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THE LAW OF AVERAGES

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I. LAWYER COMPETENCE

Although the title of this article is *The Law of Averages*, the subject has nothing to do with either statistics or games of chance. Rather, it relates to the current interest of the legal profession in the subject of lawyer competence.

Some thirty years ago, I tried my first case before a jury. It was also the first real trial I had ever seen. While the jury was out, I was nervously pacing the corridor when an old and not very good lawyer from my home town stopped to talk with me. When I told him I was "sweating out a jury," he responded, "Oh, don't worry about that, son; just try enough cases and you're bound to get by—the law of averages will take care of you." The old man's advice taught me the sad but useful lesson that some lawyers rely on chance and shoot from the hip. It occurred to me then that maybe there were ways to beat the odds. Perhaps if a lawyer worked hard to develop practice skills and was conscientious in research and preparation, he could do better than those who relied on the law of averages. I still like to think that is the way it works.

Unfortunately, some lawyers remain content with the law of averages. They lack ability or commitment or simply a stomach for hard work. As a consequence, their clients suffer, the profes-

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sion suffers, and they suffer. But today, the legal profession in this country is seeking to improve upon the law of averages. The profession has, in recent years, devoted considerable time, money, and talent to the subject of lawyer competence. Initially, attention was directed to perceived problems of the trial bar but slowly broadened to include other practice skills. The subject has now become a prominent matter of interest to the public and to the profession.

The primary response of the legal community to concern about lawyer competence has been to focus on improvements in legal education. Extensive studies have been made of law school curricula, and a shift to greater emphasis on clinical education and on skills programs has been recommended.¹ Continuing legal education (CLE) has also been urged as a curative measure. This has resulted in increased attention to transition education, that is, to practical skills training designed to help graduate lawyers bridge the gap between law school and practice.² At all levels, we have placed our faith mainly in formal education to cure lawyer incompetence.

This faith in education has prompted several jurisdictions, among them South Carolina, to make certain educational experiences mandatory. The South Carolina Supreme Court has instituted specific law school course requirements as a condition to bar admission³ and has adopted mandatory CLE.⁴ While I applaud the attention the South Carolina Supreme Court has given to improving lawyer performance, I have reservations about some steps that the court has taken. Particularly, I doubt that

1. See, e.g., ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATION OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

2. Transition education, peer review, and specialization were the topics studied by American Law Institute-American Bar Association (ALI-ABA) National Conference on Enhancing the Competence of Lawyers held in February 1981 in Houston (Houston Conference). On transition education, see Kelly, *Transition Education*, ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUC. NAT'L CONFERENCE ON ENHANCING THE COMPETENCE OF LAWYERS, CONFERENCE PAPERS 151 (1981) [hereinafter referred to as CONFERENCE PAPERS] AND GULLICKSON, *Mandatory Bar Admission Courses*, *id.* at 123. For a description of the Houston Conference, see *Enhancing Lawyer Competence*, 67 A.B.A.J. 265 (1981).

3. S.C. SUP. CT. R. FOR EXAM. AND ADMISS'N TO PRACTICE L. 5A (Supp. 1980). See also Littlejohn, *Ensuring Lawyer Competency: The South Carolina Approach*, 64 JUDICATURE 109 (1980).

4. S.C.R. ON LAWYER COMPETENCE 2(b) (adopted 1979, effective 1981).

taking specific courses in law school has much to do in the long run with lawyer performance. Rather, I place my faith in the development of good work habits and in sound analytical training. Moreover, I am concerned that the court's imposition of law school course requirements will impede progress in curriculum development and inhibit academic freedom.

Nevertheless, the South Carolina experiences, both with bar admission requirements and with mandatory CLE, could have much to teach us. If the South Carolina Supreme Court's approach does raise the level of lawyer competence in the state, then some of us will have a bit of rethinking to do.

We can all agree that education is extremely important in producing competent lawyers and that attention to the educational process is always desirable. But we must also take a hard look at what can reasonably be expected from improvements in lawyer education.

When we look at what is required of a good lawyer, we readily identify knowledge and basic skills as necessary attributes. We entrust the development of these characteristics primarily to education. But other attributes, such as motivation, care, diligence, and ethical propriety, are no less significant.⁵ Of course, development of these characteristics is not ignored in formal education, but the primary emphasis in legal education necessarily must rest elsewhere, mainly on the pedagogy of the discipline. Thus, it seems likely that problems caused by lack of these characteristics will remain with us no matter what improvements are achieved in legal education. We must also be concerned about lawyers with professional deficiencies who are already in practice, a problem that is unlikely to be remedied by changes in legal education.

