OIG 9-23-86

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case No. 68,708

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

BRIEF OF JOSEPH W. LITTLE, RESPONDENT

IN OPPOSITION TO PETITION

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SUMMARY OF ARGUMENT

Petitioner is asking this Court to exercise its legislative authority to impose a costly program upon the profession and the public. Respondent respectfully asserts that Petitioner bears the burden of establishing with convincing proof that both the principle and the plan of implementation are sound. Respondent respectfully asserts that Petitoner has done neither.

Respondent specifically asserts:

1. MCLE is bad in principle because it threatens the concept of professionalism.

2. Petitioner has not made the most meager cost-benefit proof to justify this Courts'imposing such a requirement, has not considered the important financial costs to the profession and the public, and has not provided for a systematic review and evaluation of the program.

3. The specific proposal is deeply flawed because it is based upon no stated educational priciples, clearly violates some accepted attributes of sound continuing professional education, permits satisfaction by the most perfunctory efforts, and is, therefore, ill designed to produce any learning.

In sum, Respondent respectfully requests this Court to deny the petition.

STATEMENT OF CASE AND FACTS

Respondent accepts Petitioner's statement and adds that Respondent is a member of The Florida Bar and would be subjected to the requirements of the proposed MCLE program, if adopted.

ARGUMENT

This introduction states a number of general objections to the proposed rule. Point-by-point specific objections to Petitioner's brief are made in succeeding sections.

Respondent does not question the power of this Court to adopt a rule of Mandatory Continuing Legal Education (hereinafter referred to as MCLE) nor does he challenge the constitutionality of MCLE in principle. Respondent does challenge the legislative wisdom of adopting MCLE in principle, asserts that Petitioner has not provided adequate support to justify such a measure in general, and challenges the merits of the specific proposal in particular.

First, Respondent opposes MCLE, particularly as it has been framed in the petition, on grounds of principle. Law is an historic learned profession[1] (the adjective "learned" distinguishes it from other occupations that have in latter years been acknowledged to be professions)[2] and admission to the profession imports a life-long commitment to continued learning. Hence, the adoption of MCLE will constitute an official acknowledgement of the failure of the historic profession and will be a burden on the image of the profession.

Notwithstanding this, Respondent would be foolish to maintain that there are no failed and laggard members of the legal profession. If the failings of those members are indeed doing damage to the public and to the image of the profession, a matter which is not proved in any sense by Petitioner's brief, Respondent asserts that more effective measures than MCLE may be

employed to correct the deficiencies. For example, institution of a disciplining program more rigorous than that now exists and institution of a program of genuine recertification through testing would be more suitable. Respondent readily agrees that the latter of these measures would require a great many members of the Bar to seek the assistance of formalized educational programs, but with the profound difference that the purposive nature of the commitment would be driven by the positive need to learn as opposed to the mere need to satisfy a paper formality.

Furthermore, posing the issue as one of recertification immediately reveals that the basic question is one of suitability for admission to the Bar. Prescribing criteria of threshold competence has traditionally been the job the Board of Bar Examiners, not this Petitioner. Respondent urges this Court not to overlap the functions of the Board of Bar Examiners and of The Florida Bar without thoughtful consideration of the proper roles of the two agencies.

Second, Petitioner has woefully failed to establish a justifiable basis for MCLE. Petitioner has requested this Court to exercise what is in effect its legislative power to enact a measure that will impose a very large financial burden upon the members of the Bar and the public of the state, and that will also impose a genuine burden upon the manner in which the members of the Bar conduct their professional lives.

Although Petitioner's brief makes no attempt to estimate the costs or the benefits of the measure, the monetary costs are sure to be high. If one conservatively estimates that the

obligation will be imposed upon at least 35,000 members in an amount of not less than $200 per capita per year, than a minimum cost of $7 million per year may be computed. (Respondent acknowledges that the cost of existing, qualifying voluntary CLE participation should be deducted from the gross cost of MCLE to compute the true monetary cost.) Most of these costs would, of course, be passed on to the public.

