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Professional Responsibility: Ethics, Malpractice, and Competency

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PROFESSIONAL RESPONSIBILITY: ETHICS, MALPRACTICE, AND COMPETENCY

I. Advancing Living Expenses to Clients

Under Disciplinary Rule (DR) 5-103(B) of the American Bar Association Code of Professional Responsibility,[1] an attorney may pay costs incurred in trial preparation and litigation only if the client remains unconditionally liable for repayment of the advances. The attorney, however, may not advance funds to clients for living expenses or any other needs not directly connected with the costs of litigation.[2] In 1979, two South Carolina attorneys were disciplined, in part for lending money to clients for living expenses. Although the results in these cases are correct under the Code of Professional Responsibility,[3] the facts in each case raise questions about the desirability of the rule.

In re Pusser,[4] a disciplinary proceeding, concerned an attorney who had been employed to represent a seventeen-year-old boy in a personal injury suit. Before the suit was settled, the attorney, Pusser, loaned the plaintiff's family $1000 for food and Christmas expenses. The court found a violation of DR 5-103(B), and ordered a public reprimand[5] for this conduct and for entering into a business transaction with an uneducated minor client without full disclosure.[6]

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1. DR 5-103(B) reads:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

2. *Id.*

3. South Carolina adopted the ABA Code of Professional Responsibility effective January 1, 1970. S.C. Sup. Ct. R. 32 (Cum. Supp. 1979).

4. 273 S.C. 115, 254 S.E.2d 926 (1979).

5. The court's opinion concentrated on the land sale to the client. The discussion of the violation of DR 5-103(B) was confined to one paragraph. *Id.* at 116, 254 S.E.2d at 926.

6. Pusser sold five lots to the minor client with a profit of $800 on each. Pusser

In *In re Leppard*,[7] another attorney received a public reprimand[8] in an order[9] by a divided South Carolina Supreme Court. Respondent was not charged with advancing funds to a client until the grievance hearing on his alleged neglect of client matters was underway.[10] At the hearing it was revealed that respondent advanced approximately $1200 to a needy client to assist with her living expenses.[11] The panel found that this conduct violated DR 5-103(B)[12] and, on appeal, the supreme court held that the neglect of client matters and advancement of funds together warranted the public reprimand.[13] Justice Gregory dissented, stating that a private reprimand, as recommended by a unanimous panel and executive committee, was the appropriate sanction.[14] Justice Gregory noted that the client in question had an "acute financial need" and that the loan enabled her to pay essential home maintenance expenses.[15] The dissent noted further that, although the panel and executive committee found that the advancement of funds violated DR 5-103(B), respondent's conduct was not "offensive to the spirit and reason for the

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insisted at the hearing that he disclosed his interest to the client but the client and his father claimed that they were unaware of Pusser's ownership of the lots. The client became dissatisfied with the transaction, offered to sell back one or two lots, but Pusser would not buy. *Id.* at 117, 254 S.E.2d at 926-27.

7. 272 S.C. 414, 252 S.E.2d 143 (1979).

8. The public reprimand was for an "accumulation of violations" which included two instances of neglecting to proceed with litigation on behalf of clients and one instance of advancing financial assistance to a client. Both the panel and the executive committee of the South Carolina Board of Commissioners on Grievances and Discipline recommended a private reprimand as the appropriate sanction. *Id.* at 415, 252 S.E.2d at 144-45.

9. The public reprimand was ordered in a 3-2 decision. Justice Rhodes concurred in Justice Gregory's dissent. 272 S.C. at 419, 252 S.E.2d at 145 (Gregory, J., dissenting).

10. 272 S.C. at 418, 252 S.E.2d at 145.

11. *Id.* Over the objection of respondent's counsel, evidence of the loans was admitted and the panel subsequently allowed an amendment to the complaint to include an allegation of respondent's improper advancement of funds to a client. Rule 24 of the South Carolina Rules of Disciplinary Procedure permits amendments to complaints if any party affected by the amendment is given a reasonable opportunity to respond to the new allegation. The court found that respondent's opportunity to respond was "ample." *Id.* (referring to RULE ON DISCIPLINARY PROCEDURE FOR ATTORNEYS, S.C. SUP. CT. R. 24 (Cum. Supp. 1979)).

12. 272 S.C. at 418, 252 S.E.2d at 145.

13. *Id.* at 419, 252 S.E.2d at 145.

14. *Id.* (Gregory, J., dissenting).

15. *Id.* at 420, 252 S.E.2d at 146 (Gregory, J., dissenting). Respondent's secretary also had made personal loans to the client. *Id.* (Gregory, J., dissenting).

rule."[16]

The propriety of advancing nonlitigation expenses to clients was unclear prior to adoption of the Code of Professional Responsibility in 1969. The Canons of Professional Ethics, the predecessor to the Code, did not specifically address these loans. Canon 42 read: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."[17] Because this rule did not expressly mention advancing nonlitigation expenses, many courts considered the practice permissible.[18]

ABA Formal Opinion 288, issued in 1954, evaluated the propriety of advancing living expenses to personal injury clients during the pendency of their claims.[19] In this opinion, the Committee on Professional Ethics concluded that "the activity . . . would constitute a clear violation of the Canons of Professional Ethics."[20] The opinion cited four canons in finding an ethical violation in the making of loans, even those made to cover the mere subsistence of plaintiffs so badly injured that they were unable to work.[21] The opinion declared that Canon 42[22] allowed advancements *only* for those expenses directly connected with the litigation itself.[23] Second, according to the committee, because the advanced funds clearly would be reimbursed out of plaintiff's verdict, the attorney would acquire an interest in the

16. *Id.* (Gregory, J., dissenting).

17. ABA CANONS OF PROFESSIONAL ETHICS No. 42.

18. Some courts have held that loans for living expenses are proper if not offered to induce employment of the lawyer. *See, e.g.*, Fail v. Gulf States Steel Co., 205 Ala. 148, 87 So. 612 (1920); Hildebrand v. State Bar, 18 Cal. 2d 816, 117 P.2d 860 (1941); People v. McCallum, 341 Ill. 578, 173 N.E. 827 (1930); *In re* Sizer, 306 Mo. 356, 267 S.W. 922 (1924). *Cf.* State v. Rein, 141 Neb. 758, 4 N.W.2d 829 (1942)(holding loans to clients improper only if clients' obligation to repay is contingent on the successful outcome of the litigation); Ryan v. Pennsylvania R.R., 268 Ill. App. 364 (1952)(holding loans that prevent clients from having to accept unduly low settlement offers are not against public policy).

19. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 (1954).

20. *Id.* The Committee on Professional Ethics and Grievances is authorized by the American Bar Association to issue opinions concerning proper professional conduct. 57 ABA REPORTS 50 (1922).

21. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 (1954).

