EVALUATING THE COMPETENCE OF LAWYERS

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The title states the article's subject: the problems and possibilities of evaluating the competence of lawyers. It attempts to: (1) survey what has been written about the subject, commenting on the strengths and limitations of alternative approaches; (2) suggest those activities of lawyers which most influence the effectiveness of their performance and what competence means as to them; (3) indicate what are the principal problems inhibiting better performance evaluations and some ways to try to deal with these problems; and (4) propose some research tasks which may improve our capability as systematic and relatively objective evaluators.

The literature exhibits approximately five approaches to evaluating lawyer competence. Two are indirect: (1) measurement of competence by a lawyer's training and/or his or her performance on a certification examination and (2) assessment based upon a lawyer's status or reputation. These approaches are of limited value where, as in most present instances, there is no proven relationship between such measures and actual competent performance. The other three approaches focus on performance. The first judges performance in terms of successful and unsuccessful outcomes in advocacy. The second judges performance in terms of the avoidance of negligence. The third involves a more systematic and detailed evaluation of the ways lawyers carry out certain activities central to the services they offer. The article suggests how this last approach can be most effectively developed. In spite of the formidable problems raised by attempts to evaluate lawyers, the author is optimistic that such evaluation is possible and can be productive.

I. INTRODUCTION

How to evaluate the competence of lawyers is a question of tremendous practical importance. People do not know how to choose a lawyer at the outset, or how to evaluate his or her performance during the lawyer-client relationship. We, the experts, have not given the public very much help in solving this problem. Furthermore, we ourselves have no reliable information about how competent, in the aggregate, lawyers actually are. Nevertheless, we make judgments all the time about issues of legal reform which rely upon assumptions about this aggregate competence. Can these judgments be more than ideology when we cannot assess the validity of such crucial assumptions?

Perforce, it is also a question of academic significance. Is there a role for clients, for lawyers, and for social scientists who lack

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formal legal training, in the evaluation of lawyer competence, and can such evaluations be more than random, impressionistic, or irrational? If such roles exist, how should they be assumed? If meaningful standards exist, what are they? This paper attempts to begin to answer these questions relative to all three constituencies: the lay person, the legal community, and the social scientist.

Let me make a few assumptions clear at the outset. I believe that individuals ought to have the opportunity to choose competent professionals to serve them and that the public, as well as the leaders of the legal profession and the judiciary, ought to know about the true competence of lawyers in the aggregate and to participate in formulating and adopting policies that affect or are affected by this competence. A contrary stand is incompatible with commitments to democracy, to increasing the control that people have over their lives, and to enhancing their dignity and self-respect.

So long as these values are sought, I think that strengthening and extending the delivery of legal services can and should promote them. The need for the assistance of experts in defining problems and in articulating individual and group interests must necessarily be great in a relatively open and democratic society. Lawyers, or lawyer-substitutes, perhaps with different training, titles, and roles from what they possess at present, should always be prominent among such experts. Accordingly, I hold that it is worth spending money and effort to improve the delivery of legal services, and reject the premise that resources would necessarily be better spent only on other ways to improve the quality of our lives. I have not assumed that the concerns of nonlawyers about legal services can only be expressed by more direct governmental control over the governance of lawyers. The nature and extent of appropriate lawyer self-regulation is an issue beyond this discussion. However, if lawyers do not improve the quality of existing legal services generally received and do not increase the public's sophistication in utilizing legal services, more direct governmental intervention is likely.

These ideas push toward finding ways to make it possible to evaluate systematically and reliably the performance of lawyers, and to share this information when and if it is gained. Those who do not share my premises will be quick to judge this a fruitless undertaking. They may be right. However, I believe systematic and reasonably reliable evaluation of lawyer competence is possible and can be constructive.

To make this very large area easier to cultivate, I have set a few priorities. It will be for others to farm some sections I shall leave

fallow. There is a distinction, which, though evanescent in some matters, is worth preserving, between being competent and being ethical. The greatest difficulty in evaluating legal competence is gaining consensus on its component elements. If we insist that a competent lawyer cannot be unethical, we may fail at the threshold. 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. This distinction has been suggested elsewhere (Marks and Cathcart, 1974:196). Assuredly, the two characteristics cannot be entirely separated since, as Canon 6 of the *Code of Professional Responsibility*[1] reminds us, seriously incompetent conduct is itself unethical. But, in considering competence, we can avoid grasping some porcupines such as the duty of a defense lawyer to bring forth evidence damaging to his client, or the duty of a lawyer who believes his or her client to be seriously in the wrong, or the duty of a lawyer who can help the client only by injuring an innocent third party.

A second distinction is the setting within which legal services are delivered. I will focus on three of the many possible settings:

(1) traditional fee-for-service private practice by lawyers, generally for the more affluent;

(2) publicly funded legal service programs for the poor; and

(3) privately funded group legal services, generally for the middle and working classes.

Therefore, I exclude, among others, government lawyers, salaried lawyers employed by corporations, paraprofessionals and public interest lawyers.

Third, there is a distinction between the competence of the practitioner and the effectiveness of the legal service institution, if any, for which he or she performs. This article is more concerned with evaluating individual competence than institutional competence. Partly, it is because I have a nominalist orientation. Instead of dealing with abstractions such as "the public interest" and the "good of the organization," I prefer to consider how well concrete actions and choices meet the needs and wants of individuals. It is partly, too, because an institution is unlikely to perform well if its leading participants are incompetent, and partly because evaluating the comparative effectiveness of, say, a poverty law office as against a Judicare program raises very different issues from those which influence the effectiveness of the individual practitioner.[2]

1. Hereinafter referred to as "Code."
2. The effectiveness of legal institutions is a subject directly addressed by Rick J. Carlson, *infra*. Illustrative of the institutional evaluation is Brakel (1974).

Finally, I believe there are important relationships between lawyer competence and client competence. Skill at educating clients about legality, the legal system and what is possible within it probably should be deemed an aspect of lawyer competence. Competent clients probably can improve the performance of their lawyers. While this is reflected in the significance I attribute to informed consent in defining attorney competence, (p.271 *infra, et seq.*), this article nevertheless excludes consideration of what constitutes client competence and what its relationships to lawyer competence are and should be.

Having staked out the boundaries, I will focus on four topics: (1) how legal competence has so far been evaluated; (2) standards of competent lawyer performance; (3) why evaluating lawyer performance is so difficult; and (4) identifying some specific research proposals for improved evaluation.

II. HOW COMPETENCE HAS BEEN EVALUATED UP TO NOW

We do not know much about judging legal competence. This is indicated by the fact that those law firms which generally set and meet the highest standards of competent performance in commercial law require at least five years of continuous on-the-job scrutiny to determine which associates are sufficiently competent to be taken in as partners. While a few "stars" are visible almost at once, even they must prove their value over a period of years. What little we know has hardly been written down. Most judgments are intuitive and the bases for making them are rarely shared with a larger audience. The best idea for the outsider of what competence is in private practice comes not from scholarship but from fiction, for example, Louis Auchincloss (1973), or occasional journalistic essays, such as Paul Hoffman's (1973). With respect to poverty legal services, those few recorded efforts at systematic evaluation which have been made have rarely been published. There is not a single article that discusses the problems of evaluating lawyers working in private legal insurance programs.

