

## St. John's Law Review

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Volume 50  
Number 3 *Volume 50, Spring 1976, Number 3*

Article 11

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August 2012

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#### Recommended Citation

Wolkin, Paul A. (1976) "On Improving the Quality of Lawyering," *St. John's Law Review*: Vol. 50 : No. 3 , Article 11.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol50/iss3/11>

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# ON IMPROVING THE QUALITY OF LAWYERING†

PAUL A. WOLKIN\*

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 . . . .<sup>1</sup>

Dissatisfaction with the competence and performance of lawyers is cresting once more.<sup>2</sup> Malpractice actions against lawyers are increasing and are being won.<sup>3</sup> Cautioning persons in need of legal assistance is regarded as an appropriate governmental activity.<sup>4</sup> Measures assumed to be in furtherance of professional compe-

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† Some of the material in this Article originally appeared in Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (1975), and Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064 (1975).

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The author is indebted to Joan C. Mazzotti, 1975-1976 Law Fellow of the ALI-ABA Committee on Continuing Professional Education, for her valuable assistance in the preparation of this Article.

<sup>1</sup> A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 97 n.1 (1921) (preamble to 1732 Virginia legislation "designed to remedy the evils then alleged to exist in the lower order").

<sup>2</sup> Distrust of lawyers was institutionalized in the United States at an early date. Professor Daniel J. Boorstin, presently Librarian of the Library of Congress, has offered this vivid description:

The newly-shaped ruling group in each colony preferred to keep the privileges which an established legal profession might have taken from them. In Virginia, for example, the landed aristocracy did much of their own law work rather than create a new class of colonial lawyers. In Massachusetts Bay the clergy, supported by Puritan prejudice against lawyers, delayed the growth of a trained, self-conscious bar: the colony's earliest known provision affecting lawyers . . . prohibited any man from giving a reward to another to represent him in court. In New York, too, the merchants and large landowners were unwilling to hand over any of their powers to a legal aristocracy. In Pennsylvania, the Quakers tried to avoid legal process altogether by using laymen as "common peacemakers."

D. BOORSTIN, *THE AMERICANS — THE COLONIAL EXPERIENCE* 197 (1958).

<sup>3</sup> See, e.g., *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974). The media has begun to take notice of the increase in malpractice suits. See, e.g., Hill, *The Bar at Bay*, *Wall Street Journal*, Feb. 3, 1976, at 1, col. 1; *TIME*, Jan. 12, 1976, at 53.

The consumer attack on professionals is not limited to lawyers. The American medical profession is beginning to regard unfit physicians as a serious problem that may account for tens of thousands of needless injuries and deaths each year. According to a recent newspaper article, 16,000 licensed physicians, treating an estimated total of 7.5 million patients each year, are unfit to practice medicine and include some who are mentally ill or addicted to drugs as well as others who are simply ignorant of modern medical knowledge. *N.Y. Times*, Jan. 26, 1976, at 1, col. 1.

<sup>4</sup> See, e.g., H. DENENBERG, *A SHOPPER'S GUIDE TO LAWYERS* (1974). A copy of this guide is available from the Pennsylvania State Department of Insurance, Harrisburg, Pennsylvania 17180.

tence are subjects for legislative consideration.<sup>5</sup> Judges and lawyers are publicly voicing concern over the quality of legal services.<sup>6</sup>

The profession is debating and acting on proposals to cope with problems alleged and perceived to exist. Of the measures proposed, mandatory continuing legal education (CLE),<sup>7</sup> standards for minimum qualifications for admission to practice in the Court of Appeals for the Second Circuit,<sup>8</sup> and plans for specialization<sup>9</sup>

<sup>5</sup> On October 18, 1971, the California Senate adopted a resolution calling upon various licensing agencies, including the State Bar Association, to file reports on continuing education with the Senate Committee on Business and Professions. The agencies were asked to describe the approach or plan they would be prepared to adopt for their licensees, and full consideration was to be given to the views and experience of professional associations in developing a continuing education program. ALI-ABA CLE Rev., Oct. 3, 1975, at 1, col. 3.

<sup>6</sup> In recent years many prominent members of the judiciary and the bar have criticized the legal profession. Chief Judge Irving R. Kaufman of the Court of Appeals for the Second Circuit recently spoke of the repeated instances of inadequate work by appellate lawyers and used as an example the fact that "one brief submitted by a lawyer in a habeas corpus case this term was so poor that the prisoner himself found it necessary to write and file his own brief in its place." N.Y. Times, Apr. 8, 1975, at 18, col. 2. Chief Judge David L. Bazelon of the Court of Appeals for the District of Columbia Circuit characterized a number of attorneys coming before him as "walking violations of the Sixth Amendment . . ." Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569 (1975). Chief Justice Warren E. Burger complained in his state of the judiciary message in February 1975 that many young lawyers come into the federal courts with inadequate training and are "using the courts as a bush league training camp." N.Y. Times, Apr. 8, 1975, at 18, col. 2. Mr. Chesterfield Smith, a former president of the ABA, recently suggested that about 25% of all lawyers are unfit to practice. *Id.*

<sup>7</sup> For a general discussion of mandatory CLE see Dornstein, *A Critique of Compulsory CLE* (pts. 1-2), ALI-ABA CLE Rev., Oct. 17, 1975, at 1, col. 2, Oct. 24, 1975, at 4, col. 1 [hereinafter cited as Dornstein], Leete & Loeb, *Continuing Legal Education — Should It Be Compulsory?*, 27 J. LEGAL ED. 110 (1975), Note, *Continuing Legal Education: A Significant Trend for the Kansas Legal Profession*, 14 WASHBURN L.J. 450 (1975), N.Y. Times, Apr. 8, 1975, at 18, col. 2, and N.Y. Times, Apr. 2, 1975, at 1, col. 1.

<sup>8</sup> In January 1974, Chief Judge Irving R. Kaufman appointed a committee to formulate a procedure that would improve the quality of representation in the Second Circuit. The committee conducted an exhaustive study and concluded that there was a need for improving the federal bar and, to that end, proposed rules for admission to the district court that would require applicants to have passed courses in criminal law and procedure, evidence, federal practice and procedure, professional responsibility, and trial advocacy. ADVISORY COMM. ON PROPOSED RULES FOR ADMISSION TO PRACTICE IN THE SECOND CIRCUIT, FINAL REPORT, in 67 F.R.D. 161 (1975).

The proposed rules have been the subject of heated debate. See, e.g., Erlich, *A Critique of the Proposed Admission Rule for District Courts in the Second Circuit*, 61 A.B.A.J. 1385 (1975); Frankel, *Ill-Advised Rules for Bar Admission* (pts. 1-2), ALI-ABA CLE Rev., Feb. 13, 1976, at 1, col. 3, Feb. 20, 1976, at 2, col. 1; Kaufman, *A Response to Objections to the Second Circuit's Proposed District Court Admission Rules*, 61 A.B.A.J. 1514 (1975); Weinstein, *Questionable Proposals to Make Admission to the Federal Bar More Difficult* (pts. 1-3), ALI-ABA CLE Rev., Dec. 5, 12, 19, 1975, at 2, col. 1. Both the Southern District of New York and the Eastern District of New York, located in the Second Circuit, rejected the proposed rules. 174 N.Y.L.J. 119, Dec. 22, 1975, at 1, col. 3.

<sup>9</sup> While it has been conceded that de facto specialization has long existed in the legal profession, recently there has been a movement towards its institutionalization and regulation. The approaches to specialization vary from state to state and range from California's rather stringent certification requirements to New Mexico's self-designation plan. For general discussions of specialization, see Joiner, *Specialization in the Law*, 48 FLA. B.J. 163 (1974), Mindes, *Lawyer Specialty Certification: The Monopoly Game*, 61 A.B.A.J. 42 (1975), and Reed,

are receiving the greatest attention. Minimum qualifications and specialization are being looked at closely by those whom they would affect.<sup>10</sup> Mandatory CLE, however, would reach every lawyer and many judges, and it deserves even closer examination. And that inquiry should include an assessment of the relative merits of other means for improving the quality of the profession's services.

## I

Henry James, I heard from du Maurier, came up to New Grove House after *Trilby* had become the talk of the town, and invited him to come for a walk. 'Let us,' said Henry James, 'find a seat and sit down and endeavour — if it is in any way possible to arrive at a solution — to discover some reason for such a phenomenon as the success of *Trilby*.'<sup>11</sup>

In 1971 the California Legislature adopted a resolution requesting the California bar to develop and submit a program for maintaining continuing professional competence.<sup>12</sup> In 1972 a mandatory CLE program was recommended to the Kansas Bar Association by its CLE committee.<sup>13</sup> Following the lead of these

*Specialization, Certification, and Exclusion in the Law Profession*, 27 OKLA. L. REV. 456 (1974). For discussions and examples of specific state programs of specialization and specialty certification, see Adams, *The Florida Plan is Best*, 48 FLA. B.J. 185 (1974), Eiger & Morrison, *Legal Specialization in Illinois: Designation, Certification or Stagnation?*, 63 ILL. B.J. 296 (1974), Pickering, *Why I Favor the New Mexico Plan*, 48 FLA. B.J. 180 (1974), *New Standards Set for Certification and Recertification of Legal Specialists*, 50 CAL. ST. B.J. 309 (1975), and *Legal Specialization Comes to Texas*, 38 TEX. B.J. 235 (1975).