22. ABA CANONS OF PROFESSIONAL ETHICS No. 42, *quoted in* text accompanying note 17 *supra.*

23. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 (1954).

subject matter being litigated in violation of Canon 10.[24] Third, Canon 6[25] forbade a lawyer from representing conflicting interests and the committee reasoned that the attorney's interest in repayment "might lead him to consider his own stake in the outcome rather than that of his client."[26] Finally, if the lawyer's loans to clients became known publicly, clients might be improperly induced to employ him in violation of Canon 27.[27]

Case law since Opinion 288 has been conflicting. Some courts declined to adhere to the committee's position while others embraced the opinion's interpretation.[28] Two cases concerning the same attorney and the same course of conduct illustrate this dichotomy.[29] John Ruffalo represented two clients whose husbands were killed in railroad accidents.[30] Loans for living expenses, to be repaid regardless of the outcome of litigation, were made at the request of the clients.[31] The Ohio Supreme Court disbarred Ruffalo, in part for making these loans,[32] yet the Federal District Court for the Northern District of Ohio approved his conduct and found that Ruffalo was fit to continue to practice before it.[33]

The state court found that Ruffalo's conduct violated Canon 10's proscription on "purchas[ing] an interest in the subject matter of litigation," reasoning that the disabled indigent client's agreement to repay the loan could be realized only from

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24. ABA CANONS OF PROFESSIONAL ETHICS No. 10 read: "The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting."

25. ABA CANONS OF PROFESSIONAL ETHICS No. 6 read: "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts."

26. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 (1954).

27. *Id.* "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." ABA CANONS OF PROFESSIONAL ETHICS No. 27.

28. *Compare* State v. Dawson, 111 So. 2d 427 (Fla. 1959); *In re* Ruffalo, 249 F. Supp. 432 (N.D. Ohio 1965); *In re* Ratner, 194 Kan. 362, 399 P.2d 865 (1965) *with* El Janney v. Cleveland Tankers, Inc., 209 F. Supp. 91 (N.D. Ind. 1962); Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396, *cert. denied*, 379 U.S. 931 (1964).

29. *Compare* Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396, *cert. denied*, 379 U.S. 931 (1964) *with In re* Ruffalo, 249 F. Supp. 432 (N.D. Ohio 1965).

30. 249 F. Supp. 432, 440 (N.D. Ohio 1965).

31. *Id.* at 443.

32. Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396, *cert. denied*, 379 U.S. 931 (1964).

33. *In re* Ruffalo, 249 F. Supp. 432 (N.D. Ohio 1965).

the proceeds received from trial or settlement of the client's claim.[34] In effect, according to the court, "the attorney ha[d] purchased an interest in the subject matter of the litigation."[35] The federal court rejected this reasoning: "It is not in consonance with this court's concept of justice or the underlying purposes of the Canons of Professional Ethics that a loan otherwise proper is rendered improper because of the indigency of the client."[36] The court concluded that unconditional loans to clients are not improper even though the clients may not be able to repay without favorable recovery on the client's claim.[37]

Thus, despite Opinion 288's clear prohibition of loans for living expenses, some courts refused to find a violation of professional ethics in the making of these loans. In 1969, however, the Code of Professional Responsibility incorporated the view expressed in Opinion 288. Disciplinary Rule 5-103(B) states unequivocally that financial assistance to clients during pendency of litigation is not permitted, except for advances to cover litigation expenses.[38] This strict approach[39] has been adopted by the South Carolina Supreme Court.[40]

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34. 176 Ohio St. at 264-65, 199 N.E.2d at 398 (citing ABA CANONS OF PROFESSIONAL ETHICS No. 10).

35. 176 Ohio St. at 264-65, 199 N.E.2d at 398.

36. 249 F. Supp. at 443.

37. *Id.* at 445.

38. DR 5-103(B), full text quoted at note 1 *supra.*

39. The Preliminary Statement of the Code of Professional Responsibility reads: "The Disciplinary Rules . . . are mandatory in character. . . . [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT.

40. *See* note 3 *supra.* In contrast to the strict approach of DR 5-103(B), some states have altered or eliminated that provision. Rule 5-104 of the professional conduct rules for the California Bar, for example, states in pertinent part:

> (A) A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:
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> (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or
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> (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or
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> (3) from advancing the costs of prosecuting or defending a claim or

Disciplinary Rule 5-103, however, presents some inconsistencies with other provisions of the Code of Professional Responsibility. Opinion 288, the apparent inspiration[41] for DR 5-103, suggested several reasons for prohibiting these loans. One rationale is the same as that given by the court in *Ruffalo*: a loan for nonlitigation expenses is an inappropriate acquisition of an interest in the litigation.[42] This reasoning, however, falters in light of the exception to DR 5-103(A) that allows the attorney to make a contingent fee contract with a client.[43] Although Ethical Consideration (EC) 2-20 of the Code of Professional Responsibility justifies the contingency fee arrangement by explaining that some claims might not otherwise be pursued,[44] it does not distinguish this arrangement from the loan. Although an attorney retained on a contingent fee contract does not pay money over to the client, that attorney nonetheless has a substantial proprietary interest in the outcome of his client's case. As a practical matter, even when the fee is computed on an hourly basis, the attorney has an obvious economic interest in his client's claim.[45]

Some commentators, emphasizing that a personal injury

> action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.
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> . . . .
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> (C) Nothing in this Rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this rule.

CAL. BUS. & PROF. CODE § 6076 (West Cum. Supp. 1979).

The Texas version of DR 5-103 does not include subsection (B) of the ABA rule. TEX. REV. CIV. STAT. art. 304-320a-1 (tit. 14 app.) (Vernon 1973).

41. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 288 is cited in a footnote to DR 5-103(B) with the signal *"cf."*

42. *See* text accompanying note 24 *supra.*

43. DR 5-103(A)(2) states in pertinent part:

> (A) A lawyer shall not acquire a proprietary interest . . . except that he may:
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> . . .
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> (2) Contract with a client for a reasonable contingent fee in a civil case.

DR 5-103(A)(2) (footnote omitted). An attorney, however, may not enter into a contingent fee arrangement in a criminal proceeding. DR 2-106(C).

44. EC 2-20.

45. One of the reasons for contingent fee arrangements is that a successful claim produces a *res* out of which the attorney's fee can be paid. Of course, a client's ability to pay may depend on the success of the claim and the production of a *res*. See EC 2-20.

plaintiff may be unable to work, soundly criticize the prohibition on advancement of funds. The rule, according to these critics, may force a client suffering financial hardship to accept an unjustly low settlement offer.[46] One critic claims the rule is mere self-paternalism, "serv[ing] as a crutch for soft-hearted lawyers, who can respond to imploring clients, 'I would love to help you out, but rules of professional ethics prohibit me from doing so.' "[47] In one court's view, this prohibition works only to cause hardship to indigent persons who may already be disadvantaged by a loss suffered as a result of an injury or other cause for suit.[48] Justice Gregory, dissenting in *In re Leppard,* implied that cases concerning violations "not . . . offensive to the spirit and reason for the rule" may justify the imposition of relatively lenient sanctions.[49] This view underscores some of the concerns that the strict rule generates. This case-by-case approach, however, leaves a degree of uncertainty in the application of the rule.

