

# EVALUATING "COMPETENCY" CRITERIA: TOWARD A UNIFORM STANDARD OF LAWYER PERFORMANCE

## I. INTRODUCTION

Recently, several prominent judges have complained that too many lawyers are "incompetent."<sup>1</sup> Their complaints have prompted numerous studies<sup>2</sup> and polls<sup>3</sup> to determine the nature and extent of lawyer

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1. See, e.g., Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) (many lawyers are "walking violations of the Sixth Amendment"); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 237 (1973) (performance generally has not been adequate); Burger, *Remarks on Trial Advocacy: A Proposition*, 7 WASHBURN L.J. 15, 16 (1967) (75-90% of cases tried are not properly presented); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 176 (1974) (the percent of cases suffering from "inadequate advocacy . . . is not insubstantial"; inadequacy stems from "lack of experience, lack of competence and lack of integrity"); Wolkin, *On Improving the Quality of Lawyering*, 50 ST. JOHN'S L. REV. 523, 524 n.6 (1976) (quoting Chief Justice Warren E. Burger as saying that many young lawyers are "using the courts as a bush league training camp"). But see Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 617 (1977) ("the charge of widespread incompetence is widely disputed").

2. Professors Marks and Cathcart published one of the first studies in 1974. Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193. The authors interviewed "bar executives, bar counsel and disciplinary personnel in 17 jurisdictions," to determine how effectively bar agencies deal with complaints of incompetence. *Id.* at 196.

Chief Judge Irving R. Kaufman, on behalf of the Judicial Council of the Second Circuit, instigated the next major study. Judge Kaufman appointed Robert L. Clare chairman of the Advisory Committee that conducted the research. Its findings are reported in *Qualifications for Practice Before the United States Courts in the Second Circuit, Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159 (1975) [hereinafter cited as *Clare Committee Report*]. The Advisory Committee interviewed 40 judges in the Second Circuit and held hearings in New York, Vermont and Connecticut. Clare, *Incompetency and the Responsibility of Courts and Law Schools*, 50 ST. JOHN'S L. REV. 463, 467 (1976).

The Advocacy Committee of the General Practice section of the American Bar Association sponsored another study. Its results are published in Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 A.B. FOUNDATION RESEARCH J. 105. Its researchers sent questionnaires about the quality of advocacy to all 5032 state judges and 483 federal judges sitting in trial courts of general jurisdiction. *Id.* at 109. The 1422 judges who completed the questionnaire represented every state and the District of Columbia. *Id.* at 111.

The Federal Judicial Center published the next major report. A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1978). Chief Justice Burger's creation of the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts in 1976 prompted the report. The committee, known by the name of its chairman, Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota, designed a research program that the Federal Judicial Center then administered. The *Quality of Advocacy* is the Federal Judicial Center's report of its findings to the Devitt

"incompetency." Nevertheless, the legal profession has not yet agreed upon uniform standards for judging lawyer competence.<sup>4</sup> Existing ABA standards,<sup>5</sup> proposed reforms,<sup>6</sup> and common-law decisions<sup>7</sup> each set forth different criteria for judging lawyer "competence." Moreover, no existing "competence" standard is truly effective.<sup>8</sup>

To be effective, a standard of legal "competence" must satisfy two prerequisites. First, it must address the major complaints found in the recent barrage of criticisms of lawyer performance.<sup>9</sup> Otherwise, even full compliance with the standard would not effectively restore respect for the legal profession. The standard must also be reasonably easy to apply. To meet this criterion, it must specifically state the precise du-

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Committee. *Id.* at xiii. The Judicial Center asked judges in district and circuit courts to evaluate performances of lawyers who appeared before them, to answer questionnaires about the general quality of advocacy, and to rate videotaped lawyer performances. *Id.* at 1-3. The Judicial Center also sent questionnaires to trial lawyers soliciting opinions about the quality of advocacy in federal courts. *Id.*

Finally, in 1978, the Section of Legal Education and Admissions to the Bar of the ABA appointed a Task Force headed by Roger C. Cramton to study the relationship between legal education and lawyer competence. Its findings are published in the ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter cited as CRAMTON REPORT].

3. The American College of Trial Lawyers (ACTL) surveyed judges in all the circuits except the second and fifth concerning their opinions on lawyer incompetency. *See* Clare, *supra* note 2, at 467-71.

The Illinois State Bar Association polled its members as to the "Reasons for 'A Less than Reasonable Degree of Professional Skill and Care.'" Wolkin, *supra* note 1, at 528.

The Washington State Bar Association also surveyed its members to find the reasons for inadequate representation. *See* Otorowski, *Some Fundamental Problems with the Devitt Committee Report*, 65 A.B.A.J. 713, 716 (1979).

4. *See, e.g.*, Frankel, *supra* note 1, at 615. "It may be that good advocacy is in this sense like hard core pornography . . . you can know it when you see it without being able to define it." *Id.*; Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569 (1975). "The bar has not met its duty to provide standards or guidelines for dealing with the lawyer who is incompetent." *Id.* at 572. "Another crucial problem . . . is the absence of workable criteria for judging performance." Marks & Cathcart, *supra* note 2, at 236. "More definitive work must be performed to arrive at a more tangible definition of 'competence.'" Otorowski, *supra* note 3, at 717. "There is no agreement among lawyers, consumers of legal services or scholars on what constitutes competent performance, let alone the appropriate criteria for its measurement." Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y 257, 270 (1976).

5. *See* notes 52-60 *infra* and accompanying text.

6. *See* notes 98-154 *infra* and accompanying text.

7. *See* notes 61-97 *infra* and accompanying text.

8. *See* notes 52-154 *infra* and accompanying text.

9. *See* notes 26-46 *infra* and accompanying text.

ties that a "competent" lawyer must fulfill<sup>10</sup> and the degree of care he must exercise in fulfilling them.<sup>11</sup> Furthermore, a workable competency standard must phrase its requirements in terms of actual performance rather than innate ability, for it is easier to determine if a lawyer actually did a certain act than to ascertain his capability to do it.<sup>12</sup> Effective "competence" criteria, then, require specific performance standards based on the public expectations expressed in recent criticisms.

Once effective legal performance standards are developed, their uniform application in all areas of law—civil<sup>13</sup> and criminal<sup>14</sup> cases as well as bar proceedings<sup>15</sup>—would facilitate improvement of the legal profession. Lawyers could ascertain their basic duties by referring to a simple set of criteria.<sup>16</sup> Judges and other reviewers could render more consistent decisions and develop coherent precedent.<sup>17</sup> As lawyers and re-

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10. Before a reviewer can determine if a lawyer has fulfilled his duties, he must know what those duties are. That determination might be quite difficult. For instance, it is now uncertain whether a duty exists to inform a client of important developments in his case. Compare DR 6-101 of the ABA Code of Professional Responsibility (no explicit duty), *infra* note 52, with the Model Rules of Professional Responsibility § 1.4(a) (explicit duty), *infra* note 118. A list of specific duties, therefore, would simplify the reviewer's task.

11. For instance, if there is a duty to "prepare," the reviewer still must decide how much "preparation" is required—any degree of preparation, *perfect* preparation, *reasonable* preparation, etc. A clarified standard of care would simplify the determination of compliance with the duty.

12. For example, a teacher only needs to read a pupil's answer sheet to decide if he answered a question correctly. To decide if the pupil had the *capability* to answer correctly, however, requires complicated tests to uncover any physical, intellectual, or emotional handicaps. The *Cramton Report* states:

Too much of the discussion of the "problem of lawyer incompetence" has failed to distinguish between competence and performance. *Inadequate lawyer performance—the failure to meet a satisfactory standard in some matter undertaken for a client*—is not synonymous with lawyer incompetence. *Competency properly refers to an individual's capacity to perform a particular task in an acceptable manner.* A lawyer's actual performance may fall short of the appropriate standard for any number of reasons unrelated to competence: inattention, laziness, the press of other work, economic factors or mistake.

CRAMTON REPORT, *supra* note 2, at 9 (emphasis added).

13. See notes 61-80 *infra* and accompanying text.

14. See notes 81-93 *infra* and accompanying text.

15. See notes 52-60, 122-40 *infra* and accompanying text.

16. "If attorneys are to act competently, they must know the standard by which their conduct is to be measured." Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 47, 48 (1980).

17. Judges and other reviewers would all refer to and interpret the same written standards. They could, therefore, use each other's opinions for guidance in deciding difficult interpretational issues, without regard to jurisdictional barriers.

viewers became more familiar with the standards, both voluntary compliance and strict enforcement would increase, thereby improving the quality of legal services.

To develop effective minimum legal performance standards, this Note first distills the major reports, polls, and articles on lawyer "competence"<sup>18</sup> to identify the basic complaints against lawyers.<sup>19</sup> It then evaluates existing and proposed "competence" standards to determine whether they really address those complaints<sup>20</sup> and whether they are reasonably easy to apply.<sup>21</sup> Based on those evaluations, it suggests a new minimum legal performance standard<sup>22</sup> and disposes of arguments against use of a uniform standard.<sup>23</sup> Finally, this Note proposes that the ABA incorporate the standard into the Model Rules of Professional Conduct<sup>24</sup> and encourage its uniform use in all areas of law.<sup>25</sup>

## II. THE "INCOMPETENCE" COMPLAINTS

Although the complaints against lawyers cannot be ranked in order of importance,<sup>26</sup> most of the complaints involve one of six basic performance problems: (1) lack of preparation, (2) neglect of clients, (3) inadequate attention to basic legal principles and rules, (4) inadequate

18. See notes 1-3 *supra* and accompanying text; notes 27-47 *infra* and accompanying text.

19. See notes 27-47 *infra* and accompanying text.

20. See notes 50-151 *infra* and accompanying text.

21. *Id.*

22. See notes 155-75 *infra* and accompanying text.

23. See notes 189-95 *infra* and accompanying text.

24. See note 98 *infra* and accompanying text.

25. See notes 196-99 *infra* and accompanying text.

26. Each of the major studies records the answers to different questions and focuses on different areas. Thus, a simple, numerical tabulation of results would be misleading. Marks & Cathcart, *supra* note 2, focuses on bar disciplinary actions. Its questions pertain mainly to such actions.

