

68,708

IN THE SUPREME COURT OF FLORIDA

Case No. *Jul*

THE FLORIDA BAR,

RE: PETITION TO AMEND THE RULES
REGULATING THE FLORIDA BAR -
CREATION OF CONTINUING LEGAL
EDUCATION REQUIREMENTS

BRIEF OF THE FLORIDA BAR, PETITIONER

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SUMMARY OF ARGUMENT

The Florida Bar petitions this Court for the creation of a continuing legal education requirement. This constitutes an amendment to the Rules Regulating The Florida Bar currently pending before this Court.

The Board of Governors of The Florida Bar has accepted the recommendation of their Long Range Planning Committee which felt such a requirement would encourage lawyers to stay abreast of changes and developments in the law. The experience of other states indicates a trend toward continuing legal education requirements. This is also the case with other professions.

Because of the intense study over a two year period by various committees and the Board of Governors and the input of many diverse groups, the final proposal creates a meaningful requirement which can be easily met. There are ample safeguards to ensure due process requirements in the review and sanction provisions.

The legal profession will be upgraded and the public better served by the adoption of a requirement.

STATEMENT OF THE CASE AND FACTS

In May of 1984 the Long Range Planning Committee of The Florida Bar recommended to the Board of Governors adoption of a plan for a continuing legal education requirement. A Florida Bar poll taken that summer indicated that 49.4% of the members responded favorably to some type of requirement of continuing legal education with 48.4% responding negatively. The remaining approximately 2% had no opinion or did not answer the question.

The Florida Bar Membership Attitude Survey (Summer 1984): A Compilation of Results. The Board of Governors deferred action until the September 20-21, 1984 meeting in Palm Beach.

At that time the Board directed President Gerald Richman by a vote of 28 to 3 to appoint a task force to bring a specific plan for continuing legal education to the Board of Governors. At the January, 1985 meeting in Clearwater Tom Read, Dean of the University of Florida College of Law and chairman of the Mandatory CLE Task Force presented key components of a plan to the Board for its consideration. Alternatives had been considered by the Task Force and the CLE Committee. Before proceeding further with specific language, Dean Read solicited the Board's opinion. Four major aspects of the current plan were decided at that time. These were:

1. The 3 year compliance period
2. The 30 hour requirement
3. The separate ethics requirement
4. A liberal credit policy for audio and videotapes.

Dean Read agreed to return to the Board of Governors in May of 1985 with a proposed plan. At the May, 1985 Board meeting in Miami, the Board of Governors approved Mandatory CLE by a vote of 17 to 16. The closeness of this vote mirrors the results of the earlier membership survey.

The CLER Oversight Committee was appointed pursuant to action at the August, 1985 Board meeting. The purpose of that committee was to further "fine tune" the language of the plan. The committee met three times in September and October, 1985 and reported to the Board of Governors in November, 1985 in Tallahassee. During the November meeting, the Board of Governors eliminated report filing fees as well as individual course approval fees. They also required The Florida Bar to create on audiotape an annual overview program which would qualify for ten (10) hours of credit. These audiotapes, which will include an ethics portion, are to be made available to local bar groups or county law libraries at no charge so that members can meet the CLE requirement at no cost. At the January, 1986 meeting an additional exemption for out-of-state Bar members who do not practice Florida law or render advice on matters of Florida law was added to the plan. A subsequent motion to rescind the entire plan as written failed by a vote of 23 to 8 with 1 abstention. The final language of the plan was approved at the March, 1986 Board of Governors meeting in Tampa. Although the Board of Governors was closely split on the original question

of a CLE requirement, the support became stronger as the specific plan provisions were created and modified by the various groups. It became clear that the requirements could easily be met and that the means to do so would be provided economically for all members of The Florida Bar.

Thus, the Long Range Planning and Continuing Legal Education Committees as well as two other special committees and the Board of Governors of The Florida Bar have considered the Continuing Legal Education Requirement (Appendix I) and initial implementation Policies (Appendix II) at great length. To implement the plan, The Florida Bar requests the Court adopt and establish Rules 6-10.1 - 6-10.8 of the Rules Regulating The Florida Bar as attached to its petition filed herewith.

POINT I

ADOPTION OF A CONTINUING LEGAL EDUCATION REQUIREMENT FOR EVERY MEMBER OF THE FLORIDA BAR RESIDING IN THE STATE OF FLORIDA OR RENDERING ADVICE ON MATTERS OF FLORIDA LAW WILL UPGRADE THE PROFESSION AND BETTER SERVE THE PUBLIC.