The South Carolina Supreme Court correctly found that the conduct of attorneys Pusser and Leppard violated DR 5-103(B). The question remains, however, of what place DR 5-103(B) has in the rules of professional ethics. If the decision to advance money to clients for living expenses were made a discretionary matter, it would become one of a business, rather than an ethical, nature. The granting of loans to clients in need may be unwise as a business practice,[50] but it should not be considered unethical in light of similar permissible financial arrangements between attorneys and clients. The flat prohibition contained in DR 5-103(B) fails to recognize that some attorney-client relationships spring from long-established personal friendships; thus the "ethical" lawyer is forced to choose between providing a client with no financial assistance at all or making an outright

46. *See, e.g.,* Sutton, *How Vulnerable is the Code of Professional Responsibility?,* 57 N.C.L. REV. 497, 498 n.6 (1979).

47. Huber, *Competition at the Bar and the Proposed Code of Professional Standards,* 57 N.C.L. REV. 559, 591 (1979).

48. *See In re* Ruffalo, 249 F. Supp. 432 (N.D. Ohio 1965).

49. 272 S.C. at 420, 252 S.E.2d at 146 (1979)(Gregory, J., dissenting).

50. One rationale behind the Code's prohibition of client loans for living expenses is that the practice gives an unfair competitive advantage to lawyers willing to make these loans because clients may come to the lawyer for this service, rather than for his skill as an attorney. The practice would not necessarily lead to greater profits, however, since the lawyer takes the risk that the loan may never be repaid.

gift.[51]

The proposed replacement of the current Code of Professional Responsibility, the Rules of Professional Conduct, retains the prohibition of loans for living expenses.[52] The Comment to that proposed rule suggests that the rule is designed to prevent "unfairness to the client."[53] This prohibition, however, does little to guarantee that fairness will prevail in attorney-client relations. If anything, it puts an attorney in a tenuous position. One commentator summarizes the difficulties with the apparent rationale for DR 5-103(B) and states why the prohibition deserves reconsideration:

> In labeling as unethical a lawyer who acts as a good Samaritan and punishing him for acts of generosity the Code reaches a shocking result. Such a provision may enhance the income of attorneys, but it has no place in a body of rules for professional behavior. Since advancing litigation-related expenses, which may involve thousands of dollars for depositions and expert witnesses, is permitted, it is ludicrous to suggest that advances for living expenses will compromise attorney independence. The disparate effect of the present rule on impecunious clients is an additional reason for its abolition.[54]

II. LEGAL MALPRACTICE

In *Shealy v. Walters*,[55] the South Carolina Supreme Court,

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51. EC 5-5, which discourages gifts from client to attorney, does not mention gifts from attorney to client. EC 5-5. *See In re* Bloom, 265 S.C. 86, 89, 217 S.E.2d 143, 145 (1975).

52. The new rule in pertinent part states:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) A lawyer may advance court costs and expenses of litigation, repayment of which is contigent on the outcome of the matter;
>
> (2) A lawyer or legal services organization representing a client without a fee may pay court costs and expenses of litigation on behalf of a client.

DISCUSSION DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1.9(e), 48 U.S.L.W. (Supp. No. 32) (Feb. 19, 1980). This draft is a result of the work of the ABA Board of Governors' special committee. The Commission on Evaluation of Professional Standards was established to reevaluate the Code of Professional Responsibility. *See generally* Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 46, 47 (1980).

53. DISCUSSION DRAFT OF ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1.9 Comment, 48 U.S.L.W. (Supp. No. 32) (Feb. 19, 1980).

54. Huber, *supra* note 47, at 591-92.

55. 273 S.C. 330, 256 S.E.2d 739 (1979).

reversing a lower court decision, found a defendant attorney liable for legal malpractice. The attorney had failed to properly execute a real estate deed that was subsequently cancelled by an equity court.[56] The supreme court refused to consider defendant's contention that the order of the equity court was in error and thus the *real* cause of plaintiff's injury, and found that defendant was negligent as a matter of law and liable for the full amount of plaintiff's damages. The court held that even though there may have been other causes of plaintiff's injuries, a plaintiff can recover against an attorney for legal malpractice if the attorney's conduct was "a *contributing* proximate cause."[57]

On October 29, 1971, Trippett Boineau, as sole stockholder of Rockie Realty, contracted to buy a large tract of land from W.C. Ellis. The contract was made in the name of the corporation and recited a purchase price of $114,000. The sale was to be financed by Boineau's unsecured personal and corporate note.[58] Defendant attorney Walters prepared a deed from Ellis to Rockie Realty. Boineau, who planned to mortgage the property for $100,000 to finance the deal, was unable to obtain the loan. He then asked plaintiff Shealy to buy the property and form a corporation to procure the $100,000 loan. The seller was unaware of this arrangement.[59]

On December 7, 1971, Ellis executed a deed to Rockie Realty. Boineau signed the note, as Rockie Realty's president and individually, in favor of Ellis. Walters or his secretary thereafter allegedly erased "Rockie Realty, Inc." from the deed and substituted "S.H.J., Inc." although the latter entity did not yet exist. The articles of incorporation of S.H.J., Inc. were signed on December 8 and validated by the Secretary of State on December 13. On December 14, Shealy executed S.H.J.'s mortgage on the property in favor of American Bank and Trust with a note payable one year from that date. Walters represented both Boineau and Shealy in all of the described transactions and disbursed the mortgage proceeds to Boineau.[60]

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56. *Id.* at 334, 256 S.E.2d at 741.

57. *Id.* at 338, 256 S.E.2d at 743 (emphasis added).

58. The note on its face purported to be a "mortgage note" but was actually unsecured. *Id.* at 333, 256 S.E.2d at 741.

59. *Id.* at 332, 256 S.E.2d at 740.

60. *Id.* at 333, 256 S.E.2d at 741. The major portion of the loan proceeds was paid over to Boineau per Shealy's instructions. Shealy, however, was under the impression

Rockie Realty was declared bankrupt in October 1972. In December, S.H.J., Inc. made payment on the note to the bank. In January 1973, the seller Ellis, not having been paid, obtained an uncollectible judgment against Boineau on the note executed by Rockie Realty and Boineau, individually. After deeding the property to Shealy, individually, S.H.J., Inc. was dissolved. In April 1976, Judge Francis B. Nicholson of the Abbeville County Court of Common Pleas, sitting in equity, cancelled Shealy's deed and revested title in Ellis on the ground that the deed was unlawfully altered after execution without the seller's knowledge. Thus, the seller reacquired title to the land; Boineau's corporation, which received a large portion of the $100,000 loan payment made by Shealy, was bankrupt; Shealy, who had paid the loan, had nothing.[61] Shealy brought suit against Walters.

Shealy's complaint against Walters alleged several acts of negligence: the deed was not properly prepared, the seller did not initial the corrected deed, no assignment of the land sale contract had been made, and the seller was not informed that Boineau's note was merely an unsecured, promissory note.[62] Walters' answer asserted a general denial, estoppel, plaintiff's contributory negligence, and the invalidity of plaintiff's claim because he received a fee simple title.[63]

The court outlined the three elements of proof necessary to recover in an action for malpractice: (1) that plaintiff was injured, (2) that defendant was negligent, and (3) that defendant's negligence was the proximate cause or a contributing proximate cause of plaintiff's injury.[64] The court found that Shealy carried his burden of proof by a preponderance of the evidence and held that Walters was liable for legal malpractice.[65]

Although the elements of injury and negligence were clearly established,[66] the court's analysis of the proximate cause issue is

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that the money was to be passed to the seller. *Id.*

61. *Id.* at 334, 256 S.E.2d at 741-42.