The committee designed the research reported in the *Clare Committee Report*, *supra* note 2, to evaluate the need for a separate rule for admission to practice in the federal courts. The committee interviewed judges to determine the extent and nature of perceived inadequacies in trial advocacy. *Id.* at 161-66. Its report focuses on the lack of "training" displayed by trial lawyers. *Id.* At times the Report deliberately disregards two major areas of concern: "the experienced, well-trained lawyer who, on occasion was unprepared, as well as the lawyer who lacked knowledge on the subject matter involved in the particular suit, i.e., antitrust, patents, etc." *Id.* at 164.

A. PARTRIDGE & G. BERMANT, *supra* note 2, focuses on judges' and lawyers' answers to these four questions: What percent of the lawyer performances before the court are inadequate? Is there, overall, a serious problem of inadequate advocacy in the federal courts? What is the most frequent consequence of such inadequacy as exists? And, what is the most frequent cause of inadequate advocacy? *Id.* at 5-9. Thus, the report covers a wide range of topics.

The research in Maddi, *supra* note 2, also covers a broad range of topics. Researchers first asked judges to list the factors they considered most important in determining trial advocacy com-

analysis, (5) lack of skills, and (6) laziness.<sup>27</sup>

petence. *Id.* at 124. Researchers then gave judges a list of 13 defects and asked them to identify what percentage of incompetent lawyers exhibited those defects. *Id.* at 126-27.

The *Cramton Report*, *supra* note 2, did not explain its method of determining criteria for competence. *Id.* at 8-10. It focused mainly on proposing means to reform legal education. *Id.* at 11-34.

The two state bar surveys, Wolkin, *supra* note 1, at 528 and Otorowski, *supra* note 2, at 715-16, concentrate on the reasons for inadequate performance. The ACTL survey, however, records “the percentage of incompetence, the age bracket, and the cause, and their suggestions for improvement.” Clare, *supra* note 2, at 467.

27. Maddi, *supra* note 2, breaks down its findings into very specific, often trial-oriented, categories. Nevertheless, most of the complaints reported can also be organized under the six problem areas set forth in the text. The report contains two major compilations of data. The first includes the judges’ answers to an open-ended question about the factors determining competence. The report concluded:

Judges’ Response Regarding Factors That Determine Competence

	Percent Factors Mentioned (1)	Percent Mentioning (2)	Percent Listing Factor First (3)
Preparation	27	85	54
Experience and Training	23	70	24
Presentation	21	65	5
Personal	18	57	5
Intellectual	9	36	9
Miscellaneous	<u>2</u>	<u>9</u>	<u>2</u>
Total	100		99

*Id.* at 124 (footnote omitted). Professor Maddi grouped the 6,244 factors mentioned by respondents into the following six categories:

*The combined preparation category includes* responses coded in the following categories: preparation, organization, knowledge of facts of case, knowledge of law applicable to case, and knowledge of alternatives to sentencing. *Id.* at 124 n.40 (emphasis added).

*The combined experience and training category includes* responses coded in the following categories: education or training, experience, general knowledge of law, and knowledge of rules. *Id.* at 124 n.41 (emphasis added).

*The combined presentation category includes* responses coded in the following categories: presentation of case, argumentation, brevity, communication or oral skills (unspecified), general courtroom acuity, and client control. *Id.* at 124 n.42 (emphasis added).

*The combined personal category includes* responses coded in the following categories: diligence, courtroom etiquette, ethical behavior, personality, physical appearance, and punctuality. *Id.* at 124 n.43 (emphasis added).

*The combined intellectual category includes* responses coded in the following categories: analytical ability, ability to isolate real issues, intelligence, writing skills, and objectivity. *Id.* at 124 n.44 (emphasis added).

Obviously, the factors under the first category, “preparation”, would fall into the preparation area. Of the responses in the “experience and training category”, “general knowledge of law, and knowledge of rules” would fall into the similarly denominated area. Since “education or training” and “experience” are not elements of performance, they do not fit directly into any of the performance areas. But they are probably manifested as a lack of skill, and thus would fall into that area.

## Most judges and lawyers identify lack of preparation as the preemi-

The factors included in the "presentation" category are also types of skills. Within the "personal" category, the "laziness" category covers lack of "diligence" and "punctuality." In the "personal" category, "courtroom etiquette" would fit under the "rules" section.

The rest of the category, which involves judgment about ethical behavior, personality, and physical appearance, however, is beyond the scope of this Note. Evaluations of personality and appearance are so subjective that they are inappropriate for inclusion in a minimum performance standard. And, "whatever difficulties we may have in agreeing about what a competent (i.e., skilled, effective) lawyer is are as nothing compared with disputes about what ethical behavior is." Rosenthal, *supra* note 4, at 259.

In the "intellectual" category, "analytical ability" and "ability to isolate real issues" fall within the "inadequate analysis" problem area. "Writing skills" are a form of "skills." Evaluating "objectivity" and innate "intelligence" is beyond the scope of this Note.

Thus, all of the major performance factors listed by the judges as affecting competence fall within the six major problem areas described above. The six problem areas also encompass most of the 13 "forms of incompetence" rated in the report's second data compilation. Judges estimated what percent of incompetent lawyers displayed each form of incompetence, and the mean results were:

<u>Forms of Incompetence</u>	<u>Mean Percent of Attorneys Exhibiting</u>
1. Inadequate preparation	68.7
2. Inadequate knowledge of rules of evidence	58.1
3. Inadequate ability to conduct a proper cross-examination	57.7
4. Inadequate analytical ability in the framing of the issues	57.0
5. Inadequate ability to frame objectives properly	54.1
6. Inadequate knowledge of the rules of procedure	53.3
7. Inadequate knowledge of substantive law	52.7
8. Inadequate ability to present expert testimony	48.2
9. Inadequate ability to argue before a jury	47.3
10. Inadequate ability in handling and presentation of documents and letters	45.6
11. Inadequate utilization of technical or expert supportive services	45.0
12. Inadequate understanding of basic courtroom etiquette	40.9
13. Inadequate awareness of the fundamental ethics of the legal profession	33.2

*Id.* at 126-27.

These 13 forms of incompetence can be grouped under the six problem areas as follows: Number 1, "preparation," correlates to the "preparation" area. Numbers 2, 6, 7, and 12 fall within the area of "inadequate attention to basic legal principles and rules." Numbers 3, 8, 9, 10, and 11 involve the lack of various "skills." Numbers 4 and 5 involve "inadequate analysis." Only

number 13, "ethics," is not covered. Determinations of what constitutes ethical behavior are beyond the scope of this Note. The *Clare Committee Report*, *supra* note 2, found that criticisms of lawyers fall into five basic categories:

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

*Id.* at 176.

Again, each of the categories of criticisms is within one of the six areas described above. Numbers one and two are manifested as a "lack of skill" and thus fall into that area. Number three is obviously part of the "inadequate preparation" area. Numbers four and five are examples of "inadequate attention to basic legal principles and rules." Thus, the findings of the *Clare Committee Report* fit within the six major problem areas.

The findings of Marks & Cathcart, *supra* note 2, fall within the "client neglect" category. Their findings indicate that the vast majority of complaints to disciplinary agencies are of "neglect." *Id.* at 210-13.

The criticisms found in A. PARTRIDGE & G. BERMANT, *supra* note 2, also fit into the six-area framework. The majority of district court judges and lawyers interviewed indicated that "lack of specialized trial skills or knowledge," and "failure . . . to prepare cases to the best of [one's] ability" are the most frequent causes of inadequate performance. *Id.* at 6. Those complaints fall within the "lack of skills" and "inadequate preparation" areas. The appellate judges listed as causes of inadequate advocacy: "failure by lawyers to research their cases and prepare themselves to the best of their ability" ("lack of preparation"), "lack of the basic analytical ability, knowledge, or judgment needed to be an adequate lawyer" ("inadequate analysis" and "inadequate knowledge of basic legal principles"), and "lack of the special skills, knowledge or judgment needed to be an adequate *appellate* lawyer" ("lack of skill," "inadequate knowledge" and "inadequate analysis"). *Id.* at 8.

District court judges and lawyers listed the following areas as those most in need of improvement: "proficiency in the planning and management of litigation" ("skill" and "analysis"); "technique in examining witnesses" ("skill"); "and general legal knowledge" ("knowledge of basic legal principles"). *Id.* at 6. Each area, as noted in the parentheses, matches one of the six problem areas listed above.

Appellate judges found these areas to be most in need of improvement: "ability to set forth facts and issues in briefs in a comprehensible manner" ("skills" and "analysis"); "judgment in deciding what points to focus on in briefing" ("analysis"); "skill in making distinctive use of oral argument" ("skill"); "mastery of the law important to the particular case, and mastery of the record below" ("preparation"). *Id.* at 8. Thus, the complaints compiled by A. PARTRIDGE & G. BERMANT, *supra* note 2, also fit within the six general areas.

