Credit Where Credit Isn't Due

What it takes to flunk Minnesota's CLE standards

BY KASIA KOKOSZKA AND RICK LINSK

More than a few Minnesota lawyers have sat in a CLE lecture hall wondering, "What does *this* have to do with legal education?" Rarely if ever, though, has the state's board that regulates continuing legal education agreed with that view—and to the point of revoking credit for a previously approved course.

A recent flap not only prompted the board to take that rare step, but also raised questions about how Minnesota officials administer the porous rules that govern CLEs, especially when warring factions disagree over whether controversial content is CLE-worthy. This article looks at the current rules and whether they are built to handle hot topics such as the recent course in question, which toed the line between conservative religious pushback on LGBTQ issues and what some would consider hate speech.

CLE governance: The basics

CLEs in Minnesota are governed by the Minnesota Board of Continuing Legal Education, which derives its authority from the Minnesota Supreme Court. The board has general supervisory authority over the administration of CLEs, specifically in the areas of course and program approval. To remain in good standing, lawyers must attend and report at least 45 hours of accredited CLE courses every three years, including three hours of ethics and professional responsibility credit and two hours of elimination-of-bias credit.[1]

The board reviewed 14,238 course applications in 2017. "[C]ourses in the special categories of elimination of bias and ethics are reviewed closely to ensure compliance with Rule requirements," the board stated in its annual report.

But, one might ask, reviewed against what? The CLE rules are arguably ambiguous and leave much open to interpretation:

- According to the rules' purpose statement, the goals of CLEs include requiring lawyers to continue their legal education as practitioners, establishing minimum requirements for continuing legal education, and improving knowledge of the law and quality of legal services.
- The criteria for course approval under Rule 5 include requirements for "current, significant intellectual or practical content" and course content that "shall deal primarily with matter directly related to the practice of law."[2]
- Rule 6 addresses the requirements for special categories of credit, which include the elimination of bias. These courses must be at least 60 minutes long; the application must identify the course as an elimination-of-bias course; and the sponsor must explain how the content meets the learning goals of elimination of bias.[3]

Consequently, denials of course credit requests are rare. Only 229 course applications—about 1.6 percent—were denied or administratively closed in 2017. According to the board's director, Emily Eschweiler, the most common basis for denial is that the course material is not directly related to the practice of law, thereby violating Rule 5. The board sometimes requests additional information from the sponsor about how the course will meet the CLE requirements. The rules do not address how the board should proceed when a sponsor fails to provide requested information. But the annual report states that if additional information is requested and the sponsor fails to provide it, the application is "administratively closed."

According to Eschweiler, credit determinations are typically made within two to three weeks of application. If a course has not been approved before it is staged, sponsors are instructed to notify attendees that CLE credit approval is pending. The rules don't directly address revocation. While it's unclear whether the recent course was the first for which credit was awarded and later pulled, Eschweiler—who has been with the board since 2006—says she cannot recall another case in which the board revoked credit approval.

Elimination-of-bias courses are usually where CLE controversies erupt. In 2001, multiple affinity bars sought credit revocation for a course sponsored by the Federalist Society. In a twist, the course had been approved for elimination-of-bias credit but asserted that bias was *not* a problem in the legal profession. At the time, the Minnesota Attorney General's Office produced an informal opinion letter stating the board lacked the authority to revoke CLE credit.[4]

A CLE controversy 'moment'

The latest controversy arose last December after Teresa Collett, a professor at the University of St. Thomas School of Law, sought elimination-of-bias credit for "Understanding and Responding to the Transgender Moment," a lecture sponsored by UST's Prolife Center. Collett's application explained that the presenter would be Ryan Anderson, a research fellow at the Heritage Foundation, a conservative think tank, and author of the book *When Harry Became Sally: Responding to the Transgender Moment*. The Collett-Anderson event was in turn part of a day-long symposium at UST in St. Paul called "Man, Woman, and the Order of Creation."[5]

The course—which was held on December 11, 2017, while credit was still pending—sought elimination-of-bias credit because, according to the application materials, it would address the public debate about whether, and how, transgender individuals should be accommodated and analyze this question within the context of a broader conversation about religious liberty and the role of government. The proposal included a plan to discuss the Trump administration's modification of U.S. military policy on service by transgendered individuals and legal actions in other states centered on proper pronoun usage for transgendered individuals.