62. Record at 2-8.

63. *Id.* at 18-22.

64. 273 S.C. at 335, 256 S.E.2d at 742.

65. *Id.* at 338, 256 S.E.2d at 743.

66. Shealy had nothing to show for the $100,000 he paid the bank. Walters, as attorney for Shealy, negligently carried out his duty to Shealy to prepare the documents so that Shealy would be assured of valid marketable title. The supreme court held Walter's

troublesome. Causation in fact[67] and proximate cause[68] are two distinct issues in tort law. The South Carolina Supreme Court, however, failed to distinguish the two.[69] The court noted that "[b]ut for the Walters erasure, there would have been no suit by Ellis and Shealy would have the land."[70] It failed, however, to establish that this action was the proximate cause of Shealy's injury. Thus, although the result in *Shealy* may be correct, the decision will give lower courts little guidance for deciding cases in which a party's loss is less obvious than Shealy's.

The distinction between cause in fact and proximate cause is conceptually and adjudicatively useful. Although a party's conduct may have, as a matter of fact, caused a particular result, "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred," as Prosser explained, is a separate matter.[71] According to Prosser, the proximate cause issue can be reduced to the question, "was the defendant under a duty to protect the plaintiff against the event which did in fact occur?"[72] Although the court correctly concluded that Walters' action was a cause of Shealy's injury, it failed to determine if Walters had a duty to protect Shealy from the resulting harm. This failure by the court forced it to reach the diluted conclusion that although "there may have been . . . other causes of the injuries[,] [i]t is . . . sufficient . . . [that] defendant's conduct is a contributing proximate cause."[73] There is no doubt that Walters had a duty to Shealy arising

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actions to be negligent as a matter of law because the substitution of grantees in the deed did not vest title in S.H.J., Inc. 273 S.C. at 336, 256 S.E.2d at 742.

67. Causation in fact "embraces all things which have so far contributed to the result that without them it would not have occurred." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 237 (4th ed. 1971).

68. "[A]s a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.* at 236-37.

69. See 273 S.C. at 336-38, 256 S.E.2d at 743. *See Torts, Annual Survey of South Carolina Law,* 31 S.C.L. REV. 131, 135-36 (1979). The South Carolina Supreme Court is not alone in confusing proximate cause with causation in fact. *See, e.g.,* Smith v. Lewis, 13 Cal. 3d 349, 360-61 n.9, 530 P.2d 589, 596-97 n.9, 118 Cal. Rptr. 621, 628-29 n.9 (1975); Toomer v. Breau, 146 So. 2d 723, 727 (La. App. 1962).

70. 273 S.C. at 338, 256 S.E.2d at 743.

71. PROSSER, *supra* note 67, § 42, at 244.

72. *Id.*

73. 273 S.C. at 338, 256 S.E.2d at 743.

from the attorney-client relationship.[74] If the supreme court had discussed this relationship in the context of proximate cause, its decision would have greater precedential value.[75]

Further, *Shealy* does not fit neatly into the usual categories of malpractice litigation.[76] In the typical malpractice action, the attorney defends by asserting that plaintiff's underlying claim was not meritorious and that plaintiff would not have recovered even if the attorney had not been negligent. This burden has often been identified as the "suit within a suit" rule; the original action or appeal must be litigated within the malpractice action to prove that "but for" the lawyer's negligence, plaintiff would have succeeded in the underlying action.[77] *Shealy,* however, was not a typical "suit within a suit." Instead of arguing that the client's claim lacked merit, Walters argued that the plaintiff who did not win in his previous action in equity court *should* have won. The judge's error in that proceeding thus caused injury that Shealy would not have suffered otherwise, even though Walters, admittedly, was negligent. Contending that the order divesting Shealy of title was incorrect, Walters argued that Shealy's proper course was to seek an appeal of that order.[78]

The supreme court, however, refused to inquire whether the equity court erred:

> The order of Judge Nicholson is not subject to attack in this action. It is presumptively correct, but whether it is correct or incorrect is of no real consequence in this action. That order settled a dispute between Ellis and Shealy. The order declared title in Ellis. Even if the order is incorrect, it does not mean that Shealy has good title. This is an action in tort and is not one for the purpose of trying title to land. This court makes no

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74. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 72, at 99 (1977); Bridgmen, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case,* 30 S.C.L. REV. 213, 221 (1979); Wade, *The Attorney's Liability for Negligence,* 12 VAND. L. REV. 755, 757 (1959); Comment, 27 ARK. L. REV. 452, 455 (1973).

75. The court did find that an attorney-client relationship existed between Shealy and Walters. 273 S.C. at 334, 256 S.E.2d at 741.

76. Malpractice usually arises from negligence in litigating a case or arguing an appeal, negligent execution of written instruments, giving erroneous legal advice upon which the client relies, or careless failures to comply with legal technicalities (*e.g.,* statutes of limitations).

77. *See* Coggin, *Attorney Negligence—A Suit Within a Suit,* 60 W. VA. L. REV. 225 (1958). The traditional "but for" test is commonly used in these suits.

78. 273 S.C. at 337, 256 S.E.2d at 743.

intimation relative to ownership of the property.[79]

If the settled rule of law is that alteration of the grantee's name after execution of the deed does not revest title in the grantor, as suggested by the lower court,[80] then Shealy's loss of the land to Ellis would have been the result of error by the equity court. The supreme court completely avoided this issue by refusing to support either the lower court's or the equity court's opinion. Thus, the court did not make a determination that was crucial to proper proximate cause analysis. If the lower court's view was correct and title did not revest in the grantor, the equity court's action was indeed the proximate cause of Shealy's loss. Walters' actions, although negligent, would have had no effect on the loss. If, however, the equity court's view were adopted, the supreme court's decision would be correct.

An alternate theory of liability could have lent itself to the same result based on the same claim. To find the attorney liable for malpractice, the court could have relied on the fundamental breach by Walters of the attorney-client duty in his representation of two parties (Shealy and Boineau) with potentially conflicting interests. The attorney who represents clients with conflicting interests breaches his fiduciary duty and this breach can render him liable for damages.[81] "The rule that one may not re-

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79. *Id.*

80. *Id.* at 336-37, 256 S.E.2d at 742-43. The supreme court said that a substitution of the grantee did not divest the original grantee of title. *Id.* at 336, 256 S.E.2d at 742 (citing Booker v. Stivender, 47 S.C.L. (13 Rich.) 85 (1860)). There is authority for the proposition that once a deed is delivered, erasure of the grantee's name and the substitution of a new grantee neither divests the original grantee of title nor transfers title to the substituted grantee. *See* Carr v. Frye, 225 Mass. 531, 114 N.E. 745 (1917).