The *Cramton Report*, *supra* note 2, organizes the components of "competence" into three major parts. The major parts, as well as most of their subparts, are also within the six general areas listed above. The first part is "Certain Fundamental Skills," which include analysis of problems ("analysis"); legal research ("preparation"); collecting and sorting facts ("preparation"); writing effectively ("skills"); communicating orally with effectiveness ("skills"); interviewing, counseling and negotiating ("skills"); and organizing and managing legal work ("skills"). *Id.* at 9-10. The second part is entitled "Knowledge about Law and Legal Institutions." It requires knowledge of relevant law and procedures ("knowledge of basic legal principles and rules"). *Id.* at 10. The third part involves "Ability and Motivation". *Id.* at 10. Although "ability" is not a *performance* area, "mo-

ment cause of poor legal performance.<sup>28</sup> Critics allege that many lawyers fail to do even the most basic legal research.<sup>29</sup> They also complain that lawyers have inadequate knowledge of the facts of their cases and of the law specifically applicable to those facts.<sup>30</sup>

Client complaints to disciplinary agencies most frequently allege "neglect."<sup>31</sup> It is difficult to identify the underlying cause of the allegations because disciplinary agencies rarely record the type of "neglect" complained of by clients.<sup>32</sup> Researchers have found, however, that the major cause of "neglect" complaints is lawyers' failure to inform their clients of case developments and lawyers' repeated refusals to answer requests for such information.<sup>33</sup>

Critics also allege a variety of forms of "inadequate attention to basic legal principles and rules."<sup>34</sup> Trial judges state that a high percentage of lawyers disregard the rules of evidence,<sup>35</sup> the rules of procedure,<sup>36</sup>

tivation" does fall within the "laziness" category. Most of the factors of competence listed in the *Crampton Report*, therefore, are part of the six problem areas.

The complaints revealed by surveys also fit within the six categories. The Washington State Bar Association survey lists "inadequate grasp of the facts of the case," "poor knowledge of law of the case," "inadequate preparation," and "laziness" as significant factors. Otorowski, *supra* note 3, at 716-17. All of those criticisms clearly fall within the six general areas. The Illinois Bar Association survey cited "Inadequate preparation," "Lack of experience," "General lack of ability or training," "Failure to keep abreast of specialty areas," and "Lack of formal training in an area of law" as significant reasons for inadequacy. Wolkin, *supra* note 1, at 528. Obviously, the first reason is within the "preparation" category. Each of the other reasons, except "lack of ability," is manifested as a "lack of skill" and thus falls under that area.

The ACTL survey exposes complaints of inadequate preparation ("preparation") and insufficient training ("skills"). Clare, *supra* note 2, at 469.

28. See A. PARTRIDGE & G. BERMANT, *supra* note 2, at 6, 8; CRAMTON REPORT, *supra* note 2, at 9; Maddi, *supra* note 2, at 124, 126-27; Clare, *supra* note 2, at 469; Otorowski, *supra* note 3, at 716; Clare Committee Report, *supra* note 2, at 172; Wolkin, *supra* note 1, at 528.

29. See Burger, *supra* note 1 at 237 (lawyers have not read case files); Middleton, *Judges Object to Lawyers' Courtroom Behavior*, 66 A.B.A.J. 834, 835 (1980) (same).

30. A. PARTRIDGE & G. BERMANT, *supra* note 2, at 8; CRAMTON REPORT, *supra* note 2, at 9; Maddi, *supra* note 2, at 124 n.40; Otorowski, *supra* note 3, at 716.

31. Marks & Cathcart, *supra* note 2, at 210-14. Of 996 complaints to the New York Bar disciplinary agency in one year, 524 alleged "neglect." The next highest categories were "other" with 80 and "Actions in bad faith—Abuse of process" with 41. *Id.* In Minnesota in the year examined, 50 percent of the complaints concerned "neglect." *Id.* at 212 n.44.

32. *Id.* at 209-10.

33. *Id.* at 210.

34. See note 27 *supra* and accompanying text.

35. Questionnaires compiled in Maddi, *supra* note 2, indicate that a mean of 58.1% of "incompetent" lawyers have "inadequate knowledge of the rules of evidence." *Id.* at 126. See Burger, *supra* note 1, at 234-35 (1973) (majority of lawyers do not know the rules of evidence and do not ask questions in conformity with them).

and principles of general substantive law.<sup>37</sup> Many judges, likewise, complain of annoying breaches of local rules of court.<sup>38</sup>

The last three areas—inadequate analysis, lack of skills, and laziness—are also major performance problems. Judges observe frequent failures to identify the major issues in a case.<sup>39</sup> They criticize lawyers' lack of skill in examination of witnesses,<sup>40</sup> use of expert testimony,<sup>41</sup> use of objections,<sup>42</sup> and presentation of oral argument<sup>43</sup> and evidence.<sup>44</sup> Finally, commentators condemn attorney laziness, describing lawyers

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36. Judges in one investigation found that about 53.3% of "incompetent" lawyers had an inadequate knowledge of the rules of procedure. Maddi, *supra* note 2, at 126. See Kaufman, *supra* note 1, at 176.

37. Maddi, *supra* note 2, at 26, reports that judges found a mean of 52.7% of "incompetent" lawyers had inadequate knowledge of substantive law. In A. PARTRIDGE & G. BERMANT, *supra* note 2, at 6, district court judges list general legal knowledge as an area most in need of improvement. The *Cramton Report*, lists knowledge of general law as a major part of "competence." CRAMTON REPORT, *supra* note 2, at 10.

38. The *Clare Committee Report*, *supra* note 2, at 176, reports that intentional and habitual failure "to obey court orders and rules" is one of five major complaints. Judge Kaufman complains of constant violation of court rules concerning length and deadlines for briefs. Kaufman, *supra* note 1, at 176.

39. Maddi, *supra* note 2, reports that judges found a mean of 57.0% of "incompetent" lawyers displayed inadequate analytical ability in the framing of issues, and a mean of 54.1% displayed inadequate ability to frame objectives properly. *Id.* at 127. In A. PARTRIDGE & G. BERMANT, *supra* note 2, appellate judges list "lack of . . . basic analytical ability" as a cause of inadequate advocacy. *Id.* at 8. They also find need for improvement in the "ability to set forth the important facts and issues in briefs in a comprehensible manner" and "judgment in deciding what to focus on in briefing." *Id.* at 8.

40. In Maddi, *supra* note 2, judges report a mean of 57.7% of "incompetent" lawyers demonstrate inadequate ability to conduct a proper cross-examination. *Id.* at 127. District court judges in A. PARTRIDGE & G. BERMANT, *supra* note 2, list "technique in examining witnesses" as an area in most need of improvement. *Id.* at 6. Chief Justice Burger remarked in a speech that "[i]t is a rare law graduate, for example, who knows how to ask questions . . . in order to develop facts in evidence." Keynote Address of Warren E. Burger, Annual Conference of Phi Alpha Delta Fraternity, Mayflower Hotel, August 28, 1968, (quoted in Littlejohn, *Ensuring Lawyer Competency: The South Carolina Approach*, 64 JUD. 109, 109 n.1 (1980)).

41. Maddi, *supra* note 2, reports that judges found a mean of 48.2% of "incompetent" attorneys had inadequate ability to present expert testimony, and a mean of 45.0% displayed inadequate utilization of technical or expert supportive services. *Id.* at 127.

42. See Burger, *The Special Skills of Advocacy*, *supra* note 1, at 235 (lawyers waste time making wooden objections in inappropriate matters).

43. Maddi, *supra* note 2, states that judges found a mean of 47.3% of "incompetent" attorneys displayed inadequate ability to argue before a jury. *Id.* at 127. In A. PARTRIDGE & G. BERMANT, *supra* note 2, appellate judges report that "skill in making distinctive use of oral arguments" is lacking. *Id.* at 8.

44. Maddi, *supra* note 2, reports that judges found a mean of 45.6% of "incompetent" attorneys showed inadequate ability in handling and presentation of documents and letters. *Id.* at 127.

who repeatedly miss court dates,<sup>45</sup> fail to Shepardize,<sup>46</sup> and shorten their arguments to avoid parking tickets.<sup>47</sup>

Thus, critics consider each of the six basic defects—lack of preparation, neglect of clients, inadequate attention to basic legal principles and rules, inadequate analysis, lack of skills, and laziness—a major source of concern.

### III. THE EXISTING STANDARDS

Currently, the legal profession uses three basic “competence” standards: Disciplinary Rule 6-101(A)<sup>48</sup> of the ABA Code of Professional Responsibility,<sup>49</sup> the common law of legal malpractice,<sup>50</sup> and the constitutional law interpreting the sixth amendment’s guarantee of “effective” counsel.<sup>51</sup> The standards differ greatly in their concern with the foregoing six performance complaints and in their ease of application.

Disciplinary Rule (DR) 6-101(A)<sup>52</sup> addresses two of the major complaints, but contains serious deficiencies. Subsection (A)(2) covers

45. One lawyer missed 51 of 55 scheduled court appearances and then quit when the client refused to plead guilty. Another lawyer eventually obtained an acquittal for the client. Bazelon, *supra* note 1, at 2 (quoting N.Y. Times, Feb. 3, 1973, at 1, col. 6).

Lawyers’ failures to appear in court are apparently not infrequent. See Middleton, *supra* note 29, at 835.

46. One lawyer explained to a judge that he could only cite one 1895 case as support for his argument because he did not have a Shepard’s citator. Bazelon, *supra* note 1, at 3.

47. *Id.*

48. See notes 52-60 *infra* and accompanying text.

49. In 1969, the Code of Professional Responsibility replaced the Canons of Professional Ethics, promulgated in 1908 as the guide to acceptable lawyer conduct. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 28-29 (1976). The Code has been officially adopted, with varying amendments, by the courts or legislatures of every state and the District of Columbia. *Id.* at 29.

