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## TOWARDS PROFESSIONALISM IN CONTINUING LEGAL EDUCATION - SOME QUESTIONS OF POLICY AND PRACTICE

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The purpose of this Article is to identify a range of frontier issues in Continuing Legal Education which currently confront C.L.E. professionals, including training directors, providers, policy makers and managers.

Its approach is to raise critical questions on matters which presently have no accepted answers, in order to focus attention and contribute to the development of understanding and possible solutions.

The article highlights current issues in a particular theme: 'Getting Value from C.L.E.' which aims to develop a methodology in managing a Continuing Legal Education programme to deliver the goods in a business sense.

It is based on a workshop paper prepared for a conference on legal education conducted by the Law Council of Australia in February 1991.

### INTRODUCTION

It is timely to test the need for Continuing Legal Education (C.L.E.), some 3 years after its mandatory imposition in New South Wales: without doubt, a number of amorphous assertions about its merit and worth warrant challenge.

But from any perspective, it may be more fertile to explore the issue of '**How Best to Meet the Needs of C.L.E.**' rather than the question which is implicit in the foregoing statement: 'Is there a need for C.L.E.?' This may be a worthy subject for ongoing discussion, but it is one which I believe has and can be adequately canvassed elsewhere.

In this article, I take an empiric rather than an academic approach to what in my observation are the frontier issues in C.L.E. and I focus on identifying the key questions - rather than necessarily their answers - to these issues.

C.L.E. is the final phase in our extended professional educations, which have spanned Law School, and professional induction courses either through Articles of Clerkship or the Practical Training programme. In terms of the duration of our exposure to its influence, at least, it is possibly the most important. Being the most recent addition, it is the area which we still know least about and is presently the most dynamic in terms of our ability to confront and master its challenges.

In view of the ever increasing cost of C.L.E. to our profession at large, and to each of us individually as members, it is important that we take this opportunity to re-address the fundamental questions:

- What is C.L.E. supposed to do?
- Is it working?
- Is it worthwhile?
- Is it adequate?

## 1. WHAT IS C.L.E. SUPPOSED TO DO?

### Identifying the Purpose of C.L.E.

C.L.E. is supposed to meet our ongoing educational needs as lawyers. But, is it really that simple? What are these needs, and how should they best be met?

#### 1.1 Education or Training?

The term C.L.E. is in fact a misnomer, because C.L.E. is really concerned with training and not education.

Education happens at university when we study legal philosophy and European literature and we learn to think and develop as people. Lawyers are arguably already over-educated when they enter the profession to the point where they are functionally ineffective.

C.L.E., on the other hand, aims to apply our education functionally and to consolidate the foundations of induction training either in Practical Training Courses or through Articles: C.L.E. is about training us to work better, so that we can - hopefully - earn prosperous livings providing valuable legal services.

This confusion between education and training is a fundamental one which unfortunately blurs the usefulness of much of the discussion on C.L.E.

#### 1.2 C.L.E. and the Application of Principles of Adult Learning

At the time when the young lawyer infiltrates the sphere of C.L.E., the training process changes dramatically owing to one important reason: it is no longer preparatory. From this point, the process becomes 'on the job'. This form of adult learning has been closely documented in other disciplines and can usefully be distinguished from the educational stages which have preceded it, principally, by its experiential character. As this base of experience is increased, so the demand for relevance and functionality increases. The training process loses the abstract qualities of the education phase and becomes work-centred and needs-driven.

But while these features may apply in C.L.E. for lawyers, it is important that we recognise the further distinctions of **ongoing professional education** from adult-learning, per se. Lawyers, like doctors, have survived an extraordinary level of education before becoming professionally inducted. We enjoy above-average general education and - hopefully - intelligence. We have been forced during university to become effective in self-directed learning. We must possess high levels of motivation, in order to have survived the process so far. And we are doubtless impatient to catch-up with non-lawyer peers who have been earning livings in the meantime. It can therefore be observed that the candidates for **continuing professional education** are peculiar, and that the C.L.E. process must address these distinctions in order to function effectively.

