

**Garden State CLE Presents:**



**Does CLE Ethics Instruction Actually Work?**

**Instructor:**

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**Lesson Plan**

## **Introduction**

Mandatory instruction in ethics and professionalism has been a required component of continuing legal education in New Jersey since 2010.

Untold resources in both time and money have been expended to make this field of instruction available to every one of the 98,000 attorneys in the New Jersey bar.

Given the fact that this program has now been in place for 15 years, the time has come to pose two important questions:

1) Since 2010, what impact, if any, has the imposition of a mandatory continuing legal education requirement in the field of ethics and professionalism in New Jersey had on the annual number of grievances and formal complaints alleging attorney professional misconduct?

2) What practices and program improvements to instruction in ethics and professionalism can be readily adopted to advance the public policy goals of reducing incidents of attorney misconduct, promoting ethical standards and improving professionalism?

### **a) Historical Review of Attorney Education and Training**

The published literature related to the history of the training of American attorneys reveals a long-forgotten world of legal education that is far removed from modern-day standards and practices. For the vast majority of this nation's history, the training of lawyers was accomplished on an informal basis by way of apprenticeships. Although law schools did exist in some jurisdictions, they functioned as a supplement to traditional apprenticeship training. This mode of attorney education was intended to provide the fledgling lawyer with practical experience by both observing and training under the tutelage of an experienced mentor. In essence, the practice of law in this era was viewed more as a trade than as a profession.

The first steps toward abolishing the apprenticeship training structure occurred in 1870 when the Harvard Law School adopted the case method of instruction. Under this novel approach, law students were required to read a wide variety of published appellate decisions and discuss the holdings with their professors. The new emphasis on case law implicated the need for theoretical reasoning skills among the students. As this technique was adopted by other universities, it slowly

elevated the status of law from that of a venerable trade to a respected profession. However, entry into the profession was influenced by social class, largely due to the fact that admission to law school was limited to those students who had earned an undergraduate degree and who could devote three years of postgraduate study to the law.

In the 21<sup>st</sup> century, the instruction in law has been transformed once again so as to accommodate a much more diverse student population and a broader vision of what the law is and what lawyers do. The modern law school curriculum now eschews the 1870 Harvard Law School case law approach and, instead, provides concentration on practical legal skills such as conducting litigation, negotiating, fact-gathering, counseling, drafting documents, and other such professional practices. Simply stated, modern legal education places the focus on law in action as opposed to merely law in theory as expressed in the published case law.

### **b) Historical Review of continuing legal education**

There is evidence to suggest that some form of rudimentary continuing legal education existed as early as the mid-1930s under the auspices of the American Bar Association (ABA) in cooperation with local bar organizations. The initial goal of these programs was to bridge the knowledge and experience gap for novice attorneys between law school and entry into the practice of law. However, a national push toward requiring some form of continuing education for attorneys occurred in the immediate aftermath of World War II when untold thousands of returning attorney war veterans had to be brought up to date on the developments in the law that had occurred during the war years. These post-war programs proved to be popular among both the veterans and the attorneys who had continued in practice during the war.

In response to this new demand for legal education, in 1947 the American Bar Association established an organization dedicated to promoting continuing legal education which included correspondence courses as well as ample encouragement extended to state and local bar associations to develop continuing legal education programs on their own. Although these local programs were strictly voluntary, their inherent value to the bench and bar eventually became apparent to state judicial authorities. As a result, in 1975, two states, Minnesota and Iowa, became the first jurisdictions to require MCLE as a condition of maintaining a license to practice law. By 1980, these two jurisdictions were joined by seven others. Currently, forty-six states have instituted MCLE requirements for attorneys. New Jersey was the penultimate state to require MCLE in 2010, followed by Connecticut in 2017.

