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Competency of Counsel and Judicial Responsibilty

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Litigation Ethics

Competency of Counsel and Judicial Responsibility

by Monroe H. Freedman

Chief Justice Warren Burger has been complaining for over a decade that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." We may quibble about his statistics, but we cannot deny the substance of the Chief Justice's complaint. There is a significant amount of ineffective assistance of counsel, and that situation is intolerable, both professionally and constitutionally. Under Canon 6 of the Code of Professional Responsibility, "A lawyer should represent a client competently," and under the sixth amendment, criminal defendants are entitled to the effective assistance of counsel.

The Chief Justice is correct in suggesting that law schools must bear a heavy responsibility for training in trial and appellate advocacy, as well as in client-oriented skills such as interviewing and counselling. It is clear, however, that much of the current debate in this area ignores how much legal education has progressed over the last fifteen or twenty years.

Not long ago, for example, the president of a bar association wrote to the deans of New York law schools suggesting the adjustment of law school curricula to include an elective course in trial and appellate advocacy. Law schools have such courses and have made enormous gains in developing methodology to teach litigating skills. At Hofstra Law School, which is typical in this regard, there are over a dozen clinical programs and courses in advocacy, including two neighborhood law offices and a tax clinic. In those programs, students, under faculty supervision, interview clients, draft pleadings, research and write briefs, and appear in court and before administrative agencies. In addition, lawyering skills and legal ethics are increasingly emphasized in traditional substantive law courses.

One of Chief Justice Burger's proposed remedies is that the third year of law school be devoted to clinical training in lawyering skills. In some instances, however, law schools actually have been prevented from adopting programs like this, not because of a lack of imagination or because of inertia within the law schools, but because of limitations imposed from outside. In New York, for example, the rules of the Court of Appeals severely restrict any law school's efforts to provide students with clinical experience.

Thus, while some judges and bar associations are encouraging rules requiring that certain courses be given, others prevent these innovations. This possibly also explains why law school representatives generally have opposed any imposition of course requirements by lawyers and judges, however well-meaning, who are outside the highly specialized area of legal education.

My point is not that there is ground for complacency about needed improvements in legal education. However, it is obvious that the principal opportunity for major reform in dealing with incompetent practitioners lies elsewhere than in further debate over law school curricula and methodology.

Certification No Cure

Nor is certification the proper cure for Chief Justice Burger's complaint —at least, certainly not until several crucial questions have been satisfactorily answered. Who will do the certifying? Who will certify the certifiers? What will the standards be? How will exploitation of young lawyers (compelled to serve as apprentices to

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older lawyers) be avoided? What steps will be taken to eliminate inadequate advocates from the ranks of "experienced" members of the bar, particularly in view of the fact that current complaints obviously are directed against those already in practice?

To illustrate the last point, one third to one half of the members of the New York State Trial Lawyers Association may be incompetent (if we accept the Chief Justice's figures), but they certainly are not stupid. Promptly after Chief Justice Burger's call for certification in his 1973 Sonnett Lecture, that association proposed a certification program. The proposal, of course, included a grandfather clause, which in effect would make certification unnecessary for attorneys already in practice—the very lawyers whose past performance has given rise to the idea that certification is needed.

An Odd Aspect

One of the oddest aspects of the current certification suggestion is the emphasis on litigating attorneys. Indeed, the Chief Justice and others have urged that certification be limited, at first, to trial practice. It surely cannot be believed, however, that the level of competence is higher among the large majority of lawyers who never go to court—those who do such office work as draft wills, plan estates, write contracts, counsel on business ventures, or prepare tax returns.

In fact, in one critically important respect the litigating attorney is the lawyer *least* in need of certification, because only the litigating attorney operates in what the Chief Justice has called the "goldfish bowl" of the courtroom, under close and constant scrutiny by the public, other attorneys, and—most important—by the judges themselves.