Because of the extremely high cost of regulation, a modern legislature will often require a prior estimate of the net benefits of proposed new regulatory programs. Petitioner has not provided such an estimate. Furthermore, a modern legislature, particulary the Florida legislature, also will often mandate a "sunset" review of a new regulatory measure to assure that the program proves that it deserves to remain in place. Petitioner has also failed to provide for programmatic review at the end of a specified period of time. Respondent respectfully urges this Court not to adopt any measure of this sort before Petitioner has provided both a convincing cost-benefit projection and a definite "sunset" evaluation component.

On the issue of benefits, Respondent notes that Petitioner's brief provides no documented evidence that MCLE has produced beneficial effects in other jurisdictions. Neither has Petitioner documented that any public benefit has been produced by the Forida Designation Plan (Article XX, by-laws under the Integration Rule) or of the Florida Certification Plan (Article XIX, by-laws under the Integration Rule.) Both of these programs have been in operation for several years, both of them have

mandatory CLE components, and both of them could have been evaluated to determine whether the benefits, if any, that have accrued to the public and the profession have been worth the costs. This Court should not impose similar obligations upon all the members of the Bar, including those who have eschewed designation and certification for whatever reason, without proper cost-benefit evaluation of the MCLE components of existing programs.

Moreover, Respondent respectfully maintains that various benefits attributed to MCLE by Petitioner's brief are mere unsupported assertions. This point is elaborated in Point III below. Finally, even if Petitioner had supplied adequate support for the principle of MCLE, the specific proposal presented by Petitioner is nonetheless deeply flawed and should not be approved by this Court. As discussed in Point V below, the benefits, if any exist, from MCLE would seem to arise primarily from the interactive participation of peers in educational activities. An adequate program would require, as a minimum, that each participant be engaged in programs whose content has a direct relationship to the particular educational needs of the participant; that the participant take full part in the entire program for which credit is sought; that the program content relate to matters that are germane to the practice of law; that the program ensure that the participant is exposed to group interaction as a part of the educational method; and, that the certificate of participation affirm, under the pain of penalty for misrepresentation, that the participant did take full part in

each program for which credit is sought.

In this regard, Respondent calls the Court's attention to the report of various medical continuing education (CME) programs contained in Appendix D. That report concludes that most CME programs are educationally unsound because they fail to set a conceptual goal for what is to be learned and fail to include an evaluation component. (Appendix D-5.) The report also states that the CME programs that proved to be effective all contained these five elements:

> 1.) An audience made up of people who wanted to learn something.
>
> 2.) Participants who had a perceived learning need.
>
> 3.) Participants who had a clear idea of the learning goals of the programs.
>
> 4.) Employment of approprate learning methods that included an emphasis on participation.
>
> 5.) Inclusion of some method to assess what the participants had achieved.

(Appendix D-8.)

As demonstrated below, Petitioner's proposal adheres to none of these elements nor to any other stated set of educational principles.

POINT I

PETITIONER'S BRIEF DOES NOT SUPPORT THE CONTENTION THAT 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.

Petitioner's brief in effect proceeds on the basis of the following syllogism:

MAJOR PREMISE

Modern lawyers must work constantly to keep abreast of new developments in law in order to practice competently.

MINOR PREMISE

Only about one-half of the in-state members of The Florida Bar currently attend voluntary Florida Bar CLE courses.

(CONCLUSION)

Therefore, about one-half of the members of The Florida Bar are not keeping abreast of new developments in the law and, consequently, are inadequately serving the public.

Respondent respectfully asserts that the conclusions that half the lawyers are not keeping up and that the public is being inadequately served cannot be logically inferred from the application of the minor premise to the major premise. The syllogism fails as a matter of pure logic. Participation in CLE programs is hardly the only manner in which members of the Florida Bar can remain abreast of the developments in the law. As this Court knows, lawyers have traditionally informed

themselves of developments in the law through continued study in their offices and elsewhere. Petitioner has not shown this to be outdated or deficient. Although many members of the Bar may find it beneficial to engage in formal CLE programs, this Court should not mandate a particular form of continuing education in the absence of substantial support for the proposition that other traditional means of education are inadequate.

