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**STATE OF MINNESOTA  
IN SUPREME COURT**

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**OFFICE OF  
APPELLATE COURTS**

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In re: Changes to the Rule Regulating Quantity of On-demand Continuing  
Legal Education Course Approval

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**PETITION FOR RULEMAKING FROM FIVE LICENSED ATTORNEYS**

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Jaimie Cavanaugh  
The Institute for Justice  
520 Nicollet Mall, Suite 550  
Minneapolis, MN 55402  
612-435-3451  
jcavanaugh@ij.org  
MN Bar No. 0399960

Scott Dutcher  
Dutcher & Paschka, P.A.  
418 3<sup>rd</sup> Avenue East,  
Alexandria, MN 56308  
320-759-9000  
scott.dutcher72@gmail.com  
MN Bar No. 0387629

Nicole Concordia  
Concordia Law Group, PLLC  
36 Shooters Hill Lane  
Temple, NH 03084  
612-208-9529  
nlconcordia@concordialawgroup.com  
MN Bar No. 0390076

Cory Genelin  
Gialson & Hunter Attorneys at Law  
124 East Walnut Street, Suite 200  
Mankato, MN 56001  
507-387-1115  
cgenelin@gislason.com  
MN Bar No. 0386705

Paul Loraas  
Fryberger, Buchanan, Smith &  
Frederick, P.A.  
302 West Superior Street, Suite 700  
Duluth, MN 55802  
218-725-6812  
ploraas@fryberger.com  
MN Bar No. 0249592

**TABLE OF CONTENTS**

Background .....1

Request .....3

Argument.....4

I. MINNESOTA ATTORNEYS WANT THE ON-DEMAND CLE CAP LIFTED BECAUSE ON-DEMAND IS MORE CONVENIENT, RELEVANT, AFFORDABLE, AND NUMEROUS THAN LIVE WEBCAST CLE .....4

    A. On-demand CLE is more convenient than live webcasts .....4

        1. On-demand CLE benefits busy attorneys .....4

        2. On-demand CLE benefits attorneys who have limited or no access to other forms of CLE.....6

    B. On-demand CLE offers more course options and increased relevance and affordability.....7

    C. Allowing only a portion of CLE credits to be on-demand is arbitrary and does not meet the needs of some Minnesota attorneys.....8

    D. Minnesota attorneys want more on-demand CLE credits..... 10

        1. Attorneys themselves are the best judges of what courses most effectively meet their needs ..... 10

        2. A benefit to some Minnesota attorneys is still a legitimate benefit. .... 11

II. THE BOARD’S CONCERNS ABOUT ON-DEMAND COURSES’ QUALITY, RELEVANCE, CURRENCY, AND EFFECT ON THE LIVE MARKET ARE UNFOUNDED ..... 13

    A. On-demand CLE courses match live webcast courses in content and educational value ..... 14

    B. On-demand courses have been relevant and current to Minnesota law ..... 15

    C. On-demand CLE courses have not eroded the market for live CLE..... 16

    D. On-demand courses have been successfully implemented and

    E. well received in Minnesota and other states..... 18

Petitioners ..... 20

Conclusion ..... 27

## BACKGROUND

In July 2012, five Minnesota-licensed attorneys submitted a petition to this Court requesting that the state’s Mandatory Continuing Legal Education (MCLE) requirement be changed to allow Minnesota attorneys to fulfill their CLE attendance by using on-demand courses for some or all of the required credits.<sup>1</sup> Subsequently, the Minnesota Board of CLE (Board) submitted a request that attorneys only be allowed to fulfill 15 credits—33% of the education requirement—per reporting period via on-demand courses.<sup>2</sup> The Court ordered a hearing in which several perspectives were presented and hypothetical consequences of rule changes were weighed. Finally, the Court ordered the Board to amend the rules to allow 15 on-demand credits per reporting period, with the condition that the Board submit a report, at the end of the first full reporting period with the on-demand allowance, analyzing the

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<sup>1</sup> Petition of Five Licensed Attorneys in re: Changes to the Rule Regulating General Standards for Continuing Legal Education Course Approval, No. ADM09-8008 (Minn. Jul. 16, 2012), at <https://tinyurl.com/y5xa2txr>.

<sup>2</sup> Petition of the Minnesota State Board of Continuing Legal Education for Amendment of the Rules of the Minnesota State Board of Continuing Legal Education, No. ADM09-8008 (Minn. Feb. 14, 2013), at <https://tinyurl.com/yywfypeh>.

effects of the new rules.<sup>3</sup> The Board submitted that report in June 2017.<sup>4</sup> Its conclusions support the arguments for more on-demand credits, and show that the concerns about their merits are not justified.

Now, in light of these new data showing the effects of on-demand CLE courses, it is reasonable to revisit the question of CLE course format requirements. With the benefit of this trial period of on-demand courses, there is no longer a need to speculate about the results of allowing attorneys to take more on-demand credits.

Minnesota's on-demand regulations continue to fall further behind the national trend as more and more states recognize the legitimacy and educational value of on-demand CLE courses. Of the 46 states which require CLE attendance, only three allow for a smaller percentage of on-demand coursework than Minnesota.<sup>5</sup> The states which led the charge into the present era of on-demand CLE have been followed quickly by others. In the seven years since the 2012 petition was submitted to the Court, many more states have

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<sup>3</sup> Order Promulgating Amendments to the Rules of the Minnesota State Board of Continuing Legal Education, No. ADM 09-8008 (Minn. Dec. 6, 2013), at <https://tinyurl.com/y5g9nvg5>.

<sup>4</sup> The Minnesota State Board of Continuing Legal Education's Report to the Minnesota Supreme Court re: On-demand, No. ADM09-8008 (Minn. Jun. 30, 2017), at <https://tinyurl.com/y3x8gdan>

<sup>5</sup> The three states are Louisiana, Indiana, and Arkansas. *See generally CLE Requirements*, State Bar websites. *See also* Exhibit F (a compilation of the MCLE requirement data found at *id.*).

adopted rules to increase the percentage of on-demand CLE allowed, in several cases allowing on-demand CLE to satisfy up to 100% of their continuing education requirements.<sup>6</sup>

These states recognize the benefits that on-demand courses offer to attorneys. Minnesota still has an opportunity to be one of the pioneers of modern legal education requirements, but it must act now. The report submitted by the Board confirms that attorneys appreciate the benefits of on-demand programming, and the Board's data do not suggest that on-demand CLE is inferior to other forms of CLE in terms of relevance, currency, or quality. The response from attorneys has been enthusiastically positive, with many requesting the opportunity to take more on-demand courses for credit. For these reasons and those stated below, Petitioners request that the Court re-examine the issue of on-demand CLE and amend the current Board rules which arbitrarily limit on-demand's benefits to only one third of CLE courses.

