

NEBRASKA MCLE RULES LEAVE SOME LAWYERS BEHIND

By John Wiltse*

On November 26, 2008, the Nebraska Supreme Court adopted rules¹ requiring most active² members of the Nebraska State Bar Association to continue their legal education throughout their careers. The goal of the rules is to enhance attorney competence so that they may better serve their clients.³ Attorney compliance with the continuing legal education (CLE) requirements becomes operative on January 1, 2010.⁴

Beginning October 1, 2009, attendance at any accredited and approved CLE program may apply toward CLE requirements for the first reporting period. To receive credit, the attorney must first apply to and receive approval from the Nebraska Director of Judicial Branch Education (Director).⁵ Attorneys admitted to engage in the active practice of law in Nebraska

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¹ See NEB. CT. R. §§ 3-401.1 to -402.3. The Nebraska State Bar Association website is the most comprehensive source of information about Nebraska MCLE requirements and programs. See Nebraska State Bar Association, <http://www.nebar.com/displaycommon.cfm?an=6> (last visited September 8, 2009). Forty-six U.S. jurisdictions require lawyers “to take mandatory or minimum continuing legal education (MCLE) courses in order to practice law within that particular jurisdiction.” See ABA Summary of MCLE Jurisdiction Requirements, <http://www.abanet.org/cle/mclemap.html> (last visited August 29, 2009). Nebraska’s MCLE rule resembles the American Bar Association (ABA) Model Rule for Continuing Legal Education (1986) in many respects, but is not identical. See ABA Model Rule for Continuing Legal Education with Comments, <http://www.abanet.org/cle/ammodel.html> (last visited Nov. 5, 2009).

² NEB. CT. R. § 3-803(B)(1) defines “[a]ctive members” of the Nebraska State Bar Association (NSBA) as “[a]ll members who are licensed to engage in the active practice of law in the State of Nebraska, who do not qualify for and apply for Inactive membership status, and who are not Law Student members” Law Student members are not defined in NEB. CT. R. § 3-401.2 (CLE definitions) or § 3-803 (NSBA Membership class definitions). Five exemptions to the attorney CLE requirements are found at NEB. CT. R. § 3-401.5.

³ NEB. CT. R. § 3-401.1. “It is no accident that the first [ABA] Model Rule [of Professional Responsibility] requires competence, for the drafters of the Model Rules believed that the first rule of legal ethics is competence.” RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.1-1 (2009-10 ed.).

⁴ NEB. CT. R. § 3-401.1.

⁵ *Id.* Members of the Nebraska judiciary and judicial branch employees are required to meet minimum requirements for continuing their education under rules that took effect on July 1, 2004. See NEB. CT. R. §§ 1-501, -510. The purpose of these rules, like that of the CLE rules that apply to lawyers, is to promote competence. The

are required to complete a minimum of ten hours of approved CLE in each annual reporting period.⁶

An attorney completing more than ten CLE credit hours during the annual reporting period may receive credit in the next succeeding annual reporting period for the CLE credit hours earned in excess of ten hours, provided that the excess CLE credit hours carried over into the next succeeding annual reporting period may not exceed five hours.⁷

Attorneys may receive credit for a number of different activities.⁸ Such activities include completion of computer-based legal education (subject to a five hour annual limit),⁹ “in house”

Director of Judicial Branch Education administers the program of mandatory judicial branch education established by NEB. CT. R. §§ 1-501 to -512.

⁶ NEB. CT. R. § 3-401.4(A). “Of the ten (10) hours, at least two (2) hours shall be in the area of professional responsibility.” “Professional responsibility” is defined in NEB. CT. R. § 3-401.2(J) to include instruction in “legal ethics; professionalism; diversity in the legal profession; malpractice prevention; recognizing and addressing substance abuse and mental health issues in the legal profession; Nebraska Supreme Court Rules Relating to Discipline of Attorneys; ethical standards as they relate directly to law firm management; and duties of attorneys to the judicial system, public, clients and other attorneys.”