<sup>10</sup> The establishment of minimum qualifications for admission to the federal bar is being severely criticized by academicians for the effect it will have on the curriculums of most law schools as well as the limitation it will impose on the students' freedom to choose their courses. Thomas Ehrlich, former dean of Stanford Law School, explains that although the proposed rules will not oblige any law school to offer a particular course, many students who think they may practice in the Second Circuit will press their law schools to provide the courses in quantities sufficient for all students wishing to take them. This problem may be compounded, he points out, if other jurisdictions, state and federal, adopt other requirements. Ehrlich, *The Open Door Policy on Trial*, LEARNING & L., Winter 1975, at 50. One of the few law school deans to express support for the plan was Norman Redlich of New York University Law School.

Although I originally shared the skepticism of most of my colleagues as to the wisdom or necessity of these rules, I have concluded that, on balance, the comparatively minor interference which they create with the law-school curriculum will be more than offset by the ultimate benefit to clients, who are, after all, the ultimate consumers of our product.

N.Y. Times, June 22, 1975, at 42, cols. 4-5.

Proposals for the certification of specialists are being attacked as an attempt to create an "elite corps" in order to justify higher fees. Stockwell, *Specialization . . . Should We or Shouldn't We?*, ALI-ABA CLE REV., May 23, 1975, at 3, 4, col. 4.

<sup>11</sup> T. GUTHRIE, A LONG RETROSPECT 170 (1936).

<sup>12</sup> ALI-ABA CLE REV., Oct. 3, 1975, at 1, col. 3.

<sup>13</sup> For a copy of the report of the Kansas Bar Association's Post Graduate Legal Education and Specialization Committee and the Kansas Supreme Court's proposed rules

states, in 1975 both Minnesota<sup>14</sup> and Iowa<sup>15</sup> adopted programs of mandatory CLE. Wisconsin's CLE plan, to become effective in January 1977, was approved by the state supreme court, the bar's board of governors, and a vote of the bar's membership.<sup>16</sup> Other proposals for mandatory CLE are under consideration or being advanced in more than half the states.<sup>17</sup>

The essential element of any program of mandatory CLE is the completion each year of a stated number of formal course hours in educational programs approved by the supervising state CLE board. Minnesota, for example, mandates 45 hours every 3 years;<sup>18</sup> Iowa, 15 hours each year;<sup>19</sup> and both states subject judges as well as attorneys to these requirements.<sup>20</sup> The supervising agency is typically appointed by the state supreme court and may include lay as well as professional representation.<sup>21</sup> A state administrative director of CLE generally administers the system, and ad-

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for mandatory CLE, see ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Spring/Summer Supp. 1975).

<sup>14</sup> MINN. SUP. CT. (CLE) R. 1 *et seq.*

<sup>15</sup> IOWA SUP. CT. R. 123 *et seq.*

<sup>16</sup> WIS. SUP. CT. (CLE) R. 1 *et seq.* The Wisconsin Bar Association mailed its members a ballot asking whether they favored or opposed the proposed mandatory CLE plan. Of those responding, 3905, or 72%, were in favor of the plan and 1551, or 28%, were opposed. Order Establishing Wisconsin Continuing Legal Education Rules, *id.*

Since no alternatives to mandatory class activity were listed on the ballot, there is some question whether the 72% favoring the proposed plan to ensure the competence of the bar actually favor compulsory CLE. A national survey now being conducted by the ALI-ABA Committee on Continuing Professional Education contains the following question:

- G. To assure that lawyers are competent, do you favor (check 1, 2, or 3a, 3b, or 3c)
1. An expanded program of continuing legal education on a voluntary basis \_\_\_\_\_
  2. Or a monitoring system to deal with incompetent lawyers \_\_\_\_\_
  3. Or a system of periodic license renewal conditioned on:
    - a. Mandatory attendance at continuing legal education programs \_\_\_\_\_
    - b. Successful written examination \_\_\_\_\_
    - c. Other \_\_\_\_\_ (explain) \_\_\_\_\_

<sup>17</sup> Mandatory CLE has been adopted in Iowa, Minnesota, and Wisconsin. A draft proposal has been approved in California, and proposals are before the State Supreme Court in Washington and the governing bodies in Alabama, Colorado, Idaho, Maryland, and Nebraska. Bar association studies are underway in Arizona, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, and Texas. The only jurisdictions that have failed to report any action as of September 1975 are Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Maine, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Fall/Winter Supp. 1975-1976); ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Spring/Summer Supp. 1975).

<sup>18</sup> MINN. SUP. CT. (CLE) R. 3.

<sup>19</sup> IOWA SUP. CT. R. 123.3.

<sup>20</sup> IOWA SUP. CT. R. 123.8; MINN. SUP. CT. (CLE) R. 3.

<sup>21</sup> See IOWA SUP. CT. R. 123.2 (appointment of two laypersons to supervisory agency required); MINN. SUP. CT. (CLE) R. 2 (appointment of three laypersons to supervisory agency allowed); WIS. SUP. CT. (CLE) R. 2 (appointment of laypersons to supervisory agency allowed).

ministrative costs are met by levying a charge on each lawyer in the jurisdiction.<sup>22</sup> Although some individual plans are more elaborate, entailing more or less coursework or an allocation between required and elective courses,<sup>23</sup> failure to fulfill the mandatory requirements uniformly results in probation or even suspension from the practice of law.<sup>24</sup>

## II

Accuracy and diligence are much more necessary to a lawyer, than great comprehension of mind, or brilliancy or talent. His business is to refine, define, and split hairs, to look into authorities, and compare cases. A man can never gallop over the fields of law on Pegasus, nor fly across them on the wing of oratory. If he would stand on *terra firma* he must descend; if he would be a great lawyer, he must first consent to be only a great drudge.<sup>25</sup>

As a vehicle for enhancing the quality of legal services, mandatory CLE must be viewed in the overall context of the delivery of legal services. Adequate legal services presume professional services of quality, a function of the competence and work habits of the lawyers themselves. Delivery of legal services, however, also raises the issue of making the public aware of where and from whom the services may be obtained. And here we enter the arena of advertising,<sup>26</sup> specialization,<sup>27</sup> prepaid legal services,<sup>28</sup> and the

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<sup>22</sup> See, e.g., IOWA SUP. CT. R. 123.4(a).

<sup>23</sup> The proposed California plan, for example, would require the practitioner to complete 60 credit hours over a 5-year period. In each year, however, a minimum number of hours must be completed, and, over the 5-year period, these hours must be distributed among specified areas of the law. ALI-ABA CLE REV., Oct. 3, 1975, at 4, col. 1. For a complete compilation of proposed and approved CLE plans, see ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Fall/Winter Supp. 1975-1976); ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Spring/Summer Supp. 1975).

<sup>24</sup> IOWA SUP. CT. R. 123.5; MINN. SUP. CT. (CLE) R. 4.

<sup>25</sup> SPEAK FOR YOURSELF, DANIEL 22-23 (W. Lewis ed. 1969) (Daniel Webster in an 1803 letter).

<sup>26</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 [hereinafter cited as ABA CODE] prohibits advertising by lawyers. At the 1976 Midyear Meeting of the ABA House of Delegates, however, the delegates voted to adopt a limited amendment that would allow lawyers to list in the classified sections of telephone books their field of practice and certain biographical and professional information. This proposal must now be approved by state and local bar associations. 175 N.Y.L.J. 32, Feb. 18, 1976, at 1, col. 2.

<sup>27</sup> For a brief discussion of specialization see note 9 *supra*.

<sup>28</sup> Prepaid legal services plans are spreading across the country. Depending on the form adopted, legal services are provided to the members by either a designated firm or practitioner (closed panel) or an attorney of the member's own choice (open panel). The services are paid for from the collective monies of a prepaid fund. See, e.g., Dunne, *Prepaid Legal Services Have Arrived*, 4 HOFSTRA L. REV. 1 (1975); Note, *Legal Service Plans—Coming of Age*, 49 ST. JOHN'S L. REV. 137 (1974). ABA CODE, *supra* note 26, EC 2-33 endorses the profession's participation in prepaid legal services plans.

practice of law generally. Problems of advertising, for example, are related to competence since the profession must decide whether and how to inform the public of the identity of qualified lawyers. The delivery of legal services also raises the issue of cost. Unless maintaining competence results in substantially greater efficiency, the more costly maintaining competence becomes, the more costly the services rendered.