Furthermore, and most important, Petitioners have supplied absolutely no evidence that substantial numbers of The Florida Bar are performing inadequately as a consequence of not having participated in voluntary CLE programs, and have suppled no evidence that substantial numbers are inadequately serving the public. Baneful consequences such as these should not be accepted without substantial documented support. In sum, therefore, not only does Petitioner's syllogism fail on logical grounds but the conclusion has also not been supported by empirical data.

Far from establishing that MCLE improves lawyer competency, the authorities cited in Petitioner's brief state exactly the contrary: namely, that it has not been proven by objective or scientific means that MCLE has a "positive effect on lawyer competence." Despite these admissions, the authorities cited by Petitioner blithely proceed to assert that MCLE does have positive benefits. Respondent notes that the authorities in question, namely, the Colorado Board of Continuing Legal and Judicial Education, and the American Bar Association's Task Force on Professional Competence, may have an institutional inclination

to hope that MCLE is beneficial. Petitioner's brief enthusiastically enlarges this hope, saying (p.7) "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." This is plainly an unsupported ipse dixit. The mere good wishes and hopeful expectations expressed in Petitioner's brief do not form a sound basis upon which this Court should adopt such a costly measure and impose such a high price upon members of the Bar who do not choose to participate in voluntary CLE programs and upon their clients.

POINT II

PETITIONER IS CORRECT THAT A NUMBER OF STATES HAVE IMPOSED MCLE.

Respondent accepts Petitioner's assertion that twenty states have adopted MCLE programs. In addition, Respondent notes that the Supreme Court of Arkansas has approved "the concept of mandatory continuing legal education for all members of the Bar." In re Arkansas Bar Association Rules and Regulations for Mandatory Continuing Legal Education, ___S.W.___2d (Ark. 1986, No. 85-302.) Nevertheless, the mere fact that other Bars are engaging in this activity is, of itself, no reason to impose such a requirement upon the lawyers of Florida. Faddish "me tooism" is not an adequate foundation for building such a costly requirement. Respondent notes that Petitioner's brief includes

no reference to any systematic attempt to evaluate the benefits of these programs despite the fact that some of them have been in effect for several years.

POINT III

RESPONDENT AGREES THAT A NUMBER OF OTHER PROFESSIONS WITHIN THE STATE OF FLORIDA AND IN OTHER JURISDICTIONS HAVE ACKNOWLEDGED A PLACE FOR CONTINUING EDUCATION, BUT DENIES THAT THIS PROVES THE NEED OF MCLE.

The mere fact that other professions in this state and elsewhere have adopted mandatory CE requirements is no proof of the need or of the efficacy of MCLE in Florida. Indeed, Petitioner has presented no empirical evidence that mandatory CE is beneficial in other professions. Although Petitioner quotes nine "positive results of professional education", from a work by Dr. Louis Phillips reported in Power Conflict in Continuing Professional Education (M. Stern ed. 1980), (p. 10-11) (hereinafter referred to as Stern.), this Court should note that none of the nine benefits asserts that the public is in fact benefited by mandatory continuing education. The Court should also be aware of the preliminary statement, omitted by Petitioner, made by Dr. Phillips before he listed the nine items that he referred to as "certain generalizations about the benefits of mandated continuing education across the professions." He said:

> Few studies have concluded that mandated continuing education has had a positive effect on the competence of professionals, and in particular on those professionals who are seemingly incompetent. Evidence is lacking also on why certain programs are more meaningful with longer lasting results than others, and why some participants benefit more from certain programs than others. Stern,

Id., at 215. (Underlined supplied.)

Seeking to obtain the latest available published information relating to the benefits of mandatory continuing education, Respondent telephoned Dr. Phillips in his office at the Georgia Center for Continuing Education, University of Georgia, of which he is Associate Director for Managerial Services. Dr. Phillips supplied a packet of materials, portions of which are reproduced in the appendixes. Dr. Phillips opined that the Upjohn report entitled "Educational Evaluation Studies of CME Programs" (Appendix B) was, in general, favorable to the concept of continuing professional education, and also supplied excerpts from a report entitled "Return on Investment in Continuing Education of Engineers" (Appendix C), which concluded that the evaluation of a continuing engineering education pilot program demonstrated positive results.