The effect of an alteration of a grantee's name on a deed seemingly is not well settled in South Carolina, however, as evidenced by the varied conclusions drawn by the three courts considering the transaction. The South Carolina Supreme Court found that title remained in Rockie Realty, Inc. (Boineau): "[w]hen Ellis signed the deed in favor of Rockie Realty, Inc., Rockie Realty, Inc. became vested with title, and the substitution did not serve the purpose of divesting Rockie Realty, Inc. of the title Ellis had conveyed to it." 273 S.C. at 336, 256 S.E.2d at 742. The lower court in *Shealy* found that title vested in Shealy: "However haphazardly and carelessly defendant effectuated the transfer, as a matter of law title did become vested in S.H.J., Inc. [Shealy]." 273 S.C. at 336-37, 256 S.E.2d at 742. The equity court in the suit to cancel the deed found that title revested in Ellis: "the deed . . . is hereby declared to be cancelled, null, void and of no force and effect, and title to the said property revested in the plaintiffs [Mr. and Mrs. Ellis]." Record at 93.

81. MALLEN & LEVIT, *supra* note 74, § 99, at 147.

present conflicting interests is simple, but the bar, through ignorance, inattention, or greed, shows an appalling ability to disregard it."[82]

A recent California case, *Spindler v. Kirtland & Packard,*[83] illustrates well the malpractice action based on conflicts of interest. The attorney in *Spindler* was retained by the common insurer of an orthopedist and a neurosurgeon, defendants in a medical malpractice case. Plaintiff's case against the neurosurgeon was weak; his case against the orthopedist was strong. The apparent strategy to prevent the defendants' implicating one another by having the same attorney represent them failed and both were found liable for medical malpractice. The attorney advised the neurosurgeon to refrain from making statements that were incriminating against his co-defendant but exculpatory to himself. The neurosurgeon did so and subsequently sued the attorney for malpractice. The neurosurgeon was awarded a jury verdict of $130,000 based on the conflict of interest.[84]

The undisputed testimony in the *Shealy* case was that Walters represented both Boineau and Shealy in the land transaction at issue. The supreme court could have premised its finding of malpractice on a conflict of interest theory and the resulting breach of Walters' fiduciary obligation to Shealy. The causation issue then would have concerned the attorney's malfeasance in allowing the loan proceeds to be paid directly to Boineau in contravention of Shealy's interest in having the seller Ellis receive prompt payment for the land. If Walters had properly guarded Shealy's interest by seeing that Ellis was paid, Shealy's title to the land may never have been challenged. The conflict of interest in the case appears clearer than the degree of culpability for erasing the deed. One result of the *Shealy* decision may be a liberalization of the burden of proof that a plaintiff must meet in his legal malpractice claim. The *Shealy* case held that an at-

82. Bridgman, *supra* note 74, at 232.

83. No. SEC 13505 (Los Angeles Super. Ct., filed March 1978), *cited in* Bridgman, *supra* note 74, at 232 n.56 and accompanying text. *See also* Brosie v. Stockton, 104 Ariz. 574, 468 P.2d 933 (1970); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ishmael v. Willington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); Public Taxi Serv. Inc. v. Barrett, 44 Ill. App. 3d 452, 357 N.E.2d 1232 (1976); Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 502, 327 A.2d 891 (1974); Hill v. Okay Constr. Co., 312 Minn. 324, 252 N.W.2d 107 (1977).

84. Bridgman, *supra* note 74, at 233.

torney is liable for malpractice if guilty of negligent conduct that was a "contributing proximate cause" of his client's injury. That standard in itself suggests a client need only show that the attorney's negligence was one of the causes in fact of the client's loss in order to recover in a malpractice action. As a result, the settlement value of malpractice claims may increase, as may the proclivity of clients to bring malpractice actions.

III. LAWYER COMPETENCY

Regulation of the legal profession is primarily the responsibility of the states.[85] In every state the courts have jurisdiction over admission to practice law and, as an incident thereto, the inherent right to supervise the bar.[86] In South Carolina, the state supreme court's power to supervise the bar is granted by the state constitution[87] and is recognized by statute.[88] Pursuant to its inherent supervisory power, the South Carolina Supreme Court promulgated new requirements affecting both prospective and current members of the bar. The new requirements are intended to assure and enhance the competency of lawyers practicing in the state.

The competence of lawyers in general has been under vigorous attack in recent years and influential public figures have not been silent amidst the general demand for a more competent bar.[89] Chief Justice Warren Burger, for example, has asserted that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."[90] The need for a mechanism assuring lawyer

85. *See generally* U.M.W. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

86. *Problems and Recommendations in Disciplinary Enforcement*, ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, 10, 13 (1970).

87. "The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." S.C. CONST. art. V, § 4.

88. "The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law is hereby recognized and declared." S.C. CODE ANN. § 40-5-10 (1976).

89. *See* Burger, *Annual Report on the State of the Judiciary*, 49 PA. B.A.Q. 212, 215-20, (1978); *President Carter's Attack on Lawyers, President Spann's Response, and Chief Justice Burger's Remarks*, 64 A.B.A.J. 840 (1978).

90. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973).

competency is well recognized by those who have studied the problem, although different approaches have been suggested.[91] The standard of competency most frequently noted is that mandated by the Code of Professional Responsibility: "[a lawyer] should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle."[92] Apparently it is this measure that the new requirements promulgated by the South Carolina Supreme Court are intended to achieve.

A. Prospective Members of the Bar—Rule 5

Rule 5 of the Rules for the Examination and Admission of Persons to Practice Law in South Carolina was amended three times in 1979.[93] In its final form,[94] the rule requires persons seeking to practice law in South Carolina to have successfully completed law school courses in fourteen designated subject-matter areas,[95] eleven "trial experiences" of either a participatory or observatory nature,[96] and the new Multistate Bar

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91. *See, e.g.*, Leete & Loeb, *Continuing Legal Education—Should It Be Compulsory?*, 27 J. LEGAL EDUC. 110 (1975); Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence*, 1974 UTAH L. REV. 463; Petrey, *Professional Competence and Legal Specialization*, 50 ST. JOHN'S L. REV. 561 (1976); Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (1975).

92. EC 6-1.

93. The court amended Rule 5 on February 6, April 25, and December 14, 1979.

94. RULES FOR THE EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA, S.C. SUP. CT. R. [hereinafter cited as ADMISSION RULES] 5A, 5B (Cum. Supp. 1979). Rule 5A(8), however, is included in S.C. SUPREME COURT, ORDER RE RULES FOR THE EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA (Dec. 14, 1979). That portion of the rule reads:

> (8) has passed an examination on the Code of Professional Responsibility given under the auspices of the Multistate Bar Examination Committee of the National Conference of Bar Examiners and received thereon a minimum grade as determined by the South Carolina Supreme Court. Arrangements to take said examination, including the payment of any fees therefor, shall be made directly with the Multistate Bar Examination Committee of the National Conference of Bar Examiners. The effective date of this provision is July 1, 1981. Since passage of the separate Multistate Professional Responsibility Examination is required, there shall be no limit to the number of times an applicant may take said examination.

S.C. SUPREME COURT, ORDER RE RULES FOR EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA (Dec. 14, 1979).

95. ADMISSION RULES 5A(5).

96. *Id.* 5B.