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Collett says she submitted the application for CLE credit in early December 2017. The board requested additional information on how the course met the requirements for elimination of bias, but did not receive a response. In an interview, Professor Collett stated that she received the requests for follow-up during winter break and spring break, and could not respond due to time constraints.

Even before the event, however, critics who had heard about it began expressing concerns about whether it would constitute a valid CLE. Taking the lead was the Minnesota Lavender Bar Association, which contacted the board to oppose the CLE credit. According to Hillary Taylor, an LBA board member, the group argued that the event was inappropriate for CLE credit principally based on the transphobic message of Ryan Anderson's publications and its inconsistency with the elimination of bias learning goals. To the Lavender Bar and several affinity bars that added their support to the opposition letter,[6] the lecture questioned the very legitimacy of transgender identity—presenting transgender as little more than a mistake in perception—yet its sponsors had the nerve to promote it as a CLE. According to Taylor, the CLE board responded several times, saying each time it was still in the process of reviewing the application, and continued in that mode until the credit was (as Taylor puts it) "quietly approved" on March 12, 2018 for one hour of standard (not elimination-of-bias) CLE credit. The board notified Collett of the approval.

The Lavender Bar didn't back down. Once a YouTube video of the presentation became available, the LBA argued that the course materials were not directly related to the practice of law and therefore failed to meet the CLE rules.[7] In May 2018, the CLE board received the link to the YouTube video, which it felt illustrated inconsistencies between the application material and the actual presentation, as well as a failure to meet the minimum 60-minute time requirement for one standard CLE credit. The board advised Professor Collett that the CLE credit would be evaluated at the May board meeting and requested additional information to demonstrate compliance with the CLE requirements. At its May 17, 2018 meeting, the Lavender Bar presented its opposition letter, supported by other affinity bars, and discussed its complaint. The board decided to revoke the CLE credit. *Minnesota Lawyer* reported the revocation on its front page.

In the end, both sides were left grumbling about the process. Collett says she was never notified by the board that Lavender Bar had presented a letter advocating revocation and that it would be considered at the May 17 meeting. Hillary Taylor says the board failed to notify her or the Lavender Bar of Collett's initial plans to appeal the decision. (After initially considering an appeal, Collett says, she decided against it.)

Authority to revoke?

The CLE board's decision was all the more remarkable because the CLE rules do not provide a revocation procedure. Eschweiler, the board's director, was uncertain whether this was the first time a CLE credit was revoked. Still, she distinguished the "Transgender Moment" incident from the Federalist Society CLE in 2001. In the previous incident, she stated, lawyers had detrimentally relied on the board's approval when they took the course, so revocation was not appropriate. In the recent case, in contrast, there could have been no such reliance because the application was—according to Eschweiler—only submitted on the day of the lecture and had not been approved

by the time of the lecture. (Collett maintains that the application was submitted around December 4 or 5, 2017. The board's application form does not contain a space for date of submission.)

For some, the board's action raised the question of whether the revocation was triggered by the content of Anderson's lecture—which criticized what the speaker called "transgender ideology," questioned the "truth" of gender identity, and claimed many transgender individuals later regret their decisions to transition—or by a narrower, more technical violation of the rules. Eschweiler says it's the latter. Had the application matched the material presented during the lecture, the lecture would have met the criteria for standard CLE credit, she said. But, she added, video footage suggested the lecture did not meet the 60-minute requirement for elimination-of-bias credit, and it was not directly related to the practice of law, instead focusing on philosophical and moral arguments against recognition of transgendered identities.

Collett disagrees. She maintains that the lecture met the 60-minute requirement if the ensuing question-and-answer session—not part of the YouTube video—is counted. She also argues that elimination-of-bias credit is appropriate for discussions that explore whether what contemporary society calls discrimination is in fact a "mistake in perceptions or realities." (Collett also insists the board never informed her of any opposition to the CLE credit, stating she believed the additional information requested by the board about the lecture was part of a "random audit" and not potentially a response to opposition efforts.)