There are few who would argue with the premise that the practice of law in today's society has become increasingly complex. We have seen a constant reduction in the number of true general practitioners over the last few years. Gone are the days when a lawyer admitted to practice could claim to be qualified to represent clients in all areas or without further study until the conclusion of his or her practice. Everyone must remain current in whatever areas they practice. This has led to a need for continuing legal education.

Continuing Legal Education (CLE) can take many forms such as reading advance sheets, reporting services and statutory changes. The problem is that even the lawyer who limits practice to a single area of the law cannot deal with the great volume of material produced annually. Thus the concept of CLE, formalized continuing legal education, has evolved. As sponsored by Bar groups, law schools, private concerns or other entities this allows the presentation of seminars by experts on specific areas of the law, thereby permitting lawyers who concentrate on very narrow aspects of these disciplines to share their expertise with other lawyers who do not have the time, resources or ability to synthesize the vast amounts of information. Because of this perceived need, CLE and CLE organizations have gained widespread acceptance during recent years. The

latest roster of the Association of Continuing Legal Education Administrators, a group of nonprofit CLE providers comprised mainly of Bar groups and law schools, shows at least one member in every state except Wyoming and includes members from Canada, Ireland and Australia.

Registrations for Florida Bar sponsored CLE courses during the 1983-84 Fiscal Year totaled 14,002 and during the 1984-85 Fiscal Year were 16,876. If each of these registrations represented a different individual they would comprise approximately 54% of the 26,123 in-state members in good standing as of June 15, 1984 and 61% of the 27,713 in-state members in good standing on July 1, 1985. There were programs offered during these periods by groups other than The Florida Bar and most certainly some lawyers attended more than one course. Nevertheless this represents a fairly accurate reflection of the number of lawyers attending seminars. For the most part these courses are one day in length and comprised of five to six hours of lecture time. Thus, we are faced with 50% to 60% of our in-state lawyers attending a day per year of formalized training. This is an insufficient effort to keep abreast of the latest developments in the law.

The Long Range Planning Committee of The Florida Bar concluded in their report in 1984 that The Florida Bar should require Mandatory CLE. The Committee said:

"A lawyer's education should not end upon graduation from law school. Mandatory CLE would require practitioners to set aside time to concentrate on formal knowledge acquisition. The program need not be burdensome and perhaps one course per year would suffice. Mandatory CLE appears to be the most feasible of all possible alternatives for promoting competency." Report 1984, The Florida Bar Long Range Planning Committee, IV-11.

It is not argued here that there is a direct, measurable link between lawyer competency and a CLE requirement. The Colorado Board of Continuing Legal and Judicial Education undertook a study after five years of Mandatory CLE. In the report filed in 1984 they concluded:

"The Colorado Board also strongly believes that MCLE has a positive effect on lawyer competence even though it cannot be proven by either objective or scientific means. In every MCLE jurisdiction where lawyer's responses have been sought surveys indicate that they believe that MCLE does improve their competence as well as that of their fellow attorneys. An educational habit seems to have been created by MCLE that encourages lawyers to add to their legal knowledge. This positive feeling about MCLE is echoed by the Young Lawyers Division of the American Bar Association which has proposed that MCLE be adopted in all jurisdictions. MCLE is increasingly being seen as a very positive program which improves lawyer competence." ACLEA Program Materials, 1984 Annual Meeting, Page 157.

Even though many opportunities currently exist for Florida lawyers to improve and maintain their legal skills, a significant number of them do not. A failure to continue their legal education beyond Bar admission ultimately hurts their clients and the public in general. By requiring lawyers to attend a minimal amount of organized continuing legal education each year, including a requirement of ethical considerations, everyone will benefit. As the American Bar Association's Task Force on Professional Competence noted:

"While there is no definitive evidence that mandatory CLE enhances professional competence, there nonetheless may be a number of reasons why states may want to adopt such programs. Mandatory CLE may well improve knowledge of specific legal topics and enhance practical and management skills. Moreover, it forces all attorneys into an environment where important learning is likely to occur through informal contact with other lawyers as well as through the formal education itself." A.B.A. Task Force on Professional Competence Final Report and Recommendations, at 10 (July 1983).

There will be a beneficial effect on the level of legal services because of the educational experience.

POINT II

A GROWING NUMBER OF STATES ARE RECOGNIZING THE NEED FOR A CONTINUING LEGAL EDUCATION REQUIREMENT.