How does the NE MCLE annual requirement compare to other states? Our neighbors in South Dakota do not have required CLE. See Digilearn Online Continuing Legal Education, <http://www.digilearnonline.com/default.asp> (last viewed September 6, 2009), and National Institute of Trial Advocacy, <http://www.nita.org/> (last viewed Sept. 6, 2009) for lists of requirements in United States jurisdictions. While some state bars do not have any MCLE requirements, some states require as many as fifteen hours. California requires 8.33 hours every year over three years. See STATE BAR OF CAL. R. 2.72. Colorado requires fifteen hours a year. See COLO. R.C.P. 260.6 and 260.4(2), the latter of which regards formal classroom instruction. Kansas requires twelve hours a year under KAN. CT. R. 802. Iowa requires fifteen hours a year under IOWA CT. R. 41.3(1). Missouri requires fifteen hours a year under MO. S. CT. R. 15.05. New York requires twelve hours for attorneys who have been admitted to practice in the New York bar for more than two years. See 22 N.Y.C.R.R. 1500.22(a). Wyoming requires fifteen hours a year under WYO. R. CLE 4. The ABA Model Rule for Continuing Legal Education calls for every active lawyer to complete fifteen hours of CLE annually. See ABA Model Rule for Continuing Legal Education with Comments, *supra* note 1, at § 2.

The “professional responsibility” requirement in these jurisdictions is not uniform in either definition or amount of hours. See STATE BAR OF CAL R. 2.72(A). Section 1 requires four hours of legal ethics, § 2 requires one hour dealing with the elimination of bias in the legal profession, and § 3 requires one hour of education to prevent, detect, and treat substance abuse or mental illness that impairs professional competence. Further, some jurisdictions even allow pro bono work to count toward MCLE requirements. See, e.g., WYO. R. CLE 4(g).

⁷ NEB. CT. R. § 3-401.4(C). Compare this rule to that of Alabama, which provides that “[a]ny bar member earning fifty (50) or more credits in a given year, excluding credits brought forward from the previous year and teaching credits earned, shall qualify for a continuing legal education award.” ALA. CLE R. 3.9.

⁸ NEB. CT. R. §§ 3-401.7(B), (C), 3-401.8. See ABA Model Rule for Continuing Legal Education with Comments, *supra* note 1, at § 2 cmt. (“The rule is designed to make it relatively easy for lawyers to meet the requirements while keeping it practical to monitor and administer.”).

⁹ NEB. CT. R. § 3-401.8(A). Many other states have no hourly limits on the use of online courses—such as the cap contained in Nebraska’s rule—to fulfill MCLE requirements. The summary at Digilearn Online CLE,

CLE programs (also subject to a five hour annual limitation),¹⁰ teaching approved CLE programs (subject to a three hour limit and specifically excluding teaching directed primarily at candidates for a law degree),¹¹ and “attendance at educational activities which are not approved in advance,” without limitation as to the number of hours.¹² There is also a provision in the rules for an extension of time or waiver due to disability, hardship, or extenuating circumstances.¹³ In addition there are exemptions for active members who are in the armed forces of the United States,¹⁴ inactive members of the bar,¹⁵ persons subject to Nebraska’s mandatory judicial branch education rules,¹⁶ suspended and disbarred attorneys (except as otherwise ordered),¹⁷ and newly admitted attorneys (who become subject to the rules on January 1 of the year following their admission to practice law in Nebraska).¹⁸ Proponents of Nebraska’s new mandatory CLE rules can point to the foregoing provisions as evidence that the goal of the rules is to promote attorney competence rather than to impose sanctions on active members.¹⁹

<http://www.digilearnonline.com/stateReqs.asp> (last visited Nov. 12, 2009), focuses on whether online courses can be used to fulfill a jurisdiction’s MCLE requirements.

¹⁰ NEB. CT. R. § 3-401.8(B).