What has been written about standards of competence can be divided into roughly five different approaches. Two of the five do not attempt to evaluate a lawyer's performance directly. One is the measurement of competence by the training a lawyer receives and/or exhibits in a proficiency examination. Illustrative is the traditional requirement that each lawyer pass a bar examination before being authorized to practice. While perhaps a screen against the inept, such examinations have not, so far, assured that those who pass are competent. Recently, a committee of the Second

Circuit Court of Appeals, appointed by Chief Judge Kaufman, has proposed preliminary rules for admission to practice before its district courts. Among other requirements, an applicant is to certify familiarity with the Federal Rules of Civil and Criminal Procedure and must have assisted in preparing four, or have attended six, hearings at which testimony is taken (Kaufman, 1975a:1515). Chief Justice Burger has made a similar but more general proposal (1974). Both men have been disturbed by the large numbers of incompetent trial and appellate attorneys they find appearing before even the higher federal courts of the nation. Others have called for postpractice certification procedures, voluntary or mandatory, for other specialized areas (Parker, 1974).

Improving competence through improved and more extensive training is a special subject of its own about which little is known. Some twenty years ago a superb study was conducted of the competence of a sample of general practice physicians in North Carolina (Peterson *et al.*, 1956; L. Hoffman, 1958).[3] The team of researchers found that there was no relationship between a physician's level of performance and the medical school attended, the physician's age, or years of clinical experience. Nonetheless, they did find that competence was positively related to a medical school class standing, as well as attendance at postgraduate instructional programs held out-of-town. Attendance at local programs bore no relation to competence. They also found a positive association between number of subscriptions to medical journals purchased and competent performance (Peterson *et al.*, 1956:82, 86).

Extraordinarily difficult challenges are imposed by the design of testing procedures which reliably predict actual performance. The Educational Testing Service (ETS), which administers the standardized Law School Admission Test (LSAT), is currently undertaking, in collaboration with three other organizations concerned about legal education, an ambitious attempt to generate measures of competent lawyer performance. Ultimately, it is hoped that it will be possible to design LSAT test questions which will be effective predictors of such performance.[4] In addition to tests which tap knowledge, reasoning ability and expression, qualities thought to be associated with successful practice, ETS is also exploring what have been referred to as "situational" tests, which simulate real-world professional problem solving situations with standardized conditions for all examined. Such a test was recently reported as having been applied to more than 4,500 general practice

3. Hereinafter referred to as "Peterson Study."
4. Parenthetically, the Peterson Study found no relationship between competent performance and the then-administered medical college aptitude test (1956:144).

physicians. Each watched closed-circuit television dramatizations of the examination of patients with symptoms properly treated by different and quite specific antibiotic drugs. Each doctor had to choose the appropriate drug for each patient. The examiners set a score of 80 percent correct as the standard of high competence. Half of the doctors tested did not score higher than 68 percent (Neu and Howrey, 1975). A forerunner of this technique may be the student Mock Law Office Competition established by Professor Louis Brown of U.S.C. Law School. The competition and its justification is described in Brown (1972). Student teams are given a legal problem that challenges both analytical and counseling skills. Experts decide which team is most effective in dealing with the problem and the client. So far, the standards of analytical and counseling competence are relatively imprecise. Situational tests will have to be sophisticated and precise in order to overcome the deep suspicion of many lawyers that they are and must be intellectually soft.

A second approach to evaluation is gauging a lawyer's competence by determining his status in the legal community. This approach is represented by the *Martindale-Hubbell Law Directory*, which lists and rates most practicing lawyers in most localities throughout the United States. Ratings depend upon anonymous information solicited from a nonrepresentative selection of judges, prestigious lawyers and community leaders. The Directory does not specify the criteria it uses other than age, practical experience, and nature and length of practice. Barlow Christensen is probably correct in concluding that a high rating is based more on social acceptance than on proficiency (1970:121). Sociological studies by Reichstein (1964), Handler (1967), and especially Jerome Carlin (1966), have attempted to correlate lawyer's professional status and ethical conduct. Their evidence tends to show that a substantial number of lawyers violate some canons of ethics and that many lower status lawyers frequently engage in seriously unethical conduct; but they do not analyze the relationship between ethical and competent behavior, or consider what competence involves. Age and experience seem to be weak predictors of competent performance (Peterson *et al.*, 1956:144).

If the market for lawyers were an open one, classical economic theory suggests that the fees a lawyer could command in the market place would reveal his or her competence. The best lawyers would be able to charge more than the average, notwithstanding vigorous competition among suppliers of legal services. But the law is not an open market. The dissemination of information about relative fees and services is limited. Entry into the market is restricted by

certification requirements and, of course, as is obvious from the purport of this article, most consumers have information that is highly imperfect. Accordingly, it is doubtful that either fee charged or income earned is a good predictor of competent legal performance. In the Peterson Study income was found to be of no value in predicting competent physician performance (1956:130).

Though professional reputation can often be misleading, especially where the criteria underlying the judgment are obscure, in principle professional reputation may be a useful, if somewhat inflexible, status indicator of competence. If ten judges in a community each picked the ten lawyers who were the most consistently effective advocates in their courtrooms, we might be reasonably confident that those whose names appeared frequently in the selections were competent advocates. Three caveats about such evidence: it is elitist, inviting the usually misleading conclusion that those not selected are necessarily not competent; courtroom skills are not the only ones relevant to competent litigation performance; and hidden biases may be built into judicial perceptions.

While upgrading legal training, improving legal testing and certification, promoting continuing legal education programs, and developing status and reputational measures of competence are worthwhile concerns, if they are to become more valuable we will have to find correspondences with lawyer performance. At best, they will only be indirect indicators of competent performance. At worst, they will have little or no relationship.

The remaining three approaches do attempt to evaluate competence in terms of standards of performance. The third one tries to judge competent performance in terms of successful and unsuccessful outcomes. I know of only two studies that do this using empirical data. My own book (1974a) is based upon interviews with a random sample of 60 Manhattan residents who were plaintiffs in personal injury claims and who recovered at least $2,000. A fact sheet prepared for each respondent specifying most of the factors that lawyers believe to be relevant in evaluating the worth of a claim. These include: the nature of the injury, medical expenses and lost income, the perfection of the liability issue, the name of defendant's insurer, and the income, education level, and occupation of the victim. These fact sheets were submitted to a panel of five experienced negligence experts, two plaintiff's lawyers, two insurance company claims agents, and one lawyer with experience representing both plaintiffs and insurance companies. Each expert put a dollar value on each claim as depicted in the fact sheet depending upon whether it was settled within the year of the accident, or close to trial, or was tried. They were not told the

amount of the actual recovery until after they had completed their evaluations. It was assumed that a comparison of the actual recoveries with the mean panel evaluation would provide one relatively "objective" empirical measure of the competence of professional service received by personal injury claimants. "In 77 percent of the cases (44 of 57), clients did worse than they should have according to the arithmetic mean of the values assigned to their claims by each of the five panelists" (Rosenthal, 1974a:59).

The other study, which looks to case disposition as one of several measures of lawyer competence, was conducted at the University of New Mexico Law School (Evans and Norwood, 1975). The authors have done a skillful job of comparing the effectiveness of the service provided to a sample of local misdemeanor defendants by accredited lawyers (seven public defenders and seven private practitioners) on the one hand, and by lawyer-supervised law students in a clinical training program, on the other. Several performance criteria were employed. Client interviews were videotaped (reportedly with client consent) and monitored by an expert panel. Case files were reviewed. Judges were asked to assess attorneys and students who appeared before them, though they refused to do so. Evaluations were based in part on the number of client contacts, whether the lawyer participated in the sentencing determination process for convicted clients, and how much time was spent on each case.[5] In addition, the authors reviewed both the results obtained in the court proceedings and the severity of the sentences imposed on those convicted. With a medium-sized sample (students defended against 132 charges, licensed attorneys against 67), they found no statistically significant variation between the two groups. The students acquitted themselves well and even had a slightly better win/loss record (Evans and Norwood, 1975:23).