In 1975 Minnesota was the first state to enact a continuing education requirement for its lawyers (Appendix III contains information on the plans as they exist in the various states). Their current requirement is 45 hours during a 3 year period. There then followed a flurry of activity with Iowa passing a plan in 1975 and Washington in 1976. In 1977, Wisconsin, Wyoming and North Dakota added requirements for their lawyers. The movement slowed during the next few years with only Colorado enacting a requirement in 1978 and Idaho and South Carolina in 1979.

South Carolina was the first southern state to pass a plan and foreshadowed a burst of activity by other southern and border states. In 1981 Alabama required its lawyers to take 12 hours annually and in 1984 Georgia and Kentucky adopted mandatory plans. Mississippi and Kansas joined the group in 1985 and Texas, Oklahoma and Virginia have plans which will become effective in 1986. Until the recent addition of states like Texas with its 44,500 lawyers, required continuing legal education had been restricted to smaller states. The Texas plan will take effect pursuant to a referendum of the membership wherein 69% of those voting approved establishment of a requirement. Approximately 67% of the Texas Bar voted.

In addition to those listed above, Montana and Nevada passed requirements in 1982 and Vermont in 1985 for a total of 20 states. According to the Bar Leader Volume 11, Number 3, November -

December 1985, another eleven states are actively considering mandatory continuing legal education and two state supreme courts have the issue before them. Three of these states are ones with large lawyer populations, notably Illinois, Michigan and Pennsylvania. There have been some negative responses. State bars have voted down continuing legal education requirements in Illinois and California. The concept was rejected by state supreme courts in New Mexico in 1975 and Nebraska and Pennsylvania in 1979. However, the issue is being given serious reconsideration in both Pennsylvania and Illinois although passage is not assured.

It is also significant to note that even though original approval has often been by a close vote, no state has ever repealed a continuing legal education requirement. A Colorado membership survey in 1982 indicated a 76% favorable response to mandatory continuing legal education since its implementation. Similar surveys in Nevada in 1975 and Alabama after adoption indicated 78% and 75% favorable responses respectively. ACLEA Program Materials, 1984 Annual Meeting, Pages 188-190.

Thus, a number of states have already experimented with the concept of mandatory continuing legal education. Although there is resistance at first, lawyers seem to be more supportive of the program after it is in effect.

POINT III

THE NEED FOR CONTINUING EDUCATION HAS BEEN RECOGNIZED BY OTHER PROFESSIONS WITHIN THE STATE OF FLORIDA AND IN OTHER JURISDICTIONS.

In 1972, mandatory continuing medical education was begun in New Mexico. By late 1985 eighteen states had established standards for doctors. Bar Leader Volume II, Number 3, November - December, 1985.

Appendix IV attached to this brief shows the educational requirements for other professional groups within the State of Florida. Those requirements call for accountants to take 64 hours of continuing education every two years as contrasted with opticians who are only required to take 16 hours in a two year period. The 1985 legislature increased the requirement for pharmacists and osteopaths. Specific hour requirements have not been established for dentists, medical doctors and funeral home directors but the concept has been approved.

The 1984 Colorado CLE report quotes Dr. Louis Phillips, an expert on continuing education, in Power and Conflict in Continuing Professional Education (M. Stern ed. 1980) as citing the following positive results of professional education:

- "1. The professions have experienced increased attendance at meetings, especially when some educational component is included.
2. More and better educational programs have become available.
3. There is evidence of increased interest in the profession by professionals, many of whom have been professionally inactive.

4. Professions have noticed increased respect from other professions, especially from their allied professions.
5. Professional journals are giving increased attention to educational matters; new texts and learning materials have been developed; and commercial products firms have developed many new related educational materials.
6. Self-assessment instruments are being developed.
7. Standards for educational programs are being developed to insure quality programs through accreditation and program approval mechanisms.
8. More appropriate alternatives to relicensure by continuing education are being sought by some professions.
9. Members of a profession are forced out of 'professional isolation' by the examination of new knowledge, skills, and interaction with colleagues."

Even if there is no quantitative correlation between required education and competency, there are definite observed benefits derived from the process.

POINT IV

THE PROPOSED CONTINUING LEGAL EDUCATION REQUIREMENT IS NOT BURDENSOME AND CAN EASILY BE MET.