Perhaps more important, however, is the need for a critical examination of the hypothesis that lack of competence is the root of poor lawyering — competence for the purpose of mandatory CLE meaning lack of the knowledge necessary to do an adequate or good job as a lawyer for a client. This hypothesis lacks hard evidence or data to support it. Although some judges and lawyers have offered testimony that there is a pervasive lack of competency in the trial field,<sup>29</sup> others have forcefully challenged such assertions of inadequacy.<sup>30</sup> Instructive are the results of a recent, carefully structured survey of the Illinois Bar which directed one of its many inquiries at the "Reasons for 'A Less than Reasonable Degree of Professional Skill and Care.'"<sup>31</sup> The results, broken down between those favoring specialization and those opposed, were as follows:<sup>32</sup>

REASON FOR INADEQUATE SKILL & CARE	SPECIALIZATION	
	<i>Pro</i>	<i>Con</i>
Inadequate preparation for particular matter	81%	81%
Lack of experience in particular area of law	86%	68%
General lack of ability or training	55%	55%
Failure to keep abreast of specialty areas	51%	44%
Lack of formal training in an area of law	43%	27%

<sup>29</sup> A number of problem areas have been identified as the source of poor legal representation. They include inadequate training in trial practice, unpreparedness, overwork, and low law school accreditation standards. See N.Y. Times, Apr. 8, 1975, at 18, col. 2; Joiner, *To Be a Good Judge, I Need Good Lawyers*, LEARNING & L., Summer 1975, at 50.

<sup>30</sup> See, e.g., Frankel, *Ill-Advised Rules for Bar Admission* (pts. 1-2), ALI-ABA CLE REV., Feb. 13, 1976, at 1, col. 3, Feb. 20, 1976, at 2, col. 1; Steuer, *Are the Critics of the Trial Bar Right?* (pts. 1-2), ALI-ABA CLE REV., May 3, 10, 1974, at 4.

<sup>31</sup> *Economics of Legal Services in Illinois — A 1975 Special Bar Survey*, 64 ILL. B.J. 73, table V-8b, at 106 (1975). In 1975 the Illinois State Bar Association conducted a special survey to compile the data necessary for the planning of the delivery of legal services within the State. To best explore alternative methods of delivering legal services, such as specialization regulation, CLE, and prepaid legal services, the survey hoped to measure the attitude of the Illinois bar towards these methods.

<sup>32</sup> *Id.*

In short, as a reason for the existence of less than a reasonable degree of professional skill and care, that which mandatory CLE seeks to remedy drew the lowest response.

If empirical study were to verify these opinions of the members of the profession in Illinois, assumptions of a lack of basic competence of members of the legal profession would be less tenable, and the measures being advanced on the premise of incompetency would be subject to serious challenge. Absent such empirical data, the trend to mandatory CLE to deal with the lack of quality of legal services may be ill founded, and the search for a program to assure legal services of quality must be directed elsewhere — in a direction that takes into account the complex of causative factors, including poor preparation, underlying inadequate quality.

### III

A freeman ought not to be a slave in the acquisition of knowledge of any kind. Bodily exercise, when compulsory, does no harm to the body; but knowledge which is acquired under compulsion obtains no hold on the mind.<sup>33</sup>

Before examining the possible components of another method designed to advance the quality of legal services, a few other aspects of mandatory CLE should be noted. The basic question is whether requiring all lawyers to attend a certain number of CLE hours, year in and year out, under any of the systems being prescribed, will contribute in any significant way to attorneys' fulfilling "their obligation competently to serve their clients"<sup>34</sup> or the bar's maintaining the "delivery of quality legal services to the public."<sup>35</sup>

Few will dispute that mere attendance at CLE courses will not necessarily cure lack of preparation or enhance competence. Presence is not evidence of learning since attendance may be passive or active. What is heard in the classroom, without advance preparation, classroom participation, review, and application is unlikely to be retained. With few exceptions, the number of hours of attendance being prescribed under proposed or adopted mandatory systems is so minimal that it is difficult to perceive any longlasting benefits related to enhancing competence.<sup>36</sup> The subject matter of a program may or may not bear any relation to the particular

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<sup>33</sup> THE REPUBLIC OF PLATO, bk. VII, at 284 (Vintage ed. B. Jowett transl.).

<sup>34</sup> IOWA SUP. CT. R. 123.1.

<sup>35</sup> WIS. SUP. CT. (CLE) R. 1.

<sup>36</sup> Dornstein, *supra* note 7, Oct. 24, at 4, col. 2.



needs of the lawyer. No testing procedures exist to determine how much has been acquired in the way of additional knowledge or techniques, and self-serving statements of attendance suffice as evidence of fulfillment of requirements.<sup>37</sup> These are but some of the indicia of the superficiality and inadequacy of the standards being promulgated, and they are recognized by the proponents. The Maryland State Bar Association's Special Committee on Recertification

considered, and rejected unanimously, the concept of recertification of lawyers through periodic examinations. In view of the apparently universal opposition to this concept, there is little point to detailing the practical problems inherent in any system requiring periodic examinations for lawyers taking into account the vast differences in breadth and depth of knowledge required adequately to practice law, depending upon the precise nature of the practice.

It was felt by the Committee that a system of mandatory continuing legal education, if designed in a practical manner, would provide an adequate basis for recertification.<sup>38</sup>

Several other aspects of mandatory CLE systems need careful examination. How will they affect existing CLE programs? If only 5, 10, or even 20 percent of the bar attend the CLE programs now offered, can a mandate to educate 100 percent be met adequately in terms of curriculum planning, study materials, and planning? Can a program of large dimensions be operated qualitatively, even under the best circumstances? What may well happen is that 10 or 15 hours a year of required professional education for all will entail big business for some CLE entities, rote programming for others, and an exercise in frustration for most. Mandatory CLE is not likely to facilitate significant educational programming for those who will undertake it, and the result may well be a deterioration in the quality of courses now available in many states.

Moreover, a fundamental defect of a mandatory system is that it snags in its net the entire profession. It makes little allowance for the fact that the profession is a learned calling and does not recognize that many lawyers pursue their continued betterment as professional individuals. Mandatory CLE is bound to generate a

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<sup>37</sup> The programs generally require that an attorney file a written report within a specified number of days after the close of the period in which the attorney was to complete his CLE requirements. The reports are to be accompanied by "proof satisfactory" that the work was completed. See IOWA SUP. CT. R. 123.4; MINN. SUP. CT. (CLE) R. 3.

<sup>38</sup> MARYLAND BAR ASS'N SPECIAL COMM. ON RECERTIFICATION, PROPOSED RESOLUTION, IN ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Spring/Summer Supp. 1975).

cynicism within the profession that will be inimical to educational values and goals.<sup>39</sup> And if it fails to noticeably raise the level of the quality of services, the repercussions to the profession may be very damaging. What was conceived and attempted with high aspirations may then be regarded as only an effort to avoid needed external regulation, and legislative action may then be unavoidable.<sup>40</sup>

#### IV

As long as you live, and surely as long as you practice law, an examiner will dog your foot-steps. When you enter some law office, an apprentice to some older lawyer, there will be some one looking over your shoulder, criticizing your work, pointing out its defects, cheering you, once in a while, by a concession of its merits, educating, examining, testing—the process repeated without end. When a little later you start for yourselves, there will be trial judges and juries and appellate courts, all examining, testing, approving or rejecting, just as in the days of adolescence which you thought were left behind. Sometimes when these critics are compassionate or silent, you will have to meet a test still sterner, a scrutiny yet more rigid, the merciless test and scrutiny of a defeated and reproachful client.<sup>41</sup>

Any search for effective methods to improve the quality of legal services should surmount the vulnerable characteristics of mandatory programs. Three approaches, employed singly or in combination, may succeed in accomplishing this objective: First, a more effective program of voluntary CLE; second, voluntary peer review; and third, selective monitoring of performance.

#### THE VOLUNTARY CLE APPROACH

A more effective voluntary CLE system proceeds on the theory that the attorney who seeks to better himself of his own volition derives maximum benefits from his educational experiences.<sup>42</sup> This

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<sup>39</sup> Judge Hansen's minority position on Supreme Court rule requiring CLE, in *Wis. Sup. Ct. (CLE) R. 1 et seq.*

<sup>40</sup> Where other professions have failed to adequately self-regulate members' activities, legislative regulation has resulted. In Florida, for example, the licensing agencies charged with policing the activities of contractors, doctors, barbers, real estate salesmen, and other professional groups recently came under legislative attack. They were criticized for their failure to adequately represent the public interest, respond to public needs, and guard against incompetency. The legislative response to these charges has taken the form of requiring lay representation on licensing boards and having professional services administer qualification exams. Montgomery, *Closed Societies?*, *Wall Street Journal*, Jan. 8, 1975, at 1, col. 1.

<sup>41</sup> B. CARDOZO, *The Game of the Law and Its Prizes*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 414, 414-15 (M. Hall ed. 1947).

