Trial Lawyer Incompetence: What the Studies Suggest about the Problems the Causes and the Cures

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I. INTRODUCTION

The number of unskilful attorneys practicing in county courts being a great grievance to the country in respect to their neglect and mismanagement of their clients' causes and other foul practices... ¹

Although one might reasonably mistake the above quote as an excerpt from Chief Justice Burger's latest call for a turn to English legal education as the cure for the lack of quality in American trial advocacy, the quote is in fact from the preamble to a 1732 Virginia legislative act. Similar complaints about the quality of American lawyers have been expressed throughout our history.² We are currently in the midst of yet another era of concern over lawyer incompetency, particularly in the area of trial advocacy, the genesis of which is traced to Chief Justice Burger's Sonnett Memorial Lecture at Fordham Law School on November 26, 1973,³ in which the Chief Justice accepted as a "working hypothesis" that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."⁴ Just a few weeks after that Sonnett Lecture, Chief Judge Irving R. Kaufman, of the United States Court of Appeals for the Second Circuit, sounded a similar theme in an address to the New York County Lawyer's Association.⁵ Chief Judge David C. Bazelon, of the United States Court of Appeals for the

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1. Wolkin, On Improving the Quality of Lawyering, 50 St. Johns L. Rev. 523, 523 (1976), quoting A. Reed, Training for the Public Profession of the Law, 97 n.1 (1921) (preamble to 1752 Virginia legislation).
4. Id. at 234.
District of Columbia Circuit, has described some of the counsel coming before the courts as "walking violations of the Sixth Amendment."

There is a difference between the current concern over lawyer incompetency and other such historical debates in that the present discussion has not only generated the usual spate of commentaries on the subject but has also instigated a number of empirical studies. These studies have attempted to determine the actual extent and nature of lawyer incompetence with a view toward identifying solutions to the problem.

This article will review the studies which shed light on the question of lawyer incompetency and its cures. The alleged causes of trial lawyer incompetency will be analyzed and suggested solutions discussed. Special attention will be given to the use of evidence and trial preparation skills, two deficiencies which have been identified but seldom stressed by commentators and law schools.

II. THE EXTENT AND NATURE OF TRIAL LAWYER INCOMPETENCE

A. Stating the Problem.

Although Chief Justice Burger's Sonnett Lecture, with its "one-third to one-half" lawyer incompetency allegation, has received the most notoriety, Burger actually began his attacks on the quality of trial advocacy in a 1967 address to the Annual Convention of the American College of Trial Lawyers at which time he cited even more alarming statistics, "On the most favorable view expressed, 75 percent of the lawyers appearing in the courtroom were deficient..." Burger continued his constant theme in a State of the Judiciary address to the 1978 Midyear Meeting of the American Bar Association when, without referring to specific statistics, he repeated his general assertion that "the lack of adequate training of lawyers for courtroom work is a... very serious problem in the administration of justice." Likewise Judge Kaufman's criticisms were not an isolated instance. In addition to his speech to the New York County Lawyer's Association, in which he stressed the importance of a quality partnership between the trial advocate and the court in the important enterprise of dispensing justice, he expanded on the same theme in a keynote address to a Symposium on the Role of Law Schools in Certifying Trial Lawyers, in which he

focused on the role of the law school in improving the quality of trial advocacy.  

Chief Justice Burger appreciated the limited usefulness of such vague phrases as "incompetency" and "inadequate representation," and thus, in his Sonnett Lecture, attempted to "put some flesh on the bones of these generalizations" by offering a few examples of what he was talking about:

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 trier and to do so in conformity with the rules of evidence.

2. Few lawyers have really learned the art of cross-examination, including the high art of when not to cross-examine.

3. The rules of evidence generally forbid leading questions, but when there are simple, undisputed facts, the leading question rule need not apply. Inexperienced lawyers waste time making wooden objections to simple, acceptable questions or 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.

In his 1967 address to the American College of Trial Lawyers, Burger had attempted to be more specific as to exactly what deficiencies incompetent trial advocates exhibited by citing the following example: poor preparation, inability to frame questions properly, lack of ability to conduct a proper cross-examination, lack of ability to present expert testimony, lack of ability in the handling and presentation of documents and letters, lack of ability to frame objections adequately, lack of basic analytic ability in the framing of issues, lack of ability to make an adequate argument to a jury, and lack of basic courtroom manners and etiquette.


11. Id. at 234-35.

Although Judge Kaufman did not make such an explicit effort to identify those skills in which an unqualified trial advocate is likely to be deficient, it is possible to discern what skills Kaufman is most concerned about by examining the skills on which he has suggested law schools should concentrate. His first concern is with a nucleus of essential basic courses which he identifies as civil procedure, criminal law and procedure, evidence, federal jurisdiction, federal practice and ethics. Particular courtroom skills which he would have law schools emphasize are opening arguments, direct and cross-examination, the art of objecting and summation. Kaufman further emphasized trial preparation in which he included the specific skills of drafting complaints, answers, motions, and interrogatories, the taking of depositions and the interviewing of witnesses.

Chief Justice Burger and Judge Kaufman thus served to provide the initial impetus for a critical examination of the quality of trial advocacy in America. Their addresses, however, actually offered very little acceptable data upon which to base the examination. Chief Justice Burger’s working hypothesis of “one-third to one half” was based on the rather unscientific methodology of “conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced lawyers.” Fortunately, both Burger and Kaufman recognized the limitations of their initial comments and suggestions and proceeded to appoint study commissions to continue the discussion of trial competency at a more empirical level.