Examination on the Code of Professional Responsibility.[97]

All first-time applicants for bar examinations given after July 1, 1981, must successfully complete the course requirements.[98] The court's order suggests courses under each subject-matter area that satisfy the requirement, but that list is not intended to be an exclusive list of courses meeting the requirement.[99] Subject matter rather than course name determines whether the requirement is satisfied by a given course.[100] An applicant who has not completed the course requirements will be allowed to take the bar examination, with admission to practice contingent on subsequent completion of the required courses.[101] The applicant need not complete this instruction at the law school from which he graduated, but may complete the course requirements at any law school approved by the American Bar Association or the South Carolina Supreme Court.[102] Lawyers who have practiced for three years in another state may be admitted to practice in South Carolina without meeting the course-requirement rule.[103]

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97. Rule 5A(8), S.C. SUPREME COURT, ORDER RE RULES FOR THE EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA (Dec. 14, 1979).

98. ADMISSION RULES 5A(5). In the court's first order the specific subject areas included constitutional law, contracts, property, legal writing and research, torts, civil procedure, criminal law process, commercial law, business associations, domestic relations, professional responsibility, equity, evidence, administrative law and procedure, trial advocacy, taxation, insurance, and legal accounting. A total of sixty-one credit-hours in specified courses was required. (The minimum number of hours required for graduation from the University of South Carolina School of Law is eighty-four). The second order deleted domestic relations, administrative law, and insurance from the requirement. The business associations area was redesignated as business law with legal accounting recategorized as a subject that could satisfy the business course requirement. The second order also deleted the credit-hour requirements altogether.

The first order also included amended Rule 6 that would have required those applicants taking the bar examination for the first time in July 1984 to have completed twenty-seven undergraduate semester credit-hours in United States history, English composition, English, public speaking, economics, and accounting. The second order deleted the required undergraduate subjects and substituted Rule 16. This provision directs the Clerk of the Supreme Court to notify prelaw student advisers of all South Carolina undergraduate institutions (and others upon request) in July of each year that nine undergraduate courses are recommended to persons wishing to study law. These courses are English composition, English, public speaking, United States history, accounting, economics, logic, literature, political science, and philosophy.

99. ADMISSION RULES 5A(5).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

Rule 5B provides that although an applicant is admitted to practice, he may not try a case alone until he has had eleven "trial experiences."[104] The rule defines a trial experience as: "(1) actual participation in a full trial under the direct supervision of a member of the Bar, or (2) an observation of an entire contested testimonial-type hearing in a South Carolina Tribunal."[105] Each prospective litigator must file a certificate with the Clerk of the Supreme Court indicating that he has observed or participated in the specified number of trial experiences in civil, criminal, equity, and family courts, and before an administrative officer.[106] A student may not begin his trial experiences until he has completed two-thirds of the credit-hours required for law school graduation.[107]

The court's last order added a third new requirement for prospective members of the bar. Rule 5A(8) requires an applicant to pass an examination on the Code of Professional Responsibility prepared and administered by the Multistate Bar Examination Committee.[108] The purpose of the examination is "not . . . to exclude persons from the practice of law but to insure that they study and be prepared to cope with ethical problems of the legal profession."[109] There is no limit on the

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104. *Id.* 5B.

105. *Id.* The first order called for trial experiences in state courts only but the second order broadened the rule to allow some of the trial experiences to be in federal court.

106. ADMISSION RULES 5A(5).

107. *Id.* Rule 5B was designed apparently to help prospective litigators become more familiar with courtroom procedures. While the objective is sound, the rule does little to achieve it. Because students are given a choice between observation and participation, students may opt for the observation-type experience requiring no advance preparation and far fewer total hours. Because none of the trial experiences are required to be participatory, the rule as written encourages students to take the easier method for compliance.

108. S.C. SUPREME COURT, ORDER RE RULES FOR THE EXAMINATION AND ADMISSION OF PERSONS TO PRACTICE LAW IN SOUTH CAROLINA (Dec. 14, 1979).

109. Letter dated December 3, 1979, to the Honorable Richard E. Day, Dean of the University of South Carolina School of Law, from Ms. Frances H. Smith, Clerk of the South Carolina Supreme Court. At least two questions are raised by the required examination on the Code of Professional Responsibility. The most obvious issue is whether such an examination is needed, given that the South Carolina Bar Examination already includes a legal ethics section. Also significant is the fact that the American Bar Association will propose a new body of rules, the Rules for Professional Conduct, in the near future. *See* Kutak, *supra* note 52. Because many students will be caught in the transition, a required examination at this time is of minimal value.

number of times the test may be taken.

B. Present Members of the Bar—Rules on Lawyer Competence

In a further effort to assure lawyer competency, the Supreme Court of South Carolina issued an order on September 26, 1979, entitled "Rules on Lawyer Competence."[110] With this order, the court instituted mandatory continuing legal education (MCLE) and established a plan by which lawyers can become certified as specialists. The order established a ten-member Commission on Continuing Lawyer Competence charged with administering both the MCLE and specialization programs.[111] The South Carolina MCLE program requires that twelve hours of MCLE credit be obtained annually by all bar members, except certified specialists (who must meet separate continuing education requirements), lawyers having practiced for more than thirty years,[112] and lawyers not enrolled as active members of the bar.[113]

The Commission will designate specialty fields and appoint Specialization Advisory Boards to establish certification standards and procedures.[114] Certified specialists, however, may continue to practice in all fields of the law. The Commission will consider designation for specialty fields in which certification may be obtained either upon petition of one hundred bar mem-

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110. S.C. SUPREME COURT, ORDER RE RULES ON LAWYER COMPETENCE (Sept. 26, 1979).

111. *Id.* The Commission members are appointed by the court from a list of twenty bar members nominated by the House of Delegates of the South Carolina Bar. *Id.*

112. *S.C. Supreme Court, Order re Rules on Lawyer Competence* (Sept. 26, 1979). Wisconsin is apparently the only state other than South Carolina to include a "grandfather clause" in its MCLE requirement. Wisconsin lawyers seventy years old and older are exempt from MCLE. WIS. STAT. ANN. § 256 app. R. 3 (West Supp. 1979-80).

113. S.C. SUPREME COURT, ORDER RE RULES ON LAWYER COMPETENCE (Sept. 26, 1979). The specifics of the MCLE plan will be developed by the Commission. One issue for resolution is whether credit hours may be obtained in ways other than attendance at formal CLE courses. For example, would an attorney receive MCLE credit for the publication of a scholarly article, delivery of a paper at a professional meeting, teaching a CLE course (added credit for preparation time?), teaching a law school course, or attending an in-house course presented by employer firms and governmental agencies? The preliminary discussion draft of proposed MCLE regulations is reprinted in *The Transcript*, Apr. 1980, at 5, col. 1.