Although these reports are tentative at best, they do suggest that continuing professional education can be a positive educational experience <u>if the proper elements are present in the programs</u>. Respondent emphasizes, however, that neither report purports to do a cost-benefit evaluation of the added value of <u>mandatory</u> continuing education. As far as can be told from the reports, all participants were volunteers. Moreover, the Upjohn report merely compiles various reports about specific continuing medical education programs, some of which were not educational programs, as such, but were mere attitudinal surveys. Hence, while these reports may be somewhat favorable to the idea of <u>voluntary</u> professional education, they say nothing about the

added value of a mandate, which is the issue before this Court. Indeed, Respondent, who is a professional educator, readily agrees that well developed education programs attended by interested students will impart knowledge. That, however, is a far cry from proving that the added monetary and human costs of mandating professional education will produce equal added benefit to the profession and the public.

Petitioner's brief concluded Point III with the statement: "Even if there is no quantitative correlation between required education and competency, there are definite observed benefits derived from the process." (pp. 10-11a) Respondent respectfully asserts that the asserted "definite" benefits are much too vague and tenuous to support the rule that Petitioner has proposed.

POINT IV

RESPONDENT AGREES THAT THE PROPOSED CONTINUING LEGAL EDUCATION REQUIREMENT CAN BE EASILY MET, BUT ASSERTS THAT TO BE A FUNDAMENTAL FLAW IN THE PROGRAM.

The stark deficiency of the proposed program is evidenced by the fact that Petitioner advances the assertion that it can be "easily met" as a favorable attribute.

In his telephone conversation with Respondent, Dr. Phillips opined that MCLE would have virtually no effect on 65 to 75% of the profession and that the benefits, if any, would accrue to what he refers to as "laggards" that make up 25 to 35% of most professions. (He made that statement in writing as point 1 in a letter to the Associate Dean Kirk of the Department of Pharmacy, The University of Texas. See A-1.) Dr. Phillips further stated

that the main benefit to the so-called laggards is in renewing their interest in the profession primarily through interaction with their peers on a structured basis. (Id. point 2.) Although he didn't say so, I assume he was referring to a rekindling of the socialization into the profession that goes on in law schools. Dr. Phillips had earlier reported his view on this point in the article cited in Petitoner's brief, where he said:

> Professionals are finding the socialization process - the interaction with colleagues and faculty in sharing and discussing common concerns - an added benefit of participating in educational programs. Many participants indicate they learn just as much or more outside of a program in social functions or bull sessions. Such benefits are rarely measured for their effectiveness. Stern, at 215.

As noted above, Dr. Phillips strengthened his conclusions on this point in the letter of June 13, 1986 to Dean Kirk. (See Appendix A-1.) He now apparently believes that what he once thought to be "an added benefit" is the primary source of the benefit of CE programs.

In an apparent effort to make the proposed program palatable to the many members of the Bar who oppose MCLE, Petitioner has included methods of satisfying the MCLE requirements that undercut the one area in which potential benefit might accrue; namely, the resocialization of laggards into the profession. Respondent notes specifically that proposed Rule 6.06, Credit Request, permits credit for (a) courses that have not been previously approved, (b) audio and video cassette programs that have not been previously been approved, and (c) audio and video tapes of approved programs. All of these invite laggards (and others) to obtain MCLE credit without receiving any of the

resocialization benefits that are apparently the primary source of any value to be obtained.

All of these accreditation methods would also permit laggards and anyone else to satisfy the requirements with perfunctory efforts that have no educational value. In this regard, proposed rule §6.02(d), Reporting Compliance, is not adequate to assure that laggards actually involve themselves in the MCLE programs. Any a requirement that is deemed by the regulated population to be a perfunctory "easily satisfied" formality will be given perfunctory attention by many, perhaps most, of them. Respondent knows as a matter of personal observation of current programs that some members of the Bar "sign in" for various CLE programs and then do not attend the presentations. The opportunity for satisfying the standards without useful participation will be greatly increased by the video and audio-modes proposed by Petitioner.