In January, 1974, Judge Kaufman, on behalf of the Judicial Council of the Second Circuit, appointed a committee, chaired by Robert L. Clare, Jr., the scope of which was to include:

1. an examination of the quality of advocacy in the courts of this Circuit;
2. recommendations for improvements;
3. recommendations for innovative programs to teach the art of advocacy in the law schools;
4. recommendations for amendments in the rules of admission to the federal courts;
5. a consideration of past-admission educational projects;

13. Kaufman, supra note 9, at 497-98.
14. Id. at 499.
15. Id.
6. an analysis of standards and procedures for professional discipline.\textsuperscript{17}

The report of the Clare Committee, as it became known, concluded that "there is a lack of competency in trial advocacy in the Federal Courts."\textsuperscript{18} The Committee specifically pointed out that this finding was not based on the remarks of Chief Judges Bazelon and Kaufman and Chief Justice Burger, but rather upon structured interviews of considerable length with approximately forty judges of the Second Circuit. The report made no attempt to determine the precise extent to which competency was lacking.

Although the Clare Committee also made no specific attempt to determine the precise skills that were lacking in the incompetent trial advocate, the Committee did report that the criticism of the quality of trial advocacy tended to fall into five categories:

1. the lawyer lacks basic knowledge concerning the trial of cases;
2. the lawyer has accepted a matter beyond his training;
3. the lawyer appears unprepared;
4. the lawyer intentionally and habitually fails to obey court orders and rules;
5. the lawyer fails to observe rules of courtroom courtesy and decorum.\textsuperscript{19}

The recommendation of the Committee that admittees to practice in federal court shall have demonstrated some minimal level of proficiency in evidence, civil procedure (including federal jurisdiction practice and procedure), criminal law and procedure, professional responsibility and trial advocacy\textsuperscript{20} does also, to some extent, indicate the Committee's view of the nature of trial incompetency. On the whole, however, the Clare Committee Report serves as little more than another statement in support of the argument that trial incompetency exists, without substantially illuminating the precise extent or nature of that incompetency.

Criticism was made that the Clare Committee proposal would lead to a proliferation of local admission requirements which would, in turn, make it difficult for law schools to prepare their students for differing requirements in the various circuits. Chief Justice Burger, as Chair-

\textsuperscript{17} \textit{Final Report of the Advisory Committee on Proposed Rules For Admission to Practice}, 67 F.R.D. 159, 161 (1975) [hereinafter cited as \textit{Final Report}].
\textsuperscript{18} \textit{Id.} at 164.
\textsuperscript{19} \textit{Id.} at 176.
\textsuperscript{20} \textit{Id.} at 168.
man of the Judicial Conference of the United States, partially in response to this criticism, appointed a committee in 1976 to investigate the need for a uniform system of admission to the federal courts.21 The committee, under the chairmanship of Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota (thus becoming known as the Devitt Committee) issued its report in September, 1979.

Like the Clare Committee, the Devitt Committee had no difficulty concluding that the quality of trial advocacy was a problem in the federal courts.22 Also like the Clare Committee, unfortunately, the Devitt Committee did not purport to determine the precise nature of trial incompetency, but did, however, note that the Committee recommendations and proposals were designed to meet "two significant deficiencies identified by the Committee": the lack of proficiency in planning and trying lawsuits, and the lack of knowledge of federal practice subjects, including federal civil, criminal and appellate procedure, evidence, federal jurisdiction and professional responsibility.23 Although the Devitt Committee Report itself thus does not identify the extent and nature of trial incompetency with any great clarity, the Committee did generate a rather extensive research study to determine both the extent of the perceived trial incompetency and the specific skills which contribute to competent trial advocacy.

B. Measuring the Deficiency.

In order to gather the data needed for the Devitt Committee to accomplish its goals the Federal Judicial Center undertook a comprehensive research project under the supervision of Anthony Partridge and Gordon Bermant to determine the quality of advocacy in the federal courts.24 The study included a survey of all federal district court judges in the United States, from which it was concluded that about a twelfth of the lawyer performances in cases that come to trial in the district courts are regarded as inadequate by the trial judge,25 while 41 percent of the judges stated that they believed there is a serious problem of inadequate advocacy in their courts.26 The report further concluded, in a survey of lawyers who had tried ten or more cases in the federal

22. Id. at 218.
23. Id. at 218, 224.
25. Id. at 29.
26. Id. at 15.
district court in the previous five years, that the federal trial bar does not differ substantially from the judiciary in its assessment of the seriousness of the problem.27

In an effort to determine consistency in the evaluation of lawyer performance, Partridge and Bermant asked a number of judges and trial lawyers to evaluate four brief segments of advocacy recorded on videotape. Partridge and Bermant then analyzed the evaluations to discover where and when, if at all, the judges’ ratings of lawyer performance were strongly associated with characteristics of judges that bore no plausible relation to the skills of the lawyers. Although the analysis indicated some problems with the methodology, the report generally concluded that the judges were not highly consistent with one another in rating lawyer performances.28 The report attributed the observed inconsistency to the fact that some judges rate more severely than others and to the disagreements about the relative merits of different performances.29 Although far from conclusive, this lack of consistency underscores the arguments concerning the elusiveness of the concept of qualitative trial advocacy.30

Unlike the Clare and Devitt Committee Reports, Partridge and Bermant made a specific effort to determine the areas of deficiency in trial skills. The questionnaire asked the judges and lawyers to select from eight broad areas of expertise the areas of greatest and second greatest need for improvement and then to designate within those areas, specific skills that needed greatest improvement. From the eight general areas of expertise (general legal knowledge, proficiency in the planning and management of litigation, technique in arguing to the court, technique in arguing to the trier of fact, technique in the examination of witnesses, professional conduct generally, and additional factors in criminal cases) the two areas of greatest need for improvement most often identified were “proficiency in the planning and management of litigation” and “technique in the examination of witnesses.” The area “general legal knowledge” was also mentioned quite often.31

When asked to designate the specific skills within the general category of “proficiency in the planning and management of litigation”