¹¹ NEB. CT. R. § 3-401.8(C). Other states take a different approach to granting MCLE credit to active members of the bar who engage in teaching directed primarily at J.D. candidates. ALA. CLE R. 3.4 grants credit for teaching a course “in an ABA or AALS approved law school or any other law school approved by the commission. The commission will award six (6) hours of CLE credit for each hour of academic credit awarded by the law school for the course.” California exempts full-time law professors from MCLE altogether. STATE BAR OF CAL. R. 2.54(A)(2). ME BAR R. 12(a)(5)(C) exempts “[f]ull-time teachers in any law school approved by the American Bar Association.” Attorneys who teach regularly scheduled law-related courses offered for academic credit on a part-time basis can earn six CLE credit hours for every hour of academic credit awarded by the institution for the course. ME. BAR R. 12(a)(8).

¹² NEB. CT. R. § 3-401.8(D). Under this rule, the Director must still approve the credits.

¹³ NEB. CT. R. § 3-401.13.

¹⁴ NEB. CT. R. § 3-401.5(B).

¹⁵ NEB. CT. R. § 3-401.5(A).

¹⁶ NEB. CT. R. § 3-401.5(C). Some states exempt elected officials from MCLE. See STATE BAR OF CAL. R. 2.54(A)(1). WYO. R. CLE 8(c) also allows elected officials to receive an exemption but requires written request for it.

¹⁷ NEB. CT. R. § 3-401.5(D).

¹⁸ NEB. CT. R. § 3-401.5(E). This rule also provides that “[c]redit shall *not* be given for any courses attended *before* admission to the practice of law in Nebraska.” (Emphasis added).

¹⁹ Nebraska active member attorneys who fail to satisfy CLE requirements are subject to sanctions, up to suspension. See NEB. CT. R. § 3-401.11. See generally Jay M. Zitter, Annotation, *Discipline of Attorneys for Failure to Comply with Continuing Legal Education Requirements*, 96 A.L.R. 5th 23 (2002).

Comparison of Accredited Educational Standards

<i>Standard</i>	<i>Neb. MCLE</i> ²⁰	<i>ABA Law School</i> ²¹
1. Accredited by Director	Y ²²	N
2. Accredited by ABA	N	Y ²³
3. Teaches legal subject matter	Y ²⁴	Y ²⁵
4. Organized learning program	Y ²⁶	Y ²⁷
5. Significant content	Y ²⁸	Y ²⁹

²⁰ NEB. CT. R. §§ 3-401.7, -401.9 to -401.10.

²¹ See American Bar Association, 2009–2010 Standards for Approval of Law Schools (ABA Standards), <http://www.abanet.org/legaled/standards/standards.html> (last visited Sept. 7, 2009).

²² NEB. CT. R. §§ 3-401.6 to -401.7.

²³ Note that the ABA does not formally approve any program other than the first degree in law (J.D.). “ABA accreditation does not extend to any program supporting any other degree granted by the law school.” See Overview of Post J.D. Programs, <http://www.abanet.org/legaled/postjdprograms/postjd.html> (last visited Nov. 5, 2009); ABA Standards, *supra* note 21, Interpretation 308-2. The “prior acquiescence” of the Council of the ABA Section of Legal Education and Admissions to the Bar must be obtained before a law school may establish a degree program other than its J.D. degree program. Further, no additional degree program may be established unless the school’s J.D. program is fully approved and the additional degree program must not detract from the maintenance of the J.D. degree program. ABA Standards, *supra* note 21, Standard 308.

²⁴ NEB. CT. R. § 3-401.7(A)(1).

²⁵ ABA Standards, *supra* note 21, Standard 301. Under Standard 301, a law school is required to “maintain an educational program that prepares its students for . . . effective and responsible participation in the legal profession.”

²⁶ NEB. CT. R. § 3-401.7(2).

²⁷ ABA Standards, *supra* note 21, Standard 201. Under Standard 201, a law school must be organized so that it may effectively utilize its resources to provide an education to students. See also Standard 302(b) (requiring that law schools provide certain opportunities to its students).

²⁸ NEB. CT. R. § 3-401.7(3).

²⁹ ABA Standards, *supra* note 21, Interpretation 303-1 (requiring assessment of students’ performance in the role of lawyers).