<sup>42</sup> Educators generally agree that compulsory education is not an effective learning

thesis conforms to the great traditions of the profession and is at the root of continuing legal education as it has developed in the last 30 years and exists in the United States today. Opportunities for voluntary continuing education are abundant, readily available, and generally within the means of most lawyers.<sup>43</sup> Publications offer the least expensive method of self-education. Cassette-packaged audiotapes allow for listening and learning at one's convenience. Video tapes afford opportunities for small group learning experiences in a law office, at a bar association, or at home.<sup>44</sup> The variety of live programs available to the practitioner are almost without limit<sup>45</sup> — luncheon lectures, programs and courses of varying lengths, and full semesters in law school postadmission programs. All of the educational modalities are being used today in CLE programming.

A critical problem, however, in voluntary continuing education is motivation: how do we motivate those who need professional improvement to avail themselves of the opportunities that abound? This problem requires investigation and experimentation, but experience offers some guidelines with which to construct the outlines of a program grounded on facilitating participation, keeping costs minimal, and rewarding achievement.

### *Facilitating Participation*

A variety of measures, some currently employed, might be taken to facilitate participation in voluntary CLE. For example, one method would require bringing oral programs of instruction into each legal community. Although this could be achieved through a program of traveling lecturers, geographical accessibility and time constraints on faculty may preclude in-depth instruction in sparsely

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experience. "Forcing a human being against his will to stay in a classroom does not promote learning. All educators know that a student learns only when he is in tune with the act of learning . . ." Piatt, *Compulsory Attendance Can Be Fatal*, EDUC. DIGEST, May 1974, at 26.

In order to learn, four conditions must obtain. One must: (1) want something or be motivated; (2) do something or act; (3) notice something during the act; and (4) get something or gain satisfaction. In this series of events we have a statement of the four essential elements of learning, more briefly described by the terms *drive*, *response*, *cue*, and *reward* or *reinforcement*.

A. MONTAGU, THE DIRECTION OF HUMAN DEVELOPMENT 323 (1955) (emphasis in original).

<sup>43</sup> For a complete listing of the courses, audiovisual aids, and publications currently sponsored by the ALI-ABA Committee on Continuing Professional Education and the various state CLE organizations, see ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Fall/Winter 1975-1976).

<sup>44</sup> See ALI-ABA Comm. on Continuing Professional Education, *Report*, 1975 A.B.A. REP. No. 201, at 3, 6.

<sup>45</sup> For a discussion of the strengths and weaknesses of oral programs of legal study and the new developments being implemented in this area by the ALI-ABA Committee on Continuing Professional Education, see *id.* at 7-9.

populated localities.<sup>46</sup> A possible solution to this problem would be more frequent use of audiovisual media, *viz* audiotapes and video tapes<sup>47</sup> or video discs,<sup>48</sup> supplemented by live lectures. As facilities become available, microwave radio and television and cable television could provide other solutions. Indeed, even a bar owned or leased microwave radio facility devoted entirely to legal education programs is feasible.<sup>49</sup> Additionally, programmed learning in conjunction with the employment of computer technology offers still another means of spreading individualized teaching and learning.<sup>50</sup>

Much of the self-study materials published by CLE organizations and private publishers is of high quality. The very profusion, however, creates an educational problem. To assure fuller utilization of these materials it is necessary to improve their organization and presentation, and this is a challenge that has not yet received the creative attention of publishers and CLE agencies. More needs to be done in programming and developing basic courses that can both serve as a review for the practitioner and bring him up to date. Courses in law school subjects — torts, contracts, property, practice, procedure, federal courts, and constitutional law — need to be brought back to practicing lawyers. New instruction in old subjects and the introduction of new subjects not taught in old classes should replenish knowledge, regenerate creativity, and enhance competence. These are a few illustrative measures that might be considered to facilitate fuller participation by the bar in CLE. The number could be significantly enlarged.

### *Keeping Costs Minimal*

A second aspect of encouraging voluntary CLE involves keeping costs at a minimum. A proposal being advanced to keep the

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<sup>46</sup> See ALI-ABA Comm. on Continuing Professional Education, *Report*, 1975 A.B.A. REP. No. 201, at 3.

<sup>47</sup> See, e.g., Benowitz, *Legal Applications of Videotape*, 48 FLA. B.J. 86 (1974); Fischtrom, *Using TV in Continuing Legal Education*, 60 A.B.A.J. 742 (1974); Karplus, *Using Videotape for Continuing Legal Education*, INT'L B.J., May 1975, at 17.

<sup>48</sup> See generally Lanier, *A Home TV Revolution*, N.Y. Times, May 25, 1975, § 6 (Magazine), at 9.

<sup>49</sup> In the spring of 1974, the ALI-ABA Committee on Continuing Professional Education offered videotaped programs on microwave frequency in Washington, D.C., and the New York metropolitan area. See ALI-ABA Committee on Continuing Professional Education, *Report*, 1975 A.B.A. REP. No. 201, at 7. Similarly, the medical profession is currently utilizing the radio waves to bring continuing medical education to physicians.

<sup>50</sup> The University of Illinois College of Law has recently experimented with using computers to assist in teaching legal studies, and the program appears to be working quite successfully. For a discussion of this innovative method of teaching, see Maggs & Morgan, *Computer-Based Legal Education at the University of Illinois: A Report of Two Years' Experience*, 27 J. LEGAL ED. 138 (1975).

cost of continuing one's education minimal contemplates a charge on each member of the bar to support CLE and make its publications and programs available to all members of the profession without further fee.<sup>51</sup> This may succeed if the theory that one paying for something avails himself of it is sound. The envisioned program should probably be limited to basic subjects, however, since different factors operate at the level of specialization. In any event, low fees, inexpensive but ample and usable printed and audiovisual materials, and scheduling and delivery of educational programs in a manner not disruptive of hours of practice are approaches to be considered in minimizing CLE costs.

### *Rewarding Achievement*

Rewarding achievement is perhaps the least explored aspect of encouraging voluntary participation. A start might be made by incorporating a voluntary examination system into learning programs that encompass self-study and course attendance.<sup>52</sup> The system should encourage preparation, study, and participation in the educational process beyond mere attendance or cursory reading. Its initial incentive value lies in the desire, indeed the need, of the learner to know he is progressing and acquiring knowledge. This is an important form of reward that encourages participation.<sup>53</sup> By carrying the voluntary examination one step farther, a second form of reward could be offered. Demonstrated achievement might be accorded formal recognition through certification. In medicine, the Physician's Recognition Award, a certificate suitable for framing and display offered by the American Medical Association to those who qualify, achieves this purpose.<sup>54</sup> Consideration should also be

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<sup>51</sup> See, e.g., Massachusetts Bar Association, Report of Subcommittee on Professional Competence, July 18, 1975, in ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Fall/Winter Supp. 1975-1976), endorsing an annual mandatory assessment not to exceed \$30 a year for the support of voluntary CLE programs on a 3-year trial basis.

<sup>52</sup> In the fall of 1975, the ALI-ABA Committee on Continuing Professional Education implemented a voluntary testing program in four of the Committee's courses. Registrants, however, were reluctant to expose themselves to grading. No one turned in answers to the essay examination distributed for the Investment Company course. Approximately a third of those attending the Tax Shelter course turned in their examination papers. Twenty of the one hundred and ninety-seven registrants at the course on Tax Planning for Agriculture submitted their answers for correction. The highest return was in Antitrust, with 43 of the 173 participants turning in their exams. Failure to hand in examinations, however, is not necessarily an indication that there is no value in a testing program. Just having the questions at one's elbow during an oral presentation helps to focus one's attention on the objectives of the learning situation.

<sup>53</sup> See, e.g., Berger & Barnett, *Rx for Continuing Education: Lawyer, Examine Thyself!*, 59 A.B.A.J. 877 (1973).

<sup>54</sup> The Physicians Recognition Award is granted by the American Medical Association to

given to permitting display of recognition of achievement by means of an appropriate symbol in telephone listings or on stationery, thus enabling the public to know which lawyers have extended themselves to advance and maintain their competence.

An expanded, voluntary, postadmission legal education program, fully employing the advances of modern technology, would help assure the delivery of legal services of quality.

### *Voluntary Peer Review*

Peer review is not new to the legal profession. Law directory ratings, notably those in the *Martindale-Hubbell Law Directory*, are a form of peer review,<sup>55</sup> as are reviews by bar screening committees of candidates for judicial office.<sup>56</sup> There are certain difficulties, however, with a *Martindale-Hubbell* type of peer review, since the lack of systemized structural standards and the absence of knowing participation by subjects of the review process may subject evaluations to community vagaries and biases.<sup>57</sup> Peer review in judicial

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physicians who have voluntarily completed a minimum of 150 credit hours of continuing medical education within a 3-year period. A copy can be obtained from the American Medical Association, 535 N. Dearborn St., Chicago, Ill. 60610. For a discussion of suggested procedures for the establishment of a Lawyer's Recognition Award, see Sherrer & Sherrer, *The Lawyer's Recognition Award: A Suggested Program for Upgrading and Structuring Continuing Legal Education*, 32 *FED. B.J.* 26 (1973).