27. Id. at 30.
28. Id. at 29.
29. Id.
31. PARTRIDGE & BERMANT, supra note 24, at 45-58.
most needing improvement, the respondents most often mentioned "de-
véloping a strategy for the conduct of the case" and "recognizing and
reacting to critical issues as they arise." Within the category of
"techniques in the examination of witnesses," the specific skills most
often listed were "the use of cross-examination," "the use of
objections," and "the use of direct examination to present the relevant
facts clearly," while in the third party category "general legal
knowledge," the greatest needs were identified as "knowledge of
Federal Rules of Evidence" and "knowledge of federal rules of pro-
cedure." 32

In order to correlate the above information, the questionnarie ask-
ed the district judges to indicate which of the 29 specific skills com-
prising the eight broad areas of expertise were most in need of im-
provement. These ratings were to be based on performances in specific
cases, not just on general impressions, as were the ratings discussed
above. The data from these case report ratings were essentially consis-
tent with the more general ratings. Nine skills were identified in 12
percent of the case performances and all but one of these skills were in
the three general areas of expertise needing the most improvement.
Likewise, six of the seven specific skills designated in the question-
naire for greatest need of improvement appeared within the top nine
deficient skill areas in the case reports. The seventh, "knowledge of
federal rules of procedure," was listed number 16 out of the 29 skill
areas. 33

Probably the most extensive survey of judicial attitudes has been
carried out by the American Bar Foundation, under the direction of
Dorothy Linder Maddi. 34 Unlike the Partridge and Bermant study, the
Maddi survey also included state as well as federal court judges. The
total survey population was 5399, with 1422 (26%) of the judges
responding. 35 The final report warns that because of this relatively low
response rate the results must be viewed with some caution. 36

The Maddi survey indicated that the judges surveyed rated indi-
vidual trial performances at least minimally competent 87 percent of
the time, thus reviewing 13 percent of such performances as incompe-
tent. 37 Although the Maddi report concludes that these figures present
a considerably more positive picture of attorneys' courtroom perform-

32. Id. at 48-49.
33. Id. at 50-53.
34. Maddi, Trial Advocacy Competency: The Judicial Perspective, 1978 A.B.
Foundation Research J. 105.
35. Id. at 110.
36. Id. at 111.
37. Id. at 144.
ance than might have been expected in view of recent criticism, these statistics are quite similar to the results obtained in the Partridge and Bermant study.

The Maddi survey also tried to determine precisely what skills were lacking in those attorneys that were rated as incompetent. Thirteen specific types of incompetence were given to the judges for rating. The results indicated that "inadequate preparation" was far and away the most prevalent type of incompetence (69 percent), with "inadequate knowledge of the rules of evidence" (58.1 percent), "inadequate ability to conduct a proper cross-examination" (57.7 percent) and "inadequate analytical ability in the framing of issues" (57 percent) also receiving high ratings. The least prevalent forms of incompetence were "inadequate awareness of the fundamental ethics of the legal profession" (33.2 percent) and "inadequate understanding of basic courtroom etiquette" (40 percent).

A variety of other studies have attempted to determine the relationship between lawyering skills and legal education. Although not specifically designed to determine the extent or nature of incompetency, they do shed some light on the kinds of skills considered most important to competent lawyering and the level at which practicing attorneys have acquired those skills in law school. The most extensive of these studies was sponsored by the Law School Admissions Council under the direction of Leonard L. Baird, a senior research psychologist with the Educational Testing Service. The precise purpose of the Baird study was "to determine the activities of the legally trained, the use to which they put their legal skills, and their views of the utility of various aspects of their legal training."

Baird surveyed 1600 law school graduates (response rate-50 percent) of six different law schools. The study surveyed lawyers who had been out of law school five years, ten years, and twenty years in order to obtain information about activities of lawyers at different stages in their careers. The attorneys were asked to indicate their primary areas of legal practice; the most common areas were trial and litigation, general practice, real estate, and corporate law. The least common areas were admiralty law, public interest law, patent law, legisla-

38. Id.
39. See note 25 supra and accompanying text.
40. Maddi, supra note 34, at 125-27.
42. Id. at 264.
43. Id. at 267.
tive lobbying, and international law. Of the 47.4 percent who said they worked in trial and litigation, 19.6 percent had received no law school training in that area and 9.8 percent said their training was not useful. However, 45.5 percent indicated that law school training in trial and litigation was "somewhat useful" while 25.2 percent rated such training "very useful." Although the greatest contrast between the number of practitioners in an area and the level of training was in real estate, by far the greatest number of comments dealt with trial practice and litigation.

Baird also tried to determine the significance of general categories of legal knowledge and skills by asking the survey sample to "1) rate the importance of 21 types of knowledge and skill in their daily work; 2) indicate which ones they considered key elements in their work; and 3) rate the role of their law school training for the attainment of each one." The results show that the skills considered most essential were the ability to analyze and synthesize law/facts, the ability to be effective in oral communication, the ability to write, the ability to do research, the ability to counsel clients, the ability to negotiate, and the ability to draft legal documents. It should be noted that none of the 21 knowledge and skill choices related directly to trial advocacy, except for the somewhat general categories of interviewing witnesses, investigating facts and oral communication. The respondents indicated that law school had been "essential" in the development of their ability to analyze and synthesize law and facts and to do research and that it had been "helpful" in developing their ability to write. However, a third of the respondents indicated that law school was "not helpful" or "played no role" in the development of their ability to draft legal documents and to communicate orally. A full two-thirds said that law school was "not helpful" or "played no role" in the development of their counseling and negotiating skills.

Another survey designed to determine the relationship between lawyering skills and legal education grew out of a curricular reform movement at the University of Kentucky Law School. In order to devise a curriculum that would respond to the skill needs of practicing attorneys, the law school conducted a survey of Kentucky attorneys to

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44. Id. at 270.
45. Id. at 270-71.
46. Id. at 270.
47. Id. at 273.
48. Id. at 274.
49. Id.
determine what skills they considered important to the practice of law. The survey results indicated that the attorneys spent significant amounts of time in three general task areas: litigation-oriented tasks (23.7 percent of their time); writing tasks (32.3 percent of their time); and tasks involving interpersonal skills (23.3 percent of their time). The most important lawyering skills and characteristics listed by the attorneys were knowledge of statutory law subjects, understanding human behavior, organizing facts, self-confidence, and thinking on one's feet. It should again be noted, as in the Baird survey, that none of the predetermined choices directly related to trial practice, although several of the categories generally related to trial advocacy as well as to other areas of law practice.

