Comment

Trial Advocate Competency

*The Honorable Robert H. Staton**

The competency of the trial advocate plays an indispensable role in the administration of justice. Without minimal competency of the trial advocate in the courtroom, no criminal defendant can receive the benefit of effective counsel. Under our system of government by rule of law, the liberty of an accused rests upon a very delicate balance when minimal competency of the trial advocate is placed in question. Equally important is the role of the trial advocate in the adjudication of civil litigation. Without his minimal competency injected, the due process of law equation will never balance within the terms of the United States Constitution and the constitutions of the several states. For these reasons and many more, the public should never hold in doubt the ability of the legal profession to provide minimally competent trial advocates in the courtroom when their services are needed. However, the safeguards for this public assurance are very tenuous. When a law student graduates from law school, he is tested upon the substantive law and never upon his skills as a trial advocate who will soon be entering the courtroom to protect the liberty of an accused or the vital civil interest of his client. Presently, it is assumed that passing of the state bar examination by a law school graduate qualifies him to represent the members of the public in a state or federal courtroom as a trial advocate. Some members of the federal judiciary doubt the validity of this assumption as to all licensed advocates. Many members of the state judiciary as well as members of the state and federal bars join them in their doubts.

Chief Justice Warren Burger of the United States Supreme Court delivered his now famous Sonnett Lecture in 1973 at Fordham Law School.[1] In his lecture, he remarked: "[I]n spite of all the bar examinations and better law schools, we are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians."[2]

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[1]Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973) (delivered as the Fourth Annual John F. Sonnett Memorial Lecture at the Fordham Law School, New York) (Nov. 26, 1973) [hereinafter referred to as the *Sonnett Lecture*].

[2]*Id.* at 230.

Another doubter in the federal judiciary is Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit: "Too many lawyers come into court today with only a diploma to justify their claims to be advocates. They are untrained and unsupervised in the immensely practical work of litigation."[3]

An accused is entitled under the sixth amendment to the assistance of effective trial counsel to protect his liberty during criminal proceedings by the state, but more than a few instances of less than effective trial counsel have been noticed by members of the bench. Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia recently noted these sixth amendment violations: "I come upon these 'walking violations' [of the sixth amendment] week after week in the cases I review."[4]

To what extent does less than minimal competency exist in our nation's courtrooms? Chief Justice Burger has estimated that between one-third to one-half of those advocates who appear in "serious" litigation are less than minimally competent.[5] He did not make an estimate which would include some of the less "serious" cases, but the percentage may be much lower due to the lack of the complexity of those less "serious" cases; perhaps, not more than fifteen or twenty percent would be more accurate. This estimate would be more in keeping with some of the findings of the Clare Report[6] where approximately forty judges of the federal second circuit were interviewed: "The percentage of lawyers criticized for lack of training ranged from 15% to 75%. Eliminating the extremes, it was the consensus of the judges that a substantial percentage of the lawyers trying cases before them lacked basic knowledge in the fundamentals of litigation."[7]

A second report, filed by the Devitt Committee, comes closer to the fifteen or twenty percent estimate.[8] In the spring of 1977, the Devitt Committee sent a questionnaire to 476 federal district judges.[9] One question asked on the questionnaire was: "Do you believe that there is, overall, a serious problem of inadequate trial

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[3]Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 176 (1974).

[4]Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

[5]*Sonnett Lecture, supra* note 1, at 234.

[6]Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 159 (1975) (Robert L. Clare, Jr., Chairman). This report is commonly known and will hereinafter be referred to as the *Clare Report*.

[7]*Id.* at 164.

[8]Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts, 79 F.R.D. 187 (1978) (Edward J. Devitt, Chief United States District Judge, Chairman). This report is commonly known and will be hereinafter referred to as the *Devitt Report*.

[9]*Id.* at 193.

advocacy by lawyers with cases in your court?"[10] Of the 387 judges who responded to the questionnaire, 41.3% answered "yes" and 58.7% answered "no."[11]

In another question, the judges were asked to rate the performance of 1,969 lawyers in 848 trials.[12] The judges rated 8.6% of the performances " 'very poor,' 'poor,' and 'not quite adequate.' "[13] The trial performances which fell into these two categories, " 'very poor,' and 'not quite adequate,' " amounted to 16% of the 848 trial performances considered.[14] Another category, "adequate but not better," amounted to another 16.7% of the trial performances considered.[15] The Devitt Committee concluded: "If the 16.7% of performances which were barely adequate are added to those judged inadequate, it leads to the conclusion that 25% of the performances were less than 'good.' "[16] If consideration is given to the "serious" cases only estimate of Chief Justice Burger, the Devitt Committee estimate of twenty-five percent and the Chief Justice Burger estimate of thirty-three to fifty percent may not be too far from agreement. Although the estimates of less than minimal competency made by Chief Justice Burger, the Clare Report, and the Devitt Report were restricted to federal courts, it is reasonable to assume that most of these same trial advocates practice in state courts and that similar estimates might be expected if state courts were surveyed.