### **REQUEST**

Petitioners respectfully request this Court modify Rule 6D of the Rules for the Minnesota Board of Continuing Legal Education<sup>7</sup> by adopting the

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<sup>6</sup> See Exhibit G (a compilation of the changes in MCLE requirement data since 2012); 2012 data from Petition of Five Licensed Attorneys, *supra*, at note 1.

<sup>7</sup> See Rules of the Minnesota Board of Continuing Legal Education, at <https://www.cle.mn.gov/rules/> (last accessed June 19, 2019); Exhibit A.

changes proposed in a redline version of the Rule attached hereto as Exhibit B. This request does not require any change to the standards for course approval found in Rule 5A. Instead, it would allow attorneys to seek out courses that best meet these requirements, regardless of their format.

### **ARGUMENT**

Petitioners present two arguments. First, they argue that on-demand CLE benefits attorneys, who often prefer on-demand courses because they are more convenient for their schedules and locations, more relevant to their areas of interest and practice, and far more numerous and easily available than alternative forms of CLE, including online options such as live webcasts. Second, Petitioners argue that the data from the Board's own report, as well as evidence of on-demand CLE's success in other states, should serve to alleviate any remaining concerns about the quality, educational value, relevance, or effect on the current CLE market of on-demand CLE courses.

#### **I. MINNESOTA ATTORNEYS WANT THE ON-DEMAND CLE CAP LIFTED BECAUSE ON-DEMAND IS MORE CONVENIENT, RELEVANT, AFFORDABLE, AND NUMEROUS THAN LIVE WEBCAST CLE.**

##### **A. On-demand CLE is more convenient than live webcasts.**

###### **1. On-demand CLE benefits busy attorneys.**

One reason Minnesota attorneys are interested in more on-demand CLE is because on-demand courses make their professional lives easier and more

convenient. The schedules of attorneys are notoriously busy. They are usually full of meetings with clients and colleagues and preparation for cases, and they rarely include neat windows of spare time which align precisely with the start of a live CLE webcast, let alone enough of a leisure period to commute to and from a live classroom for an in-person course. Because work schedules are often hectic and attorneys commonly work in tenths of an hour, even when attorneys do manage to squeeze a fortunately timed in-person course or webcast into their day, their attention to the course may still be cursory as they continue to be distracted by their work-related responsibilities while the educational material is being presented.

The intention of ongoing education for attorneys is to supplement their work, making them more effective and informed lawyers. Instead, for busy lawyers, it too often does the opposite. Mandatory classes presented inconveniently to busy lawyers reduce both the productivity of their workday and the effectiveness of their education. Lawyers select courses based on their availability rather than their subject matter and are therefore more likely to view their CLE as a burden rather than as an educational opportunity. On-demand courses overcome this difficulty by enabling attorneys to fill their busy work days with work and optimize their education by scheduling it at times when they are free to fully engage with the material.

## **2. On-demand CLE benefits attorneys who have limited or no access to other forms of CLE.**

While live webcast CLE can be inconvenient for busy attorneys in the metro area, for others it is even more so. Some attorneys live in rural areas where internet connections are not always reliable or consistent and commuting to a live course is unfeasible. In some cases, storms or other weather conditions threaten the internet connection necessary for a live online CLE. If this happens during a live online course, the credit is lost. And because live online CLEs are scheduled well ahead of time, they are difficult to postpone or reschedule in case of a technical difficulty. On-demand courses, on the other hand, are unaffected by weather conditions, connection issues, or technical difficulties. They can be paused and resumed if necessary and provide an ideal option for attorneys in rural areas or places with a history of difficulties with internet connections. Other attorneys face circumstances such as active military duty or time zone differences which can make finding opportunities for live courses—whether in person or online—just as difficult.

By contrast, on-demand courses are equally accessible to all Minnesota attorneys, regardless of circumstance. They can be downloaded whenever an internet connection is available, then accessed at the attorney's convenience, with or without a connection, at any time of day. This accessibility not only makes CLE much more feasible for rural and out-of-state lawyers, but it also



equalizes the opportunities for all types of lawyers to further their legal education. To level the playing field, this court should grant attorneys full access to the benefits of on-demand CLE credits.

**B. On-demand CLE offers more course options and increased relevance and affordability.**

Convenience and accessibility are not the only benefits of on-demand CLE. Because of the permanence of on-demand formats, accredited on-demand courses would give attorneys access to libraries of thousands of options representing a wealth of knowledge not only in common legal fields but in highly specialized areas as well. For lawyers who practice in these niche areas, on-demand courses are indispensable resources to further their education in ways that will be of some practical value to their practice and improve their competence and expertise as lawyers.

Once attorneys have completed their 15 allotted on-demand credits for a given reporting period, it becomes much harder for them to further their education because they must find courses that are not only pertinent and useful to their practices, but also being offered in the near future and planned for a time which does not conflict with their schedules. Often, attorneys choose the easier, less effective option: settling for whatever random live courses they can manage, regardless of whether the material they are learning has any utility to them or any bearing on their practice. This is an unproductive

approach to education and detracts from the opportunity for attorneys to increase their competency.

Furthermore, because there is such a large supply of on-demand courses, they are able to offer the same education as live courses at a fraction of the cost to attorneys. For young lawyers or those who do pro bono or non-profit work, the recurring cost of CLE can be troublesome or even crippling. Allowing attorneys to take more on-demand courses would further their education and likely reduce costs which may engender financial hardship.

**C. Allowing only a portion of CLE credits to be on-demand is arbitrary and does not meet the needs of some Minnesota attorneys**

When Minnesota changed its rules in 2012 to recognize up to 15 credits of on-demand CLE, it took a step in the right direction but solved only 33% of the problem. Despite acknowledging the manifest advantages of on-demand credits to attorneys, the Board's counterproposal continued to arbitrarily limit the benefits which Minnesota lawyers can derive from these programs. Although the Board acknowledges that attorneys overwhelmingly seek more of the convenience and advantages of on-demand CLE and have asked that the credit cap be raised or eliminated,<sup>8</sup> so far, those requests have fallen on deaf ears. But there is no reason to inconvenience attorneys in this way. Naturally, those attorneys who found a requirement of 45 live credits difficult to meet find

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<sup>8</sup> Minnesota State Board Report, *supra* note 4, at 10.

a requirement of 30 live credits similarly challenging. For these attorneys, a mere reduction of required live-credit does not solve the underlying problem: the limited availability of live CLE courses.