C. The Level of Incompetence.

It should be noted that not everyone shares the attitudes concerning the quality of trial advocacy expressed by Burger and Kaufman and in the Clare and Devitt Committee Reports. Judge Weinstein has taken particular issue with the conclusion of the Clare Committee that the quality of representation in the federal courts is poor. Through his own observation he found the quality of lawyering to be generally high. Likewise, Judge Frankel has also challenged these conclusions, noting that incompetence is an elusive concept since there are no objective measures by which to gauge it, illustrated by the fact that in Frankel's opinion, Burger, Kaufman, and Bazelon are talking about three different things when they talk about lawyer incompetence.

Pedrick and Frank have also challenged the conclusions of the Clare Committee. They point to the differing views expressed in the committee interviews with the judges of the Second Circuit and state that the cumulative opinion of those judges is not really supportive of the Clare Committee conclusion that trial advocacy below the minimally acceptable level is a major problem in the Second Circuit. They further point out that federal judges, having been drawn from the ranks of the best trial lawyers, have high standards and that it is only natural that they would be disappointed in the performance of at least some

51. Id. at 392.
52. Id. at 383.
54. See Frankel, supra note 30.
lawyers. However, the thrust of their criticism is with the proposed
cure for the problem rather than with whether or not the problem ac-
tually exists.

Former President of the American Bar Association, William B.
Spann, Jr., has primarily taken issue with Burger's statistics rather
than with his general conclusion that the quality of trial advocacy is a
problem. Spann notes that many lawyers were outraged
by Burger's
comments and demanded that he be called to account. Spann, however, like most of the other critics of Burger and Kaufman, con-
cluded that efforts relating to the improvement of the quality of trial
advocacy should continue, leading one to conclude that the differences
are ones of degree and emphasis rather than of kind.

Although the Maddi study is probably correct in concluding that
the quality of trial advocacy is probably higher than might have been
expected in light of recent criticism, most notably that of Chief Justice
Burger, it is also correct to conclude that there is at least some level of
trial advocacy incompetence in this country that is high enough to be
considered a problem. Despite the inadequacies of some of the studies
relating to lawyer competence, those studies do tend to provide at
least some initial answers to the question of what skills are most im-
portant to quality trial advocacy. The studies indicate that the area of
greatest deficiency is the preparation and planning of trials, followed
closely by evidence, which includes not only knowledge of the subject
matter, but the use of evidence in the courtroom. Other areas of defi-
ciency particularly highlighted by the studies are direct and cross-
examination, procedure and professional ethics.

III. ALLEGED CAUSES OF TRIAL LAWYER INCOMPETENCE

Unfortunately not all of the studies or commentaries on lawyer in-
competence explicitly state the perceived causes of that incompetence.
Those that do not, do however, imply those causes in the way they
discuss the nature of incompetence and in the solutions they offer.
Taking the causes for granted, however, is a mistake since it can lead
to overly simplistic and ill-conceived solutions and unrealistic assump-
tions that the problem in all its aspects can be cured. An examination

56. Id. at 47.
57. See Spann, supra note 30.
58. Id. at 75, citing Editorial Opinion and Comment, 64 A.B.A.J. 294 (1978), and
59. Anyone wanting to use the results of these studies to design a skills training
curriculum should obviously pay more detailed attention to the skills discussed therein
than is done in this brief conclusion. For the purposes of this paper, however, this brief
summary is sufficient.
of the perceived causes is important to the formulation of well-conceived solutions to the problem and to an understanding that to the extent that some causes of lawyer incompetence are inherent in either the incompetent lawyer or our legal system itself, they may not be realistically correctable.

Not surprisingly, the most frequently cited cause of lawyer incompetence is the lack of training. The Clare Committee, for example, specifically concluded that the lack of quality in trial advocacy in the federal courts was "directly attributable to the lack of legal training."60 Virtually all of the other studies and commentators have reached similar conclusions, either explicitly, or implicitly, by suggesting the provision of training as the cure for the perceived problem. This is not to indicate that most commentators suggest lack of training as the only or even chief cause of incompetence. It only suggests that it is the most prevalent and that is probably because it seems to be the most amenable to correction. Even though many commentators thus may see the cause of lack of training as the most correctable cause of lawyer incompetence, it in no way means that they are in agreement on how best to correct it. This is due to the wide variety of what might be called sub-causes of the lack of training.

A variety of reasons have been identified as contributing to the lack of sufficient training in lawyer competence. Perhaps the most prevalent reasons center on the debate over whose responsibility it is to provide the training—the law schools or the organized bar. This tension, centering on the proper place of theoretical and practical training in the law,61 caused in part by what Judge Devitt has referred to as "Langdell's disease,"62 has seemed to relax somewhat as evidenced by the rapid growth in practical skills training in law schools in the last

60. Final Report, supra note 17, at 164.


62. Judge Devitt attributes much of the current emphasis on analytic skills in today's law schools to Langdell:

When Christopher Columbus Langdell became dean of the Harvard Law School in 1870, he launched a program to improve the quality and standing of the legal profession. His goal was to establish the study of law as an intellectual pursuit on the same level as other graduate school studies. Langdell believed that for purposes of law school education all the law could be learned from books and that professors need not, and probably should not, have prior practical legal experience. In his attempt to give law schools academic respectability, Langdell emphasized the intellectual aspects of legal training and correspondingly deemphasized "skills training." The library, not the courtroom, was the center place of his theory of legal education.

decade, although there is still no consensus on whether the law school or the bar should be responsible for such training.\textsuperscript{63}

It is this increase in the provision of practical skills training coupled with the fact that the quality of today's law student is at an all time high that have caused some commentators to question why the protest about lawyer competence should arise in conjunction with those factors.\textsuperscript{64} One possible explanation may be found in the suggestion of the Clare Committee that the past decade has also seen a staggering increase in the amount of litigation, resulting in a heavily increased demand for trial lawyers, which in turn requires younger and less experienced attorneys to fill the gap.\textsuperscript{65} Thus, even though recently graduated attorneys may actually be better trained, and thus presumably more competent than their counterparts of perhaps twenty years ago, new attorneys are now appearing in court in record numbers.