II. PEER REVIEW

One answer is to accelerate implementation of pilot experimentation programs in peer review.⁶ Peer review is a system

5. For discussions of elements of competent lawyering, see Cramton, *The Law Schools and Lawyer Competence*, 51 N.Y. St. B.J. 543 (1979) (a later version appears in CONFERENCE PAPERS, *supra* note 2, at 29); Rosenthal, *Is it Possible to Define and Set Standards of Legal Competence?*, CONFERENCE PAPERS, *supra* note 2, at 181.

6. For an earlier discussion of peer review, see Smith, *Peer Review: Its Time Has Come*, 66 A.B.A.J. 451 (1980).

through which individual lawyers can receive help by having their work reviewed by other lawyers, and then, in consultation with the reviewing lawyers, work out a program for improvement. Peer review is promising because it avoids imposing remedial regimens on the entire profession to correct the inadequacies of individual lawyers. Also, because the system is based on a counseling model, it provides the means to deal with the specific problems of individual lawyers that improved methods of formal education probably cannot cure.

The peer review concept, of course, is not novel in professional fields; it has been in use in this country for some time by physicians and accountants.⁷ But until recently there was no blueprint drawn for our profession. The American Law Institute-American Bar Association Committee on Continuing Professional Education filled that void with the publication of its discussion draft of *A Model Peer Review System (ALI-ABA Model)*.⁸

The ALI-ABA *Model* is remarkable for several reasons. It is adaptable to all forms of practice. It contains what we have long lacked—a sensible, workable definition of competence. Also, it provides a means for dealing with incompetence in both counseling and disciplinary contexts.

The ALI-ABA *Model* consists of five parts.⁹ In broad outline, Part I contains a definition of competence and states cri-

7. Sources concerning peer review in the accounting and medical professions are collected in ALI-ABA COMM'N ON CONTINUING PROFESSIONAL EDUC., *A MODEL PEER REVIEW SYSTEM* apps. B & C (Discussion Draft 1980) [hereinafter referred to as ALI-ABA MODEL]. Of particular interest are Goran, *The Evolution of the PSRO Hospital Review System*, MED. CARE, May 1979, at 1, reprinted in ALI-ABA MODEL at 177; Goran, Roberts, Kellogg, Fielding & Jessee, *The PSRO Hospital Review System*, MED. CARE, Apr. 1975, at 1, reprinted in ALI-ABA MODEL at 225; *What Peer Reviews Entail and Cost*, THE PRACTICING CPA, Aug. 1979, at 1, reprinted in ALI-ABA MODEL at 167; American Inst. of Certified Public Accountants (AICPA), *Quality Control Policies and Procedures for Participating CPA Firms* (1978), reprinted in ALI-ABA MODEL at 119.

8. ALI-ABA MODEL, *supra* note 7.

9. The discussion hereafter is limited to Parts I, II, and III. Part IV sets forth law practice peer review, which provides lawyers and firms the opportunity for outside evaluation of their professional work in order to maintain the best standards of practice. The experience of other professions, most notably accounting, provide insight into the gains to be made from this type of review. See note 7 *supra*. Part V contains provisions regarding confidentiality, immunity, and inadmissible evidence applicable both to Parts II and IV.

teria to be used to evaluate specific lawyering tasks.¹⁰ The definition of competence includes such qualities as practice management, responsibility, preparation and capability, in addition to knowledge and skill.¹¹ This part identifies ten criteria that break down legal activities into aspects common to all law practice. With each criterion are questions whose answers help establish whether a lawyer's performance is competent.

Part II of the ALI-ABA *Model* describes a system for referral peer review.¹² This system provides a means for referral by third parties—judges, other lawyers, clients—of specific instances of legal incompetence to a peer review board composed of practicing lawyers. After referrals are investigated and evaluated, the board invites the lawyer to meet with it voluntarily to discuss the matter and to design a remedial regimen tailored to address the lawyer's specific problems.

Part III of the ALI-ABA *Model* provides for disciplinary peer review, which is also initiated by third-party referral.¹³ Disciplinary peer review is to be employed rarely—only after the peer review board has found substantial incompetence, and either the attorney refuses to participate in a remedial program or it seems certain that remediation would be useless.