Furthermore, the fact that 15 credits of the attorney's choosing may be achieved through on-demand study is unquestionably arbitrary. There is no evidence that on-demand courses are inferior to other forms of CLE, and they even appear not to impinge on the markets for competing forms of CLE. There is no distinction in substance between the 15 course hours in which the lawyer may participate at his or her own convenience and the 30 course hours which must be obtained live online or in person. In fact, an on-demand course which qualified as CLE credit for an attorney would not have qualified for credit if the same attorney had enrolled in the same class after meeting the 15-hour cap. This is unreasonable. The educational value of a CLE and its merit does not depend on the number of CLEs an attorney has previously taken. Ultimately, either on-demand courses are inferior to other CLE, or they are not. The reality is that on-demand courses are not inferior, and the arbitrary 15-hour cap prohibits attorneys from reaping the full benefits and convenience of on-demand CLE and does a disservice to Minnesota lawyers. Removing the on-demand credit limit would remedy the problem and allow attorneys to utilize the significant advantages which on-demand CLEs offer.

#### **D. Minnesota attorneys want more on-demand CLE credits.**

##### **1. Attorneys themselves are the best judges of what courses most effectively meet their needs.**

One reason for the Board’s recommendation of no change to the on-demand cap is that “[s]ponsors agreed that a blended approach to continuing legal format best meets the needs of lawyers,”<sup>9</sup> despite a large number of the attorneys themselves asking for an increase in the cap. When there is a disagreement about what course of action would most advantage attorneys, the opinions of the attorneys themselves should carry the most weight. First, attorneys are most interested in their own needs, professional development, and success. Therefore, they are the most likely to promote courses of action which precisely align with benefits for attorneys. Second, even if it were the case that all other parties, such as the Board and CLE sponsors, exclusively promoted the interests of attorneys, the attorneys’ opinions should be given the greatest weight because they are in the unique position of being tasked with completing CLE. The Board’s 2017 report finds that “a large number of [attorneys] requested that the credit cap be increased or lifted, but . . . the data for course attendance does not suggest that an increase to the credit cap is needed at this time.”<sup>10</sup> The Board echoes these assertions in the fourth point

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<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 9.

of the conclusions to its report.<sup>11</sup> Despite its diligence in compiling the surveys and the reports, the Board can never be more informed than attorneys about how to best meet their individual needs. Sponsors are similarly disadvantaged, as they have a financial interest in continuing to provide in-person CLE. Therefore, when considering whether an on-demand cap increase or elimination would benefit attorneys, attorneys' own input should be given more credence than the input of sponsors or the Board.

**2. A benefit to some Minnesota attorneys is still a legitimate benefit.**

The Board argues that, because the number of attorneys who have completed the maximum allowed on-demand CLE is relatively small, there is no reason to make a change to the allowance.<sup>12</sup> Although the number of attorneys who take the maximum number of allotted on-demand credits is not large, this factor is not an argument against permitting attorneys to attend more on-demand CLE courses. According to the Board's report, 3,084 (37.8%) of the lawyers due to report in 2017 were fully compliant on June 13, about 2.5 months before the August 31 deadline.<sup>13</sup> "Only 163 (5.3%) of those 3,084 took the maximum number of credits permitted."<sup>14</sup> This statistic is referenced twice

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<sup>11</sup> *Id.* See also Exhibit C.

<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.*; see also Exhibit C

in the report, in response to attorneys' requests for more on-demand courses, and as evidence of the Board's assertion that there is "no need" to raise the cap. The 5.3% statistic is not necessarily an accurate reflection of Minnesota attorneys at large.<sup>15</sup> Even assuming the statistic is accurate for the broader population of lawyers, however, approximately 421 of the 8,154 lawyers due to report in August took the maximum allowed on-demand CLE and would presumably benefit if the on-demand cap were lifted. Those attorneys should by no means have their needs and interests invalidated merely because they are not the majority of Minnesota attorneys. The statistic still indicates that a significant number of Minnesota attorneys take the maximum on-demand credits allowed. Additionally, a large quantity of lawyers in general requested an increase in the credit maximum. This is not a zero-sum game; the choice to allow more on-demand CLE does not deprive lawyers who prefer live courses of opportunities to take them. If eliminating the cap benefits even one attorney, let alone more than 400, it is a net gain for Minnesota lawyers. A

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<sup>15</sup> This is a case of "non-response bias," in which respondents differ meaningfully from non-respondents. In this instance the respondents, who were able to comply with the requirements well before the August 31 deadline under the current rules, differ significantly from the non-respondents, who did not comply well in advance, and would be more likely to benefit from rule changes (like increased on-demand cap) which make requirement more feasible to complete in a timely manner.

better reason for the on-demand credit limit must be provided than the relative scarcity of attorneys taking the maximum on-demand credits allowed.

## **II. THE BOARD'S CONCERNS ABOUT ON-DEMAND COURSES' QUALITY, RELEVANCE, CURRENCY, AND EFFECT ON THE LIVE MARKET ARE UNFOUNDED.**

In 2009, even before the 2012 Petition, the Board was already exploring the possibility of implementing on-demand courses in Minnesota in response to attorneys' requests for a more convenient and cost-effective option<sup>16</sup>. Its main concern was "to ensure that the on-demand method of presenting CLE courses is consistent with national trends and that approving such courses would not undermine the availability of high quality continuing legal education."<sup>17</sup> One function of the Board's research is to evaluate the validity of these concerns.<sup>18</sup> Fortunately, the evidence should allay both of the Board's apprehensions. The data collected by the Board in 2017 and preceding years indicate that unlimited on-demand CLE can be implemented at no cost to the quality of continuing legal education. As a result, the national trend is clearly toward more on-demand CLE.

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<sup>16</sup> Petition of the Minnesota State Board, *supra* note 2, at 2.

<sup>17</sup> *Id.*

<sup>18</sup> Order Promulgating Amendments, *supra* note 3, at 6.