### **c) Historical Review of Continuing Legal Education in New Jersey**

Initially, the concept of requiring continuing legal education in New Jersey was highly controversial and took years to implement. In the early stages, the Justices were concerned with resistance from the state's bench and bar, with claims that MCLE would be too time-consuming, expensive, and unnecessary. Despite these concerns, by 2007, the uniform consensus among the Justices was that continuing professional education was a critical component of any type of practice that requires a professional license. One member of the Court who publicly advocated for MCLE at the time, Associate Justice Barry Albin made this clear. According to this Justice, the quest for MCLE in New Jersey was premised upon the notion that a better educated attorney class will result in better attorneys:

Our special calling requires persistent educational reinforcement and renewal. Seminars and lectures help us to retain what we already know and to expand the frontiers of our knowledge in a rapidly changing legal world that demands ever more specialized skills to handle ever more complex practice areas.

Moreover, there was agreement among the Justices that greater education, especially in the fields of ethics and professionalism would be beneficial on many fronts and in no way detrimental.

In order to advance the goal of mandatory CLE, the Court convened a study commission headed by former Justice Peter Veniero. In its final report to the Supreme Court, the CLE study committee's justification for requiring four credits on a biennial basis in the field of ethics or professionalism was supported by vague platitudes, but with little practical advice on the specifics as to what the pedagogy and instruction in ethics and professionalism would involve. The Committee justified ethics instruction on two narrow grounds. First, as a matter of public policy, it determined that one of the primary goals of MCLE was to promote ethics and improve professionalism. However, the Committee provided no way of objectively determining over time if such instruction was accomplishing its intended purpose. The second justification was premised on the notion that every other MCLE jurisdiction requires between one and three credit hours of ethics or professionalism instruction during each reporting cycle.

To this day, neither the Rules of Court nor the associated MCLE Board's regulations contain any instruction, advice, or limitations on the criteria necessary for satisfactory pedagogy in the fields of ethics and professionalism. In large part, this came about because the Board's regulations were developed by attorneys and dedicated career bureaucrats, not educators. As a result, the emphasis in the

regulations was placed upon attendance as opposed to the acquisition of knowledge. In short, ethics instruction in New Jersey lacks the following characteristics:

- 1) No requirement for the qualification of instructors in the topic. This missing element means that there is no way of determining if the instructor is sufficiently knowledgeable in the subject of ethics or how to effectively teach it.
- 2) Without a formal, uniform best practices protocol, the instruction in the topic is left to the discretion of the local MCLE providers and the instructors they utilize. This missing element leaves open the possibility of wide fluctuations in instructional quality and pedagogy.
- 3) No guidelines exist in terms of what elements must be included in an ethics block of instruction and its associated lesson plan. By way of example, such guidelines could include mandatory references in each ethics course to published case law, the New Jersey Rules of Court, opinions from the Advisory Committee on Profession Ethics, the Rules of Professional Conduct, or the opinions of the Disciplinary Review Board. These sources form the foundation for ethical practices among New Jersey lawyers. However, no guideline requires that they be considered in MCLE ethics instruction.
- 4) There is no effort to associate ethics instruction to relevant topics, such as addressing the most frequent causes of attorney discipline in the state each year, a datum that is readily available through published materials.
- 5) Finally, no objective measurement of efficacy in the instruction of ethics or professionalism exists. Accordingly, there is no way to discern whether ethics and professionalism instruction is accomplishing its intended twin goals of promoting ethical conduct and improving professionalism.

#### **d) Research Techniques**

The research into the question of the effectiveness of CLE ethics instruction involved three tools:

- 1) A review of publicly available longitudinal data;
- 2) A massive online survey sent to random New Jersey attorneys; and
- 3) A series of interviews with practicing attorneys

The online survey utilized a Likert scale and included questions calculated to reveal the participants' opinions related to their perceived sense of efficacy, satisfaction, and usefulness of ethics instruction. By way of example, among the survey questions posed were the following:

1) Mandatory CLE instruction in ethics and professionalism has been beneficial to me.