The Code of Professional Responsibility has three parts: Disciplinary Rules (DR’s) setting “minimum standards” for lawyer conduct, Ethical Considerations (EC’s) providing “aspirational” guides, and Canons serving as “axiomatic norms.” ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CODE], Preliminary Statement, *reprinted in* A. KAUFMAN, *supra*, at 626.

50. See notes 61-80 *infra* and accompanying text.

51. See notes 81-132 *infra* and accompanying text.

52. DR 6-101(A) states:

Failing to Act Competently

(A) A lawyer shall not

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it
- (2) Handle a legal matter without preparation adequate in the circumstances
- (3) Neglect a legal matter entrusted to him

CODE, *supra* note 49, *reprinted in* A. KAUFMAN, *supra* note 49, at 668.

preparation complaints by forbidding the handling of a legal matter "without preparation adequate in the circumstances."<sup>53</sup> Subsection (A)(3) deals with neglect complaints by prohibiting the neglect of a "legal matter."<sup>54</sup> It is unclear, however, whether the DR answers the other complaints. The DR's other subsection, (A)(1), states that "[a] lawyer shall not . . . [h]andle a legal matter which he knows or should know that he is not competent to handle . . . ."<sup>55</sup> "Competence" may or may not include attention to legal principles and rules, thorough analysis, skill, and diligence.

That same lack of clarity makes the DR extremely difficult to apply. Beyond preparation, it does not specify a lawyer's duties;<sup>56</sup> duties to "be competent" and "not neglect" are too general to be useful. Additionally, the DR fails to delineate the degree of care required in fulfilling duties. It does mandate preparation "adequate in the circumstances,"<sup>57</sup> but it does not specify how much preparation is "adequate." Furthermore, DR 6-101(A)(1) seems to demand difficult judgments of innate ability. It proscribes the handling of a matter by a lawyer who "knows or should know that he is not competent" to handle it,<sup>58</sup> thus focusing on awareness of ability and not quality of performance. Taken literally, it requires a reviewer to ask not whether a lawyer performed "competently," but whether he was capable of performing "competently."<sup>59</sup> Although accompanying ethical considerations negate that implication somewhat,<sup>60</sup> the wording remains

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Use of the word "competent" often implies an ability judgment. "Competency properly refers to an individual's *capacity* to perform a particular task in an acceptable manner." CRAMTON REPORT, *supra* note 2, at 9 (emphasis added). Incompetence is "a general *inability* to adhere to even minimal standards of professionalism." Note, *The Illinois Legal Malpractice Tort: Basic Tenets and Recent Trends*, 1980 U. ILL. L.F. 427, 437 n.69. But see Wolkin, *supra* note 1, at 528 (as used by proponents of continuing legal education, "incompetence" means "lack of the knowledge necessary").

60. EC 6-1 states that a lawyer "should accept employment only in matters in which he is or *intends to become* competent to handle," CODE, *supra* note 49, EC 6-1 (emphasis added), thus implying that "competence" is not a fixed, innate ability but something that can be *achieved*. EC 6-2 also speaks of "attaining and maintaining . . . competence." *Id.* EC 6-2. The EC's are merely "aspirational"; they are not legally binding on attorneys. See note 49 *supra*.

confusing. The ABA Code's standard, thus, presents many application difficulties.

Legal malpractice standards are in some ways easier to apply than the Code's standards. First, they do provide a standard of care, though courts phrase it in various ways. Most<sup>61</sup> require exercise of the degree of care used by a "reasonable"<sup>62</sup> or "ordinary"<sup>63</sup> attorney in "similar circumstances"<sup>64</sup> or in the "same locality."<sup>65</sup> Courts also generally phrase malpractice standards in terms of performance, asking if a lawyer actually exercised the requisite care.<sup>66</sup> Furthermore, they do articulate some attorney duties. Although most cases discuss only the duties directly at issue,<sup>67</sup> rather than listing all responsibilities, those most frequently cited include "skill,"<sup>68</sup> "knowledge,"<sup>69</sup> "care,"<sup>70</sup> and

61. A minority of courts requires only that an attorney "[do] the best he can," *Hill v. Mynatt*, 59 S.W. 163, 166 (Tenn. Ch. App. 1900), or "[fact] to the best of his knowledge," *National Sav. Bank v. Ward*, 100 U.S. 195, 198 (1879).

62. *See, e.g.*, *Smitherman v. Superior Court*, 5 Ariz. App. 170, 174, 424 P.2d 461, 465, *vacated*, 102 Ariz. 504, 433 P.2d 634 (1967); *Rhine v. Haley*, 238 Ark. 72, 82, 378 S.W.2d 655, 661 (1964); *Smiley v. Manchester Ins. Indem. Co.*, 71 Ill. 2d 306, 313, 375 N.E.2d 118, 122 (1978); *House v. Maddox*, 46 Ill. App. 3d 68, 71, 360 N.E.2d 580, 583 (1977); *Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975); *Grago v. Robertson*, 49 A.D.2d 645, 646, 370 N.Y.S.2d 255, 258 (1975); *Glenn v. Haynes*, 191 Va. 574, 481, 66 S.E.2d 509, 513 (1951); *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968).

63. *See, e.g.*, *Leighton v. New York Susquehanna & W. R.R.*, 303 F. Supp. 599, 618 (S.D.N.Y. 1969), *aff'd*, 455 F.2d 389 (2d Cir.), *cert. denied*, 406 U.S. 920 (1972); *Wright v. Williams*, 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194, 199 (1975); *Berman v. Rubin*, 138 Ga. App. 849, 851, 227 S.E.2d 802, 805 (1976); *Olson v. North*, 276 Ill. App. 457, 475 (1934); *Gabbert v. Evans*, 184 Mo. App. 283, 293, 166 S.W. 635, 638 (1914).

The standard seems to equate ordinary conduct with competent conduct. For example, since lawyers "ordinarily" do not understand the rule against perpetuities, misusing the rule is not negligence. *Lucas v. Hamm*, 56 Cal. 2d 583, 591-92, 364 P.2d 685, 689-90, 15 Cal. Rptr. 821, 825-26 (1961), *cert. denied*, 368 U.S. 987 (1962). *See Rosenthal, supra* note 4, at 265.

64. *See R. MALLEN & V. LEVIT, LEGAL MALPRACTICE* § 113, at 165 (1977).

65. *See, e.g.*, *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975); *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972); *Watkins v. Sheppard*, 278 So.2d 890 (La. Ct. App. 1973). "The standard of care to be applied to an attorney . . . is the care, skill and diligence exercised by attorneys practicing in his *community or locality*." *Id.* at 892 (emphasis added). Illinois still at least nominally adheres to the locality rule. *See Note, supra* note 59, at 431.

66. *See, e.g.*, *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 438 P.2d 865 (1968). "[T]he correct standard to which the plaintiff is held in the *performance* of his professional services is that degree of care . . . commonly *exercised* by a reasonable . . . lawyer." *Id.* at 395, 438 P.2d at 867 (emphasis added). *But cf. Hill v. Mynatt*, 59 S.W. 163, 166 (Tenn. Ch. App. 1900) (calling for ability assessments).

67. *See R. MALLEN & V. LEVIT, supra* note 64, at § 113.

68. *See, e.g.*, *Lucas v. Hamm*, 56 Cal. 2d 583, 591-92, 364 P.2d 685, 689-90, 15 Cal. Rptr. 821, 825-26 (1961), *cert. denied*, 368 U.S. 987 (1962); *Theobald v. Byers*, 193 Cal. App. 2d 147, 150, 13

“diligence.”<sup>71</sup>

Because malpractice standards include those duties, the standards obviously address some of the complaints discussed in Part II. The “skill” and “diligence” requirements directly correlate to major complaints,<sup>72</sup> and “knowledge,” as applied, covers “inadequate attention to basic legal principles and rules.”<sup>73</sup> It is unclear, however, whether legal malpractice standards answer the other criticisms. A landmark California decision recognized a duty to do “reasonable research,”<sup>74</sup> but other states have not yet adopted such a clear duty to prepare.<sup>75</sup> Courts also have not yet decided whether attorneys, like doctors, have a duty to advise clients of important decisions involving their cases.<sup>76</sup> Lack of

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Cal. Rptr. 864, 866 (1961); *Watkins v. Sheppard*, 278 So.2d 890, 892 (La. Ct. App. 1973); *Glenn v. Haynes*, 191 Va. 574, 581, 66 S.E.2d 509, 513 (1951).

One commentator asserts, however, that only a small percentage of malpractice complaints allege a lack of “technical proficiency.” Frankel, *supra* note 1, at 619.

69. *See, e.g.*, *Lucas v. Hamm*, 56 Cal. 2d 583, 591-92, 364 P.2d 685, 689-90, 15 Cal. Rptr. 821, 825-26 (1961), *cert. denied*, 368 U.S. 987 (1962); *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968); *Ward v. Arnold*, 52 Wash. 2d 581, 584, 328 P.2d 164, 167 (1958).

Courts often require only the most basic knowledge. *See, e.g.*, *Citizens Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 146, 23 N.E. 1075, 1075 (1890) (“those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported, and published a sufficient length of time to have become known”); *Gimbel v. Waldman*, 193 Misc. 758, 761, 84 N.Y.S.2d 888, 892 (Sup. Ct. 1948) (“law . . . so well and clearly defined, so firmly imbedded in our legal jurisprudence as to be beyond any point of question”).

70. *See, e.g.*, *Watkins v. Sheppard*, 278 So. 2d 890, 892 (La. Ct. App. 1973); *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954); *Glenn v. Haynes*, 191 Va. 574, 581, 66 S.E.2d 509, 513 (1951).

71. *See, e.g.*, *Theobald v. Byers*, 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864, 866 (1961); *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954); *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968).

72. *See* notes 27, 40-47 *supra* and accompanying text.