**A. On-demand CLE courses match live webcast courses in content and educational value.**

To safeguard the integrity of CLE, Minnesota rules require every class, regardless of format, to pass its general standards for course approval, presented in their entirety in Exhibit D, before becoming accredited. In part, these requirements mandate that the course have significant intellectual content, deal primarily with law and law-related issues, and be taught by faculty members qualified to teach the content.<sup>19</sup> If a course fails to meet any of these requirements, as determined by the Board, the course does not qualify for CLE credit. The number and percentage of courses approved by the Board, and, by extension, acknowledged as sufficiently educational, is an effective measurement of content quality and educational value.

If on-demand courses represented a diminution of course quality, it would be reasonable to expect a sudden surge in courses not approved by the Board in 2014 when on-demand courses first became eligible for CLE credit. In fact, the opposite has been the case. The Board annually publishes a report on its website providing, among other data, the number of courses reviewed and the number approved in that calendar year.<sup>20</sup> Since 2002 (the earliest year such data are available from reports on the Board's website), the Board has

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<sup>19</sup> See Rule 5A of Minnesota State Board Rules, *supra* note 7; Exhibit D.

<sup>20</sup> The reports are located at <https://www.cle.mn.gov/about/annual-reports-2>.



reviewed 173,135 courses. Of these, the Board has not approved 3,357 (1.9%).<sup>21</sup> Courses may be disapproved for several reasons, but among the most common reasons is failure to meet the general standards for course approval.

In its 2017 report to this Court, the Board gave similar data for on-demand courses specifically. It reviewed 6,443 courses from July 1, 2014 to June 13, 2017. Of these, only 98 (1.5%) were not approved. Only 30 (0.5%) were not approved because they did not meet the Board's general standards for approval.<sup>22</sup> A full chart of the data can be found in Exhibit E, which further shows that on-demand courses outperformed other kinds of courses in terms of Board approval. This evidence suggests that on-demand courses are on par with live courses.

**B. On-demand courses have been relevant and current to Minnesota law.**

Another concern expressed about on-demand courses before they were implemented was that the courses might be so cheaply and broadly produced that they would be irrelevant to Minnesota lawyers and not up to date with Minnesota law.<sup>23</sup> Again, the results of the Board's study show that the opposite

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<sup>21</sup> See generally *Annual Board Reports* at id.; Exhibit E.

<sup>22</sup> Minnesota State Board Report, *supra* note 14, at 4.

<sup>23</sup> See Statement of Colorado State Bar CLE Regarding Proposed Changes, No. ADM09-8008 (Minn. April 13, 2013), at <https://tinyurl.com/yyjqzaeh> at 2; Position Statement of Minnesota Bar Leaders Regarding Proposed Changes, No. ADM09-8008 (Minn. April 30, 2013), at <https://tinyurl.com/y57vlx9w> at 4.

is true. The feedback of lawyers who responded to the Board’s surveys provide tangible evidence that on-demand courses have increased the value and relevance of their education. Their explanations reiterate the practical and common-sense arguments made by on-demand CLE supporters.

Not only were the on-demand courses sufficiently relevant to qualify for credit, a majority of lawyers surveyed by the Board said that, thanks to on-demand, they were able to take courses, unavailable in any other format, which were beneficial to their practices.<sup>24</sup> They explained that “on demand courses permitted them to take courses relevant to their practice rather than courses that fit into their schedule and permitted them to take the courses outside of the regular work day.”<sup>25</sup> Some pointed out that “although the course may have been originally available live, the time did not work for their schedule and on-demand programming permitted them to still view the course.”<sup>26</sup> When asked why they opted to take an on-demand CLE course, nearly 60% of attorneys listed “Subject Matter” as one of their reasons.<sup>27</sup> Furthermore, because approval of a course for credit is valid for only two years,<sup>28</sup> the Board has a

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<sup>24</sup> Minnesota State Board Report, *supra* note 21, at 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> Rules of the Board, *supra* note 7, Rule 6D (4).

chance to review on-demand courses regularly to ensure they are current – just as it does with every other course format.

### **C. On-demand CLE courses have not eroded the market for live CLE.**

Another concern expressed by the Board was that “unlimited on-demand may result in a decrease in the number of live CLE courses presented in the state.”<sup>29</sup> The Board cites Virginia as an example. In Virginia, when unlimited on-demand was accredited and attorneys were allowed to choose their CLE courses for themselves, they overwhelmingly opted for on-demand courses. In response, the state reinstated the mandate that lawyers take four live CLE courses per year.<sup>30</sup> But protectionism is not a legitimate government function and should by no means justify boxing out more modern, innovative, and effective CLE providers in a blatant effort to preserve the live course industry.<sup>31</sup>

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<sup>29</sup> Petition of the Minnesota State Board, *supra* note 15, at 6.

<sup>30</sup> *Id.* In Virginia, former Executive Director of Virginia CLE Gary Wilber explained, some programs became out of date and irrelevant because “many national sponsors archive their programs for a very long time. It’s not uncommon for programs to be three, five, even eight years old.” Statement of Gary L. Wilbert Regarding Proposed Changes, No. ADM09-8008 (Minn. April 13, 2013), at <https://tinyurl.com/y4pyop2o>, at 3.

<sup>31</sup> *E.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

However, the Board’s 2017 report indicates that there is no need for the government to artificially protect the live CLE industry in Minnesota, because the introduction of on-demand CLE has not affected the market for live courses at all. The Board found that when the number of course applications rose and fell, the change affected live and on-demand courses equally, leading it to conclude that “the availability of on-demand courses appears to have no impact on the number of live courses offered.”<sup>32</sup>

**D. On-demand courses have been successfully implemented and well received in Minnesota and other states.**

Given the evidence that on-demand courses meet or exceed live courses in terms of quality and relevance, it is no surprise that the national trend is toward states allowing attorneys the freedom to choose for themselves which courses best meet their educational needs. Since the issue was last brought before this Court in 2012, 15 more states have changed their rules to allow more on-demand credits for their attorneys.<sup>33</sup> Connecticut, Washington, New Hampshire, Kentucky, and Oklahoma all changed to allow their lawyers to obtain up to 100% of their CLE credits on-demand.<sup>34</sup> Exhibit F lists the current CLE requirements, if any, for each state, and Exhibit G shows the change in

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<sup>32</sup> Minnesota State Board Report, *supra* note 27, at 5.

<sup>33</sup> *See* Exhibit G.