6. Faculty credentials	Y ³⁰	Y ³¹
7. Competitive admission	N	Y ³²
8. Attendee materials	Y ³³	N ³⁴
9. Library requirement	N	Y ³⁵
10. Equal interactivity	Y ³⁶	Y ³⁷
11. One credit hour attendance	60 minutes ³⁸	700 minutes ³⁹
12. Writing requirement	Y ⁴⁰	Y ⁴¹
13. Testing requirement	N	Y ⁴²

³⁰ NEB. CT. R. § 3-401.7(4).

³¹ ABA Standards, *supra* note 21, Standard 401.

³² *Id.* at Standard 501.

³³ NEB. CT. R. § 3-401.7(5).

³⁴ Although it is commonplace for faculty to require students to purchase or otherwise access required reading materials for a course, the ABA Standards do not require attendee materials.

³⁵ ABA Standards, *supra* note 21, ch. 6.

³⁶ NEB. CT. R. § 3-401.7(6). This rule requires that if the course is being broadcast, those not physically attending the lecture must have substantially the same opportunity to interact with the teacher as those who are physically present.

³⁷ ABA Standards, *supra* note 21, Interpretation 301-4.

³⁸ NEB. CT. R. § 3-401.2(C).

³⁹ “Law schools on a conventional semester system typically require 700 minutes of instruction time per ‘credit,’ exclusive of time for an examination.” ABA Standards, *supra* note 21, Interpretation 304-4.

⁴⁰ NEB. CT. R. § 3-401.10(B). Under this rule, each attorney must make a report detailing completion of his or her CLE requirement.

⁴¹ See ABA Standards, *supra* note 21, Standard 302(a)(3), which requires at least two “rigorous writing experience[s]” required as part of the J.D. curriculum. Interpretation 303-1 states that “papers” may be used in assessing the performance of students.

⁴² *Id.* at Interpretation 303-1 (stating that student achievement shall be measured by “examinations of suitable length and complexity”).

Issue 1		Nebraska Lawyers Left Behind
14. MCLE credit	Y	N
15. Academic credit	N	Y
16. Degree or certificate	Y	Y

Lawyers Left Behind Anomaly

Given that the rules seem to be designed to promote attorney competence, one might think that they would encourage practicing Nebraska attorneys to voluntarily take more challenging courses. Courses offered as part of a degree are probably more rigorous than courses sanctioned for CLE credit under the new rules; they are certainly much more time-consuming. But an active member of the Nebraska bar may not receive any CLE credit for successfully completing a post-J.D. level course offered by an ABA-accredited law school in Nebraska. Administering the Nebraska MCLE rules to deny credit to active members who complete non-remedial courses for academic credit at ABA-accredited law schools does not comport with the prime objective of promoting attorney competence, nor does it seem consistent with court decisions assessing the qualifications of attorneys seeking admission to the bar with or without examination.

Setting the Bar in Nebraska

The Nebraska Supreme Court has made clear that the intent of its rules is to “weed out unqualified applicants, not to prevent qualified applicants from taking the bar.”⁴³ Applying this idea to the Nebraska’s CLE rules, it makes little sense to punish LL.M. students who are engaged in rigorous course work at the College of Law for failing to take CLE classes. If the goal is to promote competence among Nebraska’s attorneys, LL.M. students should not be faulted for choosing to do more rather than less. Amending the rules to allow LL.M. students to receive CLE credit better comports with both common sense and Nebraska case law.

The Nebraska Supreme Court has shown that it is willing to grant waivers to its bar admission rules so long as the applicant can show that they are qualified. In *In re Collins-Bazant*,⁴⁴ the court granted the application under NEB. CT. R. § 3-105(C) of a Canadian attorney to take the Nebraska bar examination after finding that she met her burden of proving that she

⁴³ *In re Doering*, 275 Neb. 1004, 1009, 751 N.W.2d 123, 127 (2008) (internal quotations omitted).