### What is the Role of C.L.E.

The answer generally given to this question is that C.L.E. should develop professional competence. This is clearly right, but it is not very precise. How do you measure professional competence?

If we accept that C.L.E. is the pursuit of professional competence, then it is important that we understand 'competence' as connoting an appropriate standard: - we may prefer the notion of pursuing professional excellence as being one which avoids any unwarranted suggestion of mediocrity.

The role of C.L.E. is determined by undertaking a **Training Needs Analysis**, or **Needs Assessment** for legal practitioners. This assessment identifies training needs, in the context of an overall professional or organisational business strategy. Training plays an important and integrated role in strategic planning, but it may not be dominant, and it is easy to confuse training needs with recruitment, compensation or even public relations needs for which training may not offer any effective response.

Training Needs Analysis is the process by which we measure our existing level of performance against an ideal standard of performance, in order to identify the gap which training may traverse. Not surprisingly, this is sometimes called 'Gap Analysis'. In its more sophisticated forms, this process can involve a range of quite complex research techniques including nominal group workshops, critical incidence interviewing, search conferencing and utility analysis. In essence, however, its purpose is to identify clear goals for any training response.

It is critical that the needs assessment **precisely specify training objectives**, against which attainment can subsequently be measured.

The role of training is to increase organisational effectiveness, and to contribute to the attainment of strategic goals. As a function of management, its purpose should be seen to enhance performance or, in industrial terms, 'productivity'. Training should offer demonstrable benefits in efficiency, effectiveness and ultimately profitability.

Training can be implemented pro-actively or re-actively. Today, we see the more progressive law firms implement training programmes designed to enhance organisational and individual strengths, to build on already acceptable levels of performance, and to pre-empt problems. But, perhaps more commonly, we observe training applied reactively in terms of simply attaining an induction standard, and seeking to correct any identified immediate knowledge deficit.

## 2. IS IT WORKING?

### Measuring the Effectiveness of C.L.E.

How do we know whether we are getting what we want? How do we measure whether C.L.E. is working, and attaining its goals?

The answers to these questions can be found through our introducing a set of **performance indicators** against which we can measure C.L.E. outcomes.

As in any system of competency-based training, we must firstly define **objective, functional benchmarks of professional performance** towards which we can direct goals in professional competence. This involves identification of measurable outcomes in observable behaviour. We can measure both the incidence

and the quality of behaviour, much more easily than we can measure knowledge or attitudes. And, we must prescribe not only what behaviour we must be capable of performing, but also the conditions under which we must be able to operate, and the criteria or standard to which we must adhere.

These performance indicators can be *hard*, which measure quantitative indices such as efficiency through attainment of certain levels of productivity (e.g. number of chargeable hours written, or files closed within a period), or *soft*. The soft indicators assess qualitative issues such as the standard of work as demonstrated through client-satisfaction inputs.

We must then also establish systems of **quality assurance** which can monitor and evaluate the delivery of C.L.E. servicing and measure the effectiveness of our training.

## 2.1 Evaluation

The problem we are facing is one of evaluation. Naturally, we have difficulty quantifying 'the soft stuff' and weighing 'the warm fuzzies' - we may know or be told that an activity was 'really good', but how do we objectively measure and quantify its value?

Evaluation is in essence the process of measuring results and outcomes against previously-defined objectives and then making judgments upon which decisions can be made. Evaluation can be undertaken both quantitatively, and qualitatively, and it can measure both efficiency and effectiveness. Efficiency evaluations measure the relationship between inputs and outputs and are readily quantifiable (e.g. x hours of training for y employees at \$z per hour). Effectiveness evaluations measure attainment against strategic training objectives.

In any evaluation, we must first identify its purpose. Why are we evaluating, for what, and for whom? There are two forms of evaluation:

**Accountability:** which measures the net effectiveness of C.L.E. and its attainment of its contextual objectives. This is a quantitative measurement, which can be undertaken through knowledge and information testing, behavioural observation, and monitoring numeric data such as productivity outputs, time and cost savings, and improvements in quality standards in work.