As shown by the Statement of the Case and Facts, the Rule (Appendix I) and Policies (Appendix II) have been refined over a two year period. The end product is a meaningful requirement which can be satisfied by all affected members of The Florida Bar. According to Proposed Rule 6-10.2, the Board of Certification, Designation and Education (BCDE) would administer the plan. This group will be successor to the existing Board of Certification, Designation and Advertising (BCDA) and has the benefit of over 10 years of experience with similar problems in the areas of Designation and Certification. The BCDA and Bar staff are familiar with processing applications, approval of courses and other necessary administrative procedures.

Rule 6-10.3(b) calls for each active member to show 30 hours of approved educational activity over a 3 year period. Of this 30 hours, 2 must be in the area of legal ethics. Subsection (c) of Rule 6-10.3 provides three exemptions from the educational requirements of the Rule. These exemptions extend to members on active military service, members experiencing undue hardship which prevents compliance, and nonresident members not delivering legal services or advice on matters or issues governed by Florida law. Even though these members are exempt from the requirement, they must report every 3 years.

Also attached for consideration are the proposed initial policies which further define the administration of the Plan.

These may be amended from time to time by the Board of Governors within the framework of the proposed Rule.

Pursuant to 6.02 of the Policies, the membership will be divided into three groups so that one-third of the total Bar membership will report in each year. Each member in a group will be assigned a month within the year to report. This division of the membership and the staggered phasing-in period will allow for orderly administration of the Rule. In this way a manageable number of lawyers will report each month. Also there will be no great "crush" of registrants at CLE courses at any given time. There is no fee involved with a timely report although 6.03(a) of the Policies sets a fee of \$25.00 if a report is filed after the applicable reporting period deadline.

Section 6.06(b) of the Policies provides for approval of audio or video cassettes. Section 6.09 of the Policies provides liberal credit will be is given for presenting lectures at approved CLE courses, serving as a workshop leader or panelist or author. This will encourage members to participate in CLE activities and further guarantee a sufficient number of course offerings.

There will be no fee required when members request course approval credit. There is, however, a course approval fee requirement for certain seminar sponsors under Sections 6.03(b) and 6.05(b) of the Policies. This fee need not be paid by state and local bar associations or sponsors offering courses

at no charge. To further minimize the direct cost to the membership of The Florida Bar, a set of audiotapes will be produced annually which will satisfy the educational hours. This set of tapes will be made available to the various county law libraries or local bar groups within Florida. These tapes will also be made available to out-of-state bar associations and may be purchased at cost by any Florida Bar member.

The existing Florida Bar CLE courses are available in a variety of subjects throughout the state. In the 1985-86 fiscal year, The Florida Bar presented 76 individual courses in 316 locations. The normal Florida Bar CLE course will be presented "live" in two locations, usually Miami and Tampa. It will be videotaped at one of those locations and then scheduled in five or six video locations such as Tallahassee, Jacksonville, Pensacola, Orlando, Palm Beach, Fort Lauderdale and Fort Myers. In addition to these regularly scheduled locations, local bar groups are extremely active in producing their own programs as well as presenting Florida Bar videotape programs. These cooperative efforts bring Florida Bar programs to another group of locations including Gainesville, Sarasota, Key West, Ocala and Lake City. There are also a growing number of law firms around the state that rent videotape programs for their members.

Thus ample opportunities exist for members to satisfy the required hours in a cost effective and convenient manner. The reporting requirements are not burdensome and should allow for orderly and efficient administration.

POINT V

THE REVIEW AND SANCTION PROVISIONS OF THE PROPOSED
RULE SATISFY DUE PROCESS REQUIREMENTS AND ENFORCEMENT
OF THE REQUIREMENT WILL NOT BE BURDENSOME

As noted earlier in this brief, compliance with the requirement of the proposed Rule can easily be accomplished. If, however, it is determined that a member is not in compliance, adequate guarantees of procedural due process exist in the provisions of Section 6-10.5 of the proposed Rule dealing with noncompliance.

A member not having sufficient credit at the time his report is due should file a plan for completing the requirement within one hundred twenty (120) days of the end of the reporting period or establish eligibility for an exemption. The Board of Certification, Designation and Education (BCDE) must notify the member within thirty (30) days if the plan for compliance is not acceptable. Within fifteen (15) days following the expiration of time called for by the plan, the member must notify the BCDE of compliance or the sanctions will apply.