<sup>55</sup> The *Martindale-Hubbell Law Directory* states:

The ratings are based upon confidential recommendations from lawyers and judges in the city or area where the lawyer practices and at times from such sources elsewhere. *Martindale-Hubbell* does not undertake to make an evaluation of a lawyer's scholastic background, the type of clients represented, the number and kinds of cases handled, or participation in professional or community activities. The rating action reflects the confidential recommendations received.

#### Legal Ability Rating

Ten years' admission is the minimum required for the legal ability rating of "a" ("very high"), five years for the "b" ("high"), and three years for the "c" ("fair").

Those to whom inquiries are directed are requested to make their recommendations on the basis of the standard of ability for the place or area where the lawyer practices, taking into consideration age, practical experience, nature and length of practice and other relevant qualifications.

MARTINDALE-HUBBELL LAW DIRECTORY, Confidential Key (1976).

<sup>56</sup> For discussions of bar screening committees see Grossman, *The Role of the American Bar Association in the Selection of Federal Judges: Episodic Involvement to Institutionalized Power*, 17 *VAND. L. REV.* 785 (1964), Kaminsky, *Judicial Selection: Alternatives to the Status Quo in the Selection of State Court Judges*, 48 *ST. JOHN'S L. REV.* 496 (1974), and Scott, *The Selection of Federal Judges*, 24 *WASH. & LEE L. REV.* 205 (1967).

<sup>57</sup> Considerable criticism has been leveled at the method by which *Martindale-Hubbell* arrives at its rating.

The *Martindale-Hubbell* system is based essentially upon hearsay, and while anonymity may encourage informants to be frank, it may also invite evaluation on bases other than proficiency. It is said that in some communities an "a" rating in *Martindale-Hubbell* is more a sign of social acceptance than of superior proficiency, and indeed it is fairly common to find "c" or "b" rated lawyers who are actually more proficient than certain "a" rated lawyers in the same community.

B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 121 (1970). See also D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 135-36 (1974).

selection is a very limited application of the process, and its main use may be to shed some light on the types of techniques employed. More valuable referents for the construction of peer review models for the legal profession may be found in the peer review systems employed in accountancy and medicine.

In April 1974 the American Institute of Certified Public Accountants (AICPA) circulated a peer review plan<sup>58</sup> designed "to help improve the quality control procedures of multi-office accounting firms by reviews of those procedures by other members of the profession familiar with the operations of multi-office firms."<sup>59</sup> A firm that volunteers to be reviewed furnishes to the reviewing team's executive committee a written description of the firm's quality control procedures which the committee then examines. Suggestions for improvement are offered, and the firm is allowed as much as a year to consider the suggestions and to adopt a revised quality control document. The review then proceeds and entails a comprehensive examination of the firm's personnel and operations. In reviewing quality control, the committee examines client acceptance and retention, hiring, training, promotion, independence, conduct of an engagement, supervision and review, consultation, and inspection. These are the elements that are the subjects of initial inquiry in the quality control document, and included in the process is the review of selected, specific audit engagements.

At the review's conclusion, the reviewing team's executive committee drafts a report that is circulated among all the team members for discussion. All drafts and papers are then entrusted to the captain for disposal. The final report, of which there is only one copy, states the specific problems discovered and the recommendations. After it is discussed by the team's captain with the managing partner of the reviewed firm, it is delivered to the firm. No copies are retained, nor is there any follow-up to see whether the recommendations have been fulfilled.<sup>60</sup>

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<sup>58</sup> AICPA, Plan for Implementation of AICPA Voluntary Program for Reviews of Quality Control Procedures of Multi-office Firms, Apr. 26, 1974.

<sup>59</sup> *Id.* at 1.

<sup>60</sup> Peat, Marwick, Mitchell & Co., the first accounting firm to volunteer for a peer review study by the AICPA, withdrew from the program after learning that the AICPA's board of directors decided to bar the release to clients of the results of its examination. The company, however, reaffirmed its support of the concept of peer review and independently hired Arthur Young and Company to conduct a study. It was the position of Peat, Marwick that the public has the right to know about the professional qualifications of the firms auditing public companies. *N.Y. Times*, Nov. 23, 1975, § 3, at 1, col. 1. This deficiency appears to have been corrected in the most recent peer review model circulated by the AICPA. See AICPA, Plan for Voluntary Quality Control Review Program for CPA Firms with SEC Practices, Feb. 19, 1976 (Discussion Draft). See generally Parker, *Periodic Recertification of*

A second peer review model is found in the health care services field. This model, established by Congress in 1972, provides for the creation of professional standards review organizations (PSRO's).<sup>61</sup> The function of the PSRO's is to investigate the professional activities of physicians and others engaged in the health care services to determine whether:

(A) such services and items are or were medically necessary; (B) the quality of such services meets professionally recognized standards of health care; and (C) in case such services and items are proposed to be provided in a hospital or other health care facility on an inpatient basis, such services and items could . . . be effectively provided on an outpatient basis or more economically in an inpatient health care facility of a different type.<sup>62</sup>

Upon a finding that the provisions have not been complied with, the local PSRO's report the matter, along with any recommendations as to measures to be taken, "to the Statewide Professional Standards Review Council for the state in which such organization is located."<sup>63</sup> The Statewide Review Council then proceeds to make its own review and submits recommendations to the Secretary of Health, Education, and Welfare.<sup>64</sup>

What may we learn from these two systems? What do they suggest as possible avenues for the legal profession? A model resulting from this inquiry might be structured in the following manner:

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*Lawyers: A Comparative Study of Programs for Maintaining Professional Competence*, 1974 UTAH L. REV. 463, 469-73.

<sup>61</sup> Act of Oct. 30, 1972, Pub. L. No. 92-603, §§ 1151-70, 86 Stat. 1429 (codified at 42 U.S.C. §§ 1320c-1 to c-19 (Supp. IV, 1974)). Under the Government's program, the Secretary of Health, Education, and Welfare enters into an agreement with an approved applicant, designating the applicant as the local PSRO. 42 U.S.C. § 1320c-1(a) (Supp. IV, 1974). Initially, a qualified organization, *see id.* § 1320c-1(b), applies to the Secretary to become a PSRO. If it is found to be acceptable, the Secretary enters into an agreement with the organization, conditionally designating it as the PSRO for the area. *Id.* § 1320c-3(a). If it is determined during the period of conditional designation that the organization is capable of fulfilling the imposed obligations and requirements, a more permanent agreement is entered into. *Id.* § 1320c-3(b).

The agreement provides that the PSRO is to perform such duties, functions, and responsibilities as may be required under regulations of the Secretary to carry out the legislation, collect information and data and maintain records as the Secretary may prescribe, and grant access to records the Secretary may require. *Id.* § 1320c-4(f)(1). The Secretary is to make payment to the organization equal to the expenses reasonably and necessarily incurred in carrying out its duties. *Id.* § 1320c-4(f)(2).

<sup>62</sup> *Id.* § 1320c-4(a)(1). Medco Peer Review, Inc., has recently prepared a series of practical guidelines for the review of hospital admissions and medical care.

<sup>63</sup> *Id.* § 1320c-6. In addition to creating local PSRO's, the Act also established Statewide Professional Standards Review Councils and a National Professional Standards Review Council. *Id.* §§ 1320c-11 to c-12.

<sup>64</sup> *Id.* § 1320c-6.



1. A bar unit would authorize and establish a system of peer review which it would sponsor and operate.
2. Participation in the plan would be on a voluntary basis, both as to those subjecting themselves to the peer review process and those serving on reviewing teams.
3. The bar would initially undertake the formulation of standards of practice for practitioners to observe and criteria for reviewing teams to follow in the evaluation process. Several categories and levels of standards and criteria would be developed to fit the needs of the diverse kinds of law practices, practitioners, and firms in a community. It might be appropriate for the members in each practice category to draw up the standards and criteria for their group and to serve as reviewers for that category.
4. The standards and criteria might include, to borrow from the AICPA, a set of standards for quality control procedures. One of its functions would be to deal with internal office procedures that may affect the timely rendition of services, problems of carelessness, and guidelines for adequate preparation in client representation. Borrowing from the PSRO legislation, the standards and criteria might address themselves to the need for the utilization of legal services, *viz* whether they entailed the proper and necessary use of the machinery of the courts and other governmental agencies.
5. Participating firms and practitioners who were found after review to meet the prescribed criteria and standards would be able to make that fact known to the public.