The current ABA Code of Professional Responsibility provides that a lawyer should serve the client competently,¹⁴ but the provision is ineffective because it lacks a definition of competence and, in practice, we rarely discipline lawyers for incompetence.¹⁵ With the detailed standards in the ALI-ABA *Model*, perhaps we can remedy this problem and, through concrete experience with nondisciplinary referral peer review, delineate more precise standards.

Those who drafted the ALI-ABA *Model* provided for discipline within the peer review system because they believed that the system should not ignore the bar's responsibility to protect

10. ALI-ABA MODEL, *supra* note 7, at 11-26.

11. For a discussion of definitions in the ALI-ABA Model and of other definitions, see Rosenthal, *supra* note 5.

12. ALI-ABA MODEL, *supra* note 7, at 27-37.

13. ALI-ABA MODEL, *supra* note 7, at 39-44.

14. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6 (1980).

15. ABA MODEL RULES OF PROFESSIONAL CONDUCT, Notes to Rule 1.1, at 9-10 (Proposed Final Draft, May 30, 1981).

the public from egregious incompetence.¹⁶ I agree with that viewpoint. There is, however, strong opposition to this position. The opponents believe that peer review will be most effective if the system encourages a lawyer to come to it voluntarily for help—or can be referred to it—free of the threat of discipline.¹⁷

Despite differences of this sort, support for peer review programs is nevertheless developing, and initial efforts at implementation in various forms are underway.¹⁸ Further implementation is needed, however, especially through state and local bar associations. Peer programs require the involvement of the ablest lawyers—those with the respect of the profession, the ability to assist others, and the security that prevents them from feeling threatened by the idea of helping potential competitors with their personal interest and support. Peer review programs can be a means to deal with problems of competence on a continuing basis and to renew the concept of collegueship at a time when it is waning.

III. COLLEAGUESHIP

Historically, there has been a strong sense of collegueship in the legal profession. By this I mean pride in our profession and our work fostered by an informal system of providing help and support to each other, especially to younger lawyers. Many of us now practicing law are beneficiaries of collegueship. We were aided and instructed early in our practice by older, more experienced lawyers. Those experiences, I suggest, have much to do with levels of competence we have achieved—more, perhaps, than our formal legal education.

As our numbers have grown and practice modes have changed, the effects of collegueship are diminishing. Recently it has been estimated that only a very small percentage of our new lawyers have the opportunity to begin practice by carrying an older lawyer's briefcase and by learning from observation and

16. ALI-ABA MODEL, *supra* note 7, at 3.

17. A substantial portion of the discussion of peer review at the Houston Conference was devoted to this debate. See *Enhancing Lawyer Competence*, *supra* note 2, at 266.

18. For discussion of progress in implementation, see Benagh, *Developments in Peer Review*, CONFERENCE PAPERS, *supra* note 2, at 195; *Enhancing Lawyer Competence*, *supra* note 2, at 266.

personal counseling.¹⁹ If—as I think is surely the case—there is a strong connection between collegueship and competence, then we need to replicate it in modern practice as best we can.

IV. CONCLUSION

Although I strongly support the peer review concept, I recognize that a variety of approaches to the problems of lawyer incompetence are desirable and probably necessary. The *ALI-ABA Model* provides a blueprint for developing formal peer review programs, but it can also be used as a starting point for informal variations on the theme that will afford guidance and assistance for both young lawyers and older ones whose level of competence needs raising. I believe that through peer review, we can draw upon an invaluable resource inherent in our profession—its collegueship—as we seek to remedy problems of lawyer incompetence in this country. Those of us who have been nurtured by mutual support in our profession know the importance of the insight, judgment, and values that other lawyers have gained from their experience and reflection.

South Carolina has taken many positive steps toward raising the level of competence in the state, and I hope that South Carolina lawyers will give serious consideration to implementation of peer review systems. Indeed, with the addition of peer review programs, the South Carolina response could well serve as both a national model for assuring competence and as a primary laboratory for evaluating the effectiveness of diverse remedial measures. Thus, despite my reservations about requiring certain courses of study in law school as a condition for bar admission, I am heartened that a concern for competence is being translated into action in this and other states. Maybe it will not be long before no lawyer will counsel another to rely on the law of averages; all of us who have a real stake in improving lawyer competence will be the better for that.

19. Kelly, *supra* note 2, at 155.