73. *See* notes 35-38, 69 *supra* and accompanying text.

74. *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *overruled on other grounds*, *In re Marriage of Brown*, 15 Cal. 3d 838, 851, 544 P.2d 561, 569, 126 Cal. Rptr. 633, 641 (1976).

[E]ven with respect to an unsettled area of law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.

*Id.* at 359, 530 P.2d at 595, 118 Cal. Rptr. at 627.

75. *See* Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 706 (1977).

76. *See* *Schnidman, The Collateral Effects of Legal Specialization On the Applicable Standard of Care As It Relates to a Duty to Consult and a Duty to Advise*, 6 OHIO N.U.L. REV. 666, 676 (1979).

The question of whether an attorney is under a duty to advise a client of every action he

communication is the basis of client neglect complaints;<sup>77</sup> because the legal malpractice standards currently fail to require communication, they do not definitively address those complaints. Likewise, they generally do not speak to "inadequate analysis" criticisms.<sup>78</sup> Only a few of the basic complaints identified in Part II, therefore, are consistently considered in legal malpractice actions.

Courts also dismiss many malpractice suits without even considering the scope of an attorney's duty of care. A client must show that his attorney's acts or omissions caused palpable harm in order to win a judgment.<sup>79</sup> It is so difficult to prove that "but for" attorney performance a client would have won his case that many cases are dismissed on the causation issue,<sup>80</sup> leaving the duty question unsettled.

A similar problem hampers development of sixth amendment "effective counsel" standards. Under the sixth amendment,<sup>81</sup> if a criminal defendant shows that his representation was not "effective," he receives a new trial.<sup>82</sup> Most courts, however, grant new trials only if the defendant demonstrates that the lawyer's performance actually prejudiced the defendant's chances of leniency or acquittal.<sup>83</sup> Thus, many courts

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takes in handling the client's case remains unanswered. Yet there is no uncertainty at all that physicians may be held liable for failing to advise a patient of a risk common to a medical procedure.

*Id.*

77. See note 33 *supra* and accompanying text.

78. See notes 69-72 *supra* and accompanying text.

79. Note, *supra* note 59.

[P]laintiff must prove four elements to establish a prima facie case: that an attorney-client relationship existed between the plaintiff and defendant; that the attorney deviated from the standard of care owed to his client; that this alleged departure from the applicable standard of care constituted the actual and proximate cause of the plaintiff's injury and that as a result of this injury, the plaintiff suffered actual damages.

*Id.* at 430. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971); Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 667-68 (1978); Note, *supra* note 75, at 692.

80. See Note, *supra* note 75, at 689; Note, *supra* note 59, at 430.

81. U.S. CONST. amend. VI states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

82. *E.g.*, *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 76 (1942); *Wilson v. Phend*, 417 F.2d 1197, 1200 (7th Cir. 1969); *Goodson v. Peyton*, 351 F.2d 905, 907-08 (4th Cir. 1965); *Joseph v. United States*, 321 F.2d 710, 712 (9th Cir. 1963), *cert. denied*, 375 U.S. 977 (1964).

83. See, *e.g.*, *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976) (en banc) (Leventhal, J.), *cert. denied*, 444 U.S. 944 (1979); *id.* at 226 (Mac Kinnon, J.); *Davis v. Alabama*, 596 F.2d 1214, 1221-22 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903 (1980); *Cooper v. Fitzharris*, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); *United States v. Ritch*, 583 F.2d 1179, 1183 (1st Cir.), *cert. denied*, 439 U.S. 970 (1978); *Beran v. United States*, 580 F.2d 324,

never fully consider questions of degrees of care and kinds of duties.

When courts do reach standard of care questions, most now formulate an objective standard<sup>84</sup> that eases application. Most of the standards are phrased in terms of actual performance<sup>85</sup> and require the level of care ordinarily expected of attorneys generally<sup>86</sup> or of "reasonable" attorneys<sup>87</sup> in similar circumstances. The standards, however,

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327 (8th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *United States v. Cooper*, 580 F.2d 259, 263 n.8 (7th Cir. 1978); *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976); *People v. Pope*, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979).

Only mistakes that might affect the verdict's accuracy cause reversal. *See, e.g.*, *De Kaplany v. Enomoto*, 540 F.2d 975 (9th Cir. 1976) (failure to raise diminished capacity defense), *cert. denied*, 429 U.S. 1075 (1977); *Trombley v. Anderson*, 439 F. Supp. 1250 (E.D. Mich. 1977) (failure to raise insanity defense); *Gray v. United States*, 430 F. Supp. 399 (E.D. Mo. 1977) (failure to raise statutory inapplicability); *United States ex rel. Mitchell v. LaValee*, 417 F. Supp. 154 (S.D.N.Y.), *aff'd*, 551 F.2d 301 (2d Cir. 1976) (failure to introduce exculpatory evidence).

The prejudice requirement, however, is not uniformly applied. *See United States v. Decoster*, 624 F.2d 196, 245 (D.C. Cir. 1976) (en banc) (Robinson, J., concurring), *cert. denied*, 444 U.S. 944 (1979); *id.* at 275 (Bazelon, J., dissenting); *Cooper v. Fitzharris*, 586 F.2d 1325, 1334 (9th Cir. 1978) (en banc) (Hufstedler, J., concurring and dissenting) ("[d]efendants . . . denied their Sixth Amendment right to the assistance of reasonably competent counsel at trial should be entitled to relief without a showing of prejudice"), *cert. denied*, 440 U.S. 974 (1979); *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970) (en banc) ("[t]he ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency").

Some courts decide on a case-by-case basis whether prejudice must be shown. *See, e.g.*, *Davis v. Alabama*, 596 F.2d 1214, 1223 (5th Cir. 1979) ("[I]n each case we must assess the advisability of requiring a showing of prejudice"), *vacated as moot*, 446 U.S. 903 (1980); *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3d Cir. 1970) (requiring proof of prejudice if counsel's error is "with respect to a narrow issue," but reversing automatically if the errors "have . . . so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice").

84. *See* notes 86-90 *infra* and accompanying text.

85. *E.g.*, they ask if "the lawyer's performance was so ineffective that it was tantamount to a denial of [the defendant's] constitutional right." *United States v. Decoster*, 624 F.2d 196, 231 (D.C. Cir. 1976) (en banc) (MacKinnon, J., concurring) (emphasis added), *cert. denied*, 444 U.S. 944 (1979).

86. *See, e.g., id.* at 206 (Leventhal, J.) ("behavior of counsel [and] falling measurably below that which might be expected an ordinary, fallible lawyer"); *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978) ("within the range of competence expected of attorneys in criminal cases"); *Marzullo v. Maryland*, 561 F.2d 540, 547 (4th Cir. 1977) (within "the range of competence expected of attorneys in criminal cases"), *cert. denied*, 435 U.S. 1011 (1978); *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) ("the exercise of the customary skill and knowledge which normally prevails at the time and place").

87. *See, e.g., Dyer v. Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc) ("the skill, judgment and diligence of a reasonably competent defense attorney"), *cert. denied*, 445 U.S. 945 (1980); *Cooper v. Fitzharris*, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc) ("reasonably effective and competent defense representation"), *cert. denied*, 440 U.S. 974 (1979); *United States v. Gray*, 565 F.2d 881,

vary considerably from court to court, and the United States Supreme Court has so far refused to settle the conflicts.<sup>88</sup> A few courts continue to use a subjective test, overturning a case only if it "shocks the conscience" and "makes a mockery of justice."<sup>89</sup> The trend, however, is clearly toward the objective standards of care.<sup>90</sup>

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887 (5th Cir.) ("reasonably likely to render and did render reasonably effective counsel"), *cert. denied*, 435 U.S. 955 (1978); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) ("the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances"), *cert. denied*, 435 U.S. 844 (1977); *United States v. Toney*, 527 F.2d 716, 720 (6th Cir. 1975) ("reasonably likely to render and does render reasonably effective assistance"), *cert. denied*, 429 U.S. 838 (1976).

88. The Supreme Court has defined ineffectiveness of counsel in a few narrow areas. *See, e.g.*, *Holloway v. Arkansas*, 435 U.S. 475 (1978) (representation of clients with conflicting interests); *Geders v. United States*, 425 U.S. 80 (1976) (denial of right to consult with attorney during trial recess).

The Court, however, has never defined effective representation in the context of lawyer "competence." In *Chambers v. Maroney*, 399 U.S. 42 (1970), for instance, the parties principally argued the adequacy of the defense presented. The defendant met his attorney "for the first time en route to the courtroom on the morning of the trial." *Id.* at 55 (Harlan, J., concurring and dissenting). Nevertheless, the sixth amendment claim was "all but ignored by the Court majority which affirmed the conviction." Bazelon, *supra* note 1, at 21. Similarly, in *McMann v. Richardson*, 397 U.S. 759 (1970), the Court left the job of delineating minimum performance standards to the lower courts. *Id.* at 770-71. *See Note, A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1057-58 (1980).

In *Maryland v. Marzullo*, 435 U.S. 1011 (1978), Justice White, joined by Justice Rehnquist, strongly dissented from the denial of certiorari:

Despite the clear significance of this question, the Federal Courts of Appeals are in disarray . . . .

. . . .

. . . [I]t is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. . . . [W]e should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants.

*Id.* at 1011-13.

