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COMMENT: Mandatory legal education is a step in the right direction

Richard Devlin and Jocelyn Downie

For decades, and from sea to sea to sea, many Canadian lawyers have resisted and ridiculed mandatory continuing legal education (MCLE). But the winds of change are blowing from the West.

As of January 2009 all lawyers in British Columbia will be obliged to complete 12 hours of “continuing professional development” per year. While some other provinces have imposed mandatory reporting obligations for CLE, British Columbia is the first to grasp the nettle and make actual participation in CLE mandatory. There are a number of compelling reasons for concluding that this is a very good thing.

However, undoubtedly, and predictably, there will be a significant number of lawyers in British Columbia and across the country who will object to MCLE on numerous grounds:

- it is an infringement of lawyer autonomy
- it is yet another power grab by overweening and bureaucratic law societies
- it will only add to the already onerous costs experienced by lawyers
- it is redundant because real learning takes place in the real world, not the classroom
- it is futile and symbolic because 12 hours per year can facilitate very little real learning
- it is naïve, because the real determinants of lawyer conduct are material and economic, not educational.

While there may be an element of truth to each of these criticisms, most are overstated and none qualify as a knockdown objection to MCLE. In this brief comment, we focus on responding to them.

To argue that MCLE is an infringement of a lawyer’s autonomy as if that is a sufficient reason to be against MCLE is to forget that the practice of law is not an individual right but a socially conferred privilege. It is also to forget that with that privilege, come many responsibilities that could be characterized as infringements on autonomy, including the responsibility to follow the rules and requirements and respect the authority of the relevant law societies. MCLE is but one requirement among many.

As for the second objection, MCLE is not about law societies claiming more power — it's about them exercising their existing power and responsibility. Indeed, MCLE may indicate that, finally, Canadian law societies are beginning to resolve “regulatory contradiction” in a better way. Many critics in multiple jurisdictions have pointed out that while law societies have been charged with regulating the profession to protect the “public interest”, in reality because of their concurrent representative function, they have been captured by the profession and therefore have been promoting and protecting “lawyer’s interests.” MCLE may be a way of restoring the balance.

As to the costs complaint, at least two answers are possible: it's true that MCLE will increase lawyers' expenses, but this is simply part of the price for the monopoly over the practice of law enjoyed by lawyers; and such costs may, in fact, lead to economic benefits (e.g., as a result of MCLE, lawyers may find their insurance premiums reduced and what they learn may lead to efficiencies in their practice).

The fourth argument — redundancy — also misses the mark because well designed adult education initiatives build upon experiential learning and provide an opportunity to carefully and critically reflect upon these experiences. Such critical reflection is unlikely in the day to day pressure cooker of practice.

Fifth, it cannot be denied that 12 hours per year may be more symbolic than real, especially when an approved activity can include “participation in a study group of two or more people provided the group's study focuses on law related activities.” As our legal ethics students are quick to point out, this could include getting together at the Old Triangle Pub here in Halifax and talking shop... something that already happens a lot! The B.C. Law Society's clarification “[g]uidelines for study groups are still being developed” just proves that the devil is always in the details.

As to the final concern, naïveté, few would argue that MCLE can shift the determinants away from economics. The reality is indeed that the practice of law is becoming increasingly affected by intensifying economic and material pressures. However, MCLE can modestly hope to achieve improved competency to respond to these pressures.

There could, of course, be improvements to the British Columbia model. We would like to see more time for legal ethics than the paltry one hour currently designated to it. This is crucial given the historic failure of the majority of Canadian law schools to develop the skills of critical ethical analysis in their students. But, at least in British Columbia, there is an attempt to take education after law school seriously. This is unlike Ontario, where there are disturbing signs that the Law Society of Upper Canada may try to retreat from its educational responsibilities. Perhaps this is a moment when the Federation of Law Societies could show some leadership and build upon British Columbia's significant first step.

Let's give some credit where credit is due. Two cheers for the Law Society of British Columbia!

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