114. S.C. SUPREME COURT, ORDER RE RULES ON LAWYER COMPETENCE (Sept. 26, 1979).

bers or the Commission's own initiative. This designation will depend on several factors, including the public interest to be served, the bar's interest in the area, the ability to establish proficiency standards readily, the availability of a CLE program in the area, and the compatability of the designation with the goals of certified specialization in South Carolina.[115]

An active member in good standing with the bar may apply for certification in a speciality field with payment of a fee and submission of the names of five attorneys who can attest to the lawyer's competency in the field. The applicant must have practiced law for five years, although this requirement can be waived by the specific Advisory Board upon a satisfactory showing that the applicant has specialized post-graduate education or concentrated experience in the given area that is equal to five years of practice. The applicant may then be certified under one of three methods: (1) a satisfactory showing of "substantial involvement" in the field for five years, (2) a satisfactory completion of a program of special instruction approved by the Board, or (3) satisfactory completion of oral and/or written examinations in the speciality area.[116]

C. Questions Raised by These Changes

As indicated, the changes made by the supreme court are designed to reduce perceived deficiencies among practicing attorneys. Yet, the changes raise a number of concerns, particularly that they will not effectively achieve the court's goal.

One commentator[117] has succinctly framed the issues raised by the assertion of a competency problem in the profession:

> -What seems to be the problem?
> -What is the nature and extent of the incompetence that gives concern?
> -How suited are the curative measures for the actual disorders?
> -What are the side effects, if any?
> -What may be the alternatives, if any?[118]

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115. *Id.*

116. *Id.*

117. Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613 (1977).

118. *Id.* at 614.

Proper evaluation of the merits of a particular remedy for lawyer incompetence requires consideration of the threshold issues of the definition, extent, and causes of incompetency. Answers to these questions are needed to ascertain whether a given remedy will be an effective cure for the perceived deficiency.

Some members of the legal profession question the accuracy of the assertion that there is widespread incompetence among lawyers.[119] One writer suggests that "the evidence of 'incompetence,' like its very definition, is vague and ambiguous. Impressionistic accounts, by judges and others, are diverse and conflicting. There is no consensus."[120]

Among those who agree that there *is* a problem, there are diverse views concerning the nature of the incompetency causing the problem. One viewpoint is that "[t]he significant qualities distinguishing good from bad lawyers—and, thus, the areas for truly major concern about 'competence'—are matters of character, judgment, wisdom, morals, and attitude, not the business of technical proficiency."[121] A federal judge, in a similar vein, pointed out that "[i]nsofar as bad lawyering is the product of bad character, or laziness, or apathy, there is little that can be done by way of education."[122] In contrast, the committee to study lawyer incompentency in the Second Circuit Court of Appeals found that incompetence, at least in the context of trial advocacy, is "directly attributable to the lack of legal training."[123]

If incompetency is caused primarily by characterological deficiencies, such as poor work habits or lack of personal integrity, then the remedies implemented by the supreme court would not appear to be well-suited to raising the level of competency. If, however, incompetency stems from a deficiency in legal skills or

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119. *Id.* at 617.

120. *Id.* at 620.

121. *Id.* at 618.

122. REPORT AND RECOMMENDATIONS OF THE ABA TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 16 (1979)(quoting Address by Judge Irving R. Kaufman, ABA Annual Meeting (Aug. 15, 1974)).

123. Final Report of the Advisory Committee of Proposed Rules for Admission to Practice, 67 F.R.D. 161, 164 (1975). The committee's finding was based on "interviews of considerable length with approximately forty judges of the Second Circuit." *Id.* The committee proposed that, in the district courts of the Second Circuit, admission to practice be conditioned on either successful completion of law school or CLE courses in five designated subject areas. *Id.* at 188.

knowledge, then the steps taken by the court may well result in an upgrading of lawyer competency. The supreme court faced a void of factual data when it attempted to structure responsive solutions to the unknown causes of alleged incompetence. Perhaps because competency is a nebulous concept, the court felt constrained to select immediate, intuitively guided action over continued inaction.

The court is urged to remain receptive to alternatives if the measures adopted prove to be unsatisfactory. If incompetency is a serious problem in the profession, the public may be falsely placated if there is no empirical proof that the measures implemented have been successful. The court is urged to evaluate the steps taken to improve lawyer competency in terms of their costs and benefits. The benefits to be derived from specifying law courses, for example, may be negligible or even nonexistent. The costs, however, in terms of problems engendered by the rule, are not insubstantial.

The fundamental problem with the law school course requirement is the questionable validity of its two underlying premises. Presumably, the court, to arrive at the order mandating courses in specific areas, reached two conclusions. First, present methods of assuring competency must have been found to be lacking. Second, the requirement of legal education in certain areas of the law, must have been found, in combination with other requirements of the court order, to be the most effective way to improve the competency of the South Carolina bar. It is disturbing that the court made no factual findings to support these two necessary conclusions, but apparently relied on an intuitive feeling that the measures it adopted would result in improved competency. Indeed, the court regularly observes the performance of a certain segment of the bar. It is questionable, however, whether this observation is a sufficient basis for the conclusion concerning the general incompetency of the bar, absent factual findings that the present means of assuring lawyer competency (bar examinations and disciplinary sanctions) have failed. Further, no statistical data have shown that course requirements will improve lawyer competency.[124] Completion of a course in a particular area of law does not assure the ability to

124. See text accompanying notes 132 & 133 *supra*.

practice law in that area. The bar examination is designed to assure that new lawyers have a basic knowledge in substantive areas of the law. Without facts to show that required courses will better prepare the lawyer, it would seem preferable to let bar examinations determine this facet of competency.

Since the rule has been modified by reducing the number of prescribed course areas and deleting the requirement of specified hours, the course requirement does not work substantial hardship on most law students. The required courses are basic ones that most students ordinarily would elect to take. Yet, the rule will remain exclusionary to some extent. Law graduates from out-of-state law schools who seek to practice in South Carolina may find they have not taken all of the courses required for admission to the bar. These persons will not be absolutely excluded, of course, since the required instruction can be acquired later.[125] The rule, nevertheless, may deter prospective out-of-state lawyers from seeking employment in South Carolina. Thus, the rule may place South Carolina law firms at a competitive disadvantage in recruiting graduates of out-of-state law schools who have not completed courses in the required areas.

Additionally, despite its modifications, the rule undoubtedly will have an impact on the flexibility of legal education. Because of the increased demand for required courses, some elective courses may be eliminated or offered infrequently due to lack of sufficient enrollment. Law students interested in specialty electives and clinics programs may suffer and the scheduling of courses will become more burdensome. Without substantial factual documentation supporting the necessity and likely success of the court's imposition into the domain of legal education, it would be preferable to leave course requirements to the judgment of professional educators. Two commentators,[126] criticizing the course requirement proposal of the Clare Committee to the Second Circuit Court of Appeals, stated:

> We begin with a "deficiency" which is shaky at best. We leap to a cure without a scintilla of evidence—really and truly without any evidence at all—that there is any connection between

125. See text accompanying notes 101 & 102 *supra.*

126. Pedrick & Frank, *Trial Incompetence: Questioning the Clare Cure,* TRIAL, Mar. 1976, at 47.

> the evil to be corrected and the remedy sought to be applied. . . . For all we know, most of the incompetents may have taken most of the very courses which are now to be prescribed.[127]

An American Bar Association task force on lawyer competency recently issued its report recommending to bar admission authorities that completion of specific law school courses not be required prerequisites to taking bar examinations.[128] The report stated that "[r]equirements cast in terms of specific courses tend to emphasize information rather than fundamental lawyer skills and produce a more rigid law cirriculum, discouraging innovation and efforts to improve fundamental skills training."[129]

Indiana is the only other state known to have implemented a law school course requirement rule.[130] The rationale for the Indiana rule was that performance on the Indiana bar examination would be improved by appropriate course selection in law school: "[i]t is the purpose of the . . . Rule to assure against another instance of high ratio of failures among law graduates taking the Indiana examination."[131] A study conducted subsequent to the implementation of the rule revealed no correlation between course selections and bar examination results.[132] The educators who conducted the study concluded:

> Our analysis of the performance of Indiana University graduates on recent bar examinations found no support for the rationale behind Rule 13. No course or group of courses had any consistent relationship to success or failure on the bar exam. Thus we do not have a situation in which one is forced

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127. *Id.* at 52, 54.