### *Selective Monitoring of Performance*

Canon 6 of the Code of Professional Responsibility (Code) states that "[a] lawyer should represent a client competently."<sup>65</sup> Disciplinary rule 6-101 proscribes a lawyer's undertaking representation in a matter beyond his competence without associating him-

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<sup>65</sup> ABA CODE, *supra* note 26, CANON 6. Elucidation of the principle embodied in canon 6, "represent a client competently," may be derived from the various ethical considerations and disciplinary rules promulgated thereunder. For example, DR 6-101 warns that an attorney "shall not . . . [h]andle a legal matter which he knows . . . he is not competent to handle, without associating" himself with a lawyer that has the required competency. And EC 6-4 states that if the lawyer takes a matter in which he is not competent "but in which he [is] expected to become competent, he should diligently undertake the work and study necessary to qualify himself." EC 6-4 further provides that "[i]n addition to being qualified to handle a particular matter, [an attorney's] obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work."

self with a lawyer who is competent in the matter, and further provides that a lawyer shall not "handle a legal matter without preparation adequate in the circumstances."<sup>66</sup> Ethical consideration 6-4 states the lawyer's obligation to his client as requiring him to prepare adequately for and to give appropriate attention to his legal work, and notes that if, in a given instance, the lawyer is "expected to become competent, he should diligently undertake the work and study necessary to qualify himself."<sup>67</sup>

Canon 6 provides ample basis for dealing selectively with poor lawyering, whether due to incompetence or failure to prepare adequately. Its strict application and enforcement on a disciplinary basis, coupled with the civil remedies available in the courts,<sup>68</sup> could very well raise the level of quality of legal services and meet many of the problems that proposals for mandatory CLE and minimum admission qualifications are designed to overcome. This is undoubtedly a punitive approach that perhaps should be reserved for the most egregious cases. Remedial application of canon 6 might be more appropriate,<sup>69</sup> not as harsh, and contribute to a higher level of performance by members of the profession.

Let us hypothesize a plan that is founded on the character of the practice of law and the structural organization of the profession, a plan that would discriminate among lawyers in terms of their relative competence and provide mandatory education only for indicated needs. As the profession is structured for practice purposes, significant segments are self-policing with respect to the competence and performance of their members. Many law firms are mindful of the level of performance of their partners and associates, and those who fail to meet required standards are severed from the firm. Comparable policies and practices prevail in substantial corporate legal offices, in many governmental agencies, in law faculties, in legal aid or public defender offices, and in community legal service groups. Learned legal societies, bar association sections and committees, CLE agencies, law reviews and bar publications, and discriminating lawbook publishers are, among other agencies, not likely to tolerate professional incompetence and indolence. In combination, all of these outlets for professional fulfillment operate implicitly to certify professional adequacy. As a

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<sup>66</sup> *Id.* DR 6-101.

<sup>67</sup> *Id.* EC 6-4.

<sup>68</sup> See note 3 and accompanying text *supra*.

<sup>69</sup> ABA CODE, *supra* note 26, EC 6-5 states: "A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty."

rule, they encompass lawyers who are competent to serve their clients, *i.e.* practitioners who practice law as members of a learned profession. The need for compulsory education does not exist here.

The manner in which the profession functions can reveal where the need exists. Performance by lawyers is subject to observance by others. The observer may be a client, an opposing party, other counsel, a judge, a court clerk, a governmental employee, a bank officer, or a title clerk. Each of these is in a position to see a lawyer's performance, and many of them are able to recognize incompetence. Observance of what a lawyer does and how well he does it could be the basis for a bar-operated remedial monitoring system which would check professional incompetence and failure to perform.<sup>70</sup>

The system would presuppose the observer's reporting the inadequate rendition of services to a designated agency of the bar.<sup>71</sup> The bar agency would be specially designated to perform, with respect to complaints and charges of poor lawyering, the same function that a professional responsibility committee serves with

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<sup>70</sup> A form of remedial selective monitoring of attorneys has been employed by the Securities and Exchange Commission. Recently, where an attorney was found to have violated § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1970), mandatory continuing education was imposed as one of the sanctions. *In re Ferguson*, BNA Sec. Reg. & L. Rep. No. 268, at A-25 (SEC 1974). The attorney was ordered, along with the partners and associates of his firm, to "attend at least annually, municipal bond workshops and seminars." *Id.* at A-26. See also *In re Schimmel*, SEC Securities Exchange Act Release No. 12254 (March 25, 1976) where the Securities Exchange Commission withdrew an offending lawyer's privilege to practice before it, but allowed prospectively an application for readmission after 12 months "upon a proper showing of professional competence based on intervening professional training." *Id.*

<sup>71</sup> Clients' complaints to grievance committees about the quality of legal services are not uncommon. During the year ending April 30, 1975 the Committee on Grievances of the Association of the Bar of the City of New York received and processed 2428 complaints. Of the 710 alleged offenses against clients, the complaint most often made was that of neglect. Charges of neglect accounted for 481 of the 710 complaints, followed by the charge of conversion made 77 times.

Additionally, offenses against colleagues drew 54 complaints and 83 complaints were made for offenses against the administration of justice. Thirty-seven complaints involved criminal activity. No unethical behavior was found in 940 of the complaints but involved requests for legal assistance or advice, minor fee disputes and other matters not attributable to misconduct. In addition, 518 complaints concerned matters outside the jurisdiction of the Committee. After investigation, the Committee determined that complaints involving 157 attorneys warranted Committee action. Twenty-six cases were referred directly to the Appellate Division, 27 hearings were held by the Committee and 104 letters of admonition were sent to those attorneys involved in breaches of the Code of Professional Responsibility which were not serious enough to warrant a Committee hearing. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMM. ON GRIEVANCES, ANNUAL REPORT (1974-75).

The work of the Grievance Committee has been criticized as dilatory and secretive, publicly disciplining an insignificant percentage of those attorneys against whom complaints are made. See N.Y. Times, Feb. 4, 1976, at 1, col. 1.

respect to professional misconduct under the Code. It might well be a special subcommittee of an overall grievance committee. The agency would be empowered to investigate complaints of inadequate professional services and determine whether there was a basis for them and, if so, their extent and character. The agency would also have the power to prescribe and enforce remedial measures. One remedial measure might involve a defined educational program and proof of its successful completion, perhaps entailing an examination to determine whether competence has been enhanced. Additionally, the right to practice might be fully or partially withheld during the period of the remedial program with restoration of the license conditioned on meeting the requirements prescribed.

The program should be devised, structured, and represented as one to help fellow lawyers, not to censure or punish them. It should be of such character that the assistance it offers will be accepted with the understanding that the goal is a better, more competent practitioner, and, therefore, one more likely to be successful.

The selective monitoring of competence and performance is the most limited in scope and application of the various plans advanced to deal with the problem of poor lawyering. It is selective and, if vigorously applied by the profession, would tend to inhibit professional incompetence.

## V

The principle of postponement . . . holds that, other things equal, rational plans try to keep our hands free until we have a clear view of the relevant facts.<sup>72</sup>

This Article has discussed four principal methods for improving the quality of services rendered by lawyers: mandatory CLE, voluntary CLE, voluntary peer review, and selective monitoring of performance. For a number of reasons, mandatory CLE appears to be gaining the widest acceptance. Mandatory CLE regimens are relatively easy to establish and administer and afford visible evidence that the bar is taking measures to improve the quality of its services. They are a source of substantial revenues to support and enlarge CLE programs. This is especially important in jurisdictions where, absent mandatory education, financial resources for

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<sup>72</sup> J. RAWLS, *A THEORY OF JUSTICE* 420 (1971).

adequate CLE might be lacking. To opt for mandatory CLE without a qualitative analysis to determine which program would do the most good for the public and the profession, however, would be to shun the bar's responsibility to the public and itself. Such an analysis must consider the costs and the impact on the profession and the public.

### *Costs*

The cost of mandatory CLE may be substantial.<sup>73</sup> A state with 10,000 lawyers, for example, would require, at a minimum, \$10 an hour for any quality program. If 15 hours a year are the standard, as in Minnesota and Iowa, the total annual cost to the sponsoring agencies amounts to \$1,500,000, and this is probably an underestimation. Registration fees<sup>74</sup> would need to recover, at a minimum, this sum. The cost to each lawyer would be greater than his tuition, however, since it would include time away from the office and, in some instances, travel and lodging. These factors escalate the cost projections to substantially higher limits.<sup>75</sup> While initially these costs would be borne by the lawyer, they ultimately would be passed on to the public.

Voluntary CLE also entails costs that are passed on to the client; however, unlike mandatory programs that presently rely on live, oral instruction, voluntary programs permit and encourage less costly educational methods, including publications and use of audiovisual aids.<sup>76</sup> Similarly, voluntary peer review and selective monitoring of competence and performance would not approach

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<sup>73</sup> See, e.g., ALI-ABA CLE Rev., Feb. 27, 1976, at 2, col. 1, wherein it is reported that one authority estimated that the costs of a mandatory CLE program in Vermont might reach \$75,000 per year, or \$93.75 per Vermont lawyer.

<sup>74</sup> It has also been suggested that the cost of CLE could be met by adding a charge to a state's licensing fee so that payment would be compulsory. *Id.*

<sup>75</sup> If an attorney charges \$40 for each billable hour and is required to attend 15 hours of CLE classes a year, he or she will be losing \$600 in fees each year. In large cities where a firm charges \$80 an hour for an associate's time and \$150 or more for a partner's, the loss to the firm for each attorney will be from \$1200 to \$2500. See N.Y. Times, Jan. 25, 1976, § 3, at 7, col. 4.