The board is sensitive about the notion that it reacted based on the hot-button political nature of the program. Kevin Hoffman, chair of the CLE board, stated the role of the board is not to "censor" content, echoing the statement of Eschweiler that it did not do so in response to the Lavender Bar's complaint.

Conclusion: Are changes needed?

In the aftermath of the revocation, and given the increasingly polarized political and cultural climate, it is worth asking whether changes are needed in the CLE rules or in how the board handles complaints. Even if course content veers toward what some would consider hate speech, the only current basis for revocation is Rule 5, the principal rule the CLE Board applies to approve or deny course applications. But as the Lavender Bar has pointed out, the Minnesota Rules of Professional Conduct prohibit lawyers from "harass[ing] a person on the basis of sex [or] sexual orientation,"[8] and the American Bar Association recently amended its Model Rule of Professional Conduct 8.4(g) to add gender identity to the list of protected classes,[9] although Minnesota has not adopted that change.

But Eschweiler said the board is not considering any changes, nor does she believe any are necessary, because conflicts over credit eligibility are rare. Indeed, asked how the board has managed past reports of offensive content, bad behavior, or low-quality materials, Eschweiler said the board has directed complainants to approach the sponsor about the issues—a form of self-regulation not explicitly reflected in the CLE rules. Collett suggests that at a minimum, either the challenger or the board should have to provide notice of a challenge and its content to the proposed CLE provider before consideration by the board.

Hillary Taylor of the Lavender Bar questioned that approach. What use is the board, she wondered, if its response to complaints is to "punt it back" to the sponsor? "If the rules are so watery that we can't use these rules to deny credit to hateful events, then the rules need to be changed," Taylor said. Taylor advocates surveying how other state CLE boards have confronted these situations.

Interviews for this article revealed both sentiment to govern course content that flat-out questions the validity of certain persons' very identity, and on the other hand a view that—as Collett puts it—the board should remain an impartial arbitrator, not "a tool of political viewpoint suppression." In the end, it seems, the board may be stuck in neutral—fated to a role in reruns of the controversies over the 2001 and 2017 programs. Sponsors with chutzpah are likely to again seek elimination-of-bias credit for programs that question whether there *is* bias in the legal profession or what should be done about it. Organizations sensitive about programs questioning their members' identities are likely to keep monitoring and challenging CLE approvals. The rules will again be tested. It seems there should be a better way. But what is it? ▲

Notes

[1] See Rules of the Board of Continuing Legal Education, Appendix 1; text at *www.revisor.mn.gov/court_rules/rule/prboar-a1/*

[2] Rules of the Board of Continuing Legal Education, Rule 5, at *www.cle.mn.gov/rules/*

[3] Id, Rule 6, at *www.cle.mn.gov/rules/*

[4] The Minnesota Attorney General's office was not able to produce this opinion letter because it apparently was eliminated through a document-retention policy, and Eschweiler stated the board does not have a copy.

[5] The Program was cosponsored by the Minnesota Catholic Conference, the Saint Paul Seminary and School of Divinity, Archbishop Harry J. Flynn Catechetical Institute, and the Siena Symposium for Women, Family and Culture.

[6] *See Message to Our Members: May 2018*, Minnesota Lavender Bar Association, at *https://mnlavbar.org/about-mlba/policy-positions* (reporting that Minnesota Women Lawyers, Minnesota Asian Pacific American Bar Association, Minnesota Hispanic Bar Association, and Minnesota State Bar Association, plus the MSBA president at the time, all supported the Lavender Bar's letter of objection).

[7] The YouTube video is available on the Minnesota Catholic Conference's YouTube channel at *https://www.youtube.com/watch?v=LbGZnnSljbA&=&t=1s.*

[8] Minn. R. Prof'l Conduct 8.4(g). The comments to the rule add that what constitutes such harassment may be determined by reference to antidiscrimination statutes and case law interpreting them, but that it "ordinarily involves the active burdening of another, rather than mere passive failure to act properly." Thus one must wonder whether speaking about a protected class in derogatory terms at an event equates precisely to "harassing" people, and if not, whether a different word than "harassing" may be needed to describe an attorney's discriminatory conduct.

[9] *See, e.g.*, Peter Geraghty, *ABA adopts new anti-discrimination Rule 8.4(g)* (Sept. 2016), *https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html.*

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