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## Specialty Certifications as an Incentive for Increased Professionalism: Lessons from Other Disciplines and Countries

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# **SPECIALTY CERTIFICATION AS AN INCENTIVE FOR INCREASED PROFESSIONALISM: LESSONS FROM OTHER DISCIPLINES AND COUNTRIES**

ADRIAN EVANS\* & CLARK D. CUNNINGHAM\*\*

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## **I. INTRODUCTION**

It is now a reasonably common practice in a number of jurisdictions for lawyers with acknowledged experience in a particular area of law to seek peer recognition of that expertise. In general terms, applications for specialist accreditation are made by lawyers after several years in practice and concentrated experience in the area of proposed accreditation. Various described as “specialized

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accreditation” or just “specialist recognition,” these programs seek to maximize lawyers’ self-esteem, referrals, and income while providing useful information to the community as to specialist ability.

This Essay suggests that specialist certification offers a model and perhaps a path for a new approach to professionalism in law that could come to resemble accepted approaches in medicine and other professions. Specialization certification in medicine, in which doctors become recognized as “board certified,” although voluntary, is now a standard part of professional development for over ninety percent of all doctors in the United States.<sup>1</sup>

When we speak of professionalism, we are not referring to a kind of requiem for a lost civility among our peers—a lament for something past—but rather a vision of the achievable: the *best* of what lawyers can offer to clients and society, a path that leads to both an apex of altruism and a renewed self-esteem. Professionalism for us is a fusion of technical expertise with demonstrated excellence in client service, public service, and ethical practice. We suggest a harnessing of what has been proven to work elsewhere—public and peer recognition of expertise through specialist accreditation, with some additional measures of achievement in service to clients and the public as well as ethical integrity. In the interests of all stakeholders in access to justice, it is our view that the traditional assessment of competence must now be joined to the new assessment of professionalism.

In the United States, suggestions to improve lawyer professionalism face an apparent paradox. Rigorous training and assessment only take place in America up to the point of bar admission, in law school, and during the short period between graduation and licensure upon passage of the bar exam. After bar admission, further professional development is entirely voluntary (unless employer imposed) except for mandatory attendance at continuing legal education (CLE) programs, which typically require nothing more than mere presence in the audience. The paradox of using preadmission education to achieve professionalism is that professionalism is generally understood to refer to a combination of knowledge, skill, and values that exceeds the bare minimum necessary for bar admission.<sup>2</sup> On the other hand, professionalism also means more than mere accumulated experience. The current repertoire of

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1. See Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?*, 51 U. MIAMI L. REV. 273, 306 (1997) (stating that in 1978, ninety-one percent of doctors surveyed ten years after graduation “were either certified or on their way to becoming so”).

2. Indeed, professionalism can be thought of as a process in which knowledge develops into wisdom, skill becomes art, and values rise to the level of virtue.

post-admission professionalism programs—passive listening to CLE lectures, discussion groups, and voluntary lawyer organizations that encourage and reward professional excellence—provide neither concrete incentives nor reliable measures for the maintenance, much less improvement, of professional knowledge, skill, or values for the post admission lawyer.

Progressive accreditation of specialist attorneys offers a way to continue some of the rigor of the preadmission process into the post admission life of lawyers. Such programs do not seek to challenge an individual's right to basic admission or practice, but do encourage advancement to an institutionally recognized higher, specialized level of practice. After a specified period of practice, lawyers can enter a process of specialist accreditation anytime they wish and, if they do not qualify the first time, can try again when they are better qualified. No rights to basic practice are under threat in this proposal, though we are hopeful that over time and by the process of osmosis—just as has been the case in medical practice—increasing numbers of lawyers will seek of their own free will to become accredited specialists. The public and the legal profession would both gain from higher standards of professionalism as, over time, more attorneys seek this recognition and become prepared to meet its professionalism requirements.

Unfortunately, current specialization assessment in the jurisdictions we describe below tends to be dominated by the measurement of competence, the scrutiny of technique, and the celebration of the intellect, above all else. We suggest that it is time to widen these criteria and adopt, for each jurisdiction, *locally representative* measures of professionalism that add at least two further indicia of true professionalism: service to clients that goes beyond mere delivery of outcomes and high ethical standards put into practice.

In both the United States and Australia, specialty certification usually includes the following “bare minimum” assurances of professional performance in practice:

- a ‘NIL’ disciplinary record in respect of proven intentional *code* offenses
- satisfactory results in continuing legal education
- a positive rating by colleagues and peers as to whether the lawyer is in “good standing.”<sup>3</sup>

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3. For United States requirements, see Kilpatrick, *supra* note 1, at 296-97. For Australian requirements, see CHRISTOPHER ROPER, NEW ZEALAND SOCIETY PROPOSAL FOR A SPECIALISATION SCHEME: REPORT ON THE FEASIBILITY STUDY § 3.4 (2002), available at <http://www.nz-lawsoc.org.nz/lawtalk/ChrisRoperReport.htm>.

We believe, though, that much more can be expected and accomplished. First, a brief comparison of specialty certification programs in the United States and Australia will be helpful.

## II. SPECIALTY CERTIFICATION FOR LAWYERS IN THE UNITED STATES

In 1921, the prestigious Carnegie Foundation for the Advancement of Teaching published the results of an eight-year study of the legal profession in which one recommendation was that the profession recognize the reality of specialization by providing differentiated law school training.<sup>4</sup> The recommendation did not find a welcome reception, and a series of American Bar Association (ABA) committees appointed to promote specialization between 1952 and 1967 fared no better.<sup>5</sup> The ABA Model Code of Professional Responsibility, adopted in 1969, prohibited a lawyer from “hold[ing] himself out publicly as a specialist” unless certified by a state-authorized entity.<sup>6</sup> In 1970, California became the first state to establish a certification program; over the next twenty years, less than one-third of the other states set up programs to permit specialist certification.<sup>7</sup>

In 1989, the Supreme Court of Illinois, which had not approved a certification program, disciplined an attorney for mentioning on his letterhead that he had obtained a Certificate in Civil Trial Advocacy from a private organization, the National Board of Trial Advocacy (NBTA).<sup>8</sup> The U.S. Supreme Court reversed that decision: “A State may not . . . completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA.”<sup>9</sup> The Court did indicate that a state can require a lawyer who advertises specialist certification to demonstrate

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4. Kilpatrick, *supra* note 1, at 275. This section on the American approach to specialization draws heavily from Professor Kilpatrick’s comprehensive article, which is based on her doctoral dissertation in law at Columbia University. *Id.* at 273 n\*. Professor Kilpatrick is also a member of the American Bar Association’s Standing Committee on Specialization.