Strongly Agree      Agree      Disagree      Strongly Disagree

2) Mandatory CLE instruction in ethics and professionalism has taught me new legal principles that I did not know about previously.

Strongly Agree      Agree      Disagree      Strongly Disagree

3) Mandatory CLE instruction in the topic of ethics and professionalism has helped me avoid being charged with ethics complaints.

Strongly Agree      Agree      Disagree      Strongly Disagree

4) The quality of mandatory CLE instruction I have received has been excellent.

Strongly Agree      Agree      Disagree      Strongly Disagree

The survey also requested that subjects provide their age, gender, and the number of years they have been admitted to the New Jersey Bar. Finally, each participant was asked to complete an open-ended question to the effect of, "Based upon your personal experience, what steps can be taken to improve MCLE ethics instruction in New Jersey?"

The software used to email the survey tracked and calculated each of the responses. It also provided a statistical analysis of the percentage totals for each survey question choices. These data were then used to reveal inferential evidence as to the general view of the efficacy of MCLE instruction among a representative sample of the attorney population.

## e) Research Findings

### 1) New Jersey Attorney Population by Age

It may well be that the pursuit of law as a career choice among college age students has been declining in recent years. In 2021, New Jersey had an attorney population that was rapidly aging, with 55% of practitioners over the age of 50. This fact may also be of significance in that, as will be seen, the majority of cases involving final discipline involve attorneys who have been practicing between 15 and 30 years.

New Jersey Attorney Population by Age

Age	Population	Percent
<25	109	0.1
25-29	2,774	2.8
30-34	8,669	8.7
35-39	12,617	12.6
40-44	11,624	11.6
45-49	9,719	9.7
50-54	11,856	11.9
55-59	11,008	11.0
60-64	9,887	9.9
65-69	7,948	8.0
70-74	6,155	6.2
75-80	4,079	4.1
>80	3,057	3.5
Total	99,952	100.00

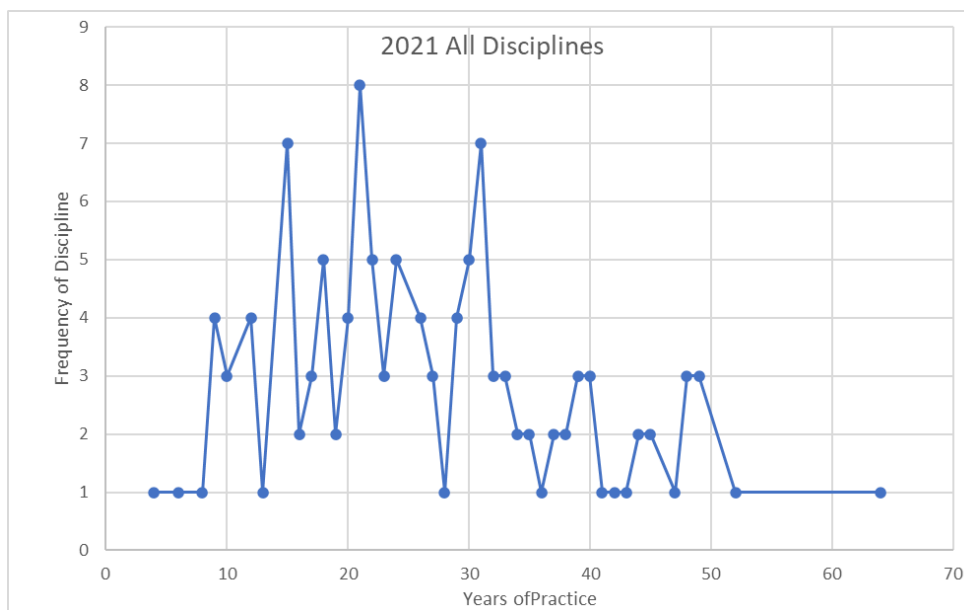
Attorney Population in New Jersey

Year	Attorney Population
2013	93,757
2014	95,807
2015	97,187
2016	98,039
2017	98,396
2018	98,657
2019	98,331
2020	97,971
2021	99,952