89. In the federal courts, only the Second Circuit still applies the "farce and mockery" test. *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974). It has indicated that it may switch to an objective standard in the future. *See, e.g.*, *Indiviglio v. United States*, 612 F.2d 624, 629 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980); *Rickenbacker v. Warden*, 550 F.2d 62, 66 (2d Cir. 1976). Some state courts, however, continue to apply it. *See, e.g.*, *Deason v. State*, 263 Ark. 56, 60-61, 562 S.W.2d 79, 82 (1978); *People v. Elder*, 73 Ill. App. 3d 192, 199-200, 391 N.E.2d 403, 408-09 (1979); *Nickell v. Commonwealth*, 565 S.W.2d 145, 149 (Ky. 1978); *People v. De Grafenreid*, 19 Mich. App. 702, 717, 173 N.W.2d 317, 325 (1969); *Turnbough v. State*, 574 S.W.2d 400, 402-03 (Mo. 1978) (en banc).

90. Eight circuits have switched from the "farce and mockery" test in the last 13 years. *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980); *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); *United States v. Bosch*, 584 F.2d 1113 (1st Cir. 1978); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976); *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (6th Cir. 1974); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974);

Unfortunately, there is no similar trend toward specification of duties.<sup>91</sup> Hence, ineffective assistance of counsel standards remain vague. Some courts do mention "skill," "judgment," or "diligence,"<sup>92</sup> but many use terms such as "reasonably competent and effective representation."<sup>93</sup> The vagueness of the latter impairs application and makes it difficult to determine whether the standard answers the competency complaints previously discussed.

Each of the three current "competence" standards—DR 6-101(A), the common law of legal malpractice, and "effective counsel" interpretations—has serious deficiencies. None addresses all the basic complaints against the legal profession.<sup>94</sup> Each presents application difficulties: unclear standards of care,<sup>95</sup> uncertain duties,<sup>96</sup> or taxing "capability" requirements.<sup>97</sup> All are unsuitable for use as a uniform minimum legal performance standard.

#### IV. THE PROPOSED STANDARDS

Bar organizations recently have made three proposals that contain "competence" standards: the Model Rules of Professional Conduct,<sup>98</sup> the ABA's proposed substitute for its Code of Professional Responsibil-

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Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (en banc); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967).

91. One recent circuit court opinion explicitly rejected the idea of using a "checklist" of responsibilities. *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976) (en banc), *cert. denied*, 444 U.S. 944 (1979).

92. *See, e.g.*, *Dyer v. Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc) ("skill, judgment, diligence"), *cert. denied*, 445 U.S. 945 (1980); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) ("skills and diligence"), *cert. denied*, 434 U.S. 844 (1977).

93. *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979).

94. *See* notes 52-55, 72-78, 91-93 *supra* and accompanying text.

95. *See* note 56 *supra* and accompanying text.

96. *See* notes 57, 91-93 *supra* and accompanying text.

97. *See* notes 59-60 *supra* and accompanying text.

98. The discussion draft of the Model Rules was published January 30, 1980. The commission solicited opinions on the Rules and held four public hearings: in Chicago, February 3, 1980; in Atlanta, March 3, 1980; in San Francisco, April 7, 1980; and in New York City, May 5, 1980. The commission originally planned to submit a final version of the Rules to the House of Delegates in February, 1981, but extended that deadline to allow further comment. ABA MODEL RULES OF PROFESSIONAL CONDUCT, Introductory Letter (Discussion Draft 1980) [hereinafter cited as RULES].

The American Bar Association Commission on Evaluation of Professional Standards, chaired by Robert J. Kutak, compiled the draft.

ity;<sup>99</sup> the Model Peer Review System, an ABA project<sup>100</sup> proposing the creation of an informal, remedial review system to supplement existing disciplinary methods;<sup>101</sup> and the American Lawyer's Code of Conduct, the American College of Trial Lawyers' (ACTL) proposed alternative to the Code of Professional Responsibility.<sup>102</sup> The proposed standards are all more effective than existing ones. Though their criteria differ significantly, they are more responsive to criticisms and easier to apply than their current counterparts.

The Model Rules of Professional Conduct (Rules) address all of the basic client complaints. Section 1.1 requires "specific legal knowledge, skill, efficiency, thoroughness and preparation."<sup>103</sup> Obviously, it covers lack of skills<sup>104</sup> and "inadequate preparation"<sup>105</sup> complaints. The section's comments also indicate that "skill" includes "analysis,"<sup>106</sup> thereby dealing with another complaint.<sup>107</sup> "Specific legal knowledge"<sup>108</sup> seems to entail "inadequate attention to basic legal principles and rules."<sup>109</sup> Section 1.4 speaks to client "neglect."<sup>110</sup> It creates

99. For a discussion of the current Code of Professional Responsibility, see notes 49 & 52-60 *supra* and accompanying text.

100. The American Law Institute-American Bar Association Committee on Continuing Professional Education prepared the discussion draft. ALI-ABA, A MODEL PEER REVIEW SYSTEM ix (1980) [hereinafter cited as PEER REVIEW].

101. The system has four components. Part I proposes model criteria for evaluating attorney competence.

Part II describes a program of "referral peer review." Through that program, third parties can refer lawyers to review authorities, who determine whether the lawyer needs assistance to meet the standards of competence. If the authorities find a need for assistance, they request that the attorney participate in a "voluntary program of remedial training."

Part III, disciplinary peer review, sets forth a program for disciplining lawyers who threaten harm to present or future clients.

Part IV, law practice peer review, outlines a program for reviewing and upgrading law practices. It involves self-referral by individual lawyers or whole firms. *Id.* at 1.

102. ACTL, THE AMERICAN LAWYER'S CODE OF CONDUCT, Preface (Discussion Draft 1980) [hereinafter cited as CODE OF CONDUCT], reprinted in TRIAL, Aug. 1980, at 44-63. The preface states that "[t]he legal profession cannot continue to function . . . under disciplinary rules and ethical considerations [found in the Code of Professional Responsibility] that are, even as the ABA has acknowledged, incoherent, inconsistent, and unconstitutional" and that "the Model Rules make few improvements over the CPR [Code of Professional Responsibility] . . ." *Id.*, reprinted in TRIAL, Aug. 1980, at 47.

103. RULES, *supra* note 98, § 1.1, at 7.

104. See notes 27, 40-44 *supra* and accompanying text.

105. See notes 28-32 *supra* and accompanying text.

106. Comments to § 1.1, RULES, *supra* note 98, § 1.1, at 8.

107. See notes 27, 39 *supra* and accompanying text.

108. RULES, *supra* note 98, § 1.1, at 7.

109. See notes 27, 35-38 *supra* and accompanying text.

a detailed duty to keep the client informed that includes “periodically advising” clients of the “status and progress” of their assignment,<sup>111</sup> “explaining the significant legal and practical aspects” of the problem<sup>112</sup> and “foreseeable effects of alternative courses of action,” and “promptly complying with reasonable requests about the matter.”<sup>113</sup> Finally, sections 1.2 and 1.5 address the “laziness” problem<sup>114</sup> by requiring lawyers to “attend promptly to matters undertaken,” to give them “adequate attention until completed,”<sup>115</sup> and to “act diligently in representing a client.”<sup>116</sup>

In addressing these complaints, the drafters made the Rules easier to apply by clearly specifying a lawyer’s basic duties. In other ways, however, the Rules present application difficulties. Section 1.1 provides that a lawyer shall “undertake representation” only if he “can act with adequate competence.”<sup>117</sup> Technically, therefore, to find a violation of section 1.1 a judge must decide not only if a lawyer did act “competently,” but also if he could act competently. As previously mentioned, ability assessments are quite difficult.<sup>118</sup> The section’s standard of care also presents problems. It requires the care employed in “acceptable practice,”<sup>119</sup> but it does not reveal to whom or by what standard a lawyer’s performance must be “acceptable.” Furthermore, the other sections furnishing “competence” criteria<sup>120</sup> provide no standard of care at all.<sup>121</sup> In terms of application ease, therefore, the Rules are ineffective.

The strengths and weaknesses of the standards in the second new proposal, the Model Peer Review System (Peer Review),<sup>122</sup> are similar to those of the Rules. The Peer Review’s criteria, like those of the Rules, respond to the criticisms discussed. In section 1, the Review states that a “competent” attorney “is specifically knowledgeable about fields of law in which he or she practices, . . . performs the techniques

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110. See notes 27, 31-33 *supra* and accompanying text.

111. RULES, *supra* note 98, § 1.4(1), at 12.

112. *Id.* § 1.4(2), at 12.

113. *Id.* § 1.4(3), at 12.

114. See notes 27, 45-49 *supra* and accompanying text.

115. RULES, *supra* note 98, § 1.2, at 10.

116. *Id.* § 1.5, at 15.

117. *Id.* § 1.1, at 6 (emphasis added).

118. See note 12 *supra* and accompanying text.

119. RULES, *supra* note 98, § 1.1, at 7.

120. *Id.* §§ 1.2, 1.4, 1.5, at 7, 10, 12, 15.

121. *Id.*

122. See notes 100-01 *supra* and accompanying text.

of such practice with skill, . . . [and] properly prepares and carries through . . . ."<sup>123</sup> Thus it addresses complaints of "inadequate attention to basic legal principles and rules,"<sup>124</sup> "lack of skill,"<sup>125</sup> and "lack of preparation."<sup>126</sup> The requirement to "properly . . . carry through"<sup>127</sup> also deals with "laziness complaints."<sup>128</sup> Section 3 addresses the "inadequate analysis" problem<sup>129</sup> by requiring that lawyers identify "material factual and legal issues" and "alternative responses to the problem."<sup>130</sup> Furthermore, sections 4 and 6 deal with neglect of clients by requiring lawyers to collaborate with clients in developing strategy<sup>131</sup> and to advise them of "the completion of actions, of delays, or of circumstances requiring reassessment" and of "relevant changes in the law."<sup>132</sup> The competence criteria of the Model Peer Review System, therefore, address all six major complaints against lawyers.<sup>133</sup>

The criteria admit to ease of application in some respects. Like the standards in the Rules, they specify a lawyer's duties in addressing those complaints.<sup>134</sup> Moreover, the criteria seeking to remedy the main problem areas<sup>135</sup> are performance, not ability, requirements; lawyers not only must be able to prepare, but they must prepare "properly."<sup>136</sup>

Nevertheless, the criteria present two application difficulties. First, they do not provide a standard of care. Section 1 states that "[l]egal incompetence is measured by the extent to which an attorney fails to maintain"<sup>137</sup> certain qualities, but it does not specify what "extent" of maintenance is necessary to achieve minimum competence.<sup>138</sup> Furthermore, the performance requirements described above are mingled with

123. PEER REVIEW, *supra* note 100, § 1, at 11.

124. *See* notes 27, 35-38 *supra* and accompanying text.