**Developmental:** which measures the efficiencies in the delivery of the training and the training outcomes. This requires a qualitative assessment of behavioural data focusing on such symptoms as absenteeism, employee satisfaction, complaints, and attitudinal changes to problem-solving, taking initiatives, etc.

Ultimately, we must be able to answer the question: Has the training worked? How have the participants improved their performance, and, how has the organisation demonstrably benefitted? In any properly structured C.L.E. programme which incorporates explicitly-defined performance goals, this should then be readily measurable.

As members of the evolving new discipline of Legal Educators, we can all benefit by exploring the range of evaluation instruments and techniques which are presently being developed. Measuring the effectiveness of training is a frontier issue vital to the management and accountability of C.L.E..

## 2.2 Managing Quality & Quality Assurance

The pursuit of quality is, of course, a motherhood quest to which we all subscribe in vociferous agreement. But, do we really attain it in C.L.E.? The difficulty facing us in C.L.E. is that just as the measurement of training benefit is intangible, so is the notion of quality ethereal.

However, this problem of managing quality can be redressed through the implementation of the explicit and specific value structure which I have discussed in setting our training goals, monitoring their attainment, and assessing the compatibility of those outcomes against the organisational performance goals (such as productivity and profitability) which have been set by the firm or profession.

While the quest for quality in C.L.E. is problematic, it is pivotal to the structure and administration of any training programme, and must determine the strategy, design, resourcing, and delivery of any C.L.E. activity.

In my observation, there is little general evidence of either our awareness of the importance of quality assurance in C.L.E. administration, or of its implementation in practice. Generally speaking, we seem to have little real idea whether it's working, or not!

## 3. IS IT WORTHWHILE?

### Measuring the Value of C.L.E.

This question involves a quantitative assessment of the value of C.L.E., and measures the benefits against costs. The costs of C.L.E. are substantial and ever increasing. The control of these costs is the responsibility of the C.L.E. administrator, whether in the law firm or the professional body: C.L.E. must be accountable, and to be accountable, it must be cost-effective.

Costing training involves matching the training outcomes with their costs. Obviously, these costs include not just direct but also indirect costs, many of which are usefully identified in the **Training Guarantee (Administration) Act 1990**.

They can include such overhead costs as hire of equipment, and apportionment of rent on the training room, etc. But, perhaps more importantly, replacement and opportunity costs should be considered. And, ultimately, we should undertake a risk assessment and apportion a value to the costs of not training (for example by failing to attract good candidates to the firm because they see better training prospects elsewhere).

### 3.1 What are the Costs of C.L.E. and M.C.L.E.?

Let us take the state of NSW which has prescribed a minimum standard of ten C.L.E. hours each year, and assume each hour can most cheaply be purchased

using College of Law services at, say \$90 per 3 hour segment, or about \$30 per delegate-C.L.E.-hour. On this basis, it will cost each practitioner in NSW about \$300 minimum per year. It may well cost more: for BLEC clients seeking perhaps more specialised and advance-level services, it will cost \$475 per full-day workshop of 6.5 instructional hours, at \$73 per hour; a notional minimum of \$730 each year. Assuming there are about 8,000 practising lawyers in NSW, and that 70% use College of Law services and the balance BLEC, then this accounts for a minimum annual expenditure of about \$3.5 million in NSW, and arguably about \$10 million throughout Australia, in direct service costs. If we then assume a direct:indirect cost relationship conservatively at 1:1, then we find ourselves embracing a national C.L.E. training industry worth a minimum of \$20 million annually.

### 3.2 Resource Allocation

This is of course a vital ingredient in measuring the worth of C.L.E. As professional trainers and educators it is our job to ensure effective training delivery - that you do get what you pay for! But it is the job of those responsible for managing C.L.E. - whether the C.L.E. Committees of the various professional bodies, or the managing partners of firms - to determine the quantum and adequacy of the training budget itself. In this regard, I offer two observations:

The first is that in the main, the training budgets of most firms can only be described as being token and, more frequently, non-existent.