One limitation of this outcome approach to evaluation is that there are relatively few types of legal practice which produce clear-cut wins or losses. It may have some applicability to personal injury and criminal practice; but it is wrong to judge the competence of representation in a commercial negotiation on whether or not a merger was consummated, or in a contested divorce on whether or not alimony was paid.

A fourth approach is to evaluate performance in terms of *minimal* standards of competence. While it is often difficult to specify precisely why a professional is competent, or to discriminate between degrees of acceptable conduct, it is easier to spot clear

5. While the first two criteria are appropriate, I doubt that time spent on a matter has any necessary relationship to competence. It fails to account for efficiencies associated with experience. It should also be noted that client satisfaction was not assessed.

inadequacies and to use their occurrence as a basis for distinguishing at least minimal competence from incompetence. This is the approach taken by the common law in litigated civil judgments as to whether a lawyer is negligent (incompetent), and therefore liable for damages resulting from his incompetence. The courts have not agreed on a common standard for defining negligence. The majority view is that negligence is a want of that degree of knowledge and skill *ordinarily* possessed by others similarly situated. The minority view is that negligence is the failure to use *reasonable* care and diligence, whatever community practices are. The first invites the conclusion that competent conduct is average or normal conduct; the second, that average or normal conduct is not enough if it shows a lack of reasonable attention (Curran, 1960). Ironically, this minority standard is almost uniformly applied to nonprofessional conduct in the general law of negligence. So far, the law of professional negligence has been used sparingly to apply either standard of competence to lawyers. Relatively few have been found negligent by courts of law. In virtually all cases in which this form of incompetence has been determined, the lawyer has made some important error of omission, analogous to abandoning the client, such as letting the statute of limitations run. The lawyer has almost never been held liable for errors of commission.[6]

The law of professional liability offers a mixed standard of fact and law. The standard of ordinary performance is relatively more objective. Evidence of it draws heavily upon the expert testimony of lawyers. A few courts in a few cases have tried to apply the more subjective standard of reasonable care, as judged by the lay jury. This latter standard, though a stricter one, nevertheless is relatively minimal. One is presumed to be competent unless adjudged to be negligent. Of course there is no necessary relationship between negligence in a particular case and incompetence as a practitioner. Not even the finest lawyers have avoided acts of professional negligence during their careers.

Another form of minimalist approach is heuristic. It suggests imprecise but meaningful standards which can be used as a form of shorthand for evaluating competence. This approach is adopted by a growing number of pamphlets and articles addressed to the unsophisticated consumer. They try to help lay persons choose and appraise lawyers by encouraging them to trust common sense and

6. The classic illustration of this is *Lucas* v. *Hamm*, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962) (no liability for ignoring the rule against perpetuities in drafting a will). A hopeful indication that times are changing is a recent severe limitation of the *Lucas* case by the California Supreme Court in *Smith* v. *Lewis*, 530 P.2d 589 (1975) (liability for negotiating a property settlement in a contested divorce, ignoring a community property claim to vested pension rights).

to apply standards of quality to lawyers similar to those applied to others from whom services are sought. One of the better pamphlets is *A Shopper's Guide to Lawyers*, produced in 1974 by the Pennsylvania Insurance Department as one of a series relating to various professions. Another is a chapter contained in a manual written by Roger Golde (1969:73) entitled, *Can You Be Sure of Your Experts?*[7] These advise consumers to trust their feelings about a lawyer. If they feel uneasy about the lawyer that may be a relevant criterion in deciding whether or not he or she should be employed. Both invite the client to question the lawyer closely and to expect responsive and plausible answers. Another criterion of competence is the lawyer's ability to speak "in plain English." Much of this kind of advice is good. It encourages clients to be active participants in the lawyer-client relationship and questions the suitability of lawyers who are unwilling or unable to permit this participation. These articles do not, however, establish that there is an inevitable connection between satisfying the client and competence. Surely some attorneys with irresistible desk-side manners are otherwise inept.

The fifth and final approach calls for a more systematic and detailed specification of what lawyers actually do when they serve clients. It involves specifying those activities which relate most directly and influentially to doing a capable job, and developing criteria for evaluating how well each of these activities is performed. The results of these individual evaluations are weighed and a cumulative judgment of overall competence is then made. This permits a more discriminating judgment than the minimalist approach. It permits, in theory, a rank order discrimination of competence, distinguishing the merely competent from the very competent. Characteristic of this approach is that it is generally thought to require professional evaluation by peers. They alone have the experience and knowledge to identify competent performance. This is a reflection of the fact that most of the present applications of this approach in the law have been subjective, with little or no articulation of the relevant types of activities or the criteria for assessing them. To the extent we can begin to articulate these standards and design ways of measuring them, evaluation will not necessarily have to be conducted by peers.

Much of the writing exemplifying this approach to legal evaluation is tentative and exploratory. Paul Wolkin has recently proposed that local bar associations should form monitoring agencies

7. The right, under the First Amendment of the Constitution, to compile and publish a consumer's directory containing representative fees and other relevant information about cooperating attorneys in one Virginia county is currently in litigation. *Consumers Union of United States, Inc. et al.* v. *American Bar Association, et al.* Civil Action No. 75-0105-R (E.D. Va.). See Plaintiff's Opening Brief on the Merits, filed August 15, 1975.

to review charges of incompetence brought by members of the public and the profession against individual attorneys. This agency, he recommends, would investigate, hold a hearing, and if the allegations of lack of competence were found to have substance, prescribe a remedial educational program. Its purpose would be to help the lawyer to become a better, more qualified, and ultimately successful lawyer. Pending practice would be limited or suspended (1975a: 577; see also 1975b). In theory, this plan is not unlike one of the existing functions of bar association grievance committees—to raise and maintain standards of performance. In practice, however, most such disciplinary bodies have, for years, dealt with only a small percentage of lawyer misconduct. Virtually all of those sanctions meted out have been for grossly unethical behavior (Special Committee On Evaluation of Disciplinary Enforcement, 1970). Even one of the best and most active committees, that of The Association of the Bar of The City of New York, disciplines only a few lawyers a year for negligent conduct. As with courts hearing lawyer malpractice cases, actionable incompetence is found and discipline is deemed to be warranted only in situations of relatively flagrant omissions of proper practice which cause the client palpable injury (Committee on Grievances, Bar Association of City of New York, 1972).[8]

Wolkin does not specify the kinds of lawyer activities requiring closest scrutiny, nor the values embodied in competent performance. Rather he points to the existence of models of similar peer review plans, especially in medicine, which can be used for guidance. As he says, Congress has recently amended the Social Security Act to provide for the creation of local Professional Standards Review Organizations (PSROs) to monitor the performance of professionals providing federally financed health care services.[9] Unfortunately, PSROs are new and there is, as yet, very little systematic information about their formation, operation or standards of evaluation. Nonetheless, there are other useful models of peer review in medicine to consider. In most hospitals, utilization and review, medical audit and tissue committees review the performance of hospital personnel for evidence of incompetence (Parker, 1974:467). Usually this review is based entirely on written and photographic records and surgical biopsies; only suspected incompetence may be followed-up by interviewing the professionals involved.