Basic skills are lacking in most of the trial performances that have shown less than minimal competency including the lack of skill in questioning witnesses on direct examination and on cross-examination, in the making of proper objections to testimony and exhibits, and in making the proper procedural motions. In his Sonnett Lecture, Chief Justice Burger made these five observations:

> 1. The thousands of trial transcripts I have reviewed show that a majority of the lawyers have never learned the seemingly simple but actually difficult art of asking questions so as to develop concrete images for the fact triers and to do so in conformity with rules of evidence.
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> 2. Few lawyers have really learned the art of cross-examination, including the high art of when not to cross-examine.
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> 3. The rules of evidence generally forbid leading questions, but when there are simple undisputed facts, the

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[10] *Id.* at 194.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

leading-questions rule need not apply. Inexperienced lawyers waste time making wooden objections to simple, acceptable questions, on uncontested factual matters.

4. Inexperienced lawyers are often unaware that "inflammatory" exhibits such as weapons or bloody clothes should not be exposed to jurors' sight until they are offered in evidence.

5. An inexperienced prosecutor wasted an hour on the historical development of the fingerprint identification process discovered by the Frenchman Bertillon, until it finally developed that there was no contested fingerprint issue. Such examples could be multiplied almost without limit.[17]

During the public hearings held by the Clare Committee to determine whether any trial advocacy inadequacies actually existed in the federal court system, a former United States Attorney testified that "of the last twelve cases he tried as U.S. Attorney he was of the opinion that one-half of the defendants were convicted because of incompetency of their counsel."[18] Later, because he was so moved by the inadequacies of defense counsels, he resigned as United States Attorney and became the first head of the Connecticut Criminal Defense Committee.[19]

During the investigation and research by the Devitt Committee, which was trying to determine the extent of the incompetency found by the Clare Committee, two general areas of inadequacy of trial advocates appeared more prominent than any others. First, the trial advocates were inadequate in the general area of trying the lawsuit—"they don't know how to try a lawsuit."[20] They lack " 'proficiency in the planning and management of litigation,' " and they lack sophistication of " 'technique in the examination of witnesses.' "[21] Second, trial advocates appeared to be inadequately trained in the area of the Federal Rules of Procedure and the Federal Rules of Evidence.[22]

Before considering any of the particular causes ascribed by the previously discussed reports to the inadequacies of trial advocacy in

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[17]*Sonnett Lecture, supra* note 1, at 234-35. Chief Justice Burger also noted: "Another aspect of inadequate advocacy—and one quite as important as familiarity with the rules of practice—is the failure of lawyers to observe the rules of professional manners and professional etiquette that are essential for effective trial advocacy." *Id.* at 235.

[18]*Clare Report, supra* note 6, at 166.

[19]*Id.*

[20]*Devitt Report, supra* note 8, at 194.

[21]*Id.*

[22]*Id.*

the courtroom, the general historical development of legal education as it pertains to trial advocacy may be helpful.[23] Certainly, it will draw into sharper focus the underlying currents of concern for increasing the standards of legal education and explain why some basic advocacy skills have suffered as a result of these concerns.

In the colonial period, the trial advocate received his training through the apprentice system which had been inherited from England.[24] He served as a clerk in a law office which may have had one or more additional clerks serving their apprenticeships. His duties were usually routine drafting and copying from the books, but he would accompany an experienced advocate into the courtroom on occasion and observe the proceedings. He learned by observing, asking questions, and by doing what he was told to do in the office and in the courtroom. Admittedly, this kind of training was not standardized nor did it have any recognizable system. It was merely learning by doing, which varied from one law office to another. However, one should not assume that there was a complete absence of control over the quality of the training. The various state bar associations had minimum standards that all aspiring trial advocates had to meet.[25]

> By insisting upon the observation and enforcement of certain minimum standards, the bar to a large extent controlled the profession, including the admission to the study of law and to active practice. This control of admission [in Massachusetts] was exercised by means of an examination before a committee of the bar.[26]

For example, in New Hampshire a candidate of good moral character who had a liberal arts degree and had served as an apprentice for three years would have to pass the bar examination prepared by the bar association.[27] If the candidate did not have a liberal arts degree, he would have had to serve an apprenticeship of five years.[28] In some states, the apprenticeship requirement was as long as seven years.[29] Taking into consideration the body of law to be studied in the law office which was usually limited to Blackstone,

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[23]For a more thorough historical examination, see A. BLAUSTEIN & C. PORTER, THE AMERICAN LAWYER (1954); 1 & 2 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965); Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 BRIGHAM YOUNG L. REV. 695, 719.

[24]Gee & Jackson, *supra* note 23, at 722-25.

[25]*Id.* at 727.

[26]*Id.* at 727-28 (quoting 2 A. CHROUST, *supra* note 23, at 131).

[27]*Id.* at 728.

[28]*Id.*

[29]*Id.*

Kent, and Coke, the apprentice system was fairly well suited to the early colonial setting.

This apprentice system rapidly began to deteriorate for the trial advocate in the late 1820s under the crushing political pressures from the egalitarian philosophy of Jacksonian democracy.[30] This anti-elitist philosophy was very popular among aspiring trial advocates who were anxious to earn a livelihood in the courtroom. Too, the state legislatures were asserting their authority to dictate through legislation the requirements for admission to practice. The tightly held grip of the bar associations upon the standards for admission to practice law weakened and was finally lost. With few exceptions, anyone of "good moral character,"—giving little consideration for his knowledge of the law—was permitted to practice law under the legislatures' scheme of admission to practice.[31] There was no compelling need for the aspiring trial advocate to serve an apprenticeship for three or five years before being admitted to practice, although some private law schools, such as the Litchfield School founded in 1784 by Tapping Reeve,[32] and law lectures at William and Mary, Harvard, and Yale[33] remained available for those who heard a different drummer.