5. *Id.* at 277-80.

6. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-105 (A)(3) (1969). A narrow exception was made for lawyers admitted to practice before the U.S. Patent and Trademark office. *See* MODEL CODE OF PROF’L RESPONSIBILITY DR 2-105 (A)(1) (1969).

7. Kilpatrick, *supra* note 1, at 282-87.

8. *See In re Peel*, 534 N.E.2d 980, 986 (Ill. 1989).

9. *Peel v. Attorney Disciplinary Comm’n of Ill.*, 496 U.S. 91, 110 (1990).

that such certification meets “standards relevant to practice in a particular area of the law.”<sup>10</sup>

The Supreme Court’s 1990 decision in *Peel* resulted in some expansion of state certification programs as well as promulgation by many states of permissive rules that allowed lawyers to advertise specialist certification if certified by “a recognized and bona fide professional entity.”<sup>11</sup> The ABA Rules of Professional Conduct (which have replaced the 1969 ABA Model Code of Professional Responsibility) are more restrictive, still prohibiting a specialization claim unless certified by an organization approved by the relevant state or by the ABA itself.<sup>12</sup> As recently reported in one state bar journal, “Certification in [l]egal [s]pecialties [h]as [b]een [s]lower to [c]atch on than [e]xpected,” noting that there are still very few private organizations that certify lawyers as specialists.<sup>13</sup> The ABA has only accredited five organizations, including the NBTA.<sup>14</sup>

### III. SPECIALTY CERTIFICATION FOR LAWYERS IN AUSTRALIA

Australia has a nine jurisdiction federal system similar to the United States.<sup>15</sup> There are six states, two self-governing territories, and one federal jurisdiction.<sup>16</sup> The eight states and territories have their own separate legal education and bar admission systems and, under the auspices of the national Standing Committee of Attorneys General (SCAG) in conjunction with the Law Council of Australia, are steadily moving towards a nationally “uniform” approach to these issues and all aspects of legal regulation as well. With the exception of the systems for lawyers’ discipline, these issues are not regarded as contentious, and legislation to achieve uniformity in all jurisdictions is expected in the next two to three years.<sup>17</sup>

Legal education is controlled by the university-based law schools. While the system is in some flux, a typical law degree leading to conditional admission is a three to five year undergraduate course with

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10. *Id.* at 109.

11. *See, e.g.*, GA. RULES OF PROF’L CONDUCT R. 7.4 (2000) (stating that a “lawyer who is . . . certified by a recognized and bona fide professional entity, may communicate such specialty . . .”).

12. MODEL RULES OF PROF’L CONDUCT R. 7.4(c) (2002).

13. Lisa L. Granite, *In No Hurry to Specialize*, THE PENN. LAWYER, May-June 2001, at 24, 24.

14. *Id.*

15. CATRIONA COOK ET AL., LAYING DOWN THE LAW 43-44 (2001).

16. *Id.*

17. Chris Merritt, *National Legal Market Closer*, THE AUSTRALIAN FIN. REV., July 26, 2002, at 13.

many entrants commencing at age seventeen to eighteen.<sup>18</sup> In the more traditional universities, law is often taken with other basic degrees in arts, science, commerce, and, more recently, engineering and information technology.<sup>19</sup> There are eleven prescribed areas of study in the basic Bachelor of Laws (“LLB”), including “Professional Conduct.”<sup>20</sup> The content of these areas is controlled by the Law Admissions Consultative Committee (“the Priestly Committee”), formerly known as the “Consultative Committee of State and Territorial Law Admitting Authorities.” The Priestly Committee reports to the national Council of Chief Justices.<sup>21</sup>

Law graduates most often seek admission by one of two processes: a one year apprenticeship inside a firm (Articles of Clerkship) which is available in some jurisdictions,<sup>22</sup> or attendance at any one of a number of practical legal training (PLT) courses, which take five to six months and are offered by a number of providers, including law schools.<sup>23</sup> PLT courses must cover twelve key areas of practice, including professional conduct.<sup>24</sup> “Articled Clerks” are not required to undergo specific training in issues associated with professionalism (apart from trust accounting), but are generally admitted unconditionally after completion of the one-year period.<sup>25</sup> Depending on the jurisdiction, PLT graduates are usually admitted conditionally for six months before being eligible for full admission.<sup>26</sup> The usual conditions require supervision of the admittee during that period and prevent the holding of trust money.<sup>27</sup>

The Articles of Clerkship system is under considerable pressure from critics who allege that the quality of supervision available to

18. PAUL REDMOND & CHRISTOPHER ROPER, LEGAL EDUCATION AND TRAINING IN HONG KONG: PRELIMINARY REVIEW, CONSULTATION PAPER § 3.1.4, at 36 (2000), available at <http://www.hklawsoc.org.hk/pub/news> (providing an overview of legal education in Australia and other selected countries for the Steering Committee on the Review of Legal Education and Training in Hong Kong).

19. *Id.*

20. *Id.* § 4.7.1, at 62-63.

21. STANDING COMMITTEE OF ATTORNEYS GENERAL, AUSTRALIA, OFFICER’S REPORT CONCERNING MODEL NATIONAL LAWS GOVERNING AUSTRALIA’S LEGAL PROFESSION 52 n.40 (2002) [hereinafter OFFICER’S REPORT].

22. *See, e.g.*, Legal Practice (Admission Rules) 1999 (Victoria), S.R. No. 144/1999, R.3.01, available at [www.dms.dpc.vic.gov.au](http://www.dms.dpc.vic.gov.au) [hereinafter Admission Rules].

23. *Id.*; *see also* REDMOND & ROPER, *supra* note 18, § 3.1.4, at 36-37 (detailing the training process in Australia).

24. Admission Rules, *supra* note 22 at R. 3.02.

25. *Id.* at R. 3.01(1)(a)(i).

26. *Id.* at R. 4.12(2).