If MCLE is to be, the plan should include a rigorously enforced requirement that each participant certify actual participation throughout the entire substantive program (meaning physical presence, at a minimum, with enough leeway to make a trip to the restroom) and should also include a specific sanction for false reporting. Indeed, if satisfying MCLE is to be a condition of continual membership in the Bar, as Petitioner proposes, then the Court should also require a recertification of the oath of office in reporting compliance. The recertification oath might be:

> I hereby renew my oath of admission and specifically affirm that I have not herein and will not otherwise mislead the Court by any artifice or false statement of fact.

(See Oath of Admission, Fla. Rules of Ct., 86 Pamph., at 730.)

Respondent also notes that proposed Rule 6.08 permits approval of courses for non-lawyers and courses on non-law subjects. Without suggesting that these courses should never be awarded MCLE credit, Respondent does observe that many would offer no opportunity for resocialization in the profession and, therefore, should not be eligible for credit.

In sum, Respondent respectfully asserts that in its zeal to institute a program that it hopes will garner public approbation, Petitioner has designed a specific proposal that is unlikely to produce substantive benefits and may in effect be nothing but a sham.

POINT V

RESPONDENT DOES NOT DENY THAT THE REVIEW AND SANCTION PROVISIONS OF THE PROPOSED RULES SATISFY DUE PROCESS REQUIREMENTS, BUT DOES DENY THAT ENFORCEMENT OF THE REQUIREMENT WILL NOT BE BURDENSOME.

Respondent does not challenge the constitutionality of the proposed requirements or the fact that they will "not be burdensome", to people who choose to give short-shrift to the program. As noted above, the requirements will permit laggards to satisfy them with little cost and without gaining any of the intended benefits. Respondent does not agree, however, that the program will "not be burdensome" in its effect upon the members

of the profession at large and upon the public. As noted above, the program will cost many millions of dollars each year and, as proposed, is unlikely to produce any measurable benefits to the public.

The least important point in this brief is to observe that the program will have directly measureable costs to Respondent and is unlikely to benefit him personally. Respondent, as a university law teacher, will gain 50% of his credits by virtue of performing his usual employment tasks (Proposed Rule 6.08 (f) (2)). The other 50% will be obtained by other means that will necessarily require a commitment of time, and perhaps money, that Respondent would otherwise devote to his personal educational goals. Earning practically no income from the practice of law and not being required to be a member of the Bar to teach, the monetary costs, whatever they are, will be a net loss.

Although, the personal effect upon this Respondent is properly unimportant to this Court, the educational principal is vitally important, as indicated by the report contained in Appendix D. Respondent will be diverted from his self-defined learning program merely to satisfy a formal requirement that need not have any educational value to him. Respondent believes that many other members of the Bar will suffer the same fate under the proposed rule.

CONCLUSION

For the reasons set forth in this brief, respondent respectfully requests this Court to deny the petition.

Respectfully submitted,

7/15/86

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FOOTNOTES

1. Geoffrey Holmes refers to law, medicine and clergy and the "great" and "learned" professions. G. Holmes, Augustan England (1982), at 115. Larson states that architecture has also been considered a learned profession from the times of Cicero and Vitruvius. M. Larson, The Rise of Professionalism (1977), at 3.

2. No specific attribute separates a profession from a mere vocation. A recent compilation of the views of fourteen authors produced the following matrix of important dimensions: organized in a profession (13 authors); complex occupation (12); long training (9); code of ethics (8); licensed (4); person-orientated (4); altruistic service (3); self-employed (2); high-income (2); and, high prestige (2). J. Cullen, The Structure of Professionalism (1978), p. 15, Table 1.1. The same work propounds a series of postulates and propositions about professionalism. Id., 203-206. These, too, strongly identify law as a profession. Larson states the "dimensions" of professionalism in conceptual terms: a cognitive dimension based upon a body of knowledge and techniques and training; a normative dimension based upon service orientation, ethics and self-regulation; and an evaluative dimension that implicitly compares a profession to other occupations. Larson, n. 1 supra., at x.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion on brief, with appendixes, were placed with proper postage in the United States mail for the addressees named below on 16th day of July, 1986.

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