And this brings me to my principal point. If one third to one half of the litigating lawyers are inadequate, and if it "happens regularly" that attorneys are unable to handle criminal cases assigned to them, and if Chief Justice Burger in two decades on the bench has indeed seen hundreds, if not thousands, of "miscarriages of justice" caused by incompetent lawyers, then who is best able to do something about it? Who, in fact, has a responsibility to do something about it?

The answer is obvious: Chief Justice Burger and his colleagues on the bench have both the opportunity to observe litigating attorneys and the obligation to take remedial measures regarding incompetent representation, if and when it occurs. Both the Code of Professional Responsibility and the Constitution require that counsel be competent and effective. Indeed, under Canon 7, counsel also must be "zealous." Under the ABA Code of Judicial Conduct, a judge is required specifically to initiate appropriate disciplinary action against a lawyer for any unprofessional conduct of which the judge may become aware. [Canon 3B(3); see also Canons 3A(4) and 3B(1).] The Code of Professional Responsibility also requires lawyers (including judges) to report violations of Disciplinary Rules. DR 1-103(A); DR 1-102(A)(1).

Despite these clear obligations (and similar requirements under the previous canons), neither the Chief Justice nor virtually any other judge has accepted that fundamental responsibility. In fact, they have tended to go in precisely the opposite direction. Courts place such a "heavy burden" upon a defendant maintaining a claim of ineffective assistance of counsel that numerous cases undoubtedly never are appealed, and in virtually all that are appealed, the inadequate attorney is "vindicated."

In many courts the client's heavy burden requires proof not simply of ineffective or incompetent counsel, but that counsel was "horribly inept." Nothing less than showing a "farce and mockery" will do. If a defendant's attorney was demonstrably "mentally incapacitated and of unsound mind," that "may" be grounds for reversal, but does not assure it.

In one case, the defendant's attorney did not have an office, was a chronic alcoholic, and had to be summoned to court by a bench warrant. Since the panel on appeal was one of the most liberal in the country, the defendant had the satisfaction of a dissenting vote in his favor when his conviction was affirmed.

Some courts have replaced the "farce and mockery" rule with a "reasonable competency" standard. Generally, however, those same courts require a showing of prejudice —which must be done, of course, on a record initially made by the attorney charged with incompetence. In a case in which defense counsel appeared to be sound asleep during the direct testimony of prosecution witnesses, the conviction was nevertheless affirmed. The court specifically found a lack of prejudice, because "the testimony during the periods of counsel's somnolence was not central to [the accused's] case . . ."

In a 1972 decision, with Chief Justice Burger in the majority, the Supreme Court declined an opportunity to provide standards for minimum competency in litigation. Dissenting from the denial of certiorari, Justice Byron R. White, joined by Justice William H. Rehnquist, wrote that the Supreme Court was thereby "shirk-[ing] its central responsibility as the court of last resort, particularly its function in the administration of criminal justice. . . ."

Kept in Dark

Further insight into the problem of incompetent attorneys and judicial irresponsibility is provided by a "decertification" practice in the United States District Court for the Southern District of New York. A Criminal Justice Act Panel composed of federal judges has notified some attorneys that their handling of cases has been so bad that they will not be assigned others. Yet no defendants represented by any of those lawyers ever have had their convictions vacated on that ground (which should be done automatically), nor have any such defendants even been informed of the judges' opinion of their counsel's incompetence.

Unhappily, therefore, one is forced to the inference that too many judges are concerned about incompetence because of its effects on their calendars, and not because of lawyers' ethics or clients' constitutional rights. The Chief Justice has in fact explained his concern by pointing to incompetence as "one of the major reasons for congestion and delay in courts." As long as that continues to be the prevailing judicial concern, it is unlikely that judges will risk possible retrials by identifying instances of in-

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competence. It is much easier to make uninformed demands upon the law schools, and issue ill-advised calls for certification.