## 2) Who is Getting Into Trouble and Why?

One might expect that the attorneys who are most likely to become the subject of grievances and formal ethics complaints would be those who are the most inexperienced and lack the foundational knowledge as to how to conduct themselves in an ethical manner during their initial years of the practicing law. However, this is probably not the case. According to the most recently available data, it is the more seasoned attorneys who become subject to discipline. The majority of final discipline in the year 2021 was imposed by the Supreme Court upon attorneys who had been admitted to the bar for a range of 15 to 30 years. To a certain extent, this datum suggests that it is the attorney population within this experience range that may be most in need of enhanced MCLE ethics training.

Frequency of Discipline by Years Admitted to Practice





A full 64% of the reasons for the imposition of final discipline in 2021 fell into six discrete categories, including 32% related to the handling of client funds:

Category	Percent of Total Attorney Discipline for 2021
Knowing misappropriation of client funds	17
Other money offenses	15
Dishonesty, fraud, and deceit	11
Conviction for criminal offenses	8
Gross negligence or pattern of neglect	7
Unauthorized practice of law	6
All other reasons for discipline	36

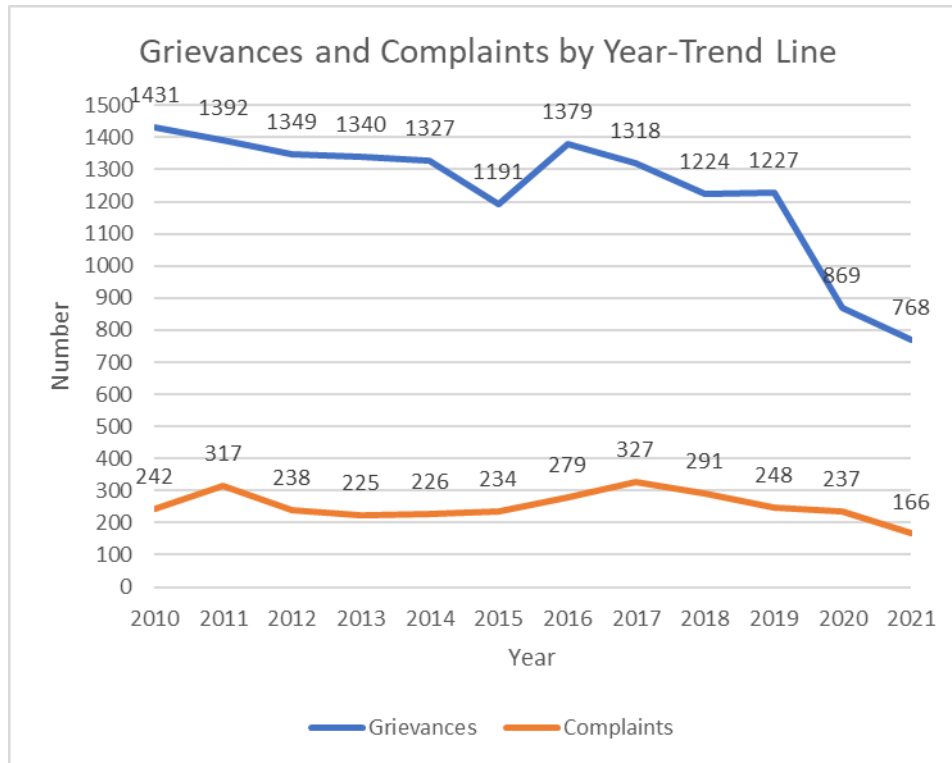
As a practical matter, the filing of grievances and formal complaints affects only a tiny portion of the attorney population in any given year.