125. *See* notes 27, 40-44 *supra* and accompanying text.

126. *See* notes 27-29 *supra* and accompanying text.

127. PEER REVIEW, *supra* note 100, § 1, at 11.

128. *See* notes 27, 45-47 *supra* and accompanying text.

129. *See* notes 27, 38 *supra* and accompanying text.

130. PEER REVIEW, *supra* note 100, § 3, at 16.

131. *Id.* § 4, at 17, 20.

132. *Id.* at 20.

133. *See* note 27 *supra* and accompanying text.

134. They create duties to be "specifically knowledgeable about fields of law," to use "skill," to "prepare," to "carry through," to identify issues, and to advise clients of developments. *See* notes 122-32 *supra* and accompanying text.

135. *See* note 27 *supra* and accompanying text.

136. PEER REVIEW, *supra* note 100, § 1, at 11.

137. *Id.*

138. *Id.*

such “ability” requirements, as being “intellectually . . . capable,”<sup>139</sup> and with aspirational goals, such as “achiev[ing] rapport with those who participate in the client’s matter.”<sup>140</sup> The mixture of ability requirements, aspirational goals, and performance standards makes identification, and thus application, of the Peer Review’s standards more difficult.

Like the Rules and the Peer Review System, the American Lawyer’s Code of Conduct (Code of Conduct) addresses most of the complaints considered in Part II. In doing so, however, it articulates some of a lawyer’s duties with more specificity than do the other standards, thereby increasing ease of application. For instance, rather than merely requiring “preparation,”<sup>141</sup> it commands lawyers to “seek out all facts and legal authorities that are reasonably available and relevant to a client’s interests.”<sup>142</sup> It also clarifies treatment of the “laziness” problems,<sup>143</sup> mandating that attorneys “take such legal action as is necessary and reasonably available to protect . . . a client’s interests.”<sup>144</sup> It includes “attention to basic legal principles and rules”<sup>145</sup> by stating that “[a] lawyer shall give due regard not only to established rules of law, but also to legal concepts that are developing and that might affect a client’s interests.”<sup>146</sup>

Some of its duties, however, are less specific. Its requirement that lawyers must keep clients informed,<sup>147</sup> for instance, is not as detailed as that of the Rules.<sup>148</sup> The Code of Conduct also does not explicitly address the problem of inadequate analysis<sup>149</sup> or expand on the duty of skill.<sup>150</sup> Nevertheless, in most areas its detail is helpful.

The Code of Conduct’s “competence” standard is also easy to apply for two other reasons. First, its sections are definitely phrased as per-

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139. *Id.*

140. *Id.* § 5, at 19.

141. RULES, *supra* note 98, § 1.1, at 7.

142. CODE OF CONDUCT, *supra* note 102, § 4.3, at 55.

143. *See* notes 27, 45-47 *supra* and accompanying text.

144. CODE OF CONDUCT, *supra* note 102, § 4.2, at 55.

145. *See* notes 35-38, 69, 73 *supra* and accompanying text.

146. CODE OF CONDUCT, *supra* note 102, § 4.4, at 55. It is unclear, however, whether “rules of law” include procedural as well as substantive rules.

147. *Id.* § 4.5, at 55. Section 4.5 states that “[a] lawyer shall keep a client apprised of all significant developments . . . unless the client has instructed the lawyer to do otherwise.” *Id.*

148. *See* notes 111-13 *supra* and accompanying text.

149. *See* CODE OF CONDUCT, *supra* note 102, § 4, at 55.

150. *Id.*

formance requirements, alleviating the need for difficult capability assessments.<sup>151</sup> In addition, it clearly states a standard of care: "At a minimum, a lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."<sup>152</sup> The phrase "generally afforded," however, may cause problems. If it means "average," then the half of the legal profession that is necessarily "below average" violates the standard.<sup>153</sup> If it means "customary," courts may find, as they have in certain industries, that "customary" practice may still be unreasonable" and thus unacceptable.<sup>154</sup> The Code of Conduct's standard does, however, provide at least some standard of care.

The proposed "competence" standards, on the whole, are clearly superior to existing standards in most areas. Each, however, has certain weaknesses. An effective uniform standard would embody the best aspects of each set of competence criteria.

## V. ANALYSIS

### A. *The Standard*

By combining parts of the various existing and proposed competence standards, one can assemble a standard that definitively addresses the major criticisms of lawyers<sup>155</sup> and assiduously avoids the application problems discussed above.<sup>156</sup> In addressing those criticisms, a performance standard should state a lawyer's duties as specifically as possible to make application easier. The first complaint is "lack of preparation,"<sup>157</sup> and the Code of Conduct's formulation of the preparation requirement is the most specific. It requires, in one section, that a lawyer

151. Each section begins "A Lawyer shall" and requires a specific action. See CODE OF CONDUCT, *supra* note 102.

152. *Id.* § 4.1, at 55.

153. One court, in a medical malpractice case, recognized that an "average" standard would "put the jury in a predicament as to how to arrive at an 'average' . . . [and] automatically make . . . approximately one-half of the doctors guilty of malpractice." *Gambill v. Stroud*, 258 Ark. 776, 770, 531 S.W.2d 945, 950 (1976). See also *Babbitt v. Bumpus*, 73 Mich. 331, 41 N.W. 417 (1889); *Purfield v. Kathrane*, 73 Misc. 2d 194, 341 N.Y.S.2d 376 (1973).

154. See *Marietta v. Cliffs Ridge, Inc.*, 20 Mich. App. 449, 174 N.W.2d 164 (1970); *Shafer v. H.B. Thomas Co.*, 53 N.J. Super. 19, 146 A.2d 483, (1958); *Pan American Petroleum Corp. v. Like*, 381 P.2d 70 (Wyo. 1963). See also *Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 301 (1979).

155. See note 27 *supra* and accompanying text.

156. See notes 10-12 *supra* and accompanying text.

157. See notes 28-29 *supra* and accompanying text.

“seek out all facts and legal authorities that are reasonably available and relevant”<sup>158</sup> and, in another section, that he seek out “reasonably available resources.”<sup>159</sup> Together the two sections cover most aspects of preparation, and the “reasonably available and relevant”<sup>160</sup> caveat may assuage fears of judicial abuse.

“Neglect of clients” is best addressed by the Model Rules of Professional Conduct. Their requirement is more detailed than the Code of Conduct’s command to “keep a client apprised.”<sup>161</sup> The Rules’ standard requires a lawyer to “periodically” inform his client of his case’s “status and progress,” explain significant legal points and “the foreseeable effects of alternative action,” and to “promptly [comply] with reasonable requests for information.”<sup>162</sup> Thus, the standard directly answers complaints that lawyers leave clients uninformed and refuse to answer requests for information.<sup>163</sup> It also ensures that consumers of legal services, like medical patients,<sup>164</sup> will be aware of significant decisions affecting their lives. Unlike the Peer Review System’s criteria, however, it does not generally require client collaboration in strategy.<sup>165</sup> Because a lawyer must make many “strategy” decisions that cannot involve collaboration with the client due to time and legal complexity, the Rules’ more narrow requirement to inform clients of foreseeable effects of courses of action<sup>166</sup> is easier to apply.

The Code of Conduct’s standard is the most detailed with regard to “inadequate attention to basic legal principles and rules.”<sup>167</sup> It commands a lawyer to “give due regard not only to establishing rules of law, but also to legal concepts that are developing,”<sup>168</sup> making it clear that lawyers are required to keep “current.” The section should include “legal rules” as well as “principles,” however, in order to fully answer the complaints discussed above.<sup>169</sup>

The Peer Review System contains the only “analysis” duty. It re-

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158. CODE OF CONDUCT, *supra* note 102, § 4.3, at 55.

159. *Id.* § 4.6, at 55.

160. *Id.* § 4.3, at 55.

161. *Id.* § 4.5, at 55.

162. RULES, *supra* note 98, § 1.4, at 12.

163. *See* note 33 *supra* and accompanying text.

164. *See* note 76 *supra* and accompanying text.

165. *See* notes 131, 162 *supra* and accompanying text.

166. *See* note 162 *supra* and accompanying text.

167. *See* notes 27, 35-38 *supra* and accompanying text.

168. CODE OF CONDUCT, *supra* note 102, § 4.4, at 55.

169. *See* notes 35-36, 146 *supra* and accompanying text.

quires lawyers to identify “material and factual legal issues” and “alternative responses to the problem.”<sup>170</sup> It would be difficult to formulate a more specific standard.

Similarly, the minimum performance standard should not dissect into components the requirement of the exercise of “skill.”<sup>171</sup> Otherwise, it may become too narrow to be applied to all types of lawyers.<sup>172</sup> An effective standard simply calls for the exercise of “skill.”