8. I am grateful to Lester Brickman for the information that no grievance committee has ever been reported to have disciplined an attorney error of commission, so far as diligent research can discover. See also Marks and Cathcart, 1974:210.
9. 86 Stat. 1329-1493 (1972) (codified in segments of 42 U.S.C. § 201-4918 (Supp. II, 1972)).

The Peterson Study (1956), previously cited, is one exciting model for possible application to direct observation of lawyer performance. Direct observation is certainly a better evaluative procedure than inspection of evidence after the fact. In 1953, the Peterson team observed the work of 88 North Carolina private general practice physicians for one month as they treated their regular paying patients. Each was graded on the techniques of six activities: history taking, physical examination, use of laboratory diagnostic aids, therapy, preventive medicine, and record-keeping. When the results were in, only 25 percent were rated highly; 31 percent were judged to be satisfactory and fully 44 percent were rated unsatisfactory. Only seven doctors received the highest rating because

> only they knew exactly what they were doing and did it thoroughly and systematically. Even more important . . . they seemed to enjoy the intellectual challenge of medicine. [At the other extreme] sixteen doctors did a sketchy, haphazard job . . . some of them had evidently never had the basic training needed for the practice of good medicine. Others knew better, but didn't seem to care enough. [Hoffman, 1958:367]

Throughout its life, the Office of Legal Services of the Office of Economic Opportunity (OEO) conducted a program of onsite evaluations of individual OEO poverty law offices by joint teams of outside consultants and OEO officials. One of the most important parts of these inspections were interviews with staff attorneys to attempt to assess their competence. Until 1970, evaluators received almost no instruction in how to conduct these interviews. In that year, a report prepared for OEO by The Urban Institute attempted to make this evaluation process more systematic (Duffy *et al.*, 1970). The report does not specify criteria of competent performance by staff attorneys in individual cases but it does recommend the useful procedure of randomly having each attorney pull 20 of his or her recent cases, with the monitor closely questioning how the attorney justifies what he or she did in at least five of these. The report recommends that the evaluator discuss hypothetical cases as well, to identify the techniques of practice used by the attorney.

Unfortunately, the report does not seem to identify those values it considers appropriate in best serving individual clients. For example, it does not say whether it is desirable for a staff attorney to define his or her role as counselor to the client broadly or narrowly. Should a lawyer give a client who seeks it, psychological and financial guidance, even though the lawyer is not trained in these fields? Lawyers are divided on this question. The report does indicate that it is thought appropriate for attorneys to be committed to certain values that OEO as an institution was trying to promote. These include commitment to seeking law reform, to

seeking economic development for the community and to increasing the level of community education about the law. I wonder whether these commitments are necessarily related to competent performance on behalf of clients. A commitment to public interest law reform goals may sometimes directly conflict with giving the client the best possible service for his or her particular needs; for example, the client who wants to settle an important test case before the court has ruled upon the merits. The Urban Institute approach was further limited by not including interviews with clients as part of the overall evaluation. I do not intend to be very critical of it. Evaluating the competence of staff attorneys was only one of several justifications for the monitoring process, and not the most important one. The report was a sophisticated early effort to deal with intractable problems raised by the systematic evaluation approach. It probably did help to reduce the variation of evaluative orientations applied by various investigators and, although never published, it has been made available to and has stimulated those few scholars who have been working to improve the performance of poverty legal service programs.

The Legal Services Corporation, recently created by Congress to succeed OEO,[10] has commissioned The Urban Institute to develop a new program for evaluating its effectiveness. This project, directed by Leona Vogt (who coauthored the earlier report), is in the stage of developing evaluative measures (Vogt *et al.*, 1976b). The present approach includes surveying client satisfaction as part of the evaluative strategy but does not evaluate the lawyer's skill in obtaining the informed consent of the client.

One of the few systematic evaluations of poverty legal services which has been published (in a limited edition), studied a program in East Harlem, Manhattan, staffed primarily by young volunteer attorneys from elite, downtown commercial law firms (Rosenthal *et al.*, 1971).[11] Its principal focus was trying to determine how competently the attorneys served the individual clients. A major limitation was inability to question the lawyer or to inspect the files with respect to particular cases. The trustees of the program were unwilling to permit what they perceived as an intrusion by the researchers into the confidentiality of the lawyer-client relationship However, unlike the OEO evaluators, the researchers were permitted to interview a sample of 150 clients in terminated cases, when they agreed to talk. In addition to interviewing clients, the program's supervising attorneys reviewed the files for every one of the

10. The Legal Services Corporation Act of 1974 (42 U.S.C. § 2996 *et seq.*).
11. Other poverty legal services evaluations include Marks *et al.*, 1974; Hofeller, 1970; and Champagne, 1976.

2,000 cases handled during the preceding year, and 137 of the volunteer attorneys (77 percent) did a self-evaluation of their overall performance. Perhaps the most interesting finding was that from each of these three perspectives, competent service was judged to have been rendered in more than three-fourths of the cases. Furthermore, clients, staff attorneys, and supervisors agreed on the most common form of incompetence: failure to work sufficiently quickly and efficiently on cases.

We may draw a few conclusions from this survey of the literature. Obviously, the state of the enterprise is very primitive. 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. There has not even been a systematic deductive analysis of what specific lawyer activities should have standards applied to them. Both subjective client satisfaction and objective quality of performance seem, in principle, to be valid standards of competence; but there appears to be no consistent positive relationship between them when they are empirically studied, as in my book. Systematic peer review, pursued according to the fifth approach, would seem to offer perhaps the most promising route for the upgrading of competence evaluations. While it is presently performed in the legal profession by supervisors, courts, disciplinary boards and, with respect to poverty services, by outside monitors, the standards have tended to be unarticulated, unpublished, and their application unsystematic and infrequent. These deficiencies will have to be addressed if peer review is to be as revealing as it appears to have been in the Peterson Study. However, even the useful peer reviews from medicine need further validation through replication to be effective models for legal evaluation.

III. TOWARDS STANDARDS

The fifth approach, developing detailed standards accessible to reliable direct observation or indirect inference, seems possible and productive. Once we can agree on what activities have the greatest impact on the outcome of a matter, and what values we wish to promote in the conduct of these activities, we will be well on the way to identifying what we mean by overall competent performance.

What then are the important tasks that lawyers perform? Lawyers essentially perform a problem solving service. Almost all systematic problem solving involves five sequential sets of activities. These are:

1. getting information;
2. sifting it;
3. devising a preliminary strategy for going forward;
4. putting that strategy into operation; and
5. reviewing and revising the strategy in the light of new experience.[12]

Getting the relevant facts from the client, asking the right questions and recording them accurately and accessibly is the obvious starting point. If this first step is faulty it often undermines what follows. This suggests two initial activities for evaluation: how well the lawyer conducts the first information-gathering interview and how well he records what he learns.

The raw material provided by the early interview has to be sifted. The lawyer must determine what information he still lacks and how it might be obtained. Are there witnesses to be questioned, reports or other documents to be obtained and reviewed? What do the principal legal issues seem to be? Do some of them need to be researched? These are the activities of legal problem solving with which legal education is preoccupied. A lawyer's lawyer is one especially skilled in dealing with these questions.

The most controversial set of activities is the third one, devising a preliminary strategy. There are two schools of thought about what this should involve. Many lawyers claim that, as with information sifting, this is for the lawyer to decide, largely on his own.[13] I submit that this must be a collaborative undertaking, in which the lawyer and client are jointly responsible. If the lawyer alone is responsible, inadequate service is being rendered.