After egalitarianism began to wane, three very distinct events, more than any others, chartered the course for the demise of the apprenticeship system of becoming a trial advocate. The first event was the absorption of the private law schools by the universities.[34] Private schools had been more practical than theoretical in their approach to legal education. They were much more systematic in their approach to legal education than the apprenticeship, but they could not confer prestigious academic degrees which were becoming preferred by those leaders of the profession who were trying to pick up the pieces left from the Jacksonian democracy onslaught. The university, on the other hand, could confer an academic degree at the conclusion of the law school training. Usually, this marriage of the private law school and the university meant an absorption of the private law school's faculty and students as well, so both were happy with the union.

The second event was less visible. Most universities deplored the apprenticeship approach to legal education and felt themselves in direct competition with that system. When Christopher Columbus Langdell was appointed Dean of Harvard Law School in 1870, he in-

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[30] *Id.* at 728-30.
[31] *Id.* at 730.
[32] *Id.* at 726.
[33] *Id.* at 725.
[34] *Id.* at 732-33.

troduced his revolutionary casebook method of teaching legal theory which became the "model and impetus" for academic legal education.[35] This event more than any other spelled the doom of apprenticeship dominance in legal education. To this day, the Socratic method introduced by Langdell remains strong in university law schools across the country.

The third event was the organization of the American Bar Association in 1878. One of the first standing committees was the Committee on Legal Education.[36] Many of the members on this committee were university law school faculty members determined to raise the standards of legal education. They were later assisted in this endeavor by the Association of American Law Schools. It is not the purpose of this Comment to detail the reforms and standards during the first fifty or sixty years of this committee, but generally these new standards were quantitative in nature, dealing with: the length of time for undergraduate study before entering law school, the length of time for graduate study in law school, the size and composition of law libraries, and the requirement of full-time faculties.[37] The effect of these reforms was devastating to the apprenticeship approach of teaching law. The theoretical approach dominated the scene, and those private schools which remained had to comply with the new standards set by the committee. To assure compliance, the committee devised an inspection procedure of each law school before accreditation by the American Bar Association. Some observers still feel that the practical versus theoretical struggle is very much alive. Some of the recent developments in clinical education within the university law schools and the development of continuing legal education programs within the bar associations would give the impression that legal education is in some sort of cycle and is revolving back to more emphasis on the practical skills that were the mainstay of the apprenticeship.

With this very short glimpse over the shoulder at past developments in legal education, a better understanding of more recent criticisms may be possible. In citing the causes for trial advocacy incompetency, Chief Justice Burger listed three fundamental causes:

> First . . . is our historic insistence that we treat every person admitted to the bar as qualified to give effective assistance on every kind of legal problem that arises in life, including the trial of criminal cases in which liberty is at

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[35]*Id.* at 733.

[36]This committee is now called the Section on Legal Education.

[37]Gee & Jackson, *supra* note 23, at 733-43.

stake, civil rights cases in which human values are at stake, and myriad ordinary cases dealing with important private personal interests. It requires only a moment's reflection to see that this assumption is no more justified than one that postulates that every holder of an M.D. degree is competent to perform surgery on the infinite range of ailments that afflict the human animal.

. . . .

A second cause of inadequate advocacy derives from certain aspects of law school education. Law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette as things basic to the lawyer's function. With few exceptions, law schools also fail to provide adequate and systematic programs by which students may focus on the elementary skills of advocacy. I have now joined those who propose that the basic legal education could well be accomplished in two years, after which more concrete and specialized legal education should begin. If the specialty is litigation, the training should be prescribed and supervised by professional advocates cooperating with professional teachers, for both are needed. A two-year program is feasible once we shake off the heritage of our agricultural frontier that the "young folks" should have three months vacation to help harvest the crops—a factor that continues to dominate our education. The third year in school should, for those who aspire to be advocates, concentrate on what goes on in courtrooms. . . .

. . . .

The third cause is the inevitable inability of prosecutor and public defender offices to provide the same kind of apprenticeships for their new lawyers as, for example, the large law firms provide. The prosecution offices and public defender facilities have neither the wealthy clients nor consequent financial resources of the large law firms to enable them to develop whatever skills they need to carry out their mission. Prosecutors and public defenders often learn advocacy skills by being thrown into trial. Valuable as this may be as a learning experience, there is a real risk that it may be at the expense of the hapless clients they represent—public or private. The trial of an important case is no place for on-the-job training of amateurs except under the guidance of a skilled advocate.[38]

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[38]*Sonnett Lecture, supra* note 1, at 231-33.