Despite the increase in the availability of practical skills training in law school, a number of factors have been identified that tend to discourage law students from pursuing that training. Professor Louis Brown has estimated that about 85 percent of the courses taken by students are chosen entirely, or to a large extent, in response to bar examination requirements.\textsuperscript{66} Because students are not tested for practical lawyering skills on the bar examination they are discouraged from studying those skills in law school. This lack of testing of lawyering skills is closely related to a theory propounded by Professor Kelso. He has pointed out that to the extent that law school admission policies rely on undergraduate grade averages and LSAT scores as predictors of law school grades, they are relying on those indicators which predict competency in analytic and writing skills. Kelso asserts, as do most of the studies discussed in the previous section of this paper, that although these skills are certainly important to being a lawyer, that professional competence requires numerous other skills, competency or aptitude which is not determined by these indicators.\textsuperscript{67} This bias then extends to the law school curriculum and the bar examination itself, both of which overemphasize analytic skills.

One cause of this overemphasis on analytic skills may very well be

\textsuperscript{63} Gee and Jackson, supra note 61, at 709.


\textsuperscript{65} 67 FINAL REPORT, supra note 17, at 167.


\textsuperscript{67} Kelso, supra note 66, at 848-49.
the present inability to adequately test for those more practical lawyering skills, a problem which is presently being addressed by Educational Testing Service. 68 California, in 1980, began a voluntary experiment in testing advocacy skills as part of its bar examination. 69 In this regard Carrington has cautioned that we may be forced by the elusive character of competence to redefine the goal in such a way that we mistake quality by equating it with what we can measure. 70

Other factors inherent in the present law school have also been identified which may tend to discourage students from taking lawyering skills courses. Students may have an unrealistic perception of what is important in practice, which perception may be generated in part by what they do in their first year. In addition, because of the traditional first year curriculum emphasis on analytic skills, most students may feel more intellectually comfortable with continuing this kind of course, as opposed to a course emphasizing other lawyering skills. 71 It has also been suggested that students avoid such courses because of a perception, whether valid or not, that their professors, who serve as role models, care little about the actual practice of law, 72 perhaps only a corollary of the "Langdell's disease" theory.

A lack of concern and emphasis on lawyering skills in law school and on the bar exam might also be explained by what Chief Justice Burger has identified as the historical, naive assumption that all persons who pass the bar are competent to perform any legal task. 73 Given the fact that bar examinations do not purport to test trial advocacy skills, Burger has said that "we are more casual about qualifying the people we allow to act as advocates in the courtroom than we are about licensing our electricians." 74 It is argued that this assumption has inhibited discussion of the problem of trial competency and impeded its solution.

A common thread among all of the previously discussed causes of lawyer incompetency is the assumption that such incompetency is the result of the lack of technical proficiency. This assumption is not universally accepted. Judges Frankel and Weinstein contend that

68. A. CARLSON, THE BECOMING A COMPETENT LAWYER RESEARCH PROGRAM: AN OVERVIEW (Educational Testing Service, 1975). The Baird Study, supra note 41, is also a part of this effort.
70. Carrington, supra note 30, at 36.
71. Kelso, supra note 66, at 853.
72. Allen, supra note 64.
73. Burger, supra note 3, at 230.
74. Id.
lawyer competency is a function not of technical proficiency but rather of such subjective characteristics as judgment, wisdom, morale, character, and attitude. Emphasis on such factors as either the definition or cause of lawyer incompetency leads to the general conclusion that not much can be done about individual incompetency except perhaps to prevent those attorneys from practicing law. Although Judge Kaufman would agree that "insofar as bad lawyering is the product of bad character, or laziness, or apathy, there is little that can be done in law schools," he does not believe such factors are the primary causes of lawyer incompetency and thus holds out more hope of correcting the problem.

A factor in the incompetency of lawyers which is difficult to categorize is the lack of preparation or planning cited particularly by Maddi and Partridge and Bermant. The factor is difficult to categorize because it has been cited not only as a cause of other skill deficiencies, but also as a skill deficiency in itself. The difference in categorization or perception of this factor is crucial because to the extent that lack of preparation or planning is seen as a result of the above mentioned character flaws and economic pressures inherent in our legal system, little can be done to alter it short of overhauling human nature and the legal system. However, to the extent that preparation and planning are lawyering skills, their deficiency should be amenable to some more reasonable form of correction.

IV. PROPOSED SOLUTIONS TO THE PROBLEMS OF LAWYER INCOMPETENCE

A person's perception of the cause of a problem obviously influences that person's proposed solutions to the problem. As might be expected from the numerous perceived causes of lawyer incompetence discussed above, a wide variety of solutions have been proposed, most of which assume that incompetence is caused by poor training. The proposed solutions fall into five categories: 1) bar admission requirements; 2) continuing legal education; 3) certification and specialization; 4) bar association review; and 5) law school education. Each of these categories will be discussed below, with special emphasis in the law

75. See Frankel, supra note 2, at 618, and Weinstein, supra note 53, at 454. See also, Spann, supra note 30, at 76, for a similar view.
76. Kaufman, supra note 9, at 498.
77. Maddi, supra note 34, at 124.
78. Partridge and Bermant, supra note 24, at 53-56.
school education section on two particular skill deficiency areas suggested by the studies in section II.