A shorthand term for collaboration on strategy is "informed consent." Informed consent is a dialogue between lawyer and client, which ideally works as follows. The lawyer draws upon his or her expertise to set out for the client the possible ways to proceed. The estimated costs and anticipated benefits of the available choices are carefully reviewed. Where the lawyer deems it appro-

12. I reluctantly propose yet another taxonomy. When they lack not only the answers, but very likely the right questions as well, scholars resort to classification. By way of apology, this taxonomy is tentative and ready to be discarded when we have finished with it. I find it somewhat simpler and more serviceable than similar and largely complementary descriptions by others of what lawyers do. See, e.g., Johnstone and Hopson (1967); Brown and Dauer (1975).
13. This approach is illustrated by the following statement made in a pamphlet issued by the Wisconsin Bar Association (1965):

> Get at the client's problem immediately and stick to it. Don't bother to explain the reasoning processes by which you arrive at your advice. The client expects you to be the expert. . . .The client will feel better and more secure if told in simple straightforward language what to do and how to do it, without an explanation of *how* you reached your conclusions.

priate, he or she counsels the client as to the choices the lawyer thinks to be preferable, explaining why. Proper counseling, therefore, does not mean presenting the client with the one approach the lawyer prefers, but is a mutual process of joint exploration of options, in which the lawyer tries to be responsive to the concerns of the client and feels free to express his or her concerns as well. If it works, the client weighs what has been discussed, chooses, and agrees to cooperate with the lawyer in pursuing the preferred strategy, or waives his right to choose by explicitly delegating the choice to the lawyer. Either way, the client authorizes the lawyer to proceed and shares responsibility for the course of action taken. I believe that the process of informed consent is an unappreciated but essential part of competent performance. This is so not only because it enhances the dignity of the client, but because there is evidence it can actually increase the efficiency, the productiveness of the representation. These and further justifications, as well as responses to common criticisms, have been elaborated elsewhere (Rosenthal, 1974a:143). Recent cases in the law of medical malpractice have legitimated the concept of informed consent as indispensable in the formulation of therapeutic strategies in medicine. In one leading case, a federal court concluded that failure by a physician to obtain the informed consent of his patient as to a material choice of treatments with varying risks and burdens might, in itself, justify a finding of professional negligence.[14] This is so even if the actual treatment undertaken was carried through with reasonable care, free from any negligence other than the failure to honor the patient's right to self-determination. The concept has yet to be firmly engrafted into the case law of legal malpractice, with one limited exception. Occasionally, a lawyer has been held negligent for failing to consult with the client on the acceptance of a settlement offer made to the lawyer.[15] However, I venture to predict that it is only a matter of time before courts begin to hold lawyers to a similar standard.[16] Informed consent is already a requirement of

14. *Canterbury* v. *Spence*, 464 F.2d 772 (D.C. Cir. 1972) (patient not told that surgery raised one percent possibility of paralysis).
15. *Burgraf* v. *Byrnes*, 94 Minn. 418, 103 N.W. 215 (1905).
16. On the concept of informed consent generally, see Katz (1972). Some colleagues whose judgment I respect doubt that judges who were once lawyers themselves will apply either an informed consent or a general negligence standard to lawyers as strict as the ones they are beginning to apply to doctors. Perhaps I am overly optimistic, but I wonder how long it will be possible to maintain an irreconcilable double standard. Medical experience seems generally quite relevant to the practice of law. There are the same kinds of uncertainty; the problem-solving process is very similar; except for the lack of a legal parallel to the predominant role of hospitals in medicine, the institutional arrangements are comparable. While bad lawyers rarely kill (now that capital punishment is in decline), they can do a great deal of mischief to their clients. Recently, the Supreme Court of Washington held defendant doctors negligent as a matter of law for failing to test for glaucoma when conducting a routine ophthalmic examination of a youthful patient. The court so held notwithstanding

the Code. Ethical Consideration 7-8 is worth close attention.[17]

Implementing the chosen course, in law practice, primarily involves a range of activities and skills relating to dealings with third parties such as adversaries, courts, and regulatory agencies. Competence in dealing with third parties involves skills in drafting, negotiating, and making a positive impression on people, and sometimes in litigation and appellate advocacy. Certain strategies and certain types of problems call for the exercise of some of these skills more than others. Effectiveness in drafting, negotiation and making a good impression are important to almost all legal problem-solving.

One of the main insights of recent decision theory is that problem solving is not a linear process in which each step is exhausted before the next one is taken (Lindblom, 1968:21). In any moderately complex matter, no preliminary strategy will anticipate every contingency. New facts emerge. Intermediate rediagnosis is often required. Preliminary strategies need to be modified. Consent based upon the new information is required. This suggests that important values of legal performance are flexibility and adaptability in midcourse. Is there feedback? Is the lawyer "on top" of the case? Do both lawyer and client review developments along the way? If not, a basic question of competence is raised.

This may seem like a modest beginning, but these five sets of activities tend to focus our attention on the elements of performance in which failure is most likely to affect outcome. The next step is to be more specific about the values usually associated with

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uncontroverted evidence that the incidence of glaucoma in persons under 40 in the United States is approximately 1 in 25,000. They stressed that the test is simple, inexpensive, harmless, painless, and certain. *Helling* v. *Carey*, 83 Wash. 2d 514, 519 P.2d 981 (En Banc, 1974). Presumably, there would have been no finding of negligence if the patient had waived her right to have the test by informed consent. I do not see how such a holding can be reconciled with, say, *Lucas* v. *Hamm* (*supra*, note 6). Perhaps the only significant difference between law and medicine is this double standard in the minds of some lawyers and judges.

17. A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself. In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment. [Footnotes omitted.]

competent legal performance with respect to each of these five sets of activities. Information gathering, done well, involves at least six values. One is completeness, thoroughness—nothing important should be missing. Two is economy of effort—avoiding waste and irrelevance. Three is accuracy. The worst professional experience, related to me by one of the finest lawyers with whom I have worked, resulted from his having inaccurately added a column of figures. It was a costly mistake for the client which took much anxious ingenuity to undo. Four is consistency. As with a psychiatrist, inconsistent facts are the lawyer's grist. Inconsistencies must be identified and reconciled or, at least, accounted for. Five, in gathering the facts, the lawyer must clarify ambiguities. Clarification through questioning and clarity in recording are important. Six is responsiveness. This involves, among other qualities, being a good listener, being able to get along with people, being able to encourage them to be forthcoming. Completeness, economy, accuracy, consistency, clarity, and responsiveness. These values are, in theory, accessible to the observation of intelligent people—whether experts or not.

We can look for all of them in the first, information-gathering step, and for some or all in each of the four later steps as well. Information sifting, step two, is largely a process internal to the lawyer. It can only be made accessible to indirect evaluation. One means is by monitoring the next two steps, forming and implementing the strategy and reconstructing deductively the reasoning that must have produced it. This is the detective story approach being used increasingly by medical peer review committees. Another more informative means is questioning the lawyer after the fact about why he did what he did. There are at least two important things to look for in this stage: the lawyer should have spotted all the significant issues and should have accurately assessed the consequences of the choices.