<sup>34</sup> *Id.*

requirements, if any, since 2012. Both exhibits lend support to the conclusion that the national trend is decidedly in favor of on-demand CLE.

In Minnesota, the introduction of limited on-demand courses was a success, according to all parties involved: the Board, sponsors, and attorneys.<sup>35</sup> The data in Exhibit H show the positive reception on-demand courses have received. The Board has concluded that “[a]dministratively, the process is working well,” and “[o]n-demand programming in Minnesota has been successfully implemented.”<sup>36</sup>

Despite its 2014 move to 15 credits of on-demand, Minnesota continues to fall behind other states that have appreciated the considerable benefits of on-demand programming and have amended their rules to reflect those benefits. Currently, only three states, Louisiana, Indiana, and Arkansas, allow their attorneys to meet a smaller percentage of their education requirements through on-demand than does Minnesota.<sup>37</sup> An action to allow more on-demand credit is necessary to keep Minnesota consistent with the leaders in MCLE. By allowing lawyers to take on-demand courses for credit, Minnesota can again become a state with an exemplary legal education system.

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<sup>35</sup> See generally Minnesota State Board Report, *supra* note 31; Exhibit H.

<sup>36</sup> Conclusions to the Minnesota State Board Report. See Exhibit C.

<sup>37</sup> See generally *CLE Requirements*, *supra* note 5; Exhibit F.

## PETITIONERS

The Petitioners are Minnesota-licensed attorneys. Each is interested in taking more on-demand CLE credits. Although their practices, experience, and circumstances vary, lifting the on-demand cap would benefit each of them and improve their practice of law.

Jaimie Cavanaugh is an attorney at the Minneapolis office of the Institute for Justice, a non-profit public interest law firm, where she practices constitutional law. She has been barred for seven years in Colorado and for almost one year in Minnesota. Colorado, like Minnesota, requires attorneys to complete 45 CLE credits every three years. But unlike Minnesota, Colorado allows attorneys to obtain all 45 CLE credits through on-demand courses. When she moved from Colorado to Minnesota, she was able to become barred in Minnesota without retaking the bar exam based on her years of experience.<sup>38</sup> Yet, although on-demand CLE credits sufficed to qualify Cavanaugh to become licensed in Minnesota, the Board deems them inadequate to allow her to remain licensed in Minnesota.

Cavanaugh has already completed her 15 on-demand CLEs in Minnesota. To earn the remainder of her credits, she must either spend time and money traveling to an in-person CLE or work live online CLEs into her

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<sup>38</sup> See MN State Board of Law Examiners Rule 7.

schedule. Cavanaugh travels often for work. On-demand CLEs would be an excellent way for Cavanaugh to use her time in airports and on planes. Like the other Petitioners, she would greatly benefit from Minnesota addressing this inconsistency by changing its rules to allow 45 on-demand credits.

Scott Dutcher has been licensed to practice law in Minnesota since 2005. After passing the bar, he took a position as a litigation fellow at Pacific Legal Foundation, and in 2007 he started a general practice law firm called Dutcher & Paschka, P.A., in Alexandria, 140 miles northeast of St. Paul. He practices mainly family law, particularly child protection and divorce custody. More than a full year ahead of his report date, Dutcher plans to complete the maximum permitted on-demand credits before the end of his reporting cycle and is frustrated by his inability to take more. His schedule is very busy and he rarely has free one-hour periods that conveniently match the start time of a relevant CLE. Nor is it feasible to attend relevant classes in person. He explains, “I can’t go through the time-consuming process of driving downtown, parking, sitting for an hour, and driving back. That destroys your whole day.” Instead of being able to take relevant courses, Dutcher accumulates useless credits in large chunks by going to extended sessions on subjects that are irrelevant to his work. For example, he took a 6-hour course on Environmental Law because he happened to have a free day on his schedule. These irrelevant courses bear absolutely no benefit for Dutcher, his clients, or his education;

they are purely a burden on his time and resources. By contrast, Dutcher was able to take a 90-minute on-demand refresher about trust accounts, a course which did benefit his practice and his clients. “There is no way I would be able to take a class like that without on-demand,” Dutcher notes. Without the benefit of relevant courses like this one, CLEs are not useful education at all. They are mere hurdles and burdens to hard-working attorneys like Dutcher. This leads, he explains, to little or no engagement or interest in the courses by most attorneys. By contrast, allowing more on-demand courses would generate more interest from attorneys, and more utility for the CLE program.

Nicole Concordia is a solo practitioner who lives in Temple, New Hampshire, and is licensed in both New Hampshire and Minnesota. Since she moved from Minnetonka, MN, to New Hampshire four years ago, Concordia has seen her business slowly follow, but her client base is still divided between the two states, so she maintains her license in each. In New Hampshire, her CLE requirement is easy to meet, because attorneys themselves are responsible for assessing the educational value of their courses in whatever format they choose. Minnesota’s CLE requirement is much more burdensome. Concordia recognizes on-demand CLE as by far the most convenient option available to her for obtaining Minnesota CLE credit. As their name suggests, on-demand courses give Concordia ownership of her education. She can take the classes at any time of the day or night, and she can decide when to take



breaks and for how long. Additionally, the more-frequent-than-expected power outages and internet interruptions in her heavily-wooded, rural New Hampshire location often threaten CLE completion. On-demand CLE can be postponed, while live CLE cannot.

On-demand courses are especially useful for Concordia because, as the primary caretaker for her three small children, she is often faced with unforeseeable demands on her time and attention. If naptime ends early, or one of her children requires attention during a live online course, Concordia is faced with the unenviable choice of either not caring for her child or abandoning her CLE, causing her to forfeit her credit and forcing her to incur a significant waste of both time and money. Not so with on-demand. Given the ability to pause and resume the course, Concordia can both attend to her family and collect her CLE credit, with minimal disruption and inconvenience. Because of these benefits, Concordia completed her 15 allowed on-demand credits early in her reporting period. Unable to take more on-demand courses, she met the rest of her CLE requirement with a variety of live courses, including some irrelevant courses which had no educational benefit for Concordia or her practice.

Concordia also contests the argument that live courses increase engagement, pointing out that, in truth, few questions are asked at live presentations because attorneys are often attending only to “check the box”

and collect their credit. They are frequently on laptops or otherwise disengaged from the presentation. By contrast, in New Hampshire, where attorneys are responsible for their own credits, those attorneys who attend live courses have actively chosen to be there and are often far more engaged with the presentation, leading to more questions and a more collegial atmosphere. Minnesota can take the first step toward a similarly healthy system of CLE by removing its arbitrary restriction on classes that are convenient for attorneys such as Concordia.