⁴⁴ 254 Neb. 614, 623, 578 N.W.2d 38, 44 (1998).

had received an education equivalent to the education available at an ABA-approved law school.⁴⁵ A finding of equivalency was also made in *In re Gluckselig*⁴⁶ for an applicant for examination under NEB. CT. R. § 3-105(C). The applicant had earned a master's degree in law and legal science from a law school in the Czech Republic and had studied at the University of Nebraska College of Law and the University of Michigan Law School, where he earned an LL.M.⁴⁷ In *In re Brown*, the court found equivalence for a Canadian lawyer and allowed his admission without examination under NEB. CT. R. § 3-105(A)(1) because he was also a member in good standing of the California bar.⁴⁸ Most recently, in *In re Budman*,⁴⁹ the court admitted a Canadian attorney who was a member of the California bar under NEB. CT. R. § 3-105(A)(1)(b) after determining that the applicant had satisfied the evidentiary burden regarding his educational qualifications. Both *Brown* and *Budman* state that qualifications for the bar must ensure fair treatment, and have a rational connection with the individual's fitness or capacity to practice law.⁵⁰ Both cases demonstrate that the court will not permit the application of its rules to arbitrarily deny qualified lawyers the ability to practice law in this state for reasons unrelated to the essential purpose of the rules.⁵¹

Based on the foregoing analysis of Nebraska case law, the application of Nebraska MCLE rules to sanction NSBA active members who have spent more time in an ABA-approved law school classroom than their colleagues who have attended ten MCLE hours unless they also complete an additional ten hours of MCLE credit is punitive. Applying Nebraska MCLE rules to deny any MCLE credit to NSBA active members who have spent 700 minutes or more in an ABA-approved law school attending a post-J.D. class during a reporting period is arbitrary, irrational, and ignores the essential purpose of the Nebraska MCLE rule, which is to promote attorney competence.

Active members of the Nebraska bar should be given at least some MCLE credit for successful completion of post-J.D. courses offered by ABA-approved law schools. A majority of

⁴⁵ This was the same attorney who had unsuccessfully sought to gain admission under the North American Free Trade Agreement in an earlier case. *In re Collins*, 252 Neb. 222, 561 N.W.2d 209 (1997).

⁴⁶ 269 Neb. 995, 697 N.W.2d 686 (2005).

⁴⁷ See also *Osakwe v. Bd. of Bar Examiners*, 858 N.E.2d 1077, 1083 (Mass. 2006) (finding that graduate of Nigerian law school who had earned an LL.M. from an ABA-accredited law school in Connecticut satisfied educational qualifications to sit for bar examination).

⁴⁸ 270 Neb. 891, 904, 708 N.W.2d 251, 261 (2006).

⁴⁹ 272 Neb. 829, 839, 724 N.W.2d 819, 827 (2006).

⁵⁰ *Id.* at 836, 724 N.W.2d at 825–26; *Brown*, 270 Neb. at 902, 708 N.W.2d at 260. See Jay M. Zitter, Annotation, *Constitutional Validity of Continuing Legal Education Requirements for Attorneys*, 97 A.L.R. 5th 457, 466 (2002), for discussion of a California case where “the court apparently ruled that the CLE program requirements were rationally related to the consumer protection goals of the legislation.”

⁵¹ *Budman*, 272 Neb. at 836, 724 N.W.2d at 825–26; *Brown*, 270 Neb. at 902, 708 N.W.2d at 260.

jurisdictions in the United States that require mandatory continuing legal education have such provisions, and this also appears to be the prevalent rule in Australia, Canada, Ireland and the United Kingdom, under their system of “continuing professional development.”⁵²

⁵² Although details vary by jurisdiction, the following jurisdictions allow CLE credit for coursework completed at accredited law schools.