Step three, strategy formation, if done properly, calls into play several skills in which many lawyers are particularly deficient. Preeminent among these is candor. A lawyer cannot obtain the informed consent of the client in determining the preferred strategy if he or she misleads, manipulates, or holds back information. Lawyers are often unselfconscious about the numerous possible conflicts of interest or value that are built into most lawyer-client relationships. I am not referring to the obvious, gross ethical conflicts of interest such as compromising a client's claim at an inadequate level of recovery for some personal advantage. Rather I am referring to the pervasive compromises, the cutting of corners, which must be made in all but the most remunerative cases, and of

which the client may be unaware even though they significantly affect the outcome. For example, in gathering information for a plaintiff's personal injury claim, should a private investigator be hired? How skilled (expensive) should he be? Should he be authorized to make out-of-town trips? How deeply should he probe into the background and circumstances of the defendant? There can be dozens of these choices in a relatively complex claim, each involving a balance of anticipated costs and benefits. If the client has feelings about these choices, if the costs incurred are a matter of concern, or if the client is solicitous of the sensibilities of a witness, shouldn't the client be consulted? Shouldn't he or she at least set the limits of investigatory costs? Do not misunderstand me. Most lawyers who withhold such choices from clients do not do so in bad faith. They do it because it is easier to do so, because they do not think the client really cares or should care, and for numerous other reasons. However, if strategy formation is to meet the needs and concerns of clients, through shared decision, complete self-awareness and candor are very important.

In order to make informed consent meaningful, a highly competent lawyer must not only be candid but also a good communicator. It is thought by some that informed consent is impossible because most clients are unwilling to participate in choosing the way to proceed. It takes skill and patience to make difficult issues intelligible and to help a timid person see why it is in his or her interest to assume some responsibility. But what critics usually misunderstand is that clients may still choose to be passive if they wish. Once the lawyer has done a good job of informing the client, the passive client may consent by waiver, by explicitly asserting his or her unwillingness to choose. Waiver is an ancient and respectable doctrine which allows the client to balance costs and benefits. The client who waives participation avoids the burden of comprehension and responsibility for making decisions. But he or she also avoids the benefits of being able to hold the lawyer to account if the lawyer acts according to values inconsistent with those of the client.

Being a good communicator involves being a good counselor. Effective counseling requires distinctive skills.[18] As indicated, one unresolved question is whether good legal counseling requires a lawyer to have some sophistication about psychology and, among other things, some practical financial knowledge. I am inclined to think it does, if those are the aspects of the problem about which the client is most concerned. At the least, lawyers should develop knowledge about and relationships with others expert in advising

18. One book which stresses the importance of counseling skills for lawyers is Freeman and Weihofen (1970).

clients in related fields of concern so that the client may be referred to them if he or she so desires.

The way the lawyer implements the strategy is, like information-gathering, relatively accessible to inspection. It, too, involves the six values of completeness, economy, accuracy, consistency, clarity, and responsiveness. These values are especially open to systematic review in what a lawyer drafts. Most forms of legal problem solving involve at least the drafting of a letter. Virtually all legal service, beyond preliminary diagnosis, involves negotiating with third parties. These six values are as important in this form of verbal expression as in writing.

The fifth step, intermediate review, necessarily involves some or all of the values implicated in the four earlier steps; but it also requires two others. First, competence is undermined by inattention and procrastination. Legal problems rarely solve themselves. Some, like personal injury claims involving possible permanent disability and congested court calendars, may take time to resolve; a lawyer must stay on top of complex and protracted litigation and constantly review his or her strategy with as fresh an attitude as can be mustered. Second, a lawyer should be accessible to the client, not just at the beginning, but throughout. The lawyer should also assume responsibility for initiating joint review. Something is wrong if all subsequent contacts between lawyer and client are at the client's initiative—even if the client is compulsive.

The preceding has proposed guidelines for identifying the significant aspects of lawyer performance and assessing their adequacy. It does not say how to measure competence, how to validate these measures, nor how to aggregate an overall measure. These problems are beyond this discussion.

But let me offer a few additional remarks about the appropriateness of particular standards for each of the five methods of evaluation. Standards should be fashioned to meet the needs of those for whom the evaluation is made, and the capabilities of those making the evaluation. Three important distinctions are whether the standards are (1) objective or subjective; (2) articulated or impressionistic; and (3) defined as approximations of ideal conduct or, more modestly, in terms of minimum levels of acceptability.

The most important evaluators are the clients. In all three settings—private practice, group practice, and poverty services—the usual clients will not be expert in the law. I have argued that this need not render them helpless or unable to evaluate their lawyers. Even if their standards are impressionistic and subjective they should have great weight. Clients should be free to choose lawyers, to choose strategies of problem solving, to change lawyers when

dissatisfied, by whatever criteria are important to them. People do not need to be expert in the law to be able to assess such things as consistency, responsiveness, accessibility, and clarity of expression. They do not need to trust that the lawyer, entirely on his own, will determine what is in their best interest, if there is collaborative decision making through a process of meaningful informed consent. The proper standard of competence for clients to use is the best performance they can get according to their preferences, a relatively idealized standard. Nevertheless they will need expert help in setting and assessing personal standards, especially in the early years of client consumerism.

Clients in private practice will have to depend for protection, in part, upon the law of professional responsibility applied by courts in malpractice actions. The proper standard of what constitutes competent performance from the vantage of the law of professional responsibility is, and should be, avoiding negligence. The law of professional responsibility should become better articulated and less impressionistic. More opinions should be written in decided cases. Opinions should take greater care to specify the criteria of competence. What are the kinds of critical choices in legal problem solving which require informed consent? What constitutes reasonable disclosure and what constitutes knowing waiver? These are three of the questions that courts, as well as schhlars, should try to answer.

Clients in private practice will also have to rely upon the boards of discipline which the legal profession has established. I do not propose that such bodies discipline every act of negligence, let alone every act of incompetence. However, consideration should be given to the appropriateness of some form of censure for persistent patterns of poor performance. I have in mind evidence of *repeated* delay and lack of organization in handling a caseload, poorly drafted legal papers, inaccessibility, and nonresponsiveness to clients. While no one instance may constitute negligence (want of reasonable care), the entire pattern might satisfy an appropriate standard of incompetence. This is the kind of assessment which might better be made by a regulatory board than a court. Though beyond the scope of this discussion, the preceding analysis implies that lay persons should participate on such disciplinary boards along with lawyers.

It is striking that with so much judicial dissatisfaction with the courtroom performance of lawyers (Kaufman, 1975a; Burger, 1974: Marks and Cathcart, 1974:202), judges do not complain to the bar association disciplinary boards in particular cases. If they feel the boards would not be responsive to such referrals, why not establish

a competency review panel for each court? A finding of incompetence, upon due process review, might lead to a lawyer's suspension from practice before such court until proficiency was established by examination or otherwise.

While clients of poverty and group legal service programs also should rely primarily upon themselves in evaluating the performance of their lawyers, as well as upon the courts and disciplinary agencies, they should have the additional assistance of continuing objective and expert evaluation by supervisory personnel, and by the boards of trustees governing these programs. It would be foolish to demand that the standards applied by these monitors should be fully objective, or articulated, or idealized. I doubt that it will ever be possible to have idealized standards of competence in poverty law programs since the public will probably continue to be unwilling to allocate adequate resources. I also suspect that private group legal service programs will have enough difficulty achieving economic viability that, at the outset, they will be unable to develop extensive and costly internal evaluation procedures. For the foreseeable future, most internal evaluation will probably be episodic, impressionistic and somewhat subjective. While capabilities remain primitive, however, I urge those responsible for these programs to commit themselves to evaluating competent performance, within the limits of the possible. I also urge that they recognize that one criterion of competent performance to which they should give weight is the subjective judgments of their clients.[19] In every poverty and group legal services program a representative sampling of clients should be interviewed, at least after disposition of their matter.