And secondly, it is incumbent on the trainer to redress this and to negotiate an appropriate budget. In other words, the onus must stay on the person seeking expenditure to convince management of the need for and value in that expenditure. This is a fundament of ordinary management budgetting. *If we fail to secure an appropriate budget for training, it is because we have failed to demonstrate good value in training, and until we can show this, we will be stuck with token measures in C.L.E.*

## 4. IS C.L.E. ADEQUATE?

### Setting New Directions for C.L.E.

We most readily associate C.L.E. with providing how-to-do courses at the inductive level, or in providing updates in our areas of practice which arise through recent developments and reform. But, just as one might ask 'When is a Lawyer Compleat?', (theme of the conference workshop session) so we must now ask 'When is C.L.E. Compleat?'. Is this the extent of the C.L.E. service, and is it sufficient to meet our developmental needs for the remainder of our practising professional careers?

- What about learning to work efficiently?
- What about working effectively?
- What about working as a team?
- What about communicating so that clients can understand?
- What about operating profitably?
- What about skills development?

And then, when we've initially addressed these basic needs, does it stop? What about continuing to learn to do these things better?

Perhaps a more challenging question concerns the role of C.L.E. in **ongoing development**.

#### 4.1 What about the Experienced Practitioner?

A critical question rarely asked is 'What are the distinctive learning needs of senior practitioners?'. Surely they vary from those of junior lawyers at the induction and post-induction stages? Yet, any scrutiny of C.L.E. activity will show little or no discrimination in the treatment of these practitioners, with both simply being offered information-update packages.

Should we conclude, then, that our C.L.E. needs are satisfied and extinguished at about the 3-year level? Is C.L.E. really an adjunct of any induction programme that aims at establishing transactional competencies for inductees, and a range of update courses to assist practitioners in their management of change, but assumes no ongoing role for the professional development of lawyers? If we are to base our answer on observation of present activity, then it must be no. However, I suggest that this defies reason, and tells us more about our present incapacity to design and implement a comprehensive C.L.E. strategy, than it does in defining the extent of the role of C.L.E.

A second question seldom asked is whether C.L.E. could validly play a role in managing our own human resource investment - that is, in nurturing and consolidating the very considerable investment in senior partners and fee-earners which every law firm has. As we all know, it takes years of very hard work to firstly attain professional competence and then prominence. While I am not qualified in Human Resource Accounting, it is clear that we are all extremely expensive investments. Is this to be squandered when we confront midlife crisis at the peak of our income-earning potential and choose to forgo the profession for the pleasures of crocodile-hunting in the Northern Territory or wine growing on the Tasmanian Riviera? What role should C.L.E. play in providing continually expanding horizons, and in meeting the ongoing developmental needs of the experienced lawyer?

#### 4.2 The State of C.L.E. in Our Law Firms

Some Australian law firms clearly have superlative C.L.E. programmes, which are structured, integrated and developmental. These programmes are extremely well resourced and are conducted by a number of highly-skilled professionals. But, we can number these firms probably on the fingers of both hands. They are almost invariably amongst the larger organisations in our profession, and are likely to account for no more than 25% of practitioners, at most.

There are of course a great many other firms which have dedicated but inchoate commitments to 'supporting C.L.E.' (as though, it is some kind of deprived invalid, as distinct from a pathway to their own development), but who may lack the resources to provide an informed structure and direction to their activities.



The questions which flow from this analysis are two-fold:

Firstly, should we as a profession be doing anything in response to this state of affairs, or can we let market forces in the form of the latent threat of a malpractice suit do all the regulating that may be required?

Secondly, should we administer a C.L.E. system which acknowledges these profoundly divergent dispositions in our profession and, if so, how?