A. Bar Admission Requirements.

The Clare Committee solution to the lack of training was to propose that the district courts in the Second Circuit adopt a rule mandating training in certain areas of the law as a condition of admission to practice. Those areas are evidence, civil procedures (including federal jurisdiction practice and procedure), criminal law and procedures, professional responsibility and trial advocacy. The Committee’s definition of trial advocacy requires student participation in simulated or actual litigation. Although a student would take such courses while in law school, a person could also comply with the requirements of this proposed rule by taking an approved continuing legal education course or by satisfying a committee on admission that either by experience or otherwise, the person has gained equivalent knowledge of the subject matter of the required courses.

The Devitt Committee was formed to investigate the need for a uniform system of admission to the federal courts, in response to criticism that the Clare Committee proposal would lead to a proliferation of local admission requirements. Recognizing the need for some uniformity in admission requirements but apparently reluctant to impose rigid standards on the district courts, the Committee recommended that a number of pilot districts adopt as a condition to practice that applicants pass a bar examination covering Federal Rules of Evidence, federal jurisdiction and the Code of Professional Responsibility, and that attorneys who conduct a federal civil trial or any phase of a criminal proceeding satisfy an experience requirement of four supervised trial experiences, at least two of which involve actual trials in state or federal courts.

Similarly, the Indiana Supreme Court has passed an admissions rule requiring law school courses in fourteen subject matter areas. Al-

80. Final Report, supra note 17, at 168.
81. Id. at 189.
82. Id. at 188-89.
84. Id. at 233.
85. Indiana Supreme Court R. 13; discussed in Cutright and Boshkoff, Course Selection; Student Characteristics and Bar Examination Performance: The Indiana University Law School Experience, 27 J. Legal Ed. 127 (1975); see also Staton, Trial Advocate Competency, 13 Ind. L. Rev. 725 (1980); for a discussion of South Carolina’s adoption of a similar rule see Littlejohn, Ensuring Lawyer Competency: The South Carolina Approach, 64 Judicature 109 (1980).
though motivated by the desire to set some minimum standards for admission to the bar, the Indiana Supreme Court did not mandate trial advocacy among the fourteen required subject matter areas.

Although the Clare Committee proposal has perhaps received the most specific criticism,\textsuperscript{66} the same criticism would seem to apply equally to the Devitt Committee proposal and the Indiana Supreme Court rule. Although the primary complaint directed at the Clare proposal has been its lack of evidence to support its conclusion that lawyer competency is a problem, much criticism has also been levelled at the solution proposed for the problem. Critics have pointed out that the Clare Committee had absolutely no evidence on which to base its premise that the completion of certain courses correlated with lawyer competency.\textsuperscript{87} In fact, Dean Michael Sovern has asserted that the overwhelming majority of trial advocates already take most of the suggested courses,\textsuperscript{88} thereby seemingly contradicting the Clare Committee premise.

Although it is true that the Clare Committee did not have any empirical evidence to support its premise, Dean Laughlin of Fordham Law School, a member of the Committee, has defended the premise. Just as there may be no evidence that a course in surgery helps make a better surgeon, common sense tells us that it will, just as a course in trial advocacy ought to make a better trial advocate.\textsuperscript{89} If the critics still desire empirical evidence, however, the study by Partridge and Berman would tend to support a corollary to that premise that incompetent attorneys are deficient in the subject matter area suggested by the Clare and Devitt Committee reports.

Regardless of the validity of the premise concerning the relationship between lawyer competency and certain law school courses, it has been suggested that requiring a trial advocacy course in law school may actually have the adverse effect of lessening the quality of the course.\textsuperscript{90} Because of the expense of a good trial advocacy course, it may require a lower student-faculty ratio, and thus higher cost, than most traditional courses. If a school has to offer the course to more students because of a bar admission requirement, economic factors may cause the school to raise the student-faculty ratio and, then, presumably lower the quality of the course.\textsuperscript{91}

\textsuperscript{87} Id.
\textsuperscript{88} Sovern, \textit{supra} note 86, at 474.
\textsuperscript{89} McLaughlin, \textit{Trial Incompetence: In Defense of the Clare Cure}, 12 \textit{TRIAL} 62 (June 1976).
\textsuperscript{90} Sovern, \textit{supra} note 86, at 476; Pedrick and Frank, \textit{supra} note 55, at 56.
\textsuperscript{91} Pedrick and Frank, \textit{supra} note 55, at 56.
In addition to the criticism leveled at the Clare proposal, the Indiana Supreme Court Rule is further subject to Professor Kelso's criticism that emphasis on traditional bar examination courses inhibits lawyering skill training in law school. While the Clare and Devitt Committee proposals tend to alleviate this problem by requiring additional skills training, the Indiana Rule, by excluding trial advocacy, only exacerbates the problem. If the Indiana Supreme Court were really concerned with lawyer competency, Kelso would suggest it consider testing for practical lawyering skills and not encourage the overemphasis on analytical skill by requiring traditional courses.

B. Continuing Legal Education.

Virtually all of the proposals for solving the problem of lawyer incompetency suggest that at least one of the components of that solution is continuing legal education (CLE). However, the suggestion that such CLE programs be made mandatory has come under rather vehement attack as being an ineffective means of coping with any perceived problem of lawyer incompetency. It has been said that mere attendance at CLE courses will not necessarily improve competence, that learning will not necessarily take place since attendance may be passive or active, that many approved CLE courses have no relevance to some attorneys, what is heard in the classroom, without advance preparation, classroom participation, review and application is unlikely to be retained, and the number of hours of attendance being prescribed under mandatory systems is too minimal to have any long lasting affect on competence.

While all of these criticisms of current mandatory CLE programs may well be valid, the conclusion that the mandatory nature of the program should be eliminated does not necessarily follow. The criticism could also serve as guidelines for restructuring such mandatory programs to enhance their likelihood of actually having an impact on lawyer competence.