#### Compilation of Grievances and Complaints 2010-2021

Year	Grievances	Complaints	Active Attorney Pop.	Percent
2010	1,431	242	69,905	2.05%
2011	1,392	317	70,804	1.97%
2012	1,349	238	71,578	1.88%
2013	1,340	225	73,697	1.82%
2014	1,327	226	75,108	1.77%
2015	1,191	234	75,526	1.58%
2016	1,379	279	75,137	1.84%
2017	1,318	327	75,131	1.75%
2018	1,224	291	75,207	1.63%
2019	1,227	248	74,391	1.65%
2020	869	237	73,068	1.20%
2021	768	166	74,538	1.03%

When presented graphically, it is apparent that there is no discernible trend line for grievances and formal complaints, except for the impact COVID-19 had on the judiciary in the period 2020-2021.

Grievances and Complaints by Year – Trend Line



### 3) Results of Random Online Survey

In a further effort to gauge the opinions of New Jersey practitioners on the efficacy of MCLE ethics instruction, the researcher conducted a randomized online survey of 1,000 practicing New Jersey attorneys.

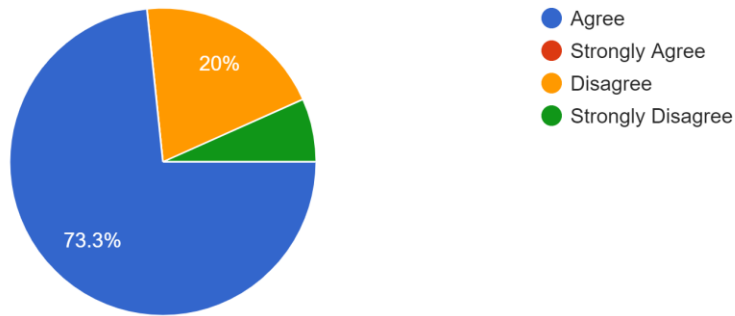
The attorneys who responded to the survey reported that they had been in practice as a member of the New Jersey Bar within a range of 22 to over 40 years. Eighty percent of respondents identified as male. None of the respondents was a certified trial attorney.

The questions posed and the cumulative responses are:.

### Responses to Online Attorney Survey

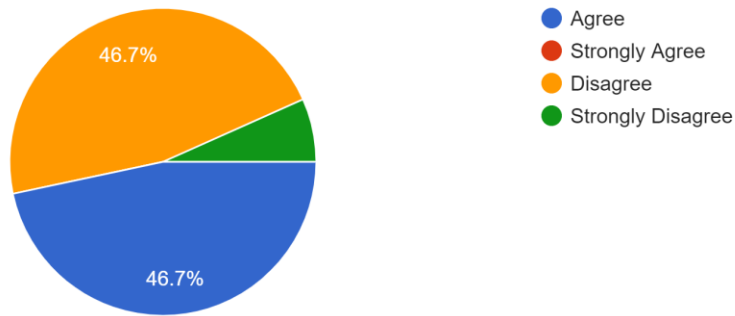
Mandatory CLE instruction in ethics and professionalism has been beneficial to me.

15 responses



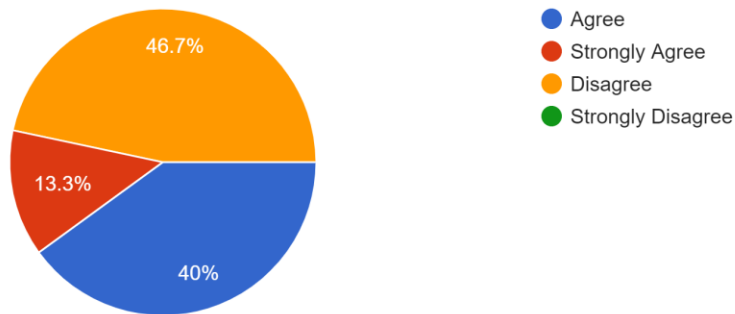
Mandatory CLE instruction in ethics and professionalism has taught me new legal principles that I did not know about previously.