The three years of law school education referred to by Chief Justice Burger in his second cause was actually a requirement thought necessary by Langdell, the first to institute the requirement at Harvard. Later, other schools followed Langdell's lead. The American Bar Association debated for almost forty years on the merits of requiring three years of legal education before accepting it as a standard for admission to the bar.[39]

Other causes for inadequate trial advocacy were cited in the Clare Report. Two principal causes which were related to more modern developments rather than historical developments were underscored. The first principal cause cited by the Clare Report was the staggering increase in litigation during the last decade which has created a severe shortage of competent trial advocates to serve the demand of litigants.[40] The Clare Report described the increased demand for trial advocates as follows:

> Today, more than ever, people look to government including the courts for the solution of an ever-increasing number of their social and economic problems.
>
> This coupled with an expanding concept of constitutional rights and a legislative tendency to enact broad social and environmental legislation, leaving implementation to the courts, necessarily results in a heavily increased demand for trial lawyers.[41]

A second principal cause cited by the Clare Report was the demand of students to choose the courses they want to take rather than to be restricted to any required list of courses prepared by the law school.[42] This student demand for freedom of choice has reduced courses such as evidence and legal ethics to elective courses in some law schools.[43] Previously, evidence, legal ethics, and procedures were considered essential to every student's legal education. The Clare Committee expressed this opinion in its report:

> The Committee is of the opinion that all of the evidence demonstrates that incompetence exists, attributable to lack of proper training, and that the public is deceived when the court admits unqualified attorneys to practice. Such admission carries the implied representation that the court is vouching for the lawyer's adequacy to try cases.[44]

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[39]Gee & Jackson, *supra* note 23, at 734.
[40]*Clare Report*, *supra* note 6, at 167.
[41]*Id.*
[42]*Id.*
[43]*See generally id.*
[44]*Id.* at 166.

This implied representation that the court is vouching for the trial advocate's minimum adequacy and the obvious public deception which may result brought about the first remedial action by a state supreme court. In his explanation for the need of Indiana Rule 13,[45]

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[45]IND. R. ADMISS. & DISCP. 13 (commonly called Rule 13). Rule 13 has 10 separate sections. Sections II and V are pertinent to this discussion and read as follows:

II. Purpose

The purpose of this rule is to establish minimal educational prerequisites for the effective assistance of counsel in civil or criminal matters and cases in the State of Indiana, which minimal educational prerequisites shall be held by all persons admitted to the bar of this Court by written examination after the effective date of this rule.

. . . .

V. Educational Qualifications

Each applicant for admission to the bar of this Court by written examination shall be required to establish to the satisfaction of the State Board of Law Examiners that the applicant is

(A) A graduate of a law school located in the United States which at the time of the applicant's graduation was (1) a school of law approved by the Supreme Court of Indiana or an agency thereof; or (2) was a school of law approved by the Supreme Court of any other state of the United States or an agency thereof; or (3) was on the approved list of the Council of Legal Education and Admission to the bar of the American Bar Association (The Supreme Court of Indiana reserves the right to disapprove any school regardless of other approval); and

(B) A person who satisfactorily has completed the law course required for graduation and furnishes to the Board of Law Examiners a certificate from the Dean thereof, or a person designated by the Dean, that the applicant will receive the degree as a matter of course at a future date, pursuant to Indiana Rules of Admission and Discipline, Rule 17, and

(C) A person who has completed in an approved school of law each of the following designated subject matter and cumulative semester hours requirements, *regardless of the course name*, in a law school curriculum:

ADMINISTRATIVE LAW AND PROCEDURE — 3 credit-semester hours*

Some examples of courses which qualify for credit in this subject are:

Administrative Law and Procedure
Federal Trade Commission
Labor Law
Securities & Exchange Commission

BUSINESS ORGANIZATIONS — 4 credit-semester hours*

Some examples of courses which qualify for credit in this subject are:

Agency
Corporations
Partnership

CIVIL PROCEDURE — 6 credit-semester hours*

Some examples of courses which qualify for credit in this subject are:

State and Federal Rules of Civil Procedure
Conflicts of Law
State and Federal Courts

Chief Justice Richard M. Givan wrote: "[I]t was clear that our Court might be certifying persons to practice law in Indiana and for the federal judiciary in Indiana, who were not, in fact, prepared to give the effective legal assistance to their clients who were entitled—whether in civil or criminal matters or cases."[46]

What is probably more important, Indiana Rule 13 awakened the conscience of other supreme courts in the United States and gave them a new sense of duty and responsibility to the public in their states. Constitutional dimensions are attached to this duty and responsibility recognized by Chief Justice Givan:

COMMERCIAL LAW — 3 credit-semester hours
CONTRACTS — 4 credit-semester hours
CONSTITUTIONAL LAW — 3 credit-semester hours
CRIMINAL LAW, CRIMINAL PROCEDURE — 4 credit-semester hours
EQUITY — 3 credit-semester hours
EVIDENCE — 3 credit-semester hours
LEGAL ETHICS — 2 credit-semester hours*
Some examples of courses which qualify for credit in this subject are:
Legal Ethics
Professional Responsibility

LEGAL RESEARCH AND WRITING — 2 credit-semester hours*
Some examples of courses which qualify for credit in this subject are:
Legal Bibliography
Legal Writing
Legal Memoranda
Trial or Appellate Brief Writing

PROPERTY — 8 credit-semester hours*
Some examples of courses which qualify for credit in this subject are:
Future Interests
Landlord and Tenant
Personal Property
Probate Law
Real Property
Trusts
Wills

TAXATION — 4 credit-semester hours*
Some examples of courses which qualify for credit in this subject are:
Taxation of Business Associations
Estate and Gift Tax
Federal Income Tax
State Tax

TORTS — 4 credit-semester hours

*Any combination of the courses set out under this requirement or similar courses in this subject matter totaling the number of hours required herein will comply with this rule. This is not an exclusive list of courses. It is subject matter and not course name which controls.