There is another constituency concerned about these things, the scholarly community. What standards can its members use in evaluating competent performance? Scholars should be the most ambitious in their judgments. They should be eclectic and diverse in approach because they can best adopt the stance of detachment. They should make fewer compromises, seeking to define objective and idealized standards and to articulate and validate criteria and measures of competence. Twenty years ago David Riesman (1957) noted that collaboration between legal scholars and social scientists has been disappointing. It still is true. More social scientists should study some law and more lawyers should study some social science. Lawyers must learn to be more empirical, more critical of the evidence they marshal in formulating their arguments. Social scientists must learn to be more relevant, less intrigued by general description, "filling gaps in our knowledge," and more attuned to

19. Another who has made the same plea is Brakel (1974).

testing propositions which underlie, and may alter, significant policy choices.

To summarize, I have now offered a general answer to the question, "How do we evaluate lawyers?" My answer is that we try to do it with two very different approaches. First, experts in law and social science should try to identify which of a lawyer's actions most affect his success. Then they should seek agreement on those values which each activity should promote. It is necessary to look at the specific ways a lawyer reaches an overall result because there is no shortcut, in most types of legal practice, to a simple and objective evaluation of performance outcome. In this section I have indicated those activities and values which seem important to me. These guidelines, suitably modified as we look more closely at the realities of legal practice, should be used to develop discrete, objective, replicable measures of performance. If I am correct that this approach is the best one for future research, we will concurrently see our way to resolving other problems. One of these will be how to cumulate a series of performance rankings for a variety of activities to reflect a measure of overall performance. Another will be adjusting our standards to different types of legal practice. If and when we reach a stage at which we can tackle this problem, we may be capable of identifying objective measures of performance-outcome sufficiently rich to account for much of the complexity of legal problem solving. This is a bold goal. It is a distant goal and I reiterate that premature quantification or overreduction of relevant causal variables provides no shortcuts.

The second approach to evaluating lawyers is properly subjective. It should be employed by the lay people who are the beneficiaries of legal service—especially by the clients themselves. However good legal service may appear to the outsider, it is not good enough if the client is dissatisfied. By increasing the level of consumer sophistication about both the law and problem solving we can try to bring subjective lay evaluations closer to objective expert evaluations. We should do the same thing in reverse by trying to make expert objective criteria responsive to client needs and concerns. But ultimately there will not, and cannot, be identity between the objective standards of experts and the subjective preferences of particular clients. People are too complex for that. This complexity is our virtue, not our disgrace. Neither the law nor social science should imagine that it can or should engineer things to be simple. What we can try to do is make of the lawyer-client relationship a dialectical process, in which the subjective and objective, the needs of the client and the skills of the lawyer, interact to produce the best result under the circumstances.

IV. OBSTACLES TO SYSTEMATIC EVALUATION

Systematic and objective standards should be chosen with informed consent. Certain obstacles to my approach should be recognized or disillusion is inevitable. One obstacle has been identified in passing. You cannot impose values by dictate. So long as lawyers and legal scholars remain deeply divided about the values legal performance should promote, no set of standards will gain wide acceptance. Most lawyers today overestimate the role played by technical proficiency in evaluating lawyers. They underestimate proficiency in dealing with people. Lawyers are not presently criticized for being poor at relating to clients or being arrogant and unselfconscious about their own motives. To my way of thinking, standards of performance which perpetuate this misplaced emphasis would be a disservice.

Another obstacle is that the definition of standards invites people to apply them. The criticism that lawyers now receive for their aloofness and hypocrisy may be sweet praise compared with the specific and painful censure that will be directed at those whose competence is judged unacceptable. I have no doubt that recent progress in defining standards of competent medical performance, including the standard of informed consent, has played an important part in the dramatic increase in large medical malpractice recoveries. The better we can judge medical practice the less we are willing to tolerate what used to be accepted without question. We who care about defining standards for lawyers are opening the same Pandora's box. I believe we should lift this lid, but with awareness and without self-satisfaction. A vigorous and effective program for evaluating legal competence should remove the seriously incompetent from the profession. Some of those removed will be victims of circumstance and of defective legal training for which they are not responsible. Removal should be compassionate. Certainly we should seek to protect the public from excessive victimization and should encourage a malpractice remedy where injury has been sustained through a want of reasonable professional care. But we should make sure that the punishment fits the mistake. If every act of serious incompetence is adjudged an act of negligence, our legal system will break down. Only material incompetence, which the client has not ratified by a knowing waiver and which results in significant injury, should be actionable as negligence. Only a persistent pattern of significant incompetence should lead to disciplinary censure of a kind which should carry a stigma. Isolated instances of incompetent performance should be identified for purposes of instruction and, perhaps, for finer discrimination be-

tween particular lawyers in competition for promotion. An effective program policing competence should not even try to banish all incompetence from the practice of law. Clients must share responsibility for legal problem solving and should bear some of the risks of its complexity and uncertainty. No-fault client compensation for professional malpractice is no solution. It undermines the incentive for lawyers and clients to behave more responsibly and it will either price legal services out of the market or lead to inadequate compensation for those most injured by incompetence.

The practice of law comprehends both routine and novelty, simple tasks and complex strategies. Obviously, to the extent the type of practice under review is simple and routine, it is easier to evaluate. There is probably a right and a wrong way to prepare papers for the filing of an uncontested divorce in most jurisdictions. The right way can probably be set down in a relatively precise and complete checklist (requiring constant revision, no doubt). But there is no right or wrong way to represent, say, a spouse seeking custody of children in a heatedly contested divorce. Checklists may be of great assistance in guarding against the inadvertent failure to consider something important; but no checklist can comprehend the uncertainty and range of factors involved in such a representation. The more complex the type of practice and the more novel the problems and situations presented, the more difficult it is to evaluate performance. A corollary is that probably the best that can be done, even with a sophisticated evaluative instrument, is to distinguish among incompetence, low competence, and relatively high competence. It is unlikely that we will be able to measure precisely what makes one lawyer "merely" very good and another superb. Lawyers refer to the genius of their craft as a matter of judgment and ingenuity. At the top of the profession, differences in degree often reduce to these illusory qualities. They can only be conveyed, imperfectly, by illustration and anecdote (e.g., Auchincloss, 1973; Hoffman, 1973).

The approach I favor will require, at the outset, a few pathbreaking studies, employing direct observation of lawyer-client interaction and access to legal records. Such access will conflict with both client and lawyer privacy and with lawyer autonomy. Two traditional doctrines serve these legitimate interests: the ethical norm and legal privilege that a client's communications to the lawyer will not be disclosed to outsiders, and the work product rule which justifies a lawyer's refusal to disclose work prepared on behalf of a client. A responsible weighing of these values is an urgent problem which has received almost no scholarly attention. It is sometimes forgotten that these doctrines are primar-

ily justified as a protection for the client. If applied inflexibly to prevent any access by evaluators, clients may be defenseless against continued widespread lawyer incompetence. Clients must be given greater opportunity to waive their privilege of confidentiality in the interest of justice and in the interest of knowledge. But scholars and law enforcers must not abuse such access.