<sup>76</sup> Video tapes have great potential for advancing CLE goals. A program recently instituted by the ALI-ABA Committee on Continuing Professional Education offers video taped programs at its Philadelphia office for the benefit of local practitioners. One course being offered is Estate Planning in Depth, video taped live at an ALI-ABA program presented June 23-29, 1974 at the University of Wisconsin Law School. The \$60 registration fee includes 12 2-hour class meetings and a 515-page *ALI-ABA Resource Materials Handbook*. Participants, therefore, are paying less than \$2.50 for each hour of CLE. The California Continuing Legal Education of the Bar makes an affirmative effort to keep the cost of its video programs low. Typical fees are \$6 for a 1-hour tape and \$15 for a 3-hour presentation.

the cost of a statewide mandatory program, and their selectivity would seem to support this appraisal.

### *Impact on the Profession*

In appraising the impact on the bar, primary values to be considered are professional integrity and enhancement. Mandatory CLE presents problems in both respects. First, and perhaps foremost, current and proposed educational programs, so painfully established, will be in jeopardy. A mandatory system will create a market of substantial proportions, but the educational product will not necessarily be designed with concern for quality, for it will be directed at a captive audience whose requirements can be fulfilled almost automatically. Although programs may be subject to accreditation,<sup>77</sup> the demand upon them will be so great that marginal and submarginal programming will likely be offered,<sup>78</sup> and this is an inherent danger of mandatory programs. Under such circumstances, members of the profession would be sorely tried not to succumb to cutting corners in certifying that they have complied with attendance requirements.

Voluntary CLE is not as vulnerable; it has taken a salutary hold on the bar. Since World War II the bar at the national level has urged and fostered expanded, active, local CLE programs.<sup>79</sup> After a hesitant start, many state and local bar groups initiated programs that have grown in quality and content. In some two-thirds of the states postadmission legal education is conducted

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<sup>77</sup> There is at present no national accreditation system for those who sponsor CLE activities. Responding to this need, in 1975 the Association of Continuing Legal Education Administrators (ACLEA) adopted standards of operation for CLE organizations. These standards, however, do not amount to an accreditation system, but are intended to provide the substantive basis upon which such a system may be developed.

<sup>78</sup> See, e.g., Hechinger, *Education's "New Majority,"* SATURDAY REVIEW, Sept. 20, 1975, at 14. Hechinger warns of the dangers involved in a sudden increase in mandated continuing professional education:

No account of the movement, however, would be complete without a warning concerning its inherent dangers. For instance, continuing education mandated by the state or by establishment associations could easily deteriorate in precisely the manner in which so much of the existing increments-oriented teacher education has turned sterile and time wasting. Particularly at a time when colleges and universities seek to add to their revenues, the temptation will be powerful to spawn required make-work (and make-pay) courses and to emphasize the number of credits completed rather than relevancy, quality, and excitement.

*Id.* at 16.

<sup>79</sup> To trace the history and progress of the CLE movement, see JOINT COMM. ON CONTINUING LEGAL EDUCATION OF THE ALI-ABA, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY (1959); JOINT COMM. ON CONTINUING LEGAL EDUCATION OF THE ALI-ABA, ARDEN HOUSE II: TOWARD EXCELLENCE IN CONTINUING LEGAL EDUCATION (1964); JOINT COMM. ON CONTINUING LEGAL EDUCATION OF THE ALI-ABA, GOALS FOR CLE AND MEANS FOR ATTAINING THEM (1968). See also ALI, 1964 ANN. REP. 27.

professionally under part or full-time administrators and staffs. National programs, such as those of the American Bar Association, the American Law Institute-American Bar Association Committee on Continuing Professional Education, and the Practising Law Institute, have developed courses on national subjects that are presented in many parts of the country. Law schools are expanding their involvement.<sup>80</sup> With impetus from an improved program that motivates fuller participation, the quality of CLE will advance at an accelerated pace and will be reinforced should there be remedial selective monitoring of competence and performance with special, in-depth programs that will be closely supervised and subject to compulsory examinations. Other CLE programming must necessarily benefit from such a rigorously disciplined educational system. CLE administrators will have to offer effective education to succeed. There will be no built-in sinecures as in a fully-mandated system. Peer review programs will encourage participation in voluntary educational endeavors since an essential standard in the review process will be the extent and character of efforts for keeping current and improving professionally through education. The main shortcoming of voluntary CLE is that those who would most benefit do not participate — a deficiency that mandatory CLE seeks to correct. A 1962 survey indicated that of those lawyers aware of these programs, a third attended only two programs and another third attended but one.<sup>81</sup> Such data, if still valid,<sup>82</sup> ignores the number of attorneys that voluntarily continue their education through the use of publications, audio cassettes, and video tapes. Nonetheless, it must be conceded that any voluntary program would have to motivate more lawyers to participate.

The major argument favoring mandatory CLE is that it would reach nonparticipants in the continuing education process and, it is assumed, thus enhance their capabilities as lawyers. But one of its

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<sup>80</sup> For a discussion of the contributions academic institutions may make to the development of CLE, see Darrell, *The Role of the Universities in Continuing Professional Education*, 32 OHIO ST. L.J. 312 (1971).

<sup>81</sup> Unterberger, *CLE Around the Country: The Lawyer's View of Continuing Legal Education*, 10 PRAC. LAW., Feb. 1964, at 4.

<sup>82</sup> The 1975 Illinois Special Bar Survey would seem to indicate that the statistics in the 1962 survey are no longer accurate. Of the Illinois attorneys participating in the survey, only about a third indicated that they did not attend any CLE programs. About 30% indicated that they participated in up to 15 hours of CLE, and about another 30% participated in 16 to 50 hours of CLE. *Economics of Legal Services in Illinois — A 1975 Special Bar Survey*, 64 ILL. B.J. 73, app. C, at 129 (1975). On the other hand, although unsubstantiated by empirical data, the Massachusetts Bar Association estimates that only 5% of Massachusetts lawyers voluntarily participate in CLE programs. Massachusetts Bar Association, Report of Subcommittee on Professional Competence, July 18, 1975, ALI-ABA, CATALOG OF CONTINUING LEGAL EDUCATION PROGRAMS IN THE UNITED STATES (Fall/Winter Supp. 1975-1976).

principal weaknesses, the extent of benefit to be derived from coerced attendance, casts doubt on this assumption. In addition to being inimical to the values of a learned profession, compelled participation is neither conducive to learning nor compatible with professionalism and its integrity.

If, as seems likely, it is only a minority of the bar that is lagging in competence and performance, and is thus a source of disservice to the public, the most efficient remedy would seem to lie in enforcement of canon 6 by selective monitoring through professional guidance committees and remedial programs. This is a selective and economical process, and it recognizes that the law is a learned profession. Those who pursue the law in this spirit by reading law reviews and journals, following legislative developments, keeping abreast of court decisions, doing the required research on a client's matter, honing their trial skills, and participating in selected bar activities will not be subjected to mandated educational programs that may add little, if anything, to their knowledge and may require them to sacrifice time and money in the observance of a ritual that may be of little significance. Those who have manifested a lack of competence in client representation will be required to undergo a mandatory but meaningful educational program with adequate testing procedures under defined terms and conditions. This should make them not only better lawyers, but also benefit them, their clients, the public, and the profession. Although in a selective monitoring approach it is most appropriate, mandatory CLE as now envisioned is not designed to meet these specific needs. The greatest difficulty selective monitoring would encounter would be the reluctance of the profession to enforce against its members sanctions for violating professional standards, especially since these standards do not involve what is regarded as fundamentally dishonest behavior. This difficulty, apparent in a straight disciplinary approach, would be alleviated in a remedial program, and lay participation might also assist in surmounting such reluctance.<sup>83</sup>

Peer review would complement an expanded voluntary CLE

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<sup>83</sup> Douglas E. Rosenthal suggests that clients may be of primary importance in evaluating lawyer competence:

Lawyers are understandably reluctant to initiate disciplinary sanctions against their less competent and less scrupulous colleagues. By giving clients the knowledge and motivation to scrutinize more actively the conduct of their attorneys, the profession would be freed from the primary burden of policing professional misconduct. The initiative would be passed to the client, who as the potential victim is the one most motivated to rectify professional wrongs. This would undercut suspicion that the legal profession is guilty of a self-perpetuating "conspiracy of silence."

Rosenthal, *Is the Public in Good Hands?*, JURIS DOCTOR, July-Aug. 1974, at 33.



program with remedial selective monitoring. Its most salutary aspect may be the process it would challenge the bar to engage in — determining and articulating standards and criteria for the rendition of quality legal services. This in itself will advance to the level of professional consciousness the essential requirements for “good lawyering,” and would offer a controlled approach which could have in sight very high standards of quality rather than minimal qualifications.