[46]Givan, *Indiana's Rule 13: It Doesn't Invite Conformity. It Compels Competency*, 3 LEARNING AND THE LAW 16, 20 (1976).

> By certifying attorneys to practice law, we represent that they are competent to provide effective counsel—on which we insist and to which a client is constitutionally entitled. That representation is not made by any American law school or any law school in Indiana, and it is not made by any bar association . . . .[47]

While some legal educators scoffed at the idea that other state supreme courts would follow Indiana Rule 13 as a model, there appears to be some indication that the contrary is true. One Indiana legal educator made this evaluation: "Rule 13 is an Indiana development having relatively little to do with the improvement of professional skills. Because it contains little to commend it to other jurisdictions, there is good reason to believe that it will not spread beyond the borders of Indiana."[48] Since this evaluation of Rule 13 was made, however, the South Carolina Supreme Court has adopted a Rule 5A[49] which is much more extensive and comprehensive than

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[47]*Id.* at 21.

[48]Boshkoff, *Indiana Rule 13: The Killy-loo Bird of the Legal World*, 3 LEARNING AND THE LAW 18, 19 (1976) (Douglass G. Boshkoff, professor and former dean, Indiana University School of Law, Bloomington).

[49]S.C. R. EXAM. & ADMISS. 5A. Rather than requiring a specific number of hours in each area, South Carolina's Rule 5A merely requires "a course in each of the . . . designated subject matters . . . ." *Id.* South Carolina's Rule 5A also differs from Indiana's Rule 13 by omitting the requirement of a course in administrative law and instead requiring a course in trial advocacy. The rule states in pertinent part:

> No person shall be admitted to the practice of law in South Carolina unless he . . .
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> . . . .
>
> (5) has completed in such school of law each of the following designated subject matters and cumulative semester hours of requirements, regardless of the course named in a law school curriculum:
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> (A) CONSTITUTIONAL LAW — 3 credit-semester hours
>
> (B) CONTRACTS — 4 credit-semester hours
>
> (C) PROPERTY — 8 credit-semester hours
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> Some examples of courses which qualify for credit in this subject are:
> Future Interests
> Landlord and Tenant
> Personal Property
> Probate Law
> Real Property
> Trusts
> Wills
> Estate Planning
>
> (D) LEGAL WRITING AND RESEARCH — 2 credit-semester hours
>
> (E) TORTS — 4 credit-semester hours
>
> An example of a course which qualifies for credit in this subject is:
> Damages

Indiana Rule 13 in its attempt to assure the public that the licensed law school graduates of South Carolina are minimally competent to represent them. The South Carolina Rules Committee stated in its report to the South Carolina Supreme Court:

(F) CIVIL PROCEDURE — 6 credit-semester hours
Some examples of courses which qualify for credit in this subject are:
State and Federal Rules of Civil Procedure
State and Federal Courts
Moot Court
Practice Court

(G) CRIMINAL LAW PROCESS — 4 credit-semester hours

(H) COMMERCIAL LAW — 4 credit-semester hours
Some examples of courses which qualify for credit in this subject are:
Commercial Transactions
Uniform Commercial Code
Sales

(I) BUSINESS ASSOCIATIONS — 4 credit-semester hours
Some examples of courses which qualify for credit in this subject are:
Corporate Finance
Business Planning
Agency
Banking Law
Corporation and Partnership Planning

(J) DOMESTIC RELATIONS — 3 credit-semester hours

(K) PROFESSIONAL RESPONSIBILITY (ETHICS) — 2 credit-semester hours*

(L) EQUITY — 3 credit-semester hours

(M) EVIDENCE — 3 credit-semester hours

(N) ADMINISTRATIVE LAW AND PROCEDURE — 3 credit-semester hours

(O) TRIAL ADVOCACY — 2 credit-semester hours
Some examples of courses which qualify for credit in this subject are:
Criminal Trial Practice
Law Advocacy Skills
Trial Advocacy Clinical Oriented Program

(P) TAXATION — 2 credit-semester hours
Some examples of courses which qualify for credit in this subject are:
Federal Income Tax
Estate and Gift Tax
Corporate Tax

(Q) INSURANCE — 2 credit-semester hours

(R) LEGAL ACCOUNTING** — 2 credit-semester hours

*Three hours are preferable but some law schools offer only 2-hour courses.

**Will not apply if applicant has 6 credit-semester hours in undergraduate or other graduate school in Accounting.

This is not an exclusive list of courses. It is subject matter and not course name which controls. The effective date of the subject matter requirements enumerated hereinabove shall be applicable for all first-time applicants applying to take the bar examination given after July 1, 1981.