United States

ALA. CLE R. 3.8; ARK. MCLE R. 4(D); STATE BAR OF CAL. R. 2.80; COLO. R.C.P. 260.4(2); GA. STATE BAR R. 8-106(B), REG. (2); IDAHO B. COMM’N R. 403(b)(3)(E); ILL. SUP. CT. R. 795(d)(2); KY. SUP. CT. R. 3.662 (1)(I); LA. SUP. CT. R. 30, CLE REG. 3.11; ME. BAR R. 12(a)(9); MINN. CLE R. 5(A)(9), 5(A)(10); MISS. CLE R. 3.13; MO. SUP. CT. R. 15.04, REG. 15.04(2); MONT. CLE R. 7(A)(2)(d); N.H. MCLE REG. 53.3(A)(4); 22 N.Y.C.R.R. 1500.22(g); N.D. CLE R. 6(a)(2); OHIO SUP. CT. B. R. X(4)(A)(5); OK. MCLE R. 7, REG. 3.5; OR. MCLE R. 5.4; PENN. CLE REG. 5(f); R.I. MCLE REG. 4.04; TENN. R. S. CT. 21, § 4.04; TEX. ST. BAR. R. art. 12, § 4(J); VA. MCLE BD. REG. 102(f); WASH. ST. CLE BD. REG. 103(e)(1); E-mail from Hope L. Gresham, MCLE Coordinator, West Virginia State Bar, to author (Sept. 28, 2009) (on file with author) (stating that West Virginia automatically approves courses offered by an ABA-accredited law school for CLE credit based upon one credit earned for each fifty minutes of actual instruction time attended).

Australia

The Australian state of New South Wales allows practitioners to satisfy the MCLE requirement through enrollment in postgraduate legal courses. *See* The Law Society of New South Wales, Mandatory Continuing Legal Education (Continuing Professional Development), <http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/mclecpd/index.htm> (last viewed Sept. 25, 2009). Rule 4.4(b) of the Queensland Bar Association Compulsory Continuing Professional Development Rules also allows for such credit. *See* Queensland Bar Association, Compulsory Continuing Professional Development, <http://www.qldbar.asn.au/images/stories/PDFs/cpdrules.pdf> (last visited Sept. 11, 2009). So does the state of Victoria. *See* Victorian Bar Continuing Professional Development Rules R. 3(viii), http://vicbar.com.au/webdata/pdf/VicBarCPDRules2008with18Feb08editsandnewattendanceform_000.pdf (last visited Sept. 11, 2009).

Canada

The Manitoba Law Society CPD Report Form states that “participation in post-LLB programs” is an activity that may be included as an acceptable type of continuing professional development. *See* Manitoba Continuing Professional Development Report Form, http://www.lawsociety.mb.ca/pubdocs/CPD_Mandatory_Report_2008.pdf (last viewed Sept. 15, 2009). The Law Society of Upper Canada, which includes Ontario, considers “participation in post-LLB degree programs” as an acceptable CLE activity. *See* Professional Development & Competence Committee, Report to Convocation, http://rc.lsuc.on.ca/pdf/minExpectationforProfDev/convjan_pdcommittee.pdf (last visited Sept. 7, 2009). The Law Society of Saskatchewan has approved a plan that will grant credit for courses completed at a law school. *See* Law Society of Saskatchewan, Mandatory Professional Development, <http://www.lawsociety.sk.ca/newsdoc/programmpdv4.pdf> (last visited Sept. 7, 2009).

Ireland

“Post-graduate legal studies” are also examples of acceptable CPD activities for Irish barristers. *See* The CPD Scheme, Bar Council of Ireland,

A rule change can be requested of the supreme court under NEB. CT. R. § 1-103 or from the Nebraska Mandatory Continuing Legal Education Commission under NEB. CT. R. § 3-402.1(B).⁵³ Who knows, the time spent in making such a proposal might qualify for MCLE professional responsibility credit!

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<http://www.lawlibrary.ie/ViewDoc.asp?fn=/documents/proeducation/intro.htm&CatID=19&m=c> (last visited Sept. 16, 2009).

United Kingdom

The United Kingdom also grants CPD credit for LL.M. courses. See The Bar Standards Board, Compliance with CPD Regulations, A General Guide to CPD (2009) <http://www.barstandardsboard.rroom.net/assets/documents/A%20General%20Guide%20to%20CPD.pdf>.

⁵³ The author submitted a proposed draft amendment to the Clerk of the Supreme Court and the Nebraska Supreme Court Continuing Legal Education Commission on October 1, 2009.