128. REPORT AND RECOMMENDATIONS OF THE ABA TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

129. *Id.* at 5.

130. *See* IND. CT. R. 13-V(C); Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. LEGAL EDUC. 449, 452 (1974). Completion of required courses may be a prerequisite for admission to practice in states that admit some law graduates to practice without sitting for a bar examination. The "diploma privilege" currently exists in Mississippi, Montana, West Virginia, and Wisconsin. NATIONAL BAR EXAMINATION DIGEST (1978).

131. *Court Amends Admission, Trial, and Criminal Rules*, RES GESTAE, Jan. 1974, at 13.

132. *See* Cutright, Cutright & Boshkoff, *Course Selection, Student Characteristics and Bar Examination Performance: The Indiana University Law School Experience*, 27 J. LEGAL EDUC. 127 (1975).

> to balance the gains to be achieved through compliance with Rule 13 against the cost of the Rule. Our study shows that there was no gain for the 1973-74 graduates and strongly suggests there will be no gain for future graduates.[133]

If a course requirement rule does not improve bar examination results, then it is unlikely that such a rule will improve lawyer competency generally.

Several methods for achieving competency among lawyers already admitted to the bar are being examined throughout the United States, including periodic reexamination, specialization, peer review, and mandatory continuing legal education.[134] MCLE appears to be the most widely accepted method of maintaining competency.[135] Compulsory CLE is not without its critics, however.[136] The criticisms generally advanced against a mandatory program include the following: (1) the attorney is not tested at the conclusion of the course and thus there is no way to know if the instruction was truly effective in increasing competency; (2) the attorney might attend courses not really useful to him just to fulfill the requirement; (3) the program is superficial and is designed only to placate the public demands on the profession; and (4) the registration fees, time away from work, and travel expenses will be a financial hardship on young attorneys.[137] One must question the necessity of requiring that all lawyers, regardless of their knowledge and skill, attend a specified number of CLE course hours. As discussed above, an improvement in lawyer competency certainly cannot be guaranteed by the mere attendance of courses. Given the uncertainty of the

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133. *Id.* at 136.

134. *See* Comment, 56 NEB. L. REV. 676 (1977). *See generally* Bratt, *Beyond the Law School Classroom and Clinic—A Multidisciplinary Approach to Legal Education,* 13 N. ENG. L. REV. 199 (1977); Campbell, *Training Law Students Outside the Classroom: Some Experience and Some Comments,* 26 J. LEGAL EDUC. 208 (1974); Manning, *Law Schools and Lawyer Schools—Two-Tier Legal Education,* 26 J. LEGAL EDUC. 379 (1974).

135. *See, e.g.,* IOWA CODE ANN. § 610 app. R. 123 (West Supp. 1979-80); MINN. SUP. CT. (CLE) R. 1-7; WASH. CT. (APR) R. 11; WIS. STAT. ANN. § 256 app. R. 1-13 (West Supp. 1979-80).

136. *See* Wolkin, *A Better Way to Keep Lawyers Competent,* 61 A.B.A.J. 574 (1975); Wolkin, *More on a Better Way to Keep Lawyers Competent,* 61 A.B.A.J. 1064 (1975).

137. *See* Kavanaugh, *Performance Evaluation, Education, and Testing: Alternatives to Punishment in Professional Regulation,* 30 U. MIAMI L. REV. 953, 954-55 (1956).

benefits to be derived, one must also consider the costs borne by the attorneys resulting from transportation, tuition fees, and lost opportunities while absent from the office. The absence of any mechanism for appraising lawyer competency after the MCLE plan has been in operation makes it impossible to determine if the program is achieving its goal of improved competency. MCLE must be more than a scheme to boost the public's opinion of the profession by mere attendance at the requisite number of seminars.

The certification of specialists is probably a sound development because it provides an assurance of competency that does not exist when there are only the self-styled specialists. Yet the validity of the assumption that passing an examination or practicing in an area for a given length of time proves that one is *competent* in the area may be questioned.[138] "May not an examination simply reflect the aptitude and willingness of an unimaginative and uncreative attorney to memorize factual data successfully? May not 'experience in the field' indicate merely a well-worn rut obviating the possibility of fresh approaches that might foster the growth of the substantive law?"[139] There is also the possibility that widespread specialization may lead to such a sharp increase in fees that there will be a decrease in the availability of lawyers whose fees are within the reach of those needing their services. Besides the potential for higher legal fees engendered by specialist status, some members of the public may be unable to ascertain the exact specialization they need. "Practically speaking, will the public be able to dispense with the diagnostic services of the general practitioner?"[140]

If the measures for assuring competence presently in use in South Carolina prove to be unsatisfactory, several alternatives are available, including a stricter bar examination covering all areas which the court deems essential to the competent practice of law, an expanded clinics program in law school, replacement of the third year of law school with an internship, or implementation of a peer review system. Peer review would provide a mechanism for developing the empirical data necessary to assess the extent of the competency problem, as well as for curing the

138. *See* R. ZEHNLE, SPECIALIZATION IN THE LEGAL PROFESSION 12 (1975).
139. *Id.*
140. *Id.*

problem itself. An American Law Institute-American Bar Association joint committee is presently finalizing the draft of a proposed Model Peer Review System.[141] The draft describes three plans, referral peer review, disciplinary peer review, and law practice peer review.[142] The peer review system is attractive from a cost-benefit perspective since it is "tailored to affect only those lawyers who perform inadequately"[143] and is responsive to all types of incompetence. The importance of applying a cost-benefit analysis to proposed remedial measures must not be understated:

> The question raised concerns the relative weights of the costs and the benefits—whether the costs of the proposed remedies are justified by prevailing conditions and by what they will accomplish. This is a legitimate inquiry because it is not the profession alone which bears the cost; ultimately, the cost in some form is passed on to the consumer or taxpayer.[144]

As stated in the report of the Devitt Committee,[145] "[p]eer review has the advantage of directing the remedy to the attorneys needing assistance without imposing remedial regimes on the entire profession."[146]

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141. See Smith, *Peer Review: Its Time Has Come*, 66 A.B.A.J. 451 (1980).

142. *Id.* at 453, 454.

143. *Id.* at 452.

144. *Id.*

145. The Devitt Committee was appointed by the Judicial Conference of the United States "to investigate the quality of trial advocacy in the federal courts, and if deficiences were found, to recommend ways that those deficiences could be remedied." Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215, 218 (1979).

146. *Id.* at Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215, 225 (1979).