> In conducting our study, we have kept in mind the fact, first, that the Constitution of South Carolina imposes upon the Supreme Court the sole responsibility of determining those persons who shall be admitted to the practice of law; secondly, that the law schools, which are the principal instrument for training attorneys, are not controlled by the Supreme Court but that, thirdly, the problem of improving trial advocacy and attorney competency in general is the problem and concern of both. The chore of providing competency is principally that of the law school, although it is to some degree also the concern of the bench and bar; the matter of assuring competency before admission to practice is the work of the Supreme Court.[50]

In addition to required areas of law and related disciplines for admission to practice law, South Carolina's Rule 5B provides:

> An attorney, though admitted to practice, may not appear alone in the actual conduct and trial of a case unless and until he or she has filed with the Clerk of the Supreme Court a certificate (to be supplied by the Court) that he or she has had at least eleven trial experiences.
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> A trial experience is defined as:
>
> (1) actual participation in a full trial under the direct supervision of a member of the Bar, or
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> (2) an observation of an entire contested testimonial-type hearing in a South Carolina Tribunal.
>
> The required trial experiences may be gained by any combination of (1) or (2) but must include the following:
>
> 3 civil jury trials in Court of Common Pleas, or 2 in Common Pleas plus 1 in the U.S. District Court and,
>
> 3 criminal trials in General Sessions Court, or 2 in General Sessions plus 1 in the U.S. District Court, and
>
> 1 trial in equity heard by a judge, master, or referee, and
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> 3 trials in Family Courts, and
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> 1 trial before an industrial commissioner or other administrative officer.
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> The certificate shall specify by name the cases and dates and tribunals involved, attested by the respective judges, masters or referees, or hearing officer. The Clerk's ac-

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[50]Committee to Study the Rules of Examination and Admission of Persons to Practice Law in South Carolina, Report of Committee to Study the Rules of Examination and Admission of Persons to Practice Law in South Carolina (1979).

> knowledgement and approval of the certificate shall be the attorney's authority to thereafter conduct and try cases without the supervision of a member of the Bar.
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> . . . .
>
> An attorney who has for three years practiced law in another state, and who has been admitted to practice law in South Carolina, may exempt the trial experiences required by submitting proof satisfactory to the Clerk of the South Carolina Supreme Court of equivalent experience in the other state.[51]

There is every reason to believe that Indiana's Rule 13, the first rule by a state supreme court which recognized its constitutional responsibility to the public, will awaken other state supreme courts to their constitutional responsibility in the administration of justice; a constitutional responsibility that extends, as does South Carolina's Rule 5, to the certification of trial advocates.

Another indication of concern by state authorities that their licensees may be less than adequate as trial advocates is the experiment being conducted in California by the Committee of Bar Examiners. The Committee is administering an "alternative assessment" test which is designed to examine the law school graduate in such clinical skills as legal research, client counseling and interviewing, negotiations, and advocacy. Armando Menocal III, chairman of California's Committee of Bar Examiners, commented:

> We all agree that if it is appropriate at all to screen people for the practice of law, the only valid test is one that determines who is competent to practice, so the public is protected. No bar examination has ever been validated as related to fitness to practice law.[52]

Most critics of trial advocacy look to the law schools as the source of the inadequacy and to the law schools as the source of the cure. This approach to the problem of training minimally adequate trial advocates may not be entirely fair. Unlike the Langdell casebook approach, advocacy training requires a very low student-faculty ratio. Very few law schools have sufficient budgetary funds to embark upon such a highly labor-intensified program. Even if the funds were available, obtaining experienced trial advocates to teach in advocacy programs could be a problem when the law school is located a long distance from a large metropolitan area. Many of the

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[51]S.C. R. EXAM. & ADMISS. 5B.

[52]Slonim, *Bar Experiment Could Blaze New Path*, 66 A.B.A.J. 139 (1980).

most experienced trial advocates are in the metropolitan areas. When adjunct professors could be made available from metropolitan areas, law school administrators have not always had a sympathetic faculty to support an advocacy program on a meaningful scale. Too, adjunct professors who are solely dedicated to clinical skill training seldom receive the faculty status and recognition as other members of the faculty who are more concerned with the theory of law and who are publishing regularly to obtain tenure status. A recent report from the American Bar Association Task Force on Lawyer's Competency made this observation:

> The perceived deficiency of law school training lay not in fundamentals—"developing . . . analytical skills and familiarizing . . . with the law in general"—but in the techniques of making those fundamentals operational. The comments on training for trial work stressed the same point. For example, one respondent wrote:
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> > [L]aw school gave me an excellent background in legal reasoning, writing, and research. However it did not prepare me for the mechanics of trial litigation, to wit, interviewing witnesses, depositions, in other words I had an excellent theoretical background, but as far as putting that background into practical results such as how to try a lawsuit, the format of law school was not helpful.[53]

Chief Justice Burger has recommended that "some system of certification for trial advocates is an imperative and long overdue step."[54] After he had observed the English advocacy system for over twenty years, Chief Justice Burger noted that litigation was conducted in a fraction of the time required for comparable litigation in the United States.[55] He urged the recognition of three basic assumptions:

> What, then, can we learn from the English legal profession? We should first recognize three implicit and basic assumptions about legal training that permeate their system. First: lawyers, like people in other professions, cannot be equally competent for all tasks in our increasingly complex society and increasingly complex legal system in particular;

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[53]ABA Section of Legal Education and Admissions to the Bar, Lawyer Competency: The Role of the Law Schools 18 (1979) (quoting Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. Legal Educ. 264, 270 (1978)).

[54]*Sonnett Lecture*, *supra* note 1, at 227.

[55]*Id.* at 228.