What is needed is for judges to assume the obligations expressed in the former Canons of Judicial Ethics: "to criticize and correct unprofessional conduct" and "to support the federal Constitution and . . . fearlessly observe and apply fundamental . . . guarantees." The Chief Justice, who claims to have seen innumerable miscarriages of justice resulting from incompetence of counsel, but who appears to have taken no corrective action in any of them, might look closer to home for the best cure for his complaint.

Fair Grand Jury

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In the Carter Administration, the Justice Department has taken a softened stand. It has gone part way toward supporting change—though not far enough. While Attorney General Bell and others vigorously opposed many of the Criminal Justice Section proposals, the committee met with Department representatives several times during the drafting to try to smooth areas of difference. By the ABA annual meeting in August 1977, Justice Department opposition had been winnowed down to only five of the original twenty-six proposals. Despite intense lobbying before the meeting by U.S. Attorneys and a personal appearance on the House of Delegates floor by the Attorney General, the delegates gave their support to the contested principle on counsel in the grand jury room by two-to-one.

The Justice Department has now recognized the need for reforms, through its support for twenty-two of the principles in the final ABA package and through its announcement in the summer of 1977 that it was substantially revising portions of its manual for U.S. Attorneys on handling a grand jury. Many states, too, are now considering changes in their grand jury procedures—including California, New York, Michigan, Ohio, Massachusetts and New Jersey. Colorado in 1977 passed comprehensive legislation bringing extensive reform of that state's grand jury system.

Courts have also begun to scrutinize grand jury procedures more scrupulously—reversing a long-time "hands off" policy. In 1976, the Court of Appeals for the Sixth Circuit condemned a grand jury's gathering of evidence against a person already indicted, calling the practice "a possible revival of a version of the English Star Chamber." *United States v. Doss*, 545 F.2d 548, 549 (1976).

Opponents of reform call these measures overkill. They decry them as undercutting and destroying the grand jury system. This is an exaggerated fear. The grand jury will not be made ineffectual. It cannot survive by infringing on the rights of citizens. It cannot shortcut due process protections that are laced throughout every other part of the system. If prosecutors are not willing to see some checks placed on their virtually total domination of the grand jury, it will surely be abolished —for it will be seen for what it too often is, a mask for the prosecution's manipulation of the formal charging process.

The ABA House of Delegates action in 1977 marked a recognition by the legal profession that abuses have occurred and demand correction. Congress is now considering legislation to carry out many of these reforms. Even more radical changes in the grand jury, which *would* render it unworkable or result in its demise, will result if prompt action is not taken.

Grand jury reform should be a concern of the entire bar. It has become an issue that cuts across all lines within the legal profession. With the increasing use of the grand jury in white-collar corporate investigations and in criminal antitrust and tax cases, pressure for reform is no longer confined to a small number of criminal defense lawyers. The trial bar must insure that changes are made—pragmatic and workable changes, ones that preserve the grand jury but make it fair.

From the Bench

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many of the most flagrant and commonly occurring grand jury abuses.

I fear, however, that imposing any or all of these various procedures will only lead to a legal circus; that we will merely be creating new issues and in all probability more cumbersome procedures to accomplish a practically useless task. I believe, for example, that permitting counsel to accompany a witness into the grand jury room will inevitably lead to vigorous objections and other proper adversarial tactics by counsel. I say inevitably because that is counsel's role. But the grand jury is not and cannot be structured to operate in an adversarial capacity; it is by nature an *ex parte* body. The preliminary hearing, by contrast, is ideally suited to adversary proceedings.

Similarly, the requirement that prosecutors present to the grand jury exculpatory evidence on the issue of guilt, although admirable in theory, is unworkable in practice. Determinations of what is "exculpatory" and on what issue, are difficult at best. Further, the method of presentment can all but negate the impact of such evidence. Moreover, even assuming adoption of the ABA's proposals, the requirement can only lead to complicated and time-consuming arguments by the witness's counsel, arguments that must be heard by the district court before the grand jury may proceed. Again, substitution of the preliminary hearing would satisfactorily resolve these problems.

Despite the impracticality of many of the reform measures, recent cases