Levering, Pennsylvania MCLE Board Administrator
- Judges of Burlington County
- Victor J. Rubino and Douglas Eakeley, Practicing Law Institute (PLI)
- Dean Patrick E. Hobbs, Seton Hall Law School
- Dean Stuart L. Deutsch, Rutgers School of Law
- Board of Trustees, Institute for Continuing Legal Education, and representatives from Pennsylvania, New York, and Minnesota MCLE
- Warren County Bar Association
- Hunterdon County Bar Association
- Appellate Division Judges
- U.S. District Judge Garrett Brown
- Charles McKenna, Assistant U.S. Attorney

- Dr. Robert Bowman, Executive Director, and Dr. Lawrence A. Nespoli, President, New Jersey Council of Community Colleges
- Young Lawyers Division, New Jersey State Bar Association

Media Articles:

- New Jersey Lawyer: "Key Education Change Gets Left Back," February 5, 2007.
- New Jersey Law Journal: "N.J. Mandatory CLE Committee Kicks Into Gear," May 2, 2007.
- New Jersey Law Journal: "Public Hearing on Mandatory CLE is Peopled by Potential Providers," May 21, 2007.
- New Jersey Law Journal: "County Bars Become MCLE Minded," June 25, 2007.
- New Jersey Law Journal: "Lawyers Speak for Honor System for Tracking Mandatory CLE Compliance," October 22, 2007.
- The Times/The Star-Ledger: "Court looks to Send Lawyers Back to School," November 4, 2007.
- New Jersey Law Journal: "Court Committee hears Last Echoes of Dissension about Mandatory CLE," November 5, 2007.
- New Jersey Lawyer: "Mandatory CLE Getting Hammered," November 5, 2007.
- New Jersey Lawyer, re: New Jersey State Bar Association Report, March 15, 2008.
- New Jersey Law Journal, re: New Jersey State Bar Association Report, March 17, 2008.

APPENDIX B

Notice to the Bar

New Jersey Supreme Court
Ad Hoc Committee on Continuing Legal Education –
May 18 Public Session (Atlantic City)

On Friday, May 18, 2007, the New Jersey Supreme Court Ad Hoc Committee on Continuing Legal Education, chaired by retired Justice Peter G. Verniero, will convene a public session at the Borgata Hotel Casino and Spa in Atlantic City, New Jersey, in conjunction with the Annual Meeting of the New Jersey State Bar Association. The session, which will be at 12 noon in the first floor Theatre at the Borgata, will provide the Ad Hoc Committee the opportunity to obtain input from members of the bar and others on a number of topics related to continuing legal education.

The Ad Hoc Committee is organized into a Steering Committee and four subcommittees, focusing on the following areas:

Requirements Subcommittee: Overall structure of CLE program, course structure, role of core course(s), area-specific curriculum, mandatory requirements, credit-hour requirements. Also, interface with attorney certification program.

Applications Subcommittee: Application of program to attorneys based on number of years of experience, areas of practice, private versus public sector attorneys, judges, in-house counsel, and attorneys with CLE in other states. Also, recommendations regarding Skills and Methods Program and eventual interplay between that program and any recommended mandatory CLE program.

Compliance Subcommittee: Recommendations on how the Supreme Court should enforce and monitor CLE program, possible creation of standing committee, staffing, funding, and other related enforcement issues.

Service Provider Subcommittee: Sources and cost of CLE instruction (e.g., law firms, Inns of Court, law schools), approval/certification of credits/courses, etc.

In addition to these areas, the Ad Hoc Committee also will make recommendations to the Supreme Court on the role of technology, including technology in the classroom and on-line course fulfillment, as well as on the manner and cost of implementing any specific subcommittee recommendations.

While the Ad Hoc Committee will receive comments at the May 18 public session, written comments may be submitted to:

Eugene Troche, Esq.
Office of the Clerk
New Jersey Supreme Court
Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625-0970

Dated: May 1, 2007