> second: legal educators can and should develop some system whereby students or new graduates who have selected, even tentatively, specialization in trial work can learn its essence under the tutelage of experts, not by trial and error at clients' expense; and third: ethics, manners and civility in the courtroom are essential ingredients and the lubricants of the inherently contentious adversary system of justice; they must be understood and developed by law students beginning in law school.[56]

The Clare Report recommended that trial advocates be separately admitted to federal practice and proposed admission rules to federal district courts[57] and to the Second Circuit Court of Appeals.[58] Study in the following areas of law was suggested as a requirement for admission to federal district courts: evidence, civil procedure, criminal law and procedure, professional responsibility, and trial advocacy.[59] Several objections were made by the law schools to this proposed rule, including contentions that the required subject matters have never been shown to improve trial advocacy and that the rule impinges upon academic freedom.[60] In addition to the balkanization objection which has also been leveled at Indiana Rule 13, the law school objection of costs beyond present budgetary limits was made.[61] It would appear that many of the essential areas of law suggested by the rule are already a part of the law school curriculum and that little additional expense would be required.[62] The Clare Committee answered the law school cost objection by singling out the extensive elective programs found in many of the law schools:

> While the law schools complain of the costs entailed in teaching Trial Advocacy, at the same time they apparently have no difficulty in funding courses in such subjects as "Urban Development", "Macro-economics and the Law", and "Psychoanalysis and the Law" (defined as a "study of the theory of psychoanalysis and its relevance (if any) to the law"). We do not argue that these courses lack value, but we do consider that if the courts and the public are to be adequately served, and if students are demanding training in the technique

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[56] *Id.* at 229-30.

[57] *Clare Report, supra* note 6, at 187-90.

[58] Rule Relating to Practice Before the United States Court of Appeals for the Second Circuit, 67 F.R.D. 192 (1975). This proposed rule was adopted and became effective Jan. 1, 1976.

[59] *Id.* at 188. For a general discussion, see *id.* at 167-70.

[60] *Id.* at 176-80.

[61] *Id.* at 169.

[62] *Id.*

> of litigation and not getting it, then the priorities demand that the necessary resources be diverted to and more emphasis be placed on trial advocacy rather than on more esoteric subjects.[63]

The Devitt Report recommended that law schools expand their trial advocacy programs.[64] It concluded that "law school is the logical place for the future trial lawyer to start learning courtroom skills."[65] Citing a survey sponsored by the American Bar Association, the report noted that eighty-three percent of those polled felt that training in trial advocacy in law school should be mandatory or would be useful.[66]

> But it appears clear that the availability of first rate training does not meet the demand. For example, in another recent study of the graduates of six law schools, approximately thirty percent of the trial lawyers said they had received no law school training in trial advocacy or that which they did receive was not useful.[67]

The Devitt Report further recommended "that as a condition of admission to practice in a United States District Court, the applicant pass an examination in Federal Rules of Civil, Criminal and Appellate Procedure, Federal Rules of Evidence, Federal Jurisdiction and the Code of Professional Responsibility."[68] The Devitt Report also recommended that some prior courtroom experience be demonstrated by an applicant before he is permitted to act as a trial advocate without the assistance or supervision of an experienced trial advocate.[69]

Another recommendation of the Devitt Report was concerned with the lack of specific guidance on competency given by the American Bar Association Code of Professional Responsibility:

> The ABA Code of Professional Responsibility should be reexamined for purposes of clarifying its requirement of competency. Ethical Consideration EC-2-30 of the American Bar Association Code of Professional Responsibility declares that "employment should not be accepted by a lawyer when he is unable to render competent service . . . ." DR 6-101 and

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[63] *Id.*
[64] *Devitt Report, supra* note 8, at 201.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 201-02.
[68] *Id.* at 196.
[69] *Id.* at 198.

> EC 6-1 through 6-6 reinforce the professional obligation regarding competence, but the Code lacks specifics as to what might constitute inability to render competent service in relation to representation in trial proceedings.[70]

In 1980, the American Bar Association Committee on Evaluation of Professional Standards published a discussion draft of "Model Rules of Professional Conduct."[71] Although the draft is a vast improvement over previous rules of professional conduct, it lacks the expressed specifics requested by the Devitt Report. Rule 1.1 concerns the lawyer's competence: "A lawyer shall undertake representation only in matters in which the lawyer can act with adequate competence. Adequate competence includes the specific legal knowledge, skill, efficiency, thoroughness, and preparation employed in acceptable practice by lawyers undertaking similar matters."[72] The comment to Rule 1.1 recognizes one of the assumptions that Chief Justice Burger felt so necessary to solving the trial advocacy problem of the practicing bar: "Since no lawyer can be adequately proficient in all areas of the law, a lawyer should undertake only matters within his or her domain of professional skill." Within that domain the lawyer should act in a particular matter with adequate attention, preparation, and thoroughness to discharge the matter properly."[73]

The discussion draft very sensibly cautions that competency of a particular lawyer in a particular legal matter must be viewed on an ad hoc basis rather than attempting to draft a general or all encompassing rule. It further cautions that no precise formula prescribes the knowledge and skill required in any particular matter. The proper standard is the skill and knowledge possessed by lawyers who ordinarily handle such matters."[74] Does this mean the "skill and knowledge possessed by lawyers" in a given community or does it mean a larger geographical area such as the state which originally licensed the lawyer to practice law? If we apply this "proper standard" to trial advocacy, it would appear that the local or county courts should be the "proper standard." A trial judge of the county would appear to be in the best position to fairly administer this standard. Too, a peer review of the trial judge's determination by the local bar would seem most appropriate. If there is a conflict of competency determinations between the trial judge and the local bar peer

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[70] *Id.* at 204.