Compulsory education has an advantage in the relative simplicity of its structure and ease of administration. The establishment of an educational program for all the lawyers of a state may be a task of considerable magnitude, but once the educational organization is created and a program formulated, the principal challenges have been met. An expanded voluntary CLE program, peer review, and selective monitoring would require from members of the profession less of a major initial effort and more of a continuing responsibility and involvement. These are the kinds of considerations the profession needs to review in evaluating the effects of proposals for advancing competence, and such analysis makes ready resort to mandatory CLE questionable.

### *Impact on Public*

In mandating continuing legal education for the lawyers of its state, the Iowa Supreme Court postulated: “Only by continuing their legal education throughout their period of the practice of law can attorneys fulfill their obligation to competently serve their clients.”<sup>84</sup> The Wisconsin Court advanced the same rationale: “Continuing professional competence is necessary for the bar to maintain delivery of quality legal services to the public.”<sup>85</sup> There can be no quarrel with the proposition that continued education enhances the lawyer’s capability to deal with a client’s problems and thus increases the probability of quality legal services. But it does not follow that the public will be more likely to receive such services as a result of mandated continuing education. If such a program is a costly one, and if the profession itself will be disadvantaged by it, one must search elsewhere to find the formula that will yield what the courts of Iowa and Wisconsin, indeed the profession, seek.

Perhaps at the heart of providing quality services for the public is the availability of information as to where such services may be obtained. A mandatory system implies that they may be ob-

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<sup>84</sup> IOWA SUP. CT. R. 123.1.

<sup>85</sup> WIS. SUP. CT. (CLE) R. 1.

tained from any lawyer in the mandating jurisdiction, an implication as lacking in substance as the one that a law degree alone offers such assurance. Compounding this hollow promise to the public is the burden of the added costs that mandatory education is likely to engender. A system that would ascertain on some individual basis, by qualitative and quantitative measurements, the practitioners who undertake to increase their potential for better serving their clients and that would make this information available to the public, would more likely and more efficiently accomplish the benefits for the public sought in Minnesota, Iowa, and Wisconsin. Proposals discussed in this Article for expanding voluntary CLE and establishing voluntary peer review are such systems.

Finally, the public would have greater confidence in any system if it could participate in the implementation of the measures adopted to foster better quality legal services, a virtue of plans which have lay members on their mandatory CLE boards. Selective monitoring, as proposed, affords a start toward this goal by involving the public in the appraisal of the quality of a lawyer's services.

## VI

Where lawmen made creative contributions it was, as in the Federal Constitution, by combining unafraid and even daring readiness to innovate with tough-minded insistence that the need and direction of innovation rest firmly on fact. Such an approach is at the pole opposite to standpattism. Sheer resistance to change, by only damming a gathering current, does not conserve, but insures destructive flood when the dam finally breaks.<sup>86</sup>

Striking a balance of pluses and minuses, it would seem that mandatory CLE, except as used in the limited instance of a selective monitoring system, is the least effective and least desirable approach to enhancing the quality of legal services — a conclusion echoed in the final statement reached by a majority of bar leaders and educators at a conference held late in 1975 under the auspices of the American Bar Association.<sup>87</sup>

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<sup>86</sup> J. HURST, *THE GROWTH OF AMERICAN LAW* 359 (1950).

<sup>87</sup> As the National Conference on Continuing Legal Education concluded:

[T]he case for mandatory programs is not sufficiently persuasive to support a recommendation that all states now adopt them. We believe that there are unanswered questions concerning the specific relationship between required programs of continuing legal education and the quality of legal service.

We urge the organized bar in each state to study closely the results of the mandatory programs now being initiated as well as other means by which the quality of legal services available to all can be improved. In addition to mandatory continuing legal education, conference participants were made aware of a number

As a result of legislative enactments and actions taken by medical societies,<sup>88</sup> mandatory continuing education is more prevalent in the medical profession than in the law. A recent series in the *New York Times* on the quality of medical services, however, seems to be telling testimony of the fact that compulsory continuing medical education is not the panacea its proponents envisioned for elevating the competence of an estimated five percent of the profession deemed "unfit to practice medicine."<sup>89</sup> Mandatory continuing professional education even seems to fall short of being a stopgap measure, except perhaps in the image it conveys to the consumer of professional services. In medicine, as in law, direct dealing with manifestations of poor professionalism by disciplinary agencies of the profession, although regarded as the best way to cope with the problem, is avoided in the hope that compulsory continuing education will come to the rescue.<sup>90</sup>

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of additional possibilities that may serve this end: various forms of specialization arrangements for providing potential clients with additional information about lawyers and legal services; increased inducements (including improved programs) for voluntary participation in continuing legal education, perhaps combined with appropriate recognition of that participation for the benefit of potential clients; peer review, self-assessment programs, and prescribed remedial educational programs for lawyers found deficient; expanded use of disciplinary procedures; and intensified efforts to improve the quality and coverage of continuing legal education courses and materials relating to the legal problems faced by middle and low income persons.

*National Conference on Continuing Legal Education Issues Final Statement with Recommendations*, 62 A.B.A.J. 210 (1976) [hereinafter cited as *Final Statement*].

<sup>88</sup> Kansas, Kentucky, Maryland, New Mexico, and Washington have legislation permitting their boards of medical examiners to require continuing education as a requirement for reregistration of the license to practice medicine. The boards in Maryland and New Mexico are using this authority and requiring continuing education. Legislation making it mandatory for the boards to require continuing education become effective in Michigan in December 1976, and in Ohio in January 1978; recent Wisconsin malpractice legislation requires continuing education for relicensure starting in 1977. State medical societies in Alabama, Arizona, Florida, Kansas, Maine, Massachusetts, Minnesota, New Jersey, North Carolina, Oregon, Pennsylvania, and Vermont have decided to require continuing medical education as a condition of membership.

[M]edical specialty societies that have decided to require continuing medical education as a condition of membership include: the American Academy of Family Physicians, American Association of Neurological Surgeons, American College of Emergency Physicians, American College of Radiology, American Psychiatric Association, American Society of Abdominal Surgeons, and American Society of Plastic and Reconstructive Surgeons, Inc.

234 J.A.M.A. 1370 (1975).

In a 1975 Survey of Continuing Medical Education Activities Among State Medical and Medical Specialty Societies it was revealed that

8,059 physicians are currently qualified under the required continuing medical education programs of their state medical associations. The number of physicians currently qualified under the required continuing medical education programs of medical specialty societies is 25,075; almost all of those physicians are members of the American Academy of Family Physicians.

*Id.*

<sup>89</sup> N.Y. Times, Jan. 26, 1976, at 1, col. 1.

<sup>90</sup> Although incidents of careless and incompetent medical treatment are known to

Despite its serious flaws, acknowledged and recognized, mandatory continuing legal education continues to gain the support of the organized bar.<sup>91</sup> Perhaps it is the politically expedient answer to demands being made on the profession going back to the Nation's early history. A choice prompted by political expediency, however, entails grave risks, risks that can be minimized by a bold assault on the problem rather than by converting an ongoing, successful, voluntary effort into a compulsory regimen.

This Article's overview of measures to improve the quality of legal services suggests that a composite approach holds the greatest promise. The broad base would be the kind of expanded voluntary CLE program discussed. Supplementing it would be a peer review system that would set the goals and standards for professional quality. Selective monitoring of competence and performance would deal with the recalcitrants, those not motivated or willing to advance the quality of their professional work, those harming the public and the profession. A remedial program for lawyers so brought to task would rely on mandatory CLE, with testing, to complete the overall program.<sup>92</sup> Such a comprehensive program would be demanding on the organized bar, more so by far than would a perfunctory plan founded on forced attendance. But its virtue would lie in meeting the challenge head-on — to improve the quality of lawyering.

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almost every physician, officials of medical societies and state licensing agencies say that relatively few doctors ever report them to the appropriate regulatory body.

This traditional reluctance of physicians to criticize their errant colleagues, these officials say, is perhaps the greatest obstacle to better regulation of the medical profession.

N.Y. Times, Jan. 29, 1976, at 1, col. 1.

<sup>91</sup> See, e.g., *Economics of Legal Services in Illinois — A 1975 Special Bar Survey*, 64 ILL. B.J. 73, 108, 129 (1975). Illinois attorneys responding to the survey indicated that a slight majority, 52%, favored making CLE mandatory. While there was a near split in attitude towards mandatory CLE, some characteristics could be noted among those opposing the adoption of a mandatory system. Those opposed were likely to also disfavor formal specialization. Attorneys associated with large firms, admitted to practice over 20 years, and earning in excess of \$90,000 were also likely to be against adoption of mandatory CLE. *Id.* at 108-10.

<sup>92</sup> The bar may well be beginning to move towards a plan encompassing voluntary CLE, peer review, selective monitoring, and a limited form of mandatory CLE. See, e.g., *Final Statement*, *supra* note 87; N.Y. Times, Feb. 4, 1976, at 1, col. 1.