15 responses



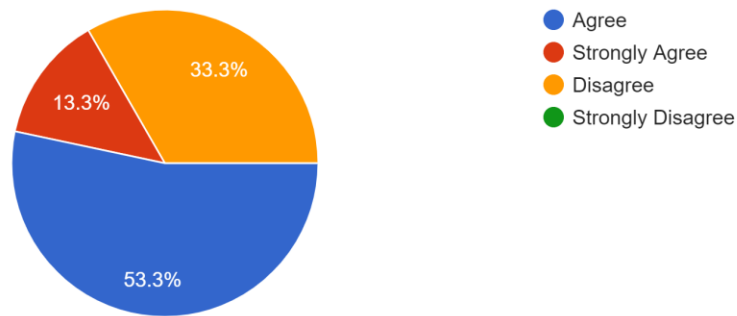
Mandatory CLE instruction in ethics and professionalism could be improved by requiring better, more experienced instructors

15 responses



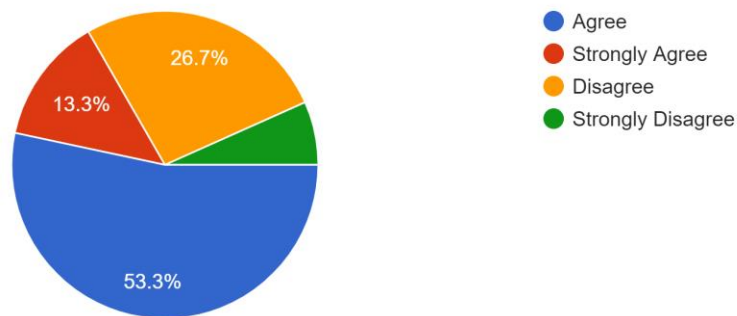
Ethics instruction would be improved by providing better and more comprehensive lesson plans.

15 responses



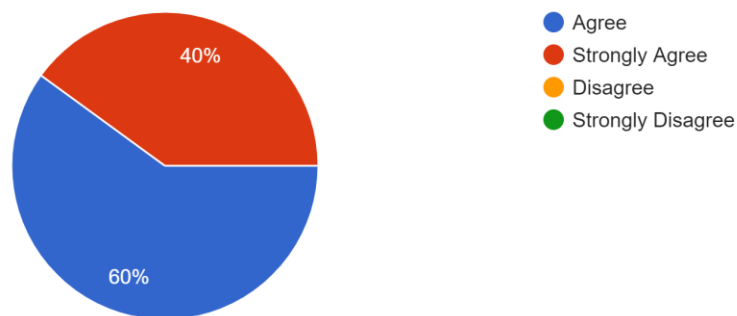
Minimum competency standards should established by the Supreme Court for ethics instructors.

15 responses



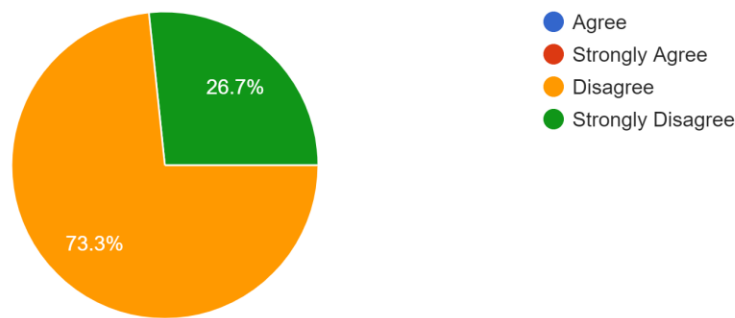
Ethics instruction would be improved through targeted instruction in specific ethics topics such as Trust Accounting, the Rules of Professional Conduct,... areas that result in frequent attorney discipline.