If a member has failed to comply with the rules in any respect, the BCDE will notify him or her of the alleged violation. The member has a right to a hearing on the issue of noncompliance. If the hearing determines compliance, the matter ends. If noncompliance exists, a plan may be filed showing a method of compliance within one hundred twenty (120) days if there is a reasonable cause for noncompliance. If no reasonable cause for noncompliance exists, a record of the matter will be sent to the

Supreme Court of Florida for appropriate action which may include suspension. The Rules also provide for appeals of adverse decisions of the BCDE to the Board of Governors of The Florida Bar and appeal of that decision to the Supreme Court of Florida. These steps are sufficient to allow review of any alleged failure to meet the requirements.

The constitutionality of a continuing legal education requirement was recently upheld by a United States Court of Appeals. In that case, the Court said:

As the trial court noted, the basic issue presented is a novel one: whether a state supreme court may constitutionally require attorneys to meet continuing legal education requirements. Ample precedent exists supporting the authority to prescribe minimum levels of legal competency, measured by a bar examination, as a prerequisite to admission to a state bar. E.G., Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); Poats v. Givan, 651 F.2d 495, 497 (7th Cir.1981); Tyler v. Vickery, 517 F.2d 1089, 1101-02 (5th Cir.1975), cert. denied, 456 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976); Chaney v. State Bar, 386 F.2d 962, 964 (9th Cir.1967), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). A fortiori, a state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements have a "rational connection with the [attorney's] fitness or capacity to practice law." Schware, 353 U.S. at 239, quoted in Younger, 625 F.2d at 377. We cannot say that the CLE requirements in Colorado have no rational connection to a lawyer's suitability to practice law.

Verner v. State of Colorado, 716 F.2d 1352, 1353 (10th Cir. Colo., 1983)

The lower court in that case dealt extensively with the question of procedural due process and concluded:

The plaintiff has in several sections of his complaint alleged that rule 260 violates procedural due process. A reading of the rule demonstrates

that this claim is without merit. Rule 260 explicitly provides for notice and a full hearing before disciplinary action can be taken. Cf. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Those accused of noncompliance have the right to counsel, to call witnesses, to make objections and to have a complete record made of the proceedings. The hearings are conducted in accordance with the Colorado Rules of Civil Procedure. See Rule 260.6(5)--(9). The plaintiff also claims that rule 260 does not specify the sanctions to be imposed for violations, allowing the court to decide arbitrarily that suspension is a proper penalty. However, rule 260 states that "... the Supreme Court shall enter such order as it shall deem appropriate, which may include an order of summary suspension from the practice of law...."

Verner v. State of Colorado, 533 F.Supp. 1109, 1117 (Colo. 1982).

The procedures and language upheld in the above case are virtually identical to our proposed Rule and Policies.

The experience of other states indicates the incidence of noncompliance will not be substantial. The range is essentially from 1% to 2%. The number of lawyers in Minnesota who fail to comply with the requirement has held steady at 2% since 1975. The Hennepin Lawyer, March-April 1986, page 18. Information received from Georgia, Wisconsin and Colorado indicates even lower degrees of noncompliance. Georgia had eleven (11) instances of noncompliance out of 14,000 reporting for the 1984 period (.078%). Wisconsin reported eighty five (85) out of the 10,500 required in 1984 (.8%) and Colorado had fifty five (55) suspensions out of 3500 due in March 1985 (1.5%). The Colorado cycle is 3 years with one-third of the lawyers reporting each year which is the same as our proposed Rules and Policies. It must be remembered that these figures represent noncompliance after all

reasonable attempts to elicit compliance have been made.
However, they do indicate that there will not be massive
noncompliance in Florida.

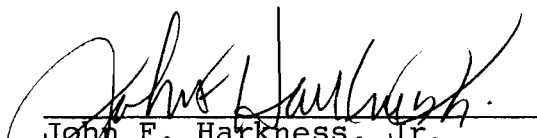
CONCLUSION

For the reasons contained in this brief, The Florida Bar Board of Governors respectfully requests that this Court adopt the proposed Continuing Legal Education Requirement.

Appendix I sets forth the Continuing Legal Education Requirement in Sections 6-10.1 through 6-10.8 which constitute an amendment to the Rules Regulating The Florida Bar which are currently pending before this Court. Appendix II is comprised of the initial Policies adopted by the Board of Governors of The Florida Bar for implementation of the Continuing Legal Education Requirement. These Policies may be revised by the Board of Governors as circumstances require.

Adoption of the Continuing Legal Education Requirement will upgrade the legal profession in Florida and better serve the public.

Respectfully submitted,



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