C. Certification and Specialization.

Chief Justice Burger's emphasis on the naive assumption that all persons admitted to the bar are competent to perform all legal tasks has led to a move for specialization and certification in the bar. Such programs could either be voluntary or mandatory, with attorneys

92. See, e.g., Burger, supra note 8; Maddi, supra note 34, at 106; Wolkin, Improving the Quality of Lawyering, 50 St. John's L. Rev. 523, 524 (1976).
93. Wolkin, supra note 92, at 529.
94. See, e.g., Derrick, Specialization in the Law, 36 Tex. B. J. 393 (1973); Bazelon, supra note 6, at 18.
either choosing to practice a specialty or being prohibited from practicing in areas outside those in which they are certified. Although Burger does not yet support broad and comprehensive specialty certification, he does adamantly support certification of trial advocacy because of its basic importance to a fair system of justice and presumably because of the unique nature of the skills involved.\(^{55}\)

The first step in Burger's certification scheme is for law schools to devote their third year to trial advocacy and for those who then want to become trial advocates to begin a period of pupilage, or apprenticeship.\(^{56}\) Burger is a devotee of the English system of justice and legal education in which barristers, who assume courtroom duties, serve a period of pupilage. Although Burger claims that he does not want to create the elitist barrister system in the United States, it is hard to see how his proposal could avoid such a system, since he would presumably only allow certified trial advocates, barristers, to appear in court.

During the past decade the English legal education system has also been the subject of much debate and study. It has been asserted that the English pupilage, or apprentice, system is deficient in at least three respects: 1) difficulty in finding a barrister with enough time and experience to instruct the pupil barrister; 2) most pupil barristers train not with specialist barristers, but with general common law barristers working on relatively minor criminal and civil cases; 3) pupil barristers receive little formal training in the art of advocacy and their real experience is still too often learned not from their pupil master, but from their first experiences in court.\(^{57}\) A Royal Commission on Legal Services in England has considered joining the barrister and solicitor branches of the legal profession, thereby becoming more like the American system. It is ironic then that at the same time Justice Burger is advocating the adoption of the English system of legal education that England itself is considering abandoning it because of its alleged inadequacies.\(^{58}\)

\[D. \text{ Bar Association Review.}\]

Proposals concerning some type of bar association or peer review are made not only by the lack-of-training theorists, but also by the lack-of-character theorists. Thus the Devitt Committee\(^{99}\) and the Maddi

\(^{95}\) Burger, supra note 3, at 240.

\(^{96}\) See text accompanying notes 108-110 infra.


\(^{98}\) Id. at 939.

study suggest peer reviews as simply another way of encouraging appropriate training while Judge Frankel has proposed such reviews more as a way to weed out incompetent lawyers.

The most detailed proposal for bar association reviews of lawyer incompetence has been made by Paul Wolkin, former Executive Director of the ALI-ABA Committee on Continuing Professional Education. He has proposed that a bar agency be established which would be specifically designated to perform, with respect to complaints and charges of incompetence, the same function that a professional responsibility committee now serves with respect to professional misconduct under the Code. Wolkin's proposed committee would be empowered to investigate complaints of incompetence, determine if there was a basis for them, determine the extent and character of the incompetence, and then prescribe and require fulfillment of remedial measures. To the extent that the cause of the incompetence was determined to be a lack of training, a prescribed remedial measure could include a defined educational program. To the extent that the incompetence was a result of laziness or other character flaw, the peer review process would presumably either lead to personal correction of the flaw, to the extent possible, or to ultimate disbarment for incompetence.

Of course the major flaw in this proposal is doubt concerning whether it would really have an impact on lawyer incompetence. The Code of Professional Conduct already contemplates competent lawyering as the minimum standard and professional responsibility committees are thus already responsible for investigating such problems. Yet, for whatever reason, bar associations have generally shown themselves to be unable or unwilling to police their own members. There is no real reason to believe that the mere formation of another committee will deal with this problem any more satisfactorily.

E. Law School Education.

Most suggested solutions to the problem of lawyer incompetence include changes in the traditional law school education, although the debate whether the responsibility is that of the law school or bar is far from over. The most common, but perhaps least helpful, suggestion is to simply provide more trial advocacy and clinical courses. While training in these areas might improve certain lawyering skills, the results of the studies discussed above indicate that a more comprehensive and

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100. Maddi, supra note 34, at 145.
101. Frankel, supra note 30, at 634; see also Pedrick and Frank, supra note 55, at 52.
103. Code of Professional Responsibility Cannon 1, DR 1-101; Canon 6.
104. Bazelon, supra note 6, at 17.
coherent approach to lawyer training is needed. Competent lawyering must be broken down into its component skills, which must then be systematically taught throughout the law school curriculum.\textsuperscript{105} For example, drafting of legal documents has been identified as an important lawyering skill. A separate course in drafting, however, with the added expense it would entail, is not necessarily the only way to provide training in this skill. Drafting could perhaps be taught in conjunction with contracts and property. Client interviewing could perhaps be developed in a domestic relations course. Oral advocacy and communication could be emphasized in all courses. Trial practice and clinical courses could then serve not as the first opportunity to learn these skills but as a further opportunity to practice them.

This more comprehensive and coherent approach has more to recommend than adding new courses to the curriculum. It would also tend to counter a cause of the lack of training in lawyering skills identified by Professor Kelso: that students do not choose lawyering skill courses because the overemphasis in law school on analytic courses gives students an unrealistic perception of what is important in the practice of law and causes them to feel intellectually more comfortable in analytic courses.\textsuperscript{106}

Closely allied with this comprehensive approach to lawyering skills is the suggestion that law schools alter their admissions policies to "consider a full range of the qualities and skills important to professional competence."\textsuperscript{107} The present reliance on grade point average and LSAT scores only serves to insure competence in analytic skills. To the extent that critics such as Judges Frankel and Weinstein are correct in believing lawyer competency is more a function of personality and character than lack of training, those factors should also be considered in admission to law school.