15 responses



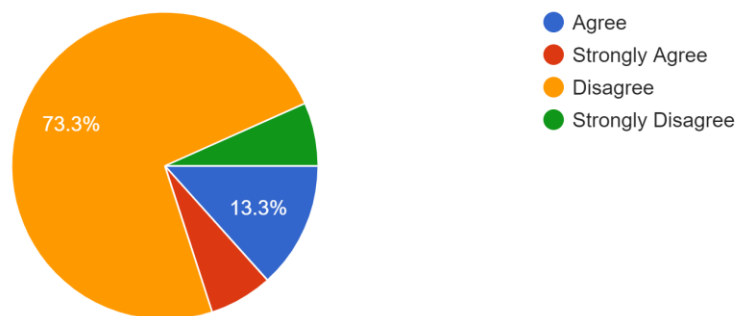
The current requirement of 5 ethics credits during each reporting cycle is too small and should be increased.

15 responses



The requirement for ethics instruction is too trivial and ineffective. It should be dropped and replaced by credits in other substantive areas of the law.

15 responses



#### 4) Results of Random Online Survey Results and Analysis

The survey respondents reported an overwhelming level of satisfaction with the current system of MCLE ethics instruction. A full 73% of respondents reported that ethics instruction had proven to be beneficial, although the responses were evenly split (46.7%) on the issue as to whether ethics instruction had taught them any new legal principles. A slight majority (53.3%) agreed that ethics instruction could be improved through the use of better and more experienced instructors and better lesson plans (66.6%). This same percentage of respondents (66.6%) also agreed that the Supreme Court should adopt minimum competency standards for ethics instructors.

There was complete unanimity among the respondents on the question as to whether there is a need for targeted ethics instruction in those areas that frequently result in ethics complaints. All respondents agreed or strongly agreed that this is a good idea. Finally, the majority of respondents felt that the current requirement of

five credits on a biennial basis was adequate. Conversely, 100% of the survey respondents voiced opposition to increasing the number of required ethics credits.

## **f) Recommendation**

In light of the foregoing and in an effort to reduce annual incidents of grievances and formal ethics complaints, the time has come to dispense with free market concepts when it comes to ethics instruction. In its place, the Supreme Court should adopt a mandatory, formalized, highly targeted curriculum, taught by accredited, well-qualified instructors that will operate in tandem with the current free market system.

### **1) Implementation of a Program of Targeted Instruction: Learning Cohorts**

The participants in the interview group expressed great satisfaction in ethics instruction when it was a component of a class in which they had a professional interest. This factor is of great importance in maintaining a high level of student interest and achieving positive educational outcomes.

The time has come for a new CLE learning and teaching paradigm for New Jersey lawyers. Under the theory, the free market system of instruction would remain in place but would be limited to topics related to substantive law. Instruction dealing with the five biennial ethics MCLE credits would no longer be subject to free market forces. Instead, the revised system would be administratively controlled and directed through a program of targeted ethics instruction directed to discrete learning cohorts. A learning cohort would be comprised of attorneys who practice in a particular field of law or have a professional interest in it.

The program of targeted ethics instruction aimed at learning cohorts would be administered by the Supreme Court Board on Continuing Legal Education (the Board). Every year, the Board would make available a variety narrowly focused topics of ethics instruction that would be associated with individual practice areas. These classes should have a strong level of appeal to the various learning cohorts that practice within these fields of law. The ethics topics would be updated on an annual basis to include the latest developments in ethics law pertinent to the practice areas. Thus, by way of example, focused ethics instruction would be made available during each biennial reporting cycle in common practice areas for each learning cohort, such as practitioners engaged in family law, criminal practice, personal injury, estate and trusts, real estate, governmental law, and other fields.