[71] ABA COMMITTEE ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (1980).

[72] *Id.* at 7.

[73] *Id.*

[74] *Id.* at 9.

review committee, an appeal to a state bar competency committee or to the state supreme court could settle the conflict and make a final determination to cure the incompetency.

This author's view is that enough reports have been made to justify some remedial efforts. Certainly, any initial step should be cautiously taken and carefully measured. The direction of the first step appears obvious. Because the competency of a trial advocate may have to be viewed on an ad hoc basis, any rule should be primarily concerned with the procedure which will identify a display of incompetency in the courtroom and with the means of remedying it for the benefit of the practicing lawyer and the protection of the public.

If a state supreme court did not want to adopt the very adequate and comprehensive South Carolina Rule 5B,[75] it could begin with a simple monitoring rule which is designed to identify incompetency of the trial advocate. This rule would test the incompetency tolerance of the trial judge and the local bar association. It would require that an aspiring trial advocate have one trial judge in his county certify that he is adequately competent to represent the public in the courtroom as a trial advocate. This certification could be waived in those instances in which the lawyer has appeared before a trial judge in the county many times before and there is no further need to demonstrate his competency as a trial advocate. On the other hand, if a lawyer is not certified by a trial judge of the county and if he has not tried a contested matter before any court, the rule should require that the first-time trial advocate be assisted by a certified trial advocate until he demonstrates to the trial court his competency to be certified. Any rule of certification should indicate whether the advocate is certified as to court trials or jury trials. It would seem appropriate that a certification for each type of trial—civil court, criminal court, civil jury, and criminal jury—would be advisable.

Once competency or incompetency is identified by the trial judge, the rule should provide for a peer review committee which should consist solely of members from the local bar association who are certified advocates. Any determination made by the trial judge should be reviewed by the peer review committee, and it should make recommendations to the lawyer whose certification is being withheld so that he may be certified by the trial judge as soon as possible. If the lawyer does not agree with the trial judge or the peer review committee's determination of his competency to practice as a trial advocate, he should have an appeal process available

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[75]*See* note 37 *supra* and accompanying text.

to him. This appeal could be taken before the state bar competency committee for a review. In Indiana, for example, if the lawyer was still dissatisfied with the determination of the state bar competency committee, he could petition the Indiana Judicial Council on Legal Education and Competence at the Bar and file the record of the proceedings before the state competency committee. The Judicial Council could review the record, hear argument, and make its recommendation to the Indiana Supreme Court. A rule encompassing these procedures would provide minimal safeguards for the public and for the lawyer who wishes to practice as a trial advocate.

The state bar association should have a continuing legal education program in trial advocacy available in this review procedure so that any identified incompetency or inadequacy could be quickly remedied to everyone's satisfaction. The attendance of a lawyer at such a continuing legal education program should qualify him for certification without further action on the part of the trial judge. However, certification of a trial advocate would always be subject to review by the trial judge and the peer review committees.

If trial advocacy is to be improved in our courtrooms, some remedial action must be taken now. The public interest and the self-interest of the legal profession demand some immediate action. There is good reason to believe that some action in the form of a rule will be taken by the federal judiciary and that the Devitt Report will have considerable influence on the formulation of the rule. Many of the same lawyers who practice in the federal courts also practice in the state courts. If any of the lawyers fail to comply with the federal advocacy rule because of some inadequacy in their training, they will be free to practice in the state courts unless the state supreme courts formulate a rule to assure minimal competency of state trial advocates as well.

The state supreme courts have been in the forefront in taking meaningful action to assure the public of minimal competency. Indiana Rule 13 and South Carolina Rule 5A are outstanding examples. If a rule is to be drafted to assure minimal competency in the courtroom, it would appear that the state supreme court should be the source of the rule because it is the licensing authority for the practice of law. If state supreme courts around the country act now, there may be very little need for the federal judiciary to enter a field of rule making which has been traditionally left to the state supreme courts.[76]

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[76]Chief Justice Burger noted in his *Sonnett Lecture*:

> Some system of specialist certification is inevitable and, as we know, it has been discussed in legal circles for a generation or more. Dean Robert B. McKay of New York University Law School has observed that the legal profession has "marched up the hill of specialist certification only to march right

down again in the face of opposition from practitioners not discontent with the absence of regulation." Our commitment to the public and to the system of justice must not let us be marched down that hill any longer.

I see nothing for lawyers, litigants, or courts to fear, and on the contrary I see a great potential gain, by moving toward specialist certification to limit admission to trial practice, beginning in courts of general jurisdiction where the more important claims and rights are resolved. When we have succeeded in that limited area we can then examine broader aspects of specialization. Furthermore, while the legal profession must obviously lead in this effort, the interests of the public dictate that the views of practitioners who are affected cannot be controlling any more than we allow the automobile or drug industry to have complete control of safety or public health standards. There are more than 200 million potential "consumers" of justice whose rights and interests must have protection, and it is the duty of the legal profession to provide reasonable safeguards—unless lawyers prefer regulation from the outside.

Sonnett Lecture, *supra* note 1, at 238-39 (footnote omitted).