One proposal to be considered is that we change the present rule (by statute or judicial regulation) which finds the privilege against disclosure of confidential communications in an adversary proceeding whenever a third party, not an agent of either lawyer or client, is present during the course of those communications. Under the present rule I, as a lawyer, would advise my client against allowing a social scientist to sit in on our discussions if there was any possibility that we might enter litigation at some future time. Our adversary in such litigation might be free to depose the social scientist and compel him or her to divulge what we had talked about. It would make no difference that the social scientist had promised to protect my client's confidentiality by publishing data in a nonattributable form. The court could compel the breaking of that promise by imposing a contempt penalty upon continued noncompliance.[20]

Before that rule is revised, however, we should think through its implications. For example, would we have wanted former President Nixon protected if his official biographer had been present during hypothetical discussions between Nixon and his attorney of, say, the 18-minute gap in the Presidential tapes? What protection would we give to a client such as Mr. Nixon in that situation if the biographer went ahead and published an account blaming Nixon for the gap in spite of his promise that nothing would be revealed? What obligations and possible sanctions should we impose upon social scientists who, not through malice but through negligence, allow confidences to become public? We could exclude the social scientist's testimony in litigation, but do we give the client (and the lawyer as well?) a cause of action for the social scientist's negligence? Some of these issues might be dealt with by holding a special judicial proceeding before beginning the observation of lawyer-client relationships. The court might define the standards for carrying out such research with client permission, and bind both the lawyer and the social scientist. If appropriate, the proceeding might

20. See the recent case of first impression, *Richards of Rockford, Inc.* v. *Pacific Gas & Electric Company et al.*, No. C-74-0578-CBR; (N.D. California), Memorandum of Opinion, Renfrew, D.J. (May 20, 1976). In the course of discovery, plaintiff moved to compel a third party social scientist to testify concerning certain confidential scholarly interviews with defendant's employees. The court denied the motion in a closely reasoned opinion which may be the first step in revising existing law.

involve a factual inquiry into the qualifications of the social scientist and the extent to which the client's consent is informed. My fear of excessive state interference in the lives of citizens leads me to oppose any observation to which the client has not voluntarily agreed.[21] Responsible social scientists might encourage such a choice by paying clients for the privilege.

Two further obstacles must be acknowledged. Research leading to standards of competence and programs monitoring performance will be very expensive. It is chastening to learn that, according to one informed estimate, the Office of Economic Opportunity spent between five and fifteen million dollars over ten years for research and monitoring which yielded very mixed results.[22] Can the new Legal Services Corporation, let alone other poverty law programs, afford such an undertaking when it has insufficient funds to make more than a dent in meeting the legal needs of the American poor? I do not know the answer. A final question is whether the legal profession today will cooperate with efforts to develop competence standards. We lawyers have a lot to lose by having outsiders look over our shoulders. Appearing to make law more of a technique and less of an art lowers our status. Observers will get in our way, waste our time, and may make it harder for us to get along with our clients. Our cooperation may lead outsiders to the conclusion that we are incompetent, and generate more public scorn than now exists. By tightening malpractice remedies we may encourage suits against the most competent and innovative attorneys, those practicing on the frontiers of legal complexity. Will it be the hacks who are affected, or will the lethargy of their clients immunize them?[23] We must care about the good faith needs and concerns of lawyers as well as those of clients.

V. A FEW RESEARCH PROPOSALS

The reader interested in supporting or conducting research may have difficulty translating what has come before into a design for further investigation. I have indicated what are the important forms of lawyer performance, and what values we should apply to their analysis. I am not a social science methodologist. Methodologists are required to develop indicators (preferably quantitative) which reliably reflect these values. We must look to their assistance,

21. This lack of voluntariness, and not the invasion of the jury room, is what I find offensive in the Chicago Jury Project. That research program and its aftermath is presented in Katz (1972:67).
22. Estimate, not for attribution, provided by a former senior OEO official.
23. An in-progress study by the National Association of Insurance Commissioners (*New York Times*, May 10, 1976) indicates that the more highly trained (though not necessarily more competent) physicians are more frequently subjected to medical malpractice suits, than their less well-trained colleagues.

as well, for the development of reliable indices to aggregate the various discrete measures of performance.

Once a bedrock of knowledge has been established, it is often possible to identify measures that are relatively accessible and unobtrusive. We are not yet at this stage in legal evaluation. But we may be in medical evaluation: the Peterson Study, twenty years ago, found that the extent to which a physician had access to five key pieces of laboratory equipment in his office tended to match up positively with his independent performance rating as a general practitioner.[24]

By way of conclusion, I will suggest a few research proposals I think would further these enterprises. Obviously, direct observation of lawyer-client interaction, with follow-up interviews of both participants, is the most productive form of research inquiry. The Peterson Study is a stimulating model. There is no more important priority within the research agenda than learning how to assess and improve informed consent in the lawyer-client relationship. Does informed consent impair or improve lawyer performance? We should try, for example, what Lasswell (1963:95) has referred to as "prototyping," intervening to structure lawyer-client relationships so as to maximize the role of informed consent, and studying the consequences of such an intervention on other values we seek to promote. For example, what will happen in actual (or simulated) lawyer-client consultations if we give lawyers some training in making full disclosure, and in proceeding to deal with a matter only after obtaining the client's knowing consent? What if we give clients some information about their right to be active participants in decision making and the reasons why such participation may be desirable? Among the issue we might learn about are the following: What aspects of legal problems do clients experience most difficulty in understanding? What do lawyers see as the burdens and the benefits of shared decision? How much time do disclosure and consent take? What are its other costs? Do disclosure and consent lead lawyers and clients to take actions different than from those they were inclined to take before joint discussions? Do lawyers and clients tend to agree on what considerations are material ones requiring disclosure? If not, why not? Data gained from observation of such prototype lawyer-client relationships could then be compared with data obtained from a control group of otherwise comparable relationships structured along more traditional lines.

24. Peterson *et al.*, 1956:107. The pieces of equipment are: microscope, clinical centrifuge, electrocardiograph, BMR machine, and photoelectric colorimeter. Technological advances would probably require the periodic updating of measures such as this.

For the legal scholar, I propose two topics worthy of careful analysis: the first is refining the standards of professional negligence, especially the doctrine of informed consent, so that they are neither too permissive nor too stringent and apply to errors of commission as well as omission; the other is resolving the conflict between the confidentiality of client communications and the research requirements of direct access to those communications.

I would like to have recordings made of actual lawyer-client consultations, especially initial client interviews (with the consent of the participants). It would be constructive if psychiatrists, or others skilled in interview techniques, prepared detailed analyses of these interviews, using the same criteria of evaluation now used in training clinical psychiatrists, psychologists, and social workers. What may be possible is suggested by Gill, Newman, and Redlich (1954). I think they might be able to specify criteria of competent legal interviewing and counseling which would be an important component of a comprehensive evaluation. Researchers might hire four lawyers, none of whom would know of the others. Each would perform the same legal task—draft a will or prepare an income tax return—based on certain standardized information. The researchers would then compare the performance of each of the lawyers, either according to individualized criteria (which are made explicit) or according to criteria standardized by the research supervisor. The written products of these consultations would then be analyzed and evaluated by a panel of experts in the field, specifying their rating criteria and illustrating incidents of good and poor performance.

In either of the preceding proposals it would be worthwhile to do a follow-up investigation of the extent to which lawyers and clients misunderstand each other. An independent researcher should interview lawyer and client separately, asking what each thought went on during their interaction and what each understood the other to be saying. I suspect that such a study would verify my notion that communication skills are a special problem of competent performance. It would also be interesting to know whether those more skilled in understanding