Cory Genelin is an attorney at Gialson & Hunter Attorneys at Law in Mankato. Because he lives near the Iowa border and often serves Iowan clients, he maintains a license in each state. He has been especially busy in the last few years, and has reached the maximum on-demand CLE credits permitted in Minnesota. These courses are most convenient for Genelin and their quality is as high as that of any other form. Within the current reporting cycle, Genelin has experience with each of the three main forms of CLE in Minnesota: live in-person, live online, and on-demand. He sees benefits in all three, including the ability to ask a question at a live CLE. However, Genelin says, the marginal benefit of his ability to ask a question of the in-person presenter is outweighed by the significant costs of attending the course, including driving an hour each way, paying for parking, and sitting through many questions of other attendees to which he already knows the answers or

which might not be relevant to him. In live online courses, he notes, on the few occasions that questions are attempted, they are often either not understood or not addressed by the presenter.

As Genelin goes through his day, his mental energy level ebbs and flows, as is the case for most people. This means that some times of day are better than others for focusing on a CLE course. With more on-demand courses, Genelin could take classes at the times when they would be most beneficial to him. He points out that at live in-person CLEs, attendees are often distracted, on their phones, or leaving the room for portions of the course. More on-demand CLEs offer attorneys like Genelin the chance to be more engaged in their education, both by taking the classes at the times when they are ready to focus, and by pausing and resuming the class if something else requires their attention temporarily.

Paul Loraas is an attorney at Fryberger, Buchanan, Smith & Frederick, P.A. He is barred in both Minnesota and Wisconsin and serves clients from both states and Canada, including banks, businesses, and individual clients. He works in Duluth, several hours from the Twin Cities, which means finding time to attend live in-person CLEs can be a challenge. Loraas's wife is currently in the process of getting her PhD., a time intensive project that often demands her full attention for several months at a time. This, in effect, renders Loraas the sole caretaker for their two children for extended periods of time.

During those periods, on-demand courses have been indispensable to Loraas not only because he can participate from the convenience of his home, but because he is able to pause the CLE if his kids need him, then resume the course later.

Loraas is impressed with the ease and simplicity of purchasing and watching on-demand CLE courses, as well as with the production quality of on-demand platforms. Modern technology, he notes, has brought on-demand courses a long way. They are on par with other forms of CLE in terms of production quality.

The few questions Loraas asks after CLEs, he usually asks remotely via email or phone, a feature that is readily available to him with on-demand courses. He speaks highly of the accessibility and friendliness of presenters when answering his questions. Often this form of communication is even more effective than asking questions in person, because the presenter is relieved of the time pressures which may be present at the end of a live CLE course.

Finally, Loraas points out that the increased affordability and accessibility serves to level the playing field between larger firms like his own and smaller firms, solo practitioners, and other attorneys who have difficulty affording both the actual costs of live CLEs and the opportunity cost of business lost on days or working hours which they had to devote to live CLE. Live courses are generally more expensive because they must recoup their

production cost and they only collect payment once, whereas on-demand courses that are shown often and have no marginal cost are often available in bundles for low prices, or even for free. Loraas, and nearly all Minnesota attorneys, would benefit greatly from the Court allowing lawyers to choose for themselves what type of education works best for them. It will increase the value of the CLE program overall and equalize the opportunities of all attorneys, regardless of where they practice, the circumstances of their personal life, or the size of their firm.

### CONCLUSION


The data from the Board's report show the numerous benefits of on-demand CLE and provide objective support for Petitioners' request. The data also refute concerns about on-demand's content quality, educational value, and impact on the live CLE market. For these reasons, courts across the United States are acknowledging the advantages of on-demand courses to attorneys, and allowing lawyers to select the courses that best meet their needs and further their education, resulting in more effective CLE programs. It is time for Minnesota to follow their example and allow its attorneys to obtain up to 100% of their continuing legal education credits through on-demand courses.


For the foregoing reasons, Petitioners respectfully request that the Court modify the Quantity of On-demand Courses, as set forth in Exhibit B, to greatly expand the accredited educational opportunities available to all Minnesota lawyers.

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Respectfully Submitted,

By   
Jaimie Cavanaugh  
520 Nicollet Mall, Suite 550  
Minneapolis, MN 55402  
612-435-3451  
jcavanaugh@ij.org  
MN Bar No. 0399960

By   
Scott Dutcher  
418 3<sup>rd</sup> Avenue East,  
Alexandria, MN 56308  
320-759-9000  
scott.dutcher72@gmail.com  
MN Bar No. 0387629

By   
Nicole Concordia  
36 Shooters Hill Lane  
Temple, NH 03084  
612-208-9529  
nlconcordia@concordialawgroup.com  
MN Bar No. 0390076

By 

Cory Genelin

124 East Walnut Street, Suite 200

Mankato, MN 56001

507-387-1115

cgenelin@gislason.com

MN Bar No. 0386705

By 

Paul Loraas

302 West Superior Street, Suite 700

Duluth, MN 55802

218-725-6812

ploraas@fryberger.com

MN Bar No. 0249592

## EXHIBITS

Minnesota Board of Continuing Legal Education Rule 6D Current Version .....	Exhibit A
Minnesota Board of Continuing Legal Education Rule 6D Proposed Redline Version.....	Exhibit B
Minnesota Board of Continuing Legal Education Excerpt From Report to the Minnesota Supreme Court re: On-Demand June 2017 .....	Exhibit C
Minnesota Board of Continuing Legal Education Rule 5: Standards for Course Approval.....	Exhibit D
Minnesota CLE Course Approval Data Found in Reports from the Board .....	Exhibit E
Current state MCLE requirement data Found at Respective State Bar Websites .....	Exhibit F
Change in CLE Requirements Since 2012 .....	Exhibit G
Feedback about on-demand courses Board Report to the Minnesota Supreme Court .....	Exhibit H



## Exhibit A

**Rule 6D. On-Demand Courses.** A lawyer may claim up to 15 hours of credit within the 45-hour CLE period for on-demand courses as defined in Rule 2R\*, subject to the following provisions:

- (1) The course meets all other requirements of Rules 2, 5, & 6;
- (2) The course sponsor agrees to have one or more faculty members accessible to all participants via electronic or other means through the 24-month period during which the program is approved for Minnesota CLE credit;
- (3) The course sponsor or course applicant completes and submits to the Board an Application for Course Approval; and
- (4) The approval for an on-demand course is valid for 24 months after the date of approval by the Board office.