27. *Id.*

“clerks” is too variable to ensure uniformly competent outcomes.<sup>28</sup> Despite these criticisms, the Articles system is likely to continue as a route to admission, in tandem with PLT courses, in the interests of a consensus between the states and territories.<sup>29</sup>

In 1989, the state of Victoria, where Australia’s second largest city, Melbourne, is located, introduced Australia’s first program for accrediting experienced lawyers as subject-matter specialists.<sup>30</sup> Victoria has since been followed by New South Wales<sup>31</sup> (where Sydney is located), Western Australia,<sup>32</sup> and Queensland.<sup>33</sup> All of these jurisdictions have modeled their programs on Victoria’s approach, although with some modifications.<sup>34</sup> Victoria now offers certification in twelve areas of legal practice. There are over 800 accredited specialists in Victoria,<sup>35</sup> drawn from a total of nearly 12,000 lawyers.<sup>36</sup> The four Australian state specialization schemes are seeking to develop in a coordinated manner and to encourage similar processes in other jurisdictions.<sup>37</sup>

Victoria’s requirements for all specialization accreditation include the following: (1) the equivalent of five years, full-time practice as a lawyer; (2) “substantial involvement” (defined as at least twenty-five percent of total workload) in the chosen specialty for at least the immediately preceding three years; (3) a passing score on a written

28. James Bremen, *Articles of clerkship-the end of an era?*, PROCTOR ON-LINE, Apr. 2000, at 18-19, at [www.themis.com.au/Themis/BaseSrv/Proctor.nsf](http://www.themis.com.au/Themis/BaseSrv/Proctor.nsf); see also REDMOND & ROPER, *supra* note 18, § 3.1.4, at 37 (describing the Articles of Clerkship system and the moves toward adoption of a common standard).

29. REDMOND & ROPER, *supra* note 18, § 5.3.8, at 56.

30. See Law Inst. of Victoria, *Member Services - Professional Development*, at <http://www.liv.asn.au/services/services-Professi.html> (providing information on specialist accreditation) [hereinafter Law Inst. of Victoria website]. Many of the relevant pages from this site are also available on the web site of the Effective Lawyer Client Communication Project. See GA. ST. UNIV. COLL. OF LAW, EFFECTIVE LAWYER CLIENT COMMUNICATION: AN INTERNATIONAL PROJECT TO MOVE FROM RESEARCH TO REFORM, at <http://law.gsu.edu/Communication/> [hereinafter ELCC website].

31. ROPER, *supra* note 3, § 3.4.

32. *Id.*

33. *Id.*

34. See, e.g., Law Soc’y of New South Wales, *Accredited Specialists*, at <http://www.lawsociety.com.au/page.asp?PartID=670> (providing information on thirteen areas of specialization) [hereinafter Law Soc’y of New South Wales website]. Many of the relevant pages from this site are also available on the ELCC website, *supra* note 30.

35. ROPER, *supra* note 3, § 3.4.

36. Legal Practice Board (Victoria), *2001-2002 Annual Report*, at 21 fig.4, available at [www.lpb.vic.gov.au/lpbreport2002.pdf](http://www.lpb.vic.gov.au/lpbreport2002.pdf).

37. There is no current specialization scheme in New Zealand, but the New Zealand Law Society has commissioned a feasibility report from the College of Law Alliance in Sydney. See ROPER, *supra* note 3.



examination; and (4) three positive references from persons who have known the applicant for at least three years, at least one of whom must be a legal practitioner with at least five years of practice experience and significant involvement in the specialty.<sup>38</sup>

These requirements are generally similar to those found in U.S. specialization programs with one significant difference: most U.S. programs define “substantial involvement” very specifically by requiring a minimum number of completed activities such as twenty-five trials for the criminal law certification in Florida, of which fifteen must be felony jury trials.<sup>39</sup> The Australian programs have no such specific requirements and for most accreditations, the applicant need merely provide a statement of the percentage of time spent in the specialized area for each of the prior three years.<sup>40</sup>

The high “substantial involvement” requirements of American programs would seem to make it very difficult for a lawyer to use certification to *develop* a specialization. For example, since most criminal cases are resolved by plea bargain in the United States—just as most civil cases are settled—jury trials are relatively rare events unless one is either a senior lawyer in a large practice setting (like an urban public defender or prosecutor’s office), where cases likely to be tried are reserved or routed to you, or one is such a well-known trial lawyer that other firms provide a steady supply of trials by referral. The young lawyer trying to develop her own practice or work her way up inside her organization is blocked by such practice requirements from developing the very credentials that should *precede* such extensive trial practice. Thus, U.S. certification programs are built on a dangerous paradox. The American system can only function if a large number of clients are represented by uncertified lawyers who are on the long road to certification and are therefore engaged in precisely the kind of specialized work that clients should demand be done only

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38. Law Institute of Victoria Specialisation Scheme Rules R. 4.4, 4.5, 4.8 (2002), available at Law Inst. of Victoria website, *supra* note 30, and ELCC website, *supra* note 30.

39. Kilpatrick, *supra* note 1, at 326 chart 1; see also RULES REGULATING THE FLORIDA BAR § 6-8.3(2) (requiring a minimum of 25 cases). Other states require a greater variety of completed activities. For example, criminal certification in California requires ten jury trials, forty criminal or juvenile “matters,” and any two of the following three options: five post-conviction hearings, three appeals, or ten additional jury trials. Kilpatrick, *supra* note 1, at 326-27 chart 1. For bankruptcy certification, California requires completion of thirty activities, at least twenty-five of which must take place in bankruptcy court in no fewer than fifteen different cases. *Id.* at 351-55 chart 2. Kilpatrick’s information is current as of 1997.

40. ROPER, *supra* note 3, § 3.4.

by certified specialists.<sup>41</sup> This paradox arises out of the origin of American specialty certification as an issue of truth-in-advertising rather than as a method of professional development.