## **2) Targeted Instruction in Other Areas of Ethics Law – “Trends in Attorney Misconduct”**

The Supreme Court’s Office of Attorney Ethics (OAE) closely monitors the incidents of unethical conduct by attorneys and the general categories of misconduct that trigger final discipline by the Supreme Court. This information can be a valuable resource in addressing current disciplinary trends by way of enhanced and targeted MCLE ethics instruction. In order for this to occur, the Board should work in conjunction with the OAE in an effort to identify and provide mandatory, targeted ethics instruction in those areas that have proven during the previous year to have been the subject of the most common ethical violations among New Jersey attorneys. A single dedicated, mandatory ethics class entitled “Trends in Attorney Misconduct” would provide instruction on these topics that could prove to be relevant, timely, and informative. The knowledge imparted may also help prevent or deter new ethics violations among the attorney students.

## **3) Limitations – Narrowing the Learning Cohort**

As a matter of best practices, the Supreme Court may want to limit “Trends in Attorney Misconduct” instruction to lawyers who are in private sector and are within their first 15 years of practice. The 2021 State of the Attorney Disciplinary System Report revealed that only 36% of New Jersey’s licensed attorneys are in private practice while the remaining 64% of the population either works in the public sector or is not actively engaged in the practice of law. Historically, issues related to professional misconduct by attorneys as it affects their clients are almost exclusively related to lawyers who are in private practice.

Attorneys who work for various political subdivisions of government, in private enterprise or in academia do not face the common ethical issues encountered by those in a law practice. As a result, instruction related to handling client money, negligence, client communications and the like generally have no relevance for government lawyers. Beyond this factor, most of the final discipline imposed by the Supreme Court in 2021 involved attorneys who had been in practice between 15 and 30 years. The inference from this datum suggests that enhanced ethics instruction is most needed during an attorney’s first 15 years as a member of the bar. Accordingly, from a best practices standpoint, the targeted, mandatory instruction related to “Trends in Attorney Misconduct” should be limited to the attorney cohort that most needs it: attorneys in the private sector who are in their first 15 years of practice.

#### **4) Certification of Ethics Instructors**

Under the current free market paradigm, the MCLE providers select the people who will teach the topics that will be presented. The Board on Continuing Legal Education has not adopted any regulations, best practices or minimum requirements as qualifications for MCLE instructors. As a result, anyone can be called upon to teach an MCLE class, even non-attorneys. Arguably, while there may be some value in having non-attorneys teach certain arcane topics, instruction in ethics is too important to be left to teachers who have no expertise, experience, or professional background in the subject-matter or in the methods of andragogy.

Another issue related to quality of instruction is teaching ability. Even though an attorney may have an enormous reservoir of knowledge and experience in a particular field of law, those facts do not necessarily translate into an ability to teach. The ability to engage an audience of highly educated adult learners and impart complex knowledge is a specialized skill that not every attorney-MCLE instructor possesses.

Accordingly, to assure the highest quality of instruction, the Supreme Court should certify ethics instructors to teach ethics courses. Certification of the instructors would be done in much the same way that trial attorneys are now certified by the Court. Ethics instructors could be certified based upon a demonstration of education, knowledge, experience, skill and, most importantly, an ability to teach. The process of certifying ethics instructors can be undertaken by the Supreme Court Board on Attorney Certification under regulations to be adopted by its members. Certified ethics instructors would be the only people authorized to teach and award MCLE credit for ethics instruction.

#### **5) Annual Monitoring**

This research appears to be the first effort in New Jersey at attempting to associate effective ethics instruction with a longitudinal decrease in grievances and formal ethics complaints. There can be little argument about the value of reducing incidents of attorney professional misconduct. Such a reduction would inure to the benefit of the bench, bar, and public. It would certainly enhance the trust between attorney and client, which is the foundation upon which our system of justice is built. As a result, future research in this area should focus upon and closely track the number of annual ethics grievances and formal complaints in order to gauge whether implementation of the suggested changes outlined here are serving their intended purposes over time.