**\*Rule 2R. “On-demand courses”** means archived CLE programming that meets all the requirements of Rule 5A and is available to participants at any time.

## Exhibit B

**Rule 6D (Proposed version).** A lawyer may also claim ~~up to 15 hours of credit within the 45-hour CLE period~~ for on-demand courses as defined in Rule 2R, subject to the following provisions:

- (1) The course meets all other requirements of Rules 2, 5, & 6;
- (2) The course sponsor agrees to have one or more faculty members accessible to all participants via electronic or other means through the 24-month period during which the program is approved for Minnesota CLE credit;
- (3) The course sponsor or course applicant completes and submits to the Board an Application for Course Approval; and
- (4) The approval for an on-demand course is valid for 24 months after the date of approval by the Board office.

Excerpt from the MN Board of CLE Report (2017)

**Conclusion:**

The Board appreciates the opportunity to submit this analysis and report. The conclusions reached are as follows:

- The number of on-demand courses does not appear to be directly impacting the number of live courses offered. (Bd. Report, p. 5).
- A significant number of lawyers are taking on-demand courses, but very few lawyers are taking the maximum number of on-demand credits. (p. 7-9).
- The approved on-demand courses with the greatest number of attendees are elimination of bias and ethics; a small number of sponsors have commented that the discussions related to elimination of bias are improved with live courses. (p. 10).
- Lawyers responding to the survey expressed an interest in increasing the number of credits lawyers are permitted to take through on-demand programming, but the lawyer compliance reporting through June 13, 2017 suggests that there is not a need to expand the number of credits at this time. (p. 9).
- Sponsors caution against expanding the number of credits offered.
- Administratively, the process is working well.

- The sponsor suggestion to permit application for on-demand credit at the same time as live credit would not require a rule change to implement.
- On-demand programming in Minnesota has been successfully implemented.

## Rule 5. Standards for Course Approval

**A. General Standards.** A course must meet the following standards before approval is granted.

- (1) The course shall have current, significant intellectual or practical content, and shall be presented in a high-quality manner permitting participants to hear all of the audio and see all of the video portions of the program, including presentations, audience questions, responses to questions, embedded videos, and other program materials.
- (2) The course shall deal primarily with matter directly related to the practice of law, the professional responsibility or ethical obligations of lawyers, the elimination of bias in the legal profession and in the practice of law, law office management, or the professional development of lawyers.
- (3) The course shall be taught by faculty members qualified by practical or academic experience to teach the specified subject matter. Legal subjects shall be taught by lawyers.
- (4) Any written materials should be thorough, high quality, readable, carefully prepared, and distributed to all participants at or before the time the course is offered.
- (5) The course shall be presented and attended in a suitable classroom or laboratory setting. A course presented via video recording, simultaneous broadcast, teleconference, or audiotape, or available on-demand or by podcast, may be approved provided that it complies with Rule 6D and a faculty member or moderator is accessible to all participants, either in person or via electronic means, allowing all participants to have access to and participate in the question and answer session. No course will be approved which involves solely correspondence work or self-study.
- (6) Credit will not normally be given for speeches at luncheons or banquets.
- (7) A list of all participants shall be maintained by the course sponsor and transmitted to the Board upon request, following the presentation of the course.

(8) Credit shall be awarded on the basis of one credit hour for each 60 minutes of instruction at an approved course.

(9) A lawyer shall not receive credit for any course attended before being admitted to practice law in Minnesota, but one so admitted may receive credit of one hour for each 60 minutes actually spent in attendance, for attending for credit or as an auditor, a regular course offered by a law school approved by the American Bar Association.

(10) Notwithstanding the provisions of paragraph (9) above, a person who takes approved courses or teaches in an approved course after sitting for the Minnesota Bar Examination, but before admission to practice, may claim credit for the courses taken or the teaching done, if he or she passes that bar examination.

**Courses Reviewed by the Minnesota Board of Continuing Legal Education (CLE)**

	<i>Courses Reviewed</i>	<i>Courses Not Approved</i>	<i>Percentage Not Approved</i>
<i>2002</i>	6,248	146	2.34%
<i>2003</i>	6,468	127	1.96%
<i>2004</i>	7,372	147	1.99%
<i>2005</i>	7,752	89	1.15%
<i>2006</i>	8,768	119	1.36%
<i>2007</i>	9,393	201	2.14%
<i>2008</i>	11,249	300	2.67%
<i>2009</i>	11,518	344	2.99%
<i>2010</i>	11,583	176	1.52%
<i>2011</i>	11,394	129	1.13%
<i>2012</i>	14,997	175	1.17%
<i>2013</i>	11,696	102	0.87%
<i>2014</i>	12,751	132	1.04%
<i>2015</i>	14,256	99	0.69%
<i>2016</i>	13,452	744	5.53%
<i>2017</i>	14,238	229	1.61%

<b>Only On-Demand Courses (14-17)</b>	<b>6,541</b>	<b>98</b>	<b>1.50%</b>
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“Courses Reviewed” refers to the total number of courses assessed by Board staff in each year for their compliance with MN CLE credit standards.

“Courses Not Approved” refers to the total number of courses not approved for CLE credit by the Board. Courses can be not approved for several reasons including:

- 1) Not containing legal content;
- 2) Not meeting CLE Rule 5 standards for approval; or
- 3) Sponsors not responding to the Board when asked for additional information.

“Percentage Not Approved” refers to the percentage of total courses reviewed in each year that were not approved for any reason

**Bold type** indicates a year in which accredited on-demand courses were permitted to satisfy up to 15 credit hours of CLE per reporting period.

“On Demand Courses (14-17)” refers to the total reviewed, total not approved, and percentage not approved of exclusively on-demand credits during the entire time those credits were permitted to satisfy CLE requirements (July 1, 2014 – June 13, 2017).



**Exhibit F****Mandatory Continuing Legal Education (MCLE) Requirements by State**

	Hrs./year	Percentage of credits available online	Percentage of online credits available on-demand	Percentage of total credits available on-demand
<b>Alabama</b>	12	100%	50%	50%
<b>Alaska</b>	3	100%	100%	100%
<b>Arizona</b>	15	100%	100%	100%
<b>Arkansas</b>	12	100%	0%	0%
<b>California</b>	8.33	100%	100%	100%
<b>Colorado</b>	15	100%	100%	100%
<b>Connecticut</b>	12	100%	100%	100%
<b>Delaware</b>	12	50%	100%	50%
<b>D.C.</b>	N/A	N/A	N/A	N/A
<b>Florida</b>	11	100%	100%	100%
<b>Georgia</b>	12	50%	100%	50%
<b>Hawaii</b>	3	100%	100%	100%
<b>Idaho</b>	10	100%	50%	50%
<b>Illinois</b>	15	100%	100%	100%
<b>Indiana</b>	12	25%	100%	25%
<b>Iowa</b>	15	100%	40%	40%
<b>Kansas</b>	12	100%	50%	50%
<b>Kentucky</b>	12	100%	100%	100%

	Hrs./year	Percentage of credits available online	Percentage of online credits available on-demand	Percentage of total credits available on-demand
Louisiana	12.5	32%	100%	32%
Maine	12	100%	42%	42%
Maryland	N/A	N/A	N/A	N/A
Massachusetts	N/A	N/A	N/A	N/A
Michigan	N/A	N/A	N/A	N/A
Minnesota	15	100%	33%	33%
Mississippi	12	50%	100%	50%
Missouri	15	100%	40%	40%
Montana	15	100%	33%	33%
Nebraska	10	50%	100%	50%
Nevada	13	100%	100%	100%
New Hampshire	12	100%	100%	100%
New Jersey	12	50%	100%	50%
New Mexico	12	100%	33%	33%
New York	12	100%	100%	100%
North Carolina	12	100%	50%	50%
North Dakota	15	100%	33%	33%
Ohio	12	100%	50%	50%
Oklahoma	12	100%	100%	100%
Oregon	15	100%	100%	100%
Pennsylvania	12	50%	100%	50%
Puerto Rico	12	100%	33%	33%

	Hrs./year	Percentage of credits available online	Percentage of online credits available on-demand	Percentage of total credits available on-demand
<b>Rhode Island</b>	10	100%	60%	60%
<b>South Carolina</b>	14	100%	57%	57%
<b>South Dakota</b>	N/A	N/A	N/A	N/A
<b>Tennessee</b>	15	54%	100%	54%
<b>Texas</b>	15	100%	100%	100%
<b>Utah</b>	12	50%	100%	50%
<b>Vermont</b>	10	100%	50%	50%
<b>Virgin Islands</b>	12	100%	100%	100%
<b>Virginia</b>	12	100%	67%	67%
<b>Washington</b>	15	100%	100%	100%
<b>West Virginia</b>	12	50%	100%	50%
<b>Wisconsin</b>	15	100%	50%	50%
<b>Wyoming</b>	15	100%	40%	40%

“Hrs./year” refers to the number of credit hours required per year of the compliance period.

“Percentage of credits available online” refers to the percentage of total credits that can be earned through online CLE programs of any sort.

“Percentage of online credits available on-demand” refers to the percentage of online credits that can be earned through on-demand webcasts.

“Percentage of total credits available on-demand” refers to the percentage of total required credits that can be earned through on-demand webcasts.

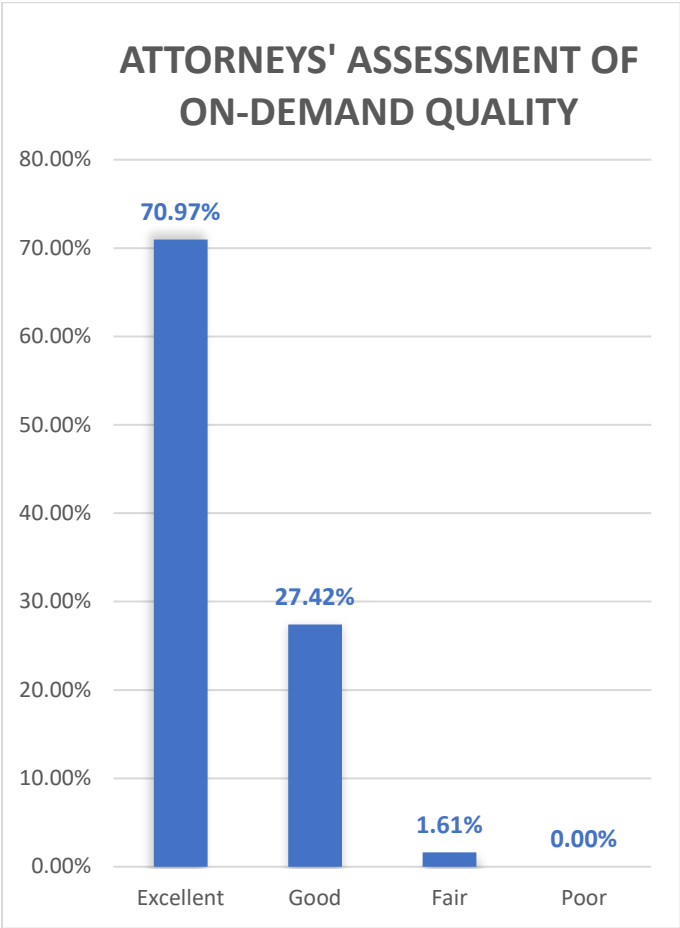
“N/A” indicates a state without mandatory continuing legal education requirements.

Exhibit G

Change in Mandatory CLE Requirements Since 2012

State	Credit hours/year required (2012)	Credit hours/year required (2019)	% of on-demand accredited (2012)	% of on-demand accredited (2019)
Alaska	12	3	50%	50%
Connecticut	N/A	12	N/A	100%
Florida	10	11	100%	100%
Hawaii	12	3	100%	100%
Indiana	12	12	17%	25%
Iowa	15	15	0%	40%
Kansas	12	12	42%	50%
Kentucky	12	12.5	48%	100%
Maine	11	12	50%	42%
Minnesota	15	15	0%	33%
New Hampshire	12	12	50%	100%
North Carolina	12	12	33%	50%
Ohio	12	12	25%	50%
Oklahoma	12	12	50%	100%
Pennsylvania	12	12	33%	50%
Rhode Island	10	10	30%	60%
South Carolina	14	14	43%	57%
Washington	15	15	50%	100%
Wyoming	15	15	33%	40%

Reception of On-demand CLE Courses



Source: Data from Minnesota State Board Report, pg. 8