Chief Justice Burger has suggested a major restructuring of the law school curriculum as his major solution to the problem of lack of quality among trial advocates. He has proposed that law schools provide the basic legal education in two\textsuperscript{108} or two-and-a-half years,\textsuperscript{109} and then in the third year, concentrate on trial advocacy. Following the third year of law school, those who wish to be advocates should begin a pupilage period in which they would assist and participate in trials directly with experienced trial attorneys.\textsuperscript{110}

\textsuperscript{106} Kelso, supra note 66, at 853.
\textsuperscript{107} \textit{Lawyer Competency}, supra note 79, at 3, Recommendation 1.
\textsuperscript{108} Burger, supra note 3, at 232.
\textsuperscript{109} Burger, supra note 7, at 22.
\textsuperscript{110} Burger, supra note 3, at 232.
A rather surprising ally of Chief Justice Burger is former Law School Dean, now President, of Columbia University, Michael Sovern who is suggesting a restructuring of law school itself. Although he opposes eliminating the third year of law school, Sovern has proposed what he calls a 2-1-1 program in which some students would be permitted to spend a year in practice after their second year of law school, provided they return for a final year of formal instruction. While ultimately aimed at the goal of providing more competent lawyers, Sovern has argued that his proposal would serve the added goal of enhancing a student's personal development and offering a substantial opportunity for specialization in the fourth year.\footnote{111}

\textbf{F. Trial Preparation and Planning.}

As the studies discussed in part II above indicated, a common deficiency among incompetent lawyers is in the area of trial preparation and planning. Despite this common thread among the studies, none of the proposals suggest trial preparation and planning as an area that should be particularly emphasized by law schools, or any other component of legal education. Perhaps this is because to a great extent lack of preparation and planning is seen not as a skill deficiency in itself, but rather as a cause of lawyer incompetence, caused in turn primarily by character flaws and economic pressures. To the extent that lack of planning and preparation is a result of such causes, there is little that law schools can do to remedy the problem. However, to the extent that the perceived deficiency of planning and preparation is a manifestation of a lack of skill in those areas, law schools should heed the lesson of these studies and attempt to specifically incorporate the skill of trial planning and preparation into its skills training curriculum.

The primary importance of including trial planning and preparation in the skills training curriculum is its crucial impact on all of the other trial advocacy skills. An attorney's ability to conduct a competent direct or cross-examination is directly related to the planning and preparation that has gone into the trial. Even though trial preparation has thus been recognized as the key to effective trial advocacy, it has not been taught as a skill because of the commonly accepted belief that preparation is a highly individualized matter that cannot be taught.\footnote{112} However, that attitude is changing. As Professor Lubet and Schoenfield have observed in writing about their own trial advocacy course, all systems of trial preparation, despite their individual nature, have in

\begin{footnotes}
\footnote{111. Fifteenth Annual Columbia Law Symposium, 11 COLUM. J. L. & SOC. PROB. 72 (1974).}
\footnote{112. Lubet and Schoenfield, Trial Preparation: A Systematic Approach, 1 AM. J. TRIAL ADV. 229 (1978).}
\end{footnotes}
common a timetested analytic approach to preparation which can be taught in a systematic way. It is hoped that commentators like Lubet and Schoenfield will prove that trial preparation can be taught and that the above-cited studies will prove the need for teaching it.

G. Use of Evidence.

Like trial preparation and planning, the studies have indicated that another common deficiency among trial advocates is in the area of evidence. Although several of the studies have specifically recommended training in evidence, none of the proposals have included the kind of training that would seem to stand the best chance of actually alleviating the deficiency. The specific examples of evidence problems cited by the studies, use of objections, expert testimony, handling of documents, are examples not of deficiencies in the theoretical aspects of evidence but rather in the use of evidence in the courtroom. The studies merely serve to underscore the obvious point that it is one thing to know the definition of hearsay and yet another to recognize it in the courtroom.

What these studies would seem to suggest is the need for a different or additional emphasis on evidence in law school. In addition to teaching evidence as an academic subject it must be taught as a practice subject. This could possibly be done by teaching the traditional evidence course by the problem method or by adding an additional course in advanced or trial evidence. Trial practice and clinical courses could place more emphasis on this skill, recognizing it as a particular trial skill that should be consciously and systematically integrated into the skill training curriculum.

V. CONCLUSION

There would seem to be little doubt that the studies and commentators discussed herein do in fact provide support for their conclusions concerning the nature, the causes, and the cures of lawyer incompetence. These studies and commentaries, however, also provide support for a cautious approach by legal educators in attempting to solve the alleged lawyer incompetency problem. The studies, partly because of their rather unscientific methods and built in biases, are far from conclusive on the nature of the problem, let alone its causes and uses.

As noted above, law schools already offer many of the courses

113. Id. at 231.
114. See, e.g., Kimball and Farmer, Comparative Results of Teaching Evidence Three Ways, 30 J. LEGAL ED. 196 (1979).
recommended by these studies. The furor over lawyer incompetency has seemingly reached its peak now, when the law schools are offering more clinical and practice-oriented courses than ever before. This should certainly give pause to the theory that lack of appropriate law school education is the major cause of lawyer incompetence. These factors point instead to more systemic and personal problems as perhaps the major culprits. Whatever the true causes may be, the presently available data is too inconclusive on which to base a radical overhaul of the American system of legal education.

One reform that the studies and commentatories do support, however, is a more systematic, skills oriented approach to legal curriculum development. These studies should serve as a basis from which competent lawyering can be broken down into its component skills, which skills can then be systematically taught and tested throughout the legal education curriculum. In addition to the traditional lawyering skills specifically recommended by the studies, the skills of trial preparation and planning and the use of evidence should also be incorporated into this planning process.