“Laziness” problems, however, can be addressed with more specificity than a mere requirement of “diligence.”<sup>173</sup> The Code of Conduct requires a lawyer to “take such legal action as is necessary and reasonably available to protect . . . a client’s interests.”<sup>174</sup> That formulation clearly covers sins of sloth such as failure to appear in court, to make timely motions, or to Shepardize.<sup>175</sup>

The foregoing duty formulations are each specific enough to be workable and are phrased in terms of actual performance. An effective standard, however, also needs a clear standard of care. In this context, the “reasonable attorney” standard used in many malpractice cases<sup>176</sup> is the easiest to apply. Courts and reviewers could easily confuse standards requiring the care exercised by the “ordinary attorney”<sup>177</sup> or that “generally afforded” by “other lawyers”<sup>178</sup> with “average” conduct. If “competent” means “average,” then all “below average” attorneys are “incompetent.”<sup>179</sup> Furthermore, “ordinary” conduct should not necessarily be equated with “competent” conduct. The pervasiveness of performance problems may make some serious and intolerable conduct ordinary.<sup>180</sup> The “reasonable attorney” standard provides an objective standard of care without presenting those problems.

The combination of the “reasonable attorney” standard with the

170. PEER REVIEW, *supra* note 100, § 3, at 16.

171. *See* notes 27, 40-44 *supra* and accompanying text.

172. Trial lawyers, for instance, need specific skills in use of expert testimony and presentation of evidence. *See* notes 41, 44 *supra* and accompanying text. It would be unreasonable, however, to require a lawyer who only drafts wills to have those skills.

173. *See* note 71 *supra* and accompanying text.

174. CODE OF CONDUCT, *supra* note 102, § 4.2, at 55.

175. *See* notes 45-46 *supra* and accompanying text.

176. *See* note 62 *supra* and accompanying text.

177. *See* note 63 *supra* and accompanying text.

178. *See* note 152 *supra* and accompanying text.

179. *See* note 153 *supra* and accompanying text.

180. *See* note 154 *supra* and accompanying text.

above specific performance duties creates a very effective minimum performance standard.

### B. *Uniformity*

The minimum performance standard described above should be uniformly applied in all areas of law. Currently, so many different duties and standards of care exist<sup>181</sup> that a lawyer cannot be certain of his obligations. Specific, uniform requirements would encourage voluntary compliance with "competence" standards.<sup>182</sup> Uniformity would also promote consistent decisions in two areas drastically in need of clarity and consistency—malpractice and "effective counsel" cases.<sup>183</sup> The arguments in favor of a uniform standard, therefore, are strong.

Commentators propound several major arguments against use of a single "competence" standard in all areas of law, but the arguments fail under close analysis. The first argument is that application of performance standards strict enough to eliminate the problems perceived in the legal profession would cause undue civil liability<sup>184</sup> and an unreasonable number of criminal case reversals.<sup>185</sup> Malpractice cases, however, require a showing of causation and harm<sup>186</sup> as well as breach of duty, and sixth amendment cases generally require a similar showing of "prejudice."<sup>187</sup> Assuming enforcement of those requirements,<sup>188</sup> viola-

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181. See notes 52-154 *supra* and accompanying text.

182. See note 16 *supra* and accompanying text.

183. See notes 72-88 *supra* and accompanying text.

184. See Wofram, *supra* note 154, at 296-97; Commentary, *Violation of the Code of Professional Responsibility as Stating a Cause of Action in Legal Malpractice*, 6 OHIO N.L. REV. 666, 700 (1979).

185. One judge estimated that if every substandard performance by a criminal defense attorney caused reversal, his court would retry half of its criminal cases. Bazelon, *supra* note 1, at 22-23.

186. See note 79 *supra* and accompanying text.

187. See note 83 *supra* and accompanying text.

188. Currently the "prejudice" requirement is not uniformly applied. See *United States v. Decoster*, 624 F.2d 196, 245 (D.C. Cir. 1976) (en banc) (Robinson, T., concurring), *cert. denied*, 444 U.S. 944 (1979). See also note 83 *supra*. Some commentators argue that courts should eliminate the requirement in order to increase pressure for better lawyer performance. Note, *supra* note 88, at 1073 n.139. See also Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659 (1980). Automatic referral of ineffective counsel complaints to bar disciplinary agencies, however, also increases pressure, and it does so at less expense.

Courts, therefore, should apply the prejudice requirement and use other tactics, such as increased referrals, to encourage high standards. One survey found that of the 18% of all judges who had ever instituted formal attorney disciplinary proceedings, 55% had done so only once, 25% twice, and 8% three times. Maddi, *supra* note 2, at 129-30. Other researchers discovered a similar

tions of the standards that do not harm clients would not cause liability or reversals.<sup>189</sup> When violations do cause harm, the critics surely are not asserting that the harm should remain unredressed simply to avoid costs to attorneys and courts. Therefore, uniform minimum performance standards would not create undue liability or unreasonable reversals.

Moreover, they would not hamper the effectiveness of a peer review system. One could argue that standards minimal enough to be used in all settings would, if enforced in a peer review system, impair efforts to make good lawyers excellent ones.<sup>190</sup> Acceptance of a minimum standard does not, however, preclude development of a whole spectrum of higher standards. Reviewers could use a uniform minimum performance standard in peer review when dealing with lawyers concerned only with meeting minimum requirements.<sup>191</sup> It would be irrelevant, but not detrimental, in working with those desiring excellence.

Another potential problem with uniform standards is illusory. Commentators assert that with identical bar and malpractice standards a finding of substandard performance in one arena might bind subsequent proceedings in another.<sup>192</sup> They argue that such issue preclusion might make disciplinary agencies even more hesitant to find violations.<sup>193</sup> The organized bar should, however, attack problems of protectionism rather than cater to them. If disciplinary agencies and courts are applying the same standards, prior agency findings of Code violations should be conclusive in courts. Lawyers in disciplinary proceedings are afforded full trial safeguards<sup>194</sup> plus the benefit of a

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reluctance to refer. See Marks & Cathcart, *supra* note 2, at 205; REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR FOUNDATION ON CANONS OF ETHICS (1958). "[T]he prevailing attitudes of lawyers toward disciplinary enforcements ranges from apathy to outright hostility." *Id.* at 1.

189. See notes 79, 83 *supra* and accompanying text.

190. Many of the lawyers participating in peer review are expected to "already be more than adequately competent." PEER REVIEW, *supra* note 100, at 1. If the review system's only standards are minimum ones, the review will be valueless.

191. Part II of the Model Peer Review System provides for third party referral of lawyers needing assistance to meet minimum requirements. PEER REVIEW, *supra* note 100, at 33. Some of those referred may be concerned only with satisfying those requirements.

192. See Wolfram, *supra* note 154, at 297, 298 n.69; Commentary, *supra* note 184, at 700.

193. Wolfram, *supra* note 154, at 297; Commentary, *supra* note 184, at 701.

194. See Wolfram, *supra* note 154, at 298 n.72. "Most jurisdictions . . . accord the accused attorney full procedural protections such as counsel, cross-examination, discovery, and subpoena powers." *Id.*

stricter standard of proof.<sup>195</sup> Courts should not waste valuable time on issues previously fairly tried. Similarly, court findings of substandard performance should preclude a lawyer's colleagues from declaring that his conduct is acceptable to the bar. Issue preclusion is simply not a legitimate reason to oppose uniform standards.

None of the major arguments against uniform standards withstands close analysis. The reasons in favor of uniformity are strong. Therefore, the legal profession should apply a uniform minimum legal performance standard.

## VI. CONCLUSION

When the ABA finalizes its Rules of Professional Conduct,<sup>196</sup> it should include the following rule:

### *Competence*

(1) At a minimum, a lawyer shall serve a client with skill and care commensurate with that afforded by reasonable attorneys in similar matters.

(2) A lawyer shall seek out all facts, legal authorities, and resources that are reasonably available and relevant to a client's interests in the matter entrusted to the lawyer by the client.

(3) A lawyer shall keep a client informed about matters in which the lawyer's services are being rendered. Informing the client includes:

(a) periodically advising the client of the status and progress of the matter;

(b) explaining the significant legal and practical aspects of the matter and the foreseeable effects of alternative courses of action; and

(c) promptly complying with reasonable requests for information about the matter.

(4) A lawyer shall give due regard not only to established legal

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195. *Id.* at 292 n.49. "While the typical civil suit burden of proof is a preponderance of the evidence, in attorney disciplinary proceedings the widely employed burden of proof is the stricter clear and convincing evidence standard." *Id.* See ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, SUGGESTED GUIDELINES FOR DISCIPLINARY ENFORCEMENT 15 n.12 (1975). Some states do, however, use the "preponderance of the evidence" test in disciplinary proceedings. See, e.g., *In re Robson*, 575 P.2d 771 (Alaska 1978); *In re Crane*, 400 Mich. 484, 255 N.W.2d 624 (1977).

196. See notes 98-99 *supra* and accompanying text.

principles and rules, but also to legal concepts that are developing and that might affect a client's interests.

(5) A lawyer shall formulate the material legal and factual issues and identify alternative legal responses to the problem.

(6) A lawyer shall take such legal action as is necessary and reasonably available to protect a client's interests.

If the ABA adopted the above rule and endorsed its use as a uniform minimum performance standard, it would greatly clarify the duties and obligations of attorneys.<sup>197</sup> That clarification would aid judges and other reviewers in uniformly enforcing performance standards.<sup>198</sup> Uniform enforcement would, in turn, help cure the perceived problems of the legal profession,<sup>199</sup> resulting in greater integrity and a better reputation for the profession. Therefore, the ABA should adopt this proposal and encourage its uniform application.

*Nancy A. Strehlow*

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197. See note 16 *supra* and accompanying text.

198. See note 17 *supra* and accompanying text.

199. See notes 27-47 *supra* and accompanying text.