In contrast, while the Australian programs also focus on certifying rather than developing competency, they clearly contemplate that applicants will build specialized competency, not just through on-the-job experience, but also by preparing for the certification process itself. For example, both the Victoria and New South Wales web sites offer ways for applicants to join study groups, which seem to be widely used.<sup>42</sup> The Australian specialist preparation period is likely to be different from any individualized study by an American would-be specialist because of another even more important difference between the two countries. All the Australian certification programs require one or more skill demonstrations in addition to a written examination about substantive law. This combination of assessment methods is intended to be, and is, quite rigorous, as evidenced by a 1994 law review article that reported practitioner complaints about the high failure rate.<sup>43</sup> For example, in New South Wales, the criminal and children's law specialties applicants must conduct a simulated court hearing,<sup>44</sup> and would-be personal injury specialists must undergo a "peer interview"

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41. The problem of the "guinea pig" clients would be less worrisome if American certification programs, like medical boards, were built on a well-established system of mentoring so that the completed jury trials represented an ever-increasing amount of responsibility under the guiding hand of an experienced lead attorney. However, legal publications are full of articles decrying the demise of mentoring in the U.S. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 67-74 (1992) (discussing a middle-ground between education and practice); Sally Evans Winkler et al., *Learning to be a Lawyer: Transition into Practice Pilot Project*, 6 GA. BAR J., Feb. 2001, at 8, 9 (addressing the need to revive mentoring). For example, for most would-be criminal specialists, the only way to get twenty-five criminal trials in the first five years of practice is to go to work for a drastically under-resourced public defender or prosecutor's office where learning consists largely of unsupervised on-the-job training of the "sink or swim" variety. There might be better mentoring and supervision in some private firms, but there is usually not enough real case responsibility; associates rarely get much criminal or civil trial experience, particularly not jury trial experience.

42. See *What's New? Specialisation News & Events: Study Groups*, Law Inst. of Victoria website, *supra* note 30; ELCC website, *supra* note 30. However, the Australian approach to specialist certification for lawyers, in contrast to medical specialization, is still more oriented toward *recognizing* existing specialization than in *creating* specialized expertise. ROPER, *supra* note 3, § 2.3.

43. Inge Lauw, *Specialisation, Accreditation and the Legal Profession in Australia and Canada*, MURDOCH UNIV. ELEC. J.L., May 1994, at n.90, at <http://www.murdoch.edu.au/elaw/issues/v1n2/lauw12.html>.

44. See Criminal Law Accreditation Assessment Guidelines, pt. C and *Children's Law Accreditation Assessment Guidelines*, pt. C, at Law Soc'y of New South Wales website, *supra* note 34, and ELCC website, *supra* note 30.

by two examiners during which applicants are questioned as to how they would deal with a variety of professional situations.<sup>45</sup> However, for our purposes, the most important method of assessment is the simulated client interview, which is required for a number of specialties.<sup>46</sup> For example, under the Family Law Accreditation, where uniform standards have been developed for all four certifying jurisdictions in Australia,<sup>47</sup> each applicant must conduct a simulated first-client interview; the exercise takes about sixty minutes and is videotaped. The videotape is assessed by examiners for competence in learning facts, taking the client's instructions, giving advice, discussing options, and developing an initial plan.<sup>48</sup>

The Australian requirement of a simulated interview assessment is a very useful first step toward a developmental approach to specialist accreditation – one that will allow lawyers to improve progressively in demonstrated skills, ethics, and client and public service until they attain a more comprehensive specialist status than is now possible in either the United States or Australia.

#### IV. EXCELLENCE IN SERVICE TO CLIENTS

The simulated client interview requirement, not found in any certification program in the United States, may have its origin in an important study conducted early in Australia's development of specialist accreditation programs.

In 1995, the Law Society of New South Wales commissioned an evaluation of the Specialist Accreditation Program (then three years old in that jurisdiction) to be conducted jointly by the Centre for Legal Education and Livingston Armytage, a distinguished lawyer who had become a consultant in law practice management and development.<sup>49</sup> One component of the evaluation was a survey of specialists' clients.

45. See *Personal Injury Law Accreditation Assessment Guidelines*, pt. D, at Law Soc'y of New South Wales website, *supra* note 34, and ELCC website, *supra* note 30.

46. ROPER, *supra* note 3, § 3.4.

47. Family Law was the first specialty to be certified in Australia (in Victoria in 1989). It has the largest number of certified specialists in Victoria (223) and the second largest number in New South Wales (283). ROPER, *supra* note 3, § 3.4.

48. The family law applicant must also prepare a mock file, including client correspondence and court documents, based on a set of documents prepared by the examiners. This is a "take home" project to be completed over a period of two weeks. See *Family Law Accreditation Assessment Guidelines* 31, at Law Soc'y of New South Wales website, *supra* note 34, and ELCC website, *supra* note 30.

49. Livingston Armytage, *Client Satisfaction with Specialists' Services: Lessons for Legal Educators*, in 1 *SKILLS DEVELOPMENT FOR TOMORROW'S LAWYERS: NEEDS AND STRATEGIES* 355, 356, 357, 366 n.1 (1996) [hereinafter Armytage I].

At that time there were 763 specialists in New South Wales who had been accredited in the areas of business, criminal, family, personal injury, and property law.<sup>50</sup> The evaluators wrote to all these specialists asking each to identify four clients: two preaccreditation and two who had retained the lawyer after accreditation. This process yielded 424 clients. The evaluators then conducted discussions with two focus groups drawn from this list. A nine question survey developed with input from these focus groups was then mailed to all 424 clients, of whom 55.2% responded.<sup>51</sup> The survey form included a free response section that asked clients to describe in a few lines “what I liked” and “what I disliked” about “how the job was done.”

Although the results of this process indicated widespread client satisfaction with the specialists’ legal knowledge and skills, the evaluators also found “consistent evidence of client dissatisfaction with the provision of services, and the quality of the service-delivery process.”<sup>52</sup> Their findings “illustrate[d] that practitioners and their clients are selecting divergent indicators of performance with which to assess satisfaction with service.”<sup>53</sup>

Practitioners are concentrating on developing their knowledge and skills to deliver better outcomes; but their clients, expecting both technical competence and results, are being disappointed by the process of getting there. Clients complained about the quality of their lawyers’ services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect . . . .<sup>54</sup>

The evaluators concluded that

consideration should be given by the profession to introducing additional training to redress identified performance deficits in the related areas of *inter-personal skills* and *client management techniques*.

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50. *Id.* at 367 n.2; THE CENTRE FOR LEGAL EDUCATION & LIVINGSTON ARMYTAGE, A REVIEW OF ASPECTS OF THE SPECIALIST ACCREDITATION PROGRAM OF THE LAW SOCIETY OF NEW SOUTH WALES 7 (1996) [hereinafter ARMYTAGE II].

51. ARMYTAGE II, *supra* note 50, at 7.

52. ARMYTAGE I, *supra* note 49, at 357.

53. *Id.* at 365.

54. *Id.* An interesting indication of the relative unimportance of outcome to client satisfaction is the fact that in the “what I liked” section of the survey there was “little mention of outcomes” and that only one client referred to outcome in the “what I disliked” section. ARMYTAGE II, *supra* note 50, at 118, 122.

This training should be client focused, rather than transaction focused; it should train practitioners to recognise that client needs are not confined to attaining objective outcomes; and it should help lawyers to listen to clients more attentively, diagnose their various levels of needs and demonstrate empathy.<sup>55</sup>

Given the findings of this thoughtful study, it is disappointing that none of the Australian programs require any kind of assessment of client service which utilizes input from clients. The need for client participation in the assessment of professional excellence is particularly important if, as Armytage and his colleagues found, lawyers are likely to have different or at least more narrow criteria for excellent service than the very people they exist to serve.

Recent research by Professor Avrom Sherr in England indicates that mere experience in practice is no guarantee of professional development in client service.<sup>56</sup> In his study, 143 first interviews with new clients were videotaped and analyzed. Almost 24% of the lawyers were law graduates in training ("articled clerks") and 75.5% were experienced lawyers.<sup>57</sup> Over 70% of the experienced lawyers had been in practice at least six years and 23.3% had more than eleven years of experience.<sup>58</sup> Sherr's overall finding was that practice experience did not result in a significant improvement in interviewing ability. When the videotapes were evaluated by expert assessors, a high percentage of all interviews scored "fairly bad" or worse on all items.<sup>59</sup> In particular, 51% of all lawyers did not get "the client's agreement to the advice or plan of action offered," 76.6% failed to get "the client's agreement to the lawyer's understanding of the facts," and 85.4% "did not inquire whether there was anything else the client wished to discuss before ending the interview."<sup>60</sup>

Although experienced lawyers used less legalese and were better at clarifying gaps, for all other items assessed "there were no significant differences" between the new and experienced lawyer

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55. Armytage I, *supra* note 49, at 366. When quoting from Australian and English materials, we have retained the original spelling (e.g. "recognise" instead of "recognize.")

56. Avrom Sherr, *The Value of Experience in Legal Competence*, 7 INT'L J. LEG. PROF. 95, 112 (2000).

57. *Id.* at 118-19.

58. *Id.*

59. *Id.* at 104.

60. *Id.* at 105.

groups.<sup>61</sup> Both clients and lawyers were asked to evaluate the interviews immediately after completion. The experienced lawyers “rated their own interview performance significantly higher” than did the new lawyers, but clients did “not differentiate between the groups.”<sup>62</sup>

An Australian initiative that bears some resemblance to specialty certification acknowledges the importance of client input concerning service quality. In 2001, the Best Practice Board of the New South Wales Law Society merged with Quality in Law Incorporated to form a national Australian organization named simply QL Inc., which has the goal of encouraging and recognizing “sustainable best practices” in law firm management.<sup>63</sup> Unlike the Specialist Accreditation Program, QL certification recognizes increasing levels of professional excellence from Level I to Level IV, and its criteria specifically mentions “monitoring client satisfaction.”<sup>64</sup> However, QL certification does not indicate that any particular level of client satisfaction has been achieved by a firm, only that a system of monitoring client satisfaction is used.<sup>65</sup>

## V. ETHICAL EXCELLENCE

Although many, including Deborah Rhode, continue to repeat that integrity and accountability are key ingredients of professionalism,<sup>66</sup> legal specialists are not, so far as we are aware, specifically encouraged to develop nor assessed for this quality in any country. There should be a test to assess honesty and integrity as qualities at

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61. *Id.* at 109.

62. Sherr, *supra* note 56, at 107.

63. The College of Law & The Law Society of New South Wales, Best Practice Gateway 3, available at [www.collaw.edu.au/cd/cbp/QLBP%20Framework%202002.pdf](http://www.collaw.edu.au/cd/cbp/QLBP%20Framework%202002.pdf) (last visited Feb. 7, 2003). Training programs to assist firms in meeting QL standards are administered by the College of Law in Sydney. *Id.* at 4.

64. *Id.* at 7.

65. *Id.* at 10. Indeed, a firm could theoretically receive QL certification without using a client satisfaction monitoring system. A firm is eligible for Level II certification if it scores at least 350 points on a scale where 500 is a perfect score; having a client satisfaction monitoring system only adds a potential maximum of 10 points towards the total score. *Id.* In contrast, internal firm personnel procedures are worth much more (up to 50 points). *Id.* at 11. LawCover, a wholly owned, non-profit subsidiary of the Law Society of New South Wales, which provides malpractice insurance, offers a risk management course that includes one module on client communication: *Listening, Asking & Explaining*. See LawCover, *Four Principals' Modules*, <http://www.lawcover.com.au/risk.asp?indexid=14> (last visited Jan. 31, 2003). This unit was developed in response to research commissioned by LawCover. See RONWYN NORTH & PETER NORTH, *MANAGING CLIENT EXPECTATIONS AND PROFESSIONAL RISK* (1994).

66. Deborah L. Rhode, *Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers*, 54 S.C. L. REV. 889 (2003).

least as important as career advancement. Professor Adrian Evans is currently developing one empirical method for the measurement of final-year law students' values which will soon be tested on practitioners as one component of a still-to-be-developed composite measure of ethical values. The first stage of this study has already disclosed both considerable variation in ethical priorities and in motivating values.

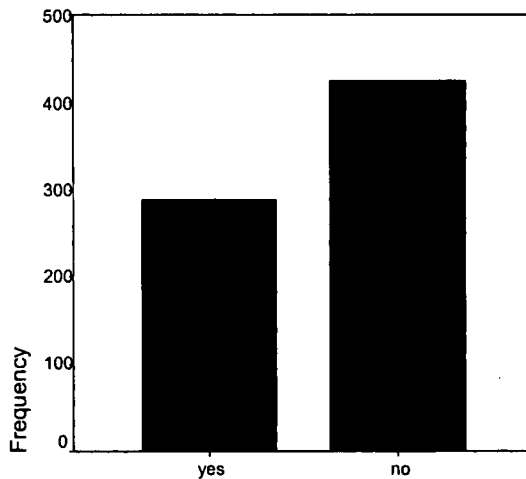
In a 2001 survey of 700 law students,<sup>67</sup> respondents were asked to react to a series of challenging moral hypotheticals encountered in legal practice by determining their actual course of action and rating several potential motivating factors (values) for their impact upon their decision. These scenarios were designed to frustrate a standard rule-based response because that tendency is too well established, at least in Australia. Further, acute personal elements were inserted into the text in order to encourage personal rather than so-called "professional"(role) reactions. We have included several scenarios and their results below to illustrate our concern that the efforts to assess lawyers' values is overdue as a part of the testing process for specialists.

**Question:** You are a Partner in the firm of AMBD. Your nephew (the son of your elder sister) is an associate in the firm. You discover your nephew has a minor gambling problem and has taken money from the firm's trust account to cover his debts. Fortunately, you discover the problem in its very early stages. Your nephew is now undergoing counseling for his gambling addiction and appears to be recovering. The amount missing from the trust account is relatively small, and you are certain could be reimbursed without attracting any attention.

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67. Results of the 2001 Survey by Adrian Evans, Stephen Parker, and Josephine Palermo were presented to the International Institute of Public Ethics (IIPE) Conference in Brisbane, Australia on October 4-7, 2002. ADRIAN EVANS & JOSEPHINE PALERMO, LAWYERS' PERCEPTIONS OF THEIR VALUES: AN EMPIRICAL ASSESSMENT OF AUSTRALIAN FINAL-YEAR UNDERGRADUATE LAW STUDENTS—SOME INTERIM RESULTS-2001, *available at* [www.iipe-online.org/conference2002/papers/Evans.pdf](http://www.iipe-online.org/conference2002/papers/Evans.pdf) (last visited Feb. 4, 2003).

**Would you report the matter to the local law society?<sup>68</sup>**  
**report nephew**



As the above chart indicates, “a sizeable majority of respondents were prepared to remain silent when aware of a trust account deficiency which involved a blood relative (59.2%).”<sup>69</sup>

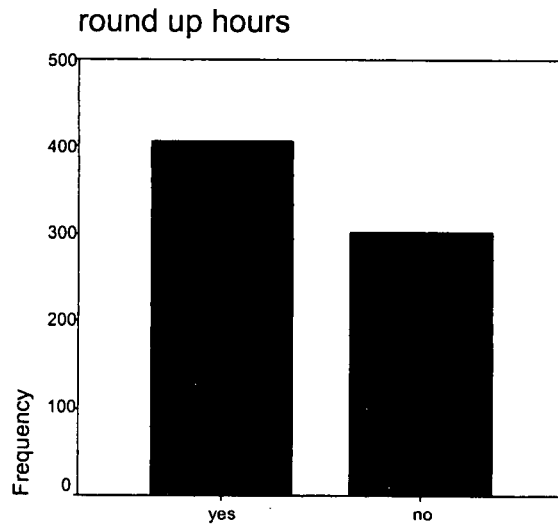
**Question:** While on a summer clerkship with a large and well-respected commercial firm, you are (naturally) concerned to make a good impression. It is your second last year of law school and you are desperate for Articles. The partner supervising you decides to give you some of her files to get ready for ‘costing.’ She asks you to total the number of hours which she has spent on each file and, from her harried expression, it is pretty clear that she is concerned to charge out a significant amount on each file. She asks you to ‘round up’ her hours to the next hundred in each file, saying that, on average, clients are happy because the main thing they demand is quality work. You know that these clients are entirely satisfied with the firm and that your supervisor is not about to debate the issue with you.

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68. *Id.* at 7.

69. *Id.*



**Would you round up the hours as requested?<sup>70</sup>**

“A considerable majority of law students were prepared to round-up *hours* (not dollars) on a file, to the next 100 hours, for the purposes of billing a client (56.6%).”<sup>71</sup>

A third hypothetical concerned the *pro bono* duty that should be an essential feature of professionalism.<sup>72</sup>

**Question:** You are a new solicitor working in a large commercial law firm. A voluntary public-interest organisation approaches you to work on a prominent test case about women who kill in self-defence. Your interest in this area is well known. The work would be *pro bono* and very high profile for you personally but of little interest to your firm. The matter requires a lot of time and work. Your senior partner however wants you to increase your billable hours for the firm. The firm does not usually do any *pro bono* work but there is no actual policy

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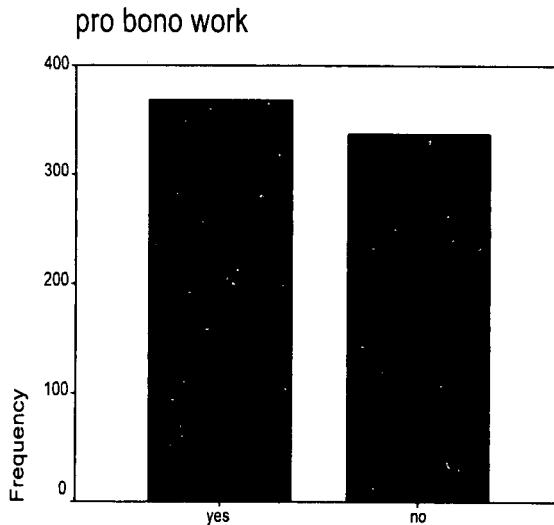
70. *Id.* at 10.

71. *Id.*

72. See MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (2001) (“Every lawyer . . . has a [professional] responsibility to provide legal services to those unable to pay . . .”).

against it. Your time is currently so limited you could only realistically do one or the other.

**Would you agree to work on the public interest case?**<sup>73</sup>



“Only a small majority of respondents (all still in law school at the time of the survey) considered that they would commit to a public interest *pro bono* matter (50.8%).”<sup>74</sup>

This troubling lack of commitment is not limited to graduating law students. The importance of *pro bono* work to professionalism would be underscored and supported if specialist certification programs required evidence of meaningful and consistent *pro bono* work on the part of applicants as a condition of certification.

Law students’ and, we suggest, lawyers’ values are not uniform and might be, in reality, no better or worse than those of the general population. If this is true, then what is professionalism? Perhaps it is the decision to *behave* appropriately, given the right incentives, despite the inclinations we all have to do otherwise. Whether as a measure of values, or inclination to behave in accordance with those values, responses to this sort of hypothetical could play a role in a *comprehensive* approach to specialist accreditation. As discussed in the next section, empirical research by medical educators indicates that it is possible to use a combination of responses to written questions

73. EVANS & PALERMO, *supra* note 67, at 6.

74. *Id.*

and observed behaviour to assess excellence in service and ethical practice.

## VI. LESSONS FROM THE MEDICAL PROFESSION

### A. *Assessing the Quality of Service*

The apparent unimportance of measuring client satisfaction in the legal profession makes a striking contrast to the medical profession. According to a 1995 survey, virtually all hospitals in the United States have some kind of patient satisfaction measurement system in place.<sup>75</sup> In 1994, the United States Joint Commission on Accreditation of Healthcare Organizations included in its standards a requirement to ensure that an organization “gathers, assesses, and takes appropriate action on information that relates to the patient’s satisfaction with the services provided.”<sup>76</sup> A substantial private industry has developed to conduct patient satisfaction surveys for health care providers; some firms have more than 5000 health care providers as clients.<sup>77</sup> It is increasingly common for doctors to be evaluated by their supervisors based on the results of patient satisfaction surveys.<sup>78</sup>

Doctor-patient communication is treated as an important subject for both pedagogy and empirical research in medical education. One recent review of the literature on doctor-patient communication cited 112 publications.<sup>79</sup> Starting in 2004, a test of communication skills using lay persons, called “standardized patients,” trained to simulate

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75. See WILLIAM J. KROWINSKI & STEVEN R. STEIBER, *MEASURING AND MANAGING PATIENT SATISFACTION* 25 (2d ed. 1996).

76. *Id.* at 23.

77. See Neil Chesnow, *Hire a Pro to Survey Your Patients*, *MED. ECON.*, Oct. 13, 1997, at 141, 148, 150; see, e.g., Press Ganey Associates, Inc., *About Press Ganey*, available at <http://www.pressganey.com/> (last visited Jan. 31, 2003). Press Ganey Associates is one of the leaders in this emerging industry.

78. See JEANNE MCGEE ET AL., *COLLECTING INFORMATION FROM HEALTH CARE CONSUMERS: A RESOURCE MANUAL OF TESTED QUESTIONNAIRES AND PRACTICAL ADVICE* 11:29-11:45 (1997) (describing the Park Nicollet Clinic in Minneapolis, which measures patient satisfaction on an annual basis for all of its first-year physicians). Individual physicians receive the survey results in a report that compares them with other physicians in the same department. The clinic’s medical director and each department chair also receive the report which they review with each new first-year physician as part of a comprehensive assessment process. *Id.*

79. See L.M.L. Ong et al., *Doctor-Patient Communication: A Review of the Literature*, 40 *SOC. SCI. & MED.* 903 (1995).

realistic clinical presentations, will be a licensing requirement for all new doctors in the United States.<sup>80</sup>

### *B. Predicting Professional Behavior*

Insufficient research has been done to accurately predict actual behavior of lawyers from perceived values, but based on observations in other professions, it is highly probable that the two are connected in some way. As Dr. David Stern described elsewhere in this issue, a system for assessing professionalism is required of all accredited medical residency programs in the United States<sup>81</sup> The United States Medical Licensing Examination, used nationwide as the standard licensure examination, tests ethics by multiple choice questions,<sup>82</sup> and a growing number of specialty boards are including ethics questions in their examinations.<sup>83</sup> Like the questions posed in the Australian research described above, the multiple choice ethics questions used in medical examinations often force a choice between competing values rather than just testing knowledge of a rule.<sup>84</sup> A recurrent issue seems to be the duty to report unprofessional behaviors of others, an ethical obligation which is rarely tested in bar examinations and even more rarely honored by lawyers.<sup>85</sup>

The medical profession is undertaking serious empirical research to test the reliability of such multiple choice questions as predictors of

80. *Clinical Skills Assessment in the USMLE [U.S. Medical Licensing Examination]*, NBME EXAMINER, Fall/Winter 2002, at 1-3 available at <http://www.nbme.org/examiner/FallWinter2002/news.htm>. The assessment is also available on the ELCC website, *supra* note 30, at Specialization/Medicine.

81. David Stern, Remarks at the Professionalism Conference in Charleston, South Carolina (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 945 (2003).

82. Susan Case, Remarks at the Professionalism Conference in Charleston, South Carolina (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 939 (2003). Reflecting the progressive nature of professionalism, the exam is given in three parts: (1) after the second year of medical school; (2) during the final, fourth year of medical school; and (3) during the post-graduate residency. *Id.*

83. *Id.*

84. Stern, *supra* note 81, at 946-47 (discussing the importance of testing how people will resolve conflicting values); see also Case, *supra* note 82, at 943-45 (presenting sample questions).

85. The Georgia Rules of Professional Conduct have an unusual feature of specifying at the end of each rule the maximum potential punishment for violation of each rule. At the end of the Georgia Rule on "Reporting Professional Misconduct," this sentence appears: "There is no disciplinary penalty for a violation of this Rule." GA. RULES OF PROF'L CONDUCT R. 8.3 (2000), available at <http://www2.state.ga.us/courts/bar/stbarru991.htm>. The Georgia rules probably make explicit the actual practice throughout the United States that lawyers are rarely, if ever, disciplined for failure to report the misconduct of other lawyers.

unethical behavior.<sup>86</sup> Evidence already exists for the reliability of two other assessment methods. One part of the standardized patient test<sup>87</sup> has been shown to have predictive value as to ethical behavior. Standardized patients typically fill out a standard patient satisfaction form as if they had been a real patient for the testing encounter. The examining physician also fills out an assessment form which mirrors the patient's form, in effect asking the examiner to predict how the patient will evaluate the experience.<sup>88</sup> Dr. Stern discovered that medical students who gave themselves higher assessments than did their standardized patients were more likely to appear before an academic review board for professional behavior problems.<sup>89</sup> Thus, even though the standardized patient test was primarily designed to test communicative and diagnostic skills, it also has the potential to identify attitudes and values that may undermine professionalism. For law, this is a particularly relevant finding because simulated client exercises are already well developed in clinical education<sup>90</sup> and, at least in Australia, have already been applied to specialty certification.<sup>91</sup> The addition of the parallel client and interviewer assessment forms would be a simple improvement.<sup>92</sup>

A second assessment method shown to be a reliable measure of professional behavior is based on extensive faculty supervision of actual clinical practice, during and after medical school. (Unfortunately, in the legal profession such close supervision is found only in preadmission legal education and even there, for most law

86. Case, *supra* note 82, at 939; Stern, *supra* note 81, at 946.

87. See *supra* note 75 and accompanying text.

88. Stern, *supra* note 81, at 947.

89. *Id.* at 953. Stern reports that almost no other factor in his wide-ranging data set was able to predict unprofessional behavior. *Id.* The relationship observed by Stern between over-assessing one's own performance in comparison to the patient's assessment and unprofessional conduct by doctors makes Avrom Sherr's findings about English lawyers even more troubling, since in his study it was the experienced lawyers who were more likely to over-assess the quality of their client interviewing. Sherr, *supra* note 56, at 107.

90. See Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*, 51 J. LEGAL EDUC. 212 (2001).

91. See *supra* notes 47-48 and accompanying text.

92. The Effective Lawyer-Client Communication Project is in the process of developing model survey forms to be filled out by clients and lawyers at the initial interview that are based, in part, on the procedures developed by the medical profession. See ELCC website, *supra* note 30. Professor Cunningham is the director of this project and Professor Evans is a member of the ELCC Advisory Board. The model survey forms are currently being tested in legal services clinics operated by Georgia State University, where Cunningham teaches, and at Monash University, where Evans teaches.

schools, only as an elective for limited credit and short duration.) Specialty board certification necessarily includes such assessment because built into medical residency programs is faculty observation of actual practice.<sup>93</sup> Dr. Stern offers the University of Michigan as an example. Faculty at this institution not only complete summative, longitudinal assessments, but also are encouraged to fill out brief "critical incident reports" on the same day that either exemplary or questionable performance is observed.<sup>94</sup> These reports are particularly valuable because they have the potential of aggregating observations from a number of different faculty members. Dr. Stern reports that his research has shown that when at least eight different supervisors provide evaluations, assessment of professionalism becomes very reliable.<sup>95</sup>

The example of medicine strongly suggests that some kind of supervised practice component, not only as a component of prelicense education but also post-license certification, would be an invaluable way of preventing unprofessional behavior and promoting professional excellence. Perhaps a specialization applicant could substitute such a supervised practice component for some of the mandatory specialization activities required by U.S. programs or to shorten the number of years in specialized practice.<sup>96</sup>

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93. *Id.*

94. Stern, *supra* note 81, at 950. These reports are "little cards . . . the flip side is a concern [or] commendation . . . . Faculty can hand as many in as they'd like." *Id.*

95. *Id.* at 950.

96. In June 2002, a joint report prepared by the committees on Legal Education and Admission to the Bar of the New York State Bar Association and the Association of the Bar of the City of New York was issued recommending a pilot project of up to two years to assess the effects of substituting public service work for the bar exam. Participants in the proposed project would perform supervised work in the court system and then be admitted without taking the bar exam if they passed the Multi State Professional Responsibility Examination, a written performance test designed to assess their ability to apply the law in the context of a lawyer's problem and an evaluation of various skills demonstrated during the course of their service. See N.Y. State Bar Assoc., *Summary of the Report on the Public Service Alternative Bar Examination*, available at [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/NYSBA\\_Reports/List-of-reports.htm](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/List-of-reports.htm) (last visited Jan. 30, 2003). A similar proposal for Arizona is being developed by the Community Legal Access Society. This proposal is on file with authors. Both the New York and Arizona reports are also available on the ELCC website, *supra* note 30, at Specialization/BarExam Alternatives. See also Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002) (discussing possible changes to the bar exam); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002) (questioning the sufficiency of the bar exam as the principal test of admission to the legal profession).

## VII. CONCLUSION

In this Essay we have tried to illustrate ways that the term “specialist” could come to signify a more profound kind of professional development than is now formally recognized in either the American or Australian legal profession. The medical profession has shown how a voluntary but rigorous process of post-admission professional development can, over time, produce truly significant specialist proficiency. And such proficiency need not be narrowly defined as technical knowledge and skill. Especially if cross-national and cross-disciplinary approaches are used, ample expertise can be marshaled to design appropriate tests of true professionalism that go beyond the traditional but narrow issues of substantive competence.

One potential benefit of the current approach to specialization by the legal profession in the United States is flexibility. Unlike Australia, where a single state entity controls the criteria and procedures for certification, some American states allow certification by any “recognized and bona fide professional entity.”<sup>97</sup> Thus, a state could recognize an organization with a particular interest in or commitment to promoting excellence in client service or ethical practice as qualified to offer an enhanced form of specialization certification without imposing its more demanding criteria and assessment procedures on all specialist applicants in the jurisdiction.<sup>98</sup>

Our reputation as a profession is rarely at risk from challenges to our technical competence, but our doubtful commitment to access to justice and our perceived lack of integrity are very much in the public eye. Other ratings of our professionalism are now required from clients, from the community for our pro bono commitment, and from our peers for our integrity.

We think that professionalism will be advanced immeasurably if bar associations have the political will to use modified specialty certification processes—schemes that do not disbar lawyers but, as in Australia, do reward excellence already achieved—in order to provide the right balance of protection for the community and adequate

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97. GA. RULES OF PROF'L CONDUCT, *supra* note 11, at R.7.4.

98. Law schools, especially those with strong clinical education programs, could offer enhanced specialist certification. Another possible entity would be the American Inns of Court, whose mission is “to foster excellence in professionalism, ethics, civility, and legal skills,” primarily through collegial discussions and mentoring of law students and new lawyers by experienced lawyers and judges. *See* <http://www.innsofcourt.org/contentviewer.asp?breadcrumb=6,9>. However, the American Inns of Court do not currently offer a certification program or registry of qualified lawyers. *See* <http://www.innsofcourt.org/contentviewer.asp?breadcrumb=6,9,343>.

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personal incentives for lawyers. Such initiatives are in the interests of reputable lawyering, now and well into the future.