#### 4.3 The Role of the Profession in Managing Training

In broad, the question is to '*intervene or not to intervene.*' The score in Australia is presently mixed: Mandatory C.L.E. (M.C.L.E.) exists in one state only. But there is a push to introduce M.C.L.E. in other states, with which I strongly disagree. In educational terms, M.C.L.E. is fundamentally misconceived precisely because it fails to address the distinctive training needs and learning characteristics of lawyers which have been discussed earlier in this paper. M.C.L.E. confuses the valid (but very separate question of the profession's public image, and self-regulation in the sensitive area of professional standards), with the attainment of sound educational goals.

There are alternative interventionist models, however, which I believe are much more effective. These include the **specialisation-model** being trialed in Victoria. While it is presently in serious risk of becoming marginalised to fringe areas of practice, it offers a sounder incentive to attain excellence.

Another alternative, and one which addresses the problem of the inveterate non-attender (who nonetheless has never been shown to be more prone to professional negligence, the traditional cue for both C.L.E. and M.C.L.E. schemes), is the financial incentive of **discounting Professional Insurance premiums** for C.L.E. attendance as is done in British Columbia and a number of other jurisdictions.

#### 4.4 Should it be Voluntary or Mandatory?

I do not propose to explore the substance of this debate further. However, I believe the submerged issue in the M.C.L.E. debate should not be who sets the standard but, rather, how can we best meet the standard (whatever that standard may ultimately be).

In this context, the focus should turn from the controversial notion of regulation, to the (arguably more vexing) question of attainment. We can then explore the management issues in C.L.E. which address **getting effective results** as educators, not policemen.

#### 4.5 Professional Standards

Standards, if set apologetically, may lack credence.

I have previously described a token element in some of our C.L.E. activities. There are other examples: of course, it is being token to impose a M.C.L.E. regime that requires only 10 hours to attain the required standard: this is minimisation.

Worse, the new **Training Guarantee** legislation has now introduced a requirement for 1-1.5% of payroll to be spent on structured training. While in general this scheme has many pleasing design features (and generally resists the legislator's temptation towards over-proscription), it is appalling that the expenditure standard is so low. Every organisation that I have contacted, which already undertakes training, has found, once it has audited its expenditure in compliance with the Act, that it is spending 4%, 5% and sometimes 10% on training, without even knowing it! Unfortunately, now they know what they've been spending some, I'm afraid, are reducing it as it appears excessive against this standard. Meantime, the 'great unwashed' who have no prior commitment to training remain largely unaffected, usually being exempt with payrolls not exceeding \$200,000.

#### **4.6 Professional Negligence**

In any discussion of the role of C.L.E., there is usually a reference to the problems of professional negligence. This is a very unsatisfactory association. While it may doubtless be true that the Compleat Lawyer will be incapable of careless mistake, it is apparent from any analysis of the data that C.L.E. may not be the appropriate antidote. The incidence of professional negligence most commonly arises in unexpected quarters, that is, amongst the respected ranks of middle-aged partners in medium-sized law firms.

The reason is usually carelessness over an obvious detail caused through overwork, oversight, mismanagement or stress - in any variety of combinations. The cause is not, usually, ignorance of the law. This is important because, excluding the beneficial impact of a limited number of courses on practice management, no amount of voluntary or compulsory C.L.E. updates will appease the problem.

#### **4.7 Who should pay for C.L.E.?**

Traditionally, C.L.E. has always been distinguished from P.T.C. in its financial modelling, and has been user-pay. This is consistent with any voluntary regime. However, one must confront the question which arises once the profession adopts an interventionist role in imposing training requirements. What responsibility, at that point, should the profession assume in facilitating and supporting its own system, and how can this be discharged or, more specifically, paid for?

#### **4.8 The Need for Data**

It is at this point that I am most conscious of the imperative for informed and well-researched data to contribute to the discussion. The prospect of proscription and the mandatory imposition of C.L.E. demands a grasp of detail which is often demonstrably lacking. This need exists in two fundamental respects:-

Firstly, to identify models of professional competence and appropriate performance indicators towards which our C.L.E. services can be directed with greatest effectiveness; and,

Secondly, to monitor and evaluate appropriate levels of competence, and thereby identify the gap which any C.L.E. response should traverse.

It will then be possible to direct the profession's training and development strategies on the basis then revealed.