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## Once You're In: Maintaining Competence in the Bar

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# Once You're In: Maintaining Competence in the Bar

## I. INTRODUCTION

Various mechanisms designed to ensure the continuing professional competence of the bar, are being considered, discussed, and adopted in the several states. These mechanisms involve five distinct, though often interrelated programs: (1) periodic re-examination; (2) mandatory continuing legal education; (3) specialization; (4) certification; and (5) peer review.

Two thirds of the states have adopted voluntary continuing legal education programs,<sup>1</sup> and a total of 60 CLE administrators work for 39 states on bar educational programs.<sup>2</sup> Although these programs are voluntary,<sup>3</sup> several states also have mandatory programs and many more states, are considering such programs.<sup>4</sup> The above five mechanisms have political ramifications, which may include urban versus rural, specialist versus generalist, and small firm versus large firm controversies. This volatile climate has caused a wide variety of compromises and patchwork programs. Some bar members have suggested that ultimately the American Bar Association should devise a national program or at least a model format for states to adopt.<sup>5</sup>

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1. Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A. J. 574, 575 (1975). The public is also interested in continuing legal education [hereinafter referred to as CLE]. See Sheils & Agrest, *Back to School*, NEWSWEEK, Jan. 12, 1976, at 71.
  2. Friday, *Continuing Legal Education: Historical Background, Recent Developments, and the Future*, 50 ST. JOHN'S L. REV. 502, 505 (1976).
  3. For an idea of the types and variety of courses being offered, see JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (1976). Currently the American Law Institute-American Bar Association [hereinafter referred to as ALI-ABA] has available 23 video taped programs. ALI-ABA CLE Review, Nov. 12, 1976, at 2.
  4. The most comprehensive compilations of enacted and proposed plans is found in the supplemental portions of JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (1976).
  5. Broden & Horvitz, *Toward Certifying Tax Specialists in Law and Ac-*

The increasing interest in this subject may be attributed to the recent rise in consumerism, and some programs have been initiated to ward off harsher legislative regulation.<sup>6</sup> Clients are becoming

*counting*, 6 TAX ADVISOR 469, 474 (1975). See also Wirt, *Professional Competency of the Bar*, ALI-ABA CLE Review, Jan. 16, 1976, at 2, 4. The A.B.A. has been struggling with the specialization controversy since at least 1952. Fromson, *Let's Be Realistic about Specialization*, 63 A.B.A. J. 74, 75 (1977).

6. See Wolkin, *supra* note 1, at 574. The interest of the bar is reflected in a recent survey done on behalf of the ALI-ABA Committee on Continuing Professional Education. Questionnaires were sent to a scientifically selected sample of 7,500 lawyers listed in the Martindale-Hubbell Law Directory and to all of the approximately 2,000 members of the American Law Institute. The results are summarized in the table below, which indicates the percentage of respondents agreeing with the following statements.

	All respond- ents	ABA member respond- ents	ALI respond- ents
To assure that lawyers are competent, there should be			
1. An expanded program of continuing legal education on a voluntary basis	55.7	53.0	54.1
2. A monitoring system to deal with incompetent lawyers	20.9	24.8	21.1
3. A system of periodic license renewal conditioned on			
a. Mandatory attendance at continuing legal education programs	26.2	23.0	28.1
b. Successful written examination	3.9	6.2	4.5
c. Other requirements	3.9	3.9	3.3
<i>Specialization:</i>			
Specialization should be recognized formally. Those who favored formal recognition believed that	69.2	70.4	71.3
a. Self-designation of specialties should suffice	36.0	33.1	34.6
b. Examination should be required for certification	64.0	66.9	65.4
c. Recertification should depend on			
1. Evidence of continuing self-education	46.7	47.3	46.1
2. Mandatory attendance at continuing legal education courses related to specialty	40.5	34.4	42.2
3. Examination	17.5	22.0	16.6

In some cases, the total response exceeds 100 per cent because some respondents favored several possibilities.

*Some Results of an ALI-ABA Survey Dealing with CLE*, ALI-ABA CLE Review, May 21, 1976, at 5.

increasingly sophisticated and correspondingly more critical of the legal services they receive.<sup>7</sup> In addition, specialization, with attendant changes in the ban on advertising, is seen as a way to bring together the large number of new attorneys and clients with previously unmet legal service needs.<sup>8</sup>

The recent efforts to maintain and improve the competence of the bar usually have involved a mixture of the five mechanisms set out above. For instance, the privilege to specialize is often contingent upon participation in a given number of hours of CLE in the chosen area. Most certification programs require periodic re-examination. There are also a number of other proficiency measures being suggested,<sup>9</sup> including the fact that the federal courts may adopt their own competence criteria.<sup>10</sup>

This commentary reviews these various programs and analyzes how each relates to the following goals:

- 1) To provide the public with better educated and more competent counsel;
- 2) To facilitate the selection of qualified counsel by clients with specific legal programs;
- 3) To decrease the cost and improve the efficiency of the legal system;
- 4) To improve the ethical standards of the legal profession.

This article also considers other effects such programs have, such as the preservation of the lawyers' monopoly in certain areas, or the creation of a dominance of one portion of the bar over another.

## II. PERIODIC RE-EXAMINATION

Proposals for re-examination of attorneys fall into three categories. The broadest proposals would involve all members of the bar, and would require that each member take a general examination periodically. Not surprisingly, such suggestions are uniformly rejected by bar associations.<sup>11</sup> One survey showed that 75 percent

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7. Petry, *Professional Competence and Legal Specialization*, 50 ST. JOHN'S L. REV. 561, 561 (1976).

8. See Singletary, *Economic Benefits of Designation and Systemization*, 50 FLA. B.J. 110 (1976); Petry, *supra* note 7, at 561.

9. See generally Wolkin, *supra* note 1; Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A. J. 1064 (1975); Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence*, 1974 UTAH L. REV. 463, 464.

10. Fahringer, *Charting a Course for the Future*, TRIAL, July/Aug. 1975, at 12, 15.

11. Byron, *Mandatory Continuing Legal Education in Minnesota: The First Year*, 50 ST. JOHN'S L. REV. 512, 514 (1976).

of all attorneys opposed mandatory, general re-examinations.<sup>12</sup> Most recently, the Maryland State Bar Association considered and rejected the idea of mandatory re-examination.<sup>13</sup> The most common reasons given for opposing such tests were that they are not a real measure of skill and that attorneys who specialize in one area would either fail a generalist exam or be forced to spend too much time studying material that was of no use to them in their practice. Indeed the only support for such exams may be in a student article which asserted that if the bar was going to require the author to take an exam, then its members should have to retake it.<sup>14</sup>

The second category of re-examination programs are those utilized in conjunction with certification plans. In this context, testing has been received much more favorably. The California,<sup>15</sup> Texas,<sup>16</sup> and A.B.A. Probate Committee<sup>17</sup> certification systems all make use of exams in specified areas every five years. This may be the only way to make a certification program meaningful.

The third category of re-examination programs involves voluntary examinations. These could be used alone, or in conjunction with CLE courses.<sup>18</sup> Although they might be useful to the individual attorney who took them, it is questionable whether they would have any significant impact on the bar as a whole.<sup>19</sup>

### III. MANDATORY CLE

Mandatory continuing legal education is perhaps the most popular "reform" within the legal system. Its origins lie in the rather long history of voluntary CLE in the United States. As early as 1916 the New York City Bar conducted review courses for its members. In 1933, the Practising Law Institute was formed

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12. Leete & Loeb, *Continuing Legal Education—Should It Be Compulsory?*, 27 J. LEGAL EDUC. 110, 114 (1975).

13. Wolkin, *supra* note 1, at 576.

14. Comment, *Specialization: An Overview*, 6 CUM. L. REV. 453, 468 (1975).

15. *Id.* at 458.

16. *Legal Specialization Comes to Texas*, 38 TEX. B.J. 235, 235 (1975).

17. A.B.A. Committee on Specialization, *Tentative Standards for Specialization in Estate Planning and Probate Law*, 10 REAL PROP., PROB., & TR. J. 622, 623 (1975).

18. See, Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A. J. 1064, 1068 (1975); Parker, *supra* note 9, at 471.

19. Estimated participation rates in voluntary CLE vary greatly, from 5% in Massachusetts to 60% in Indiana. Compare Downs, *Mandatory Assessment for CLE—Not Mandatory CLE*, ALI-ABA CLE Review, Mar. 5, 1976, at 2 with Boshkoff, *Some Thoughts Concerning Mandatory CLE in Indiana*, ALI-ABA CLE Review, May 7, 1976, at 2.

there.<sup>20</sup> Attendance at such seminars and programs was encouraged in 1938 when the ABA sponsored programs on the then new Federal Procedural Rules. Subsequently, the National Institute for Trial Advocacy was established in Colorado to provide attorneys with an opportunity to polish their advocacy skills.

CLE also received a big boost after World War II. Attorneys returning to their practices from the armed services needed to brush up on the law.<sup>21</sup> Since then, the increasingly rapid changes in all areas of the law have made the need for CLE even more apparent. For instance, the new Federal Rules of Civil Procedure and the Federal Rules of Evidence have been very popular CLE topics.

The principal weakness of using voluntary CLE to raise the level of competence in the bar was the fact that it did nothing to improve the professional skills of attorneys who do not participate in the programs. Therefore a movement to mandatory programs began. Minnesota was the first state to adopt compulsory CLE.<sup>22</sup> On April 3, 1975, the Minnesota Supreme Court instituted the plan. Every member of the Minnesota bar, including judges and government attorneys, was required to attend 45 hours of CLE courses within a three-year period. A thirteen member committee, containing three laypersons, was established to oversee the program. So far, they have approved over 750 courses for CLE credit. Each attorney has been free to choose which approved courses he or she will attend and there have been no "required" courses.

The only members of the Minnesota bar exempted from the plan's requirements were those who chose restricted status. They were limited to representing one full-time employer, themselves, and members of their family.

On April 9, 1975, the Supreme Court of Iowa also adopted a similar mandatory CLE plan, effective January 1, 1976.<sup>23</sup> A somewhat broader plan, involving 60 hours of CLE every five years, is a part of the ABA Probate Section's proposed certification program.<sup>24</sup>

20. Friday, *supra* note 2, at 503.

21. O'Donnell, Perry, & Abernathy, *Compulsory Continuing Legal Education and Periodic Re-Examination and Re-Certification of Lawyers*, 62 *WOMEN LAW. J.* 20, 20 (1976).

22. Sheran & Harmon, *Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing*, 44 *FORDHAM L. REV.* 1081 (1976). See also Harris, *Minnesota CLE: The End of Licensing for Life?*, *TRIAL*, July/Aug. 1975, at 23.

23. Wirt, *Professional Competency of the Bar*, *ALI-ABA CLE Review*, Jan. 2, 1976, at 2, 4.

24. A.B.A. Committee on Specialization, *supra* note 17, at 629.

Proponents of mandatory CLE advance several arguments. One is that many attorneys recognize the need for, and are willing to participate in CLE, but simply fail to provide time for it. Making it compulsory gives them the necessary push to do what they would like to do anyway.<sup>25</sup> Mandatory CLE is particularly appropriate in conjunction with specialization<sup>26</sup> and certification plans,<sup>27</sup> but it must be recognized that the objectives of these plans are different. CLE's emphasis is on improving the competence of the profession, while specialization and certification deal more with the internal matter of how the system is organized.<sup>28</sup> Proponents also assert that formal education should be a life-long process.<sup>29</sup> A less noble reason for adopting such plans is that they are good public relations for the bar in general. They at least give the appearance of doing something and may postpone more drastic legislative measures.

While mandatory CLE may well be the "coming thing," it is not without its detractors. They argue that if examinations are not made a part of CLE courses then there is no way of ensuring active study rather than mere attendance at programs by members.<sup>30</sup> Moreover, because the producers of the programs have a "guaranteed market" there is less incentive to maintain high quality.<sup>31</sup> Perhaps a more valid criticism is that it is difficult to match programs and audiences.<sup>32</sup> Thus seminars may be too specific for beginning attorneys and not specific enough for specialists in the field, thereby wasting the time of both.

Other critics point out that stricter bar admission requirements might be just as effective<sup>33</sup> and that no amount of courses will make an attorney smarter, more ethical, or more careful.<sup>34</sup> Finally, mandatory CLE might provide more of an appearance of doing something than would an effective program to upgrade the profes-

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25. Byron, *supra* note 11, at 515.

26. Brink, *Let's Take Specialization Apart*, 62 A.B.A. J. 191, 194 (1976).

27. Friday, *supra* note 2, at 508.

28. Fromson & Miller, *Specialty Certification, Designation, or Identification for the Practicing Lawyer—A Look At Midstream*, 50 ST. JOHN'S L. REV. 550, 552 (1976).

29. Parker, *supra* note 9, at 488.

30. Wolkin, *supra* note 1, at 576; Boshkoff, *supra* note 19, at 4.

31. Wolkin, *supra* note 1, at 577. This argument ignores the fact that in most states there are competing program producers. And after all, attorneys are generally vocal enough to complain if dissatisfied. See Brosnahan, *How to Choose a CLE Program*, PRAC. LAW., Apr. 15, 1976, at 79, 83.

32. O'Donnell, Perry, & Abernathy, *supra* note 21, at 23.

33. *Id.*

34. *Id.* at 24.

sion. It thus would dissipate the drive for more stringent competence requirements.

#### IV. SPECIALIZATION

It must be recognized that specialization within the legal profession is a fact of life.<sup>35</sup> The only real question is whether it should be regulated.<sup>36</sup> The ABA is currently taking a neutral position. After encouraging several pilot projects,<sup>37</sup> it now suggests that state associations wait before proceeding on their own.<sup>38</sup>

States that have adopted specialization plans have followed two basic approaches. The first is typified by New Mexico's self-designation plan.<sup>39</sup> The plan has two options. Under the first option, an attorney may identify himself as specializing in a specific area of the law. To do this he must have spent 60 per cent of his time in the last five years working in the chosen field. If all of the members of a firm meet these requirements then the firm may also publicize the fact that it specializes. This announcement may be carried in its listing in the yellow pages of the telephone directory, on stationery, business cards, and in law lists. If an attorney or firm receives a referral client with a problem in the specialized area, he or it may not represent that client in any other matter within three years without the written consent of the client's original attorney who made the referral.

Because relatively few attorney may meet the time requirements under the first option, the plan contains an alternative provision. Under the second option, an attorney may announce that he or she limits his or her practice to not more than three relatively narrow areas of the law. Having made this announcement, the attorney or firm must practice only within these limited areas. The plan sets out 38 areas,<sup>40</sup> to which others may be added.

The New Mexico plan requires participating attorneys to swear to an affidavit that they meet the time requirements of the program. No examination or CLE is required. However, the Bar Association publicly disclaims, in the yellow pages and elsewhere, that specialization or a limited practice is in any way an endorsement by the Bar Association and warns that clients should not assume that specialists are any more competent than nonspecialists.

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35. Petry, *supra* note 7, at 567.

36. Comment, *supra* note 14, at 453.

37. *Id.* at 455.

38. Fromson & Miller, *supra* note 28, at 552.

39. Comment, *supra* note 14, at 461.

40. Farrior, *Three Plans—A Summary for the Busy Lawyer*, 48 FLA. B.J. 169, 171 (1974).



The main advantage of the New Mexico plan are its simplicity of administration and its flexibility. It is particularly well-suited to sparsely populated states where a high degree of specialization is not practical. One of its weaknesses is the lack of CLE or exam requirements. But it serves the purpose of getting clients with particular, narrow problems, together with attorneys who wish to limit their practice. The limitation on doing further work for referral clients serves to encourage referrals, because without such limits attorneys would be reluctant to send clients to another firm for fear that the clients would shift all their legal business to the other firm.

An alternative approach to the New Mexico plan is the Florida self-designation plan. Under this system, a lawyer may specialize in as many as three areas. The plan does not establish a list of specialty fields, but rather allows the individual attorneys to make their own designations. An attorney wishing to participate in the plan must have been a member of the Florida Bar for three years and have substantial experience in his areas of designation. He or she must also promise to "earnestly continue his [or her] legal education in each designated area through conscientious reading and research and through continuing legal education programs."<sup>41</sup> After an application for designation is approved by the Florida Bar, a three-year certificate of designation is granted. If all of the members in a firm qualify, the firm as a whole may also designate a specialty. As in New Mexico, Florida attorneys may advertise their specialties. Again, however, the Bar publicly disclaims any endorsement or special expertise of those who have specialized. After three years, a Florida attorney participating in the designation program must re-apply. To renew the certificate, the applicant must demonstrate that he or she has taken at least 30 hours of CLE in each of his or her areas of specialization. The Florida plan, like the New Mexico plan, includes a limitation on soliciting referred clients. However, unlike New Mexico attorneys who limit their practice, Florida attorneys who designate specialties may continue to practice in all other areas of the law as well.

Most other specialization plans under consideration involve a combination of the characteristics of the Florida and New Mexico plans. Most impose some restriction on "keeping" referred clients. None of the plans restricts nonspecialists from practicing in any area and all of the plans evidence concern for maintaining the role of the general practitioner. CLE is often integrated into such plans but none involves re-examination. All of the plans also amend the

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41. *Id.* at 178.

Code of Professional Responsibility to allow advertising of the specialty areas. Finally, with emphasis on the individual attorney most plans do not allow firms to specialize, or they require that all of the attorneys in a firm specialize in the same areas before the firm can announce that it specializes.

The advantages of a specialization program over a certification program lie in its flexibility and in the fact that it is easier to "sell" to the bar than is a tougher certification plan. It also works better in an area with a limited number of attorneys where a strict certification program might be too limiting.

The disadvantages of a specialization program are that it might tend to deceive a naive public, that it might ultimately work a hardship on general practitioners, and that it will raise referral and competitive problems.

The Special Committee on Specialization of the American Bar Association has prepared a list of "pros" and "cons" of specialization and certification.<sup>42</sup>

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#### PROS

1. The certified specialist will become more proficient in solving problems in his specialized field.
2. Other lawyers will become more proficient in solving legal problems.
3. The overall quality of legal services to the general public will improve.
4. Costs to clients will be less.
5. Legal work for clients will be handled more speedily and proficiently, without reducing the quality of service.
6. The quality of solutions to individual legal problems will improve.
7. Specialized services will be made available to the general practitioner.
8. The income of certified specialists will increase.
9. Certified specialists will become more satisfied practicing law.
10. Clients will be more satisfied with results achieved when a certified specialist is used.
11. The public image of the bar will be improved.
12. The public will find it easier to locate an attorney dealing with specialized problems.
13. The unauthorized practice of the law will decrease.
14. The specialist will recognize a legal problem or solution overlooked by a general practitioner.
15. Law schools will be encouraged to offer in-depth courses in areas of specialization certification.
16. Because quality of legal work will be improved, there will be less of a load on court dockets.

#### CONS

1. The general practitioner will abandon the specialized

## V. CERTIFICATION

Certification programs are a hybrid plan involving specialization in limited fields with periodic re-examinations and mandatory CLE. California was the first state to adopt a certification procedure.<sup>43</sup> The California plan is similar to the specialization programs already discussed in that it is voluntary, it does not affect nonparticipating attorneys, those participating may advertise their certifications, an attorney may be certified in more than one field, there are limitations to protect the referred clients, and the plan is financed by fees from the participants.

Unlike specialization plans, certification in California involves re-examination every five years.<sup>44</sup> So far, only three areas have

fields.

2. Overall legal services to the general public will deteriorate.
3. A certification program will not provide better total legal services to the client.
4. It is impossible to truly test proficiency and competency in a given field of law.
5. Certification of specialists is biased toward the urban lawyer and against the rural lawyer.
6. Certification of specialists will channel business to the metropolitan lawyer.
7. "Substantial involvement" is not equivalent to "competence."
8. A specialist tends to become too narrow in his outlook.
9. The cost to clients of specialized legal services will increase, and increased fees may drive the general public away.
10. The specialist may tend to build-up a case beyond what it is worth.
11. The certified specialist may become dissatisfied with the drudgery of the every-day, run-of-mill practice of law.
12. The general practitioner will be destroyed.
13. Law is too complex for a layman to know the nature of his problem and make an intelligent choice as to the type of specialist to whom he should go.
14. Specialization may force a lawyer to try cases which perhaps might not otherwise be tried, in order to meet the minimum for a certificate.
15. Specialists could start practicing in the outer limits of their specialty, resulting in practice in an area in which they are not truly specialists.
16. Clients would have to go to many lawyers to get their day-to-day legal work done.

Wirt, *Professional Competency of the Bar*, ALI-ABA CLE Review, Jan. 23, 1976, at 3-4.

43. Fromson & Miller, *supra* note 28, at 554. The California Board of Governors has also recommended a plan to issue five year renewable licenses to practice law. See ALI-ABA CLE Review, Oct. 3, 1975, at 1, 4.
44. Farrior, *supra* note 40, at 173.

been approved for certification: tax, workmen's compensation, and criminal law. Only individuals, and not firms, may be certified, with certification announced only in the telephone book, and not on stationary or business cards. Committees supervising each of the three areas have developed different criteria for certification. However, all require substantial experience in the area, defined by such standards as hours spent or trials conducted. There are also rigorous CLE requirements.<sup>45</sup> To be considered for initial certification an attorney must have been a member of the California Bar for five years with substantial experience in the chosen area. For the first four years of the program there was a grandfather provision which allowed attorneys with at least ten years' experience to be certified without examination.<sup>46</sup>

The other certification program currently in effect is in Texas. This program has three approved areas: criminal, labor, and family law. Certification is granted for a period of five years. As in California, the requirements for each area vary. In addition to experience, and in some cases an examination, the Texas plan also requires references from five lawyers not associated with the applicant, including one from a judge before whom the applicant has practiced in the chosen area. The certified attorney must spend at least 25 percent of his or her time in the area and comply with mandatory CLE requirements. Only individuals and not firms may be certified. Neither the certified nor the uncertified lawyer is limited to or excluded from any areas of practice.

Perhaps the most rigorous certification programs is that proposed by the ABA committee on specialization in the area of estate planning and probate law.<sup>47</sup> The reason for the detailed requirements of the plan may be due to the fact that it was developed by a specialty, rather than geographically based, organization. The plan sets out detailed requirements as to the number of wills, trust instruments, and estate tax returns the applicant must have completed. To be certified, an attorney must have spent at least one third of his or her time in each of the last five years dealing with estates and must have completed 100 hours of CLE.<sup>48</sup> The question of re-examination was left as a local option due to the "wide reluctance to submit to examination,"<sup>49</sup> and to get broader support for the plan. The certification would be effective for five years.

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45. See Broden & Horvitz, *supra* note 5, at 472.

46. Farrior, *supra* note 40, at 175-76.

47. See A.B.A. Committee on Specialization, *supra* note 17.

48. *Id.* at 626.

49. *Id.* at 628.

Within that time the practitioner must have completed 60 hours of CLE in order to qualify for recertification.

The committee speculated on the standards which certification programs might impose on a specialist in a legal malpractice action. Specifically, would a specialist be held to higher standards? Because it is estimated that perhaps 60 per cent of the malpractice claims in California involve wills, it is not surprising that this would be a concern.<sup>50</sup> In the future some attorneys may be held to a higher standards as specialists.

## VI. PEER REVIEW

Peer review programs are widely discussed, though no state has yet adopted one. However, there are at least three empirical studies which have used peer review to evaluate the competence of legal services and attorneys.

The first study was conducted by Douglas E. Rosenthal.<sup>51</sup> It was based on a random sample of 60 Manhattan residents who had recovered at least \$2,000 from personal injury claims. A fact sheet for each claim covered the nature of the injury, medical expenses and lost income, the perfection of the liability issue, the name of the defendant's insurer, and the income, education-level, and occupation of the victim. This information was submitted to a panel of two plaintiffs' lawyers, two insurance company claims agents, and one lawyer who had represented plaintiffs and insurance companies. Each of the experts was asked to put a dollar-value on the clients' claims and five values for each claim were averaged. In 77 per cent of the cases, clients received less than the panels evaluation. Interestingly enough, approximately one-half of the clients were satisfied with their recoveries and the two-thirds were satisfied with their lawyer's performance. The study presented an interesting methodology for evaluating an attorney's performance in quantitative terms, though it only could be applied in limited areas where evaluation could be geared to judgments recovered.

The second study involved criminal defense work, and was conducted at the University of New Mexico Law School.<sup>52</sup> The study compared a sample of licensed attorneys (seven public defenders

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50. *Id.* at 631-32.

51. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974), discussed in ALI-ABA CLE Review, July 30, 1976, at 2, 4.

52. Evans & Norwood, *A Comparison of the Quality of Legal Representation Provided by Licensed and Student Attorneys* (June 1975) (unpublished report to the Law Enforcement Assistance Administration), discussed in ALI-ABA CLE Review, Aug. 6, 1976, at 2.

and seven private practitioners) with a group of supervised law students in a clinical program. Video tapes of client interviews and case files were reviewed.<sup>53</sup> The number of client contacts, the total time spent, the number of acquittals, and the severity of sentences received by convicted defendants were all considered in comparing the two groups. The authors of the study reviewed 132 charges handled by the students and 67 by attorneys. Although the difference between the two groups was not statistically significant, the students had slightly better win-loss record.

The third, and most exhaustive peer review program empirically tested is one that was developed for use in evaluating the quality of service provided by Legal Services Programs.<sup>54</sup> An eleven-member advisory panel of experienced attorneys developed and tested an interview format for rating attorneys. This format then was used by teams of two attorneys from outside the community where the Legal Services Program was located. During the two-hour interview, the interviewees were asked to discuss fifteen cases randomly selected from their files, consisting of five open, five closed, and five "advice-only" cases. The attorneys were asked to describe two or three examples of their best work.

One-half to two-thirds of the attorneys in each Legal Services Program were interviewed. Rating attorneys on a five-point scale, they found 54 per cent in the middle "adequate" range, six per cent were "poor," 21 per cent "marginal," 19 per cent "effective and competent" and none was "outstanding." The interviewing teams reached a consensus on 88 per cent of the attorneys and law students evaluated. While the authors of the study concluded they had developed a valuable tool for evaluating Legal Services Programs, the high cost of approximately \$2,700 per program probably makes the interview format prohibitively expensive for use in evaluating the bar generally.

It is unlikely that peer review would be politically acceptable to the bar as a whole. It does, however, have a great deal of viability for evaluation within firms and governmental agencies. This would be comparable to the peer review in the medical profession that is done by hospital boards and surgery review committees. No doubt many legal organizations could benefit from a standardized, routine, internal evaluation system even though the need for

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53. The client's permission was reportedly obtained in advance. The researchers had hoped to interview the presiding judges, but they refused to cooperate. *Id.*

54. Vogt, Silverman, White, & Scanlon, *Field Test Results of Peer Review Quality Assessment of Legal Services*, ALI-ABA CLE Review, Sept. 17, 1976 to Dec. 10, 1976.

confidentiality would prevent any in-depth outside review. Some of these early studies may provide a guide for developing such systems.

## VII. OTHER PROFESSIONS

When considering proposed changes in the legal profession, it may be helpful to look at the experience of other professions. For instance, there are over 20 recognized medical specialties.<sup>55</sup> In fact medicine was recognized specialization for more than 50 years.<sup>56</sup> Continuing education requirements are also common in medicine. For instance, Oregon now requires 150 hours of continuing education every three years.<sup>57</sup> In addition, doctors have long been subject to continuous peer review by hospital boards. Finally, the Department of Health, Education, and Welfare recently has become involved in monitoring and evaluating health care which is federally subsidized through Professional Service Review Organizations.<sup>58</sup>

Similarly, the accounting profession is heavily regulated. Fourteen states require continuing education for certified public accountants *by statute*.<sup>59</sup> Colorado accountants, for instance, must have 120 hours of class work every three years.<sup>60</sup> In the wake of recent business scandals such as "Home Stake Mining" and "Equity Funding," major accounting firms are even voluntarily "auditing" each other to determine if their review procedures are strict enough.<sup>61</sup>

It is clear that the legal profession lags far behind other professions in continuing competence requirements. This may be offset somewhat by the adversarial nature of the practice of law. The less than proficient counselor will have his errors constantly pointed out to him, albeit not until after the damage is done and it is too late for his client. This constant tension should provide additional incentive to maintain professional competence, but does not excuse the profession for its failure to institutionalize competence maintenance procedures. Until recently, the only remedy has been the drastic one of disbarment. It would be far better for both the profession and the public to avert such disasters by continuous professional competence programs.

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55. Broden & Horvitz, *supra* note 5, at 470.

56. Fromson & Miller, *supra* note 28, at 551.

57. Parker, *supra* note 9, at 483.

58. Wolkin, *supra* note 18, at 1065; 42 U.S.C. § 1320c-4 (Supp. II 1972).

59. Parker, *supra* note 9, at 478-79.

60. *Id.* at 480-81.

61. See Wolkin, *supra* note 18, at 1065.

## VIII. ALTERNATIVES

There are at least two alternatives to state enacted programs. The first is that the federal judicial system may impose its own competency requirements for admission to federal practice.<sup>62</sup> Chief Justice Burger's criticism of the quality of advocacy seen in the federal courts has been widely noted.<sup>63</sup> Chief Judge Irving Kaufman of the Court of Appeals for the Second Circuit has echoed the Chief Justice's criticisms, referring to "what many perceive to be a decline in the quality of advocacy at both the trial and appellate levels."<sup>64</sup> A committee appointed by Kaufman has developed a set of proposed criteria for attorneys who wish to practice in the federal system. The impetus is greatest in the criminal defense area where the "inadequate counsel" pleas are so frequent, and which quite often are justified. The Second Circuit guidelines would require that a lawyer have had certain courses in law school or through CLE.<sup>65</sup>

The other apparently viable alternative is a national program. This might involve certain general criteria such as mandatory CLE or it might involve various certification plans set up within specialty areas. Proponents of a national program argue that having so many different plans is simply not workable. So much variety would tend to confuse both the public and attorneys. A multitude of differing systems would further inhibit the mobility of attorneys and their freedom to move to another state or practice in more than one jurisdiction. Balanced against the convenience of a national system is the fact that compromises might leave it so benign that it would be useless.

Another alternative, of course, is for the bar to do nothing. The chief danger in this, from the bar's perspective, is that legislatures may attempt to fill the "regulatory gap." It seems that whatever view an attorney may have of the various plans, he or she would surely prefer regulation from within the profession to policing from the outside.

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62. A federal bar exam has been suggested. See Proceedings of the 36th Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 589 (1975).

63. Comment, *supra* note 14, at 457. See Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973).

64. Kaufman, *The Court Needs a Friend in Court*, 60 *A.B.A. J.* 175 (1974).

65. Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 159 (1975) (proposed requirements). On December 18, 1975 the U.S. Judges for the Southern District of New York voted "overwhelmingly" against adopting the rules but the concept is probably not dead. See Frankel, *Ill-Advised Rules for Bar Admission*, *ALI-ABA CLE Review* Feb. 20, 1976, at 2.



## IX. CONCLUSIONS

Perhaps one of the most compelling reasons for reforming the legal profession is the fact that if it is not done internally now, it may be accomplished from the outside later.<sup>66</sup> Coupled with the current high cost of legal services is the potential "surplus" of lawyers which together may put additional strains on the present system.

Unfortunately, most of the bar-proposed regulations are attorney-oriented rather than public-oriented. Individual bar members may be more concerned with preventing other attorneys from gaining an advantage than in developing better ways to fully and efficiently serve the public.<sup>67</sup>

Mandatory CLE is one method which could lead to better service for the public. Periodic general re-examination probably will never be adopted by the bar. Perhaps exams might be coordinated with CLE courses with the credit hours for courses contingent on passing a test at the end of the presentation. Such a requirement would not be too onerous.

Independent peer review probably will never become a reality either, because of the need for confidentiality, high cost involved, and because it is antithetical to the traditional independence of attorneys. It can, however, be used effectively by firms and agencies for internal evaluation.

Ultimately, it seems that more states, particularly those with large urban centers, will move to rigorous certification programs. To make the effort to attain certification worthwhile, eventually some areas of the law may have to be limited to certified specialists only. While initially this may not be well received by the generalist bar, eventually it will become clear that the "myth of the generalist" must be eliminated.

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66. Cf. Falk, *Lawyers, Fearing Federal Legislation, Tackle Discipline, Specialization Issues*, Wall. St. J., Feb. 14, 1977, at 9, col. 1.

67. Comment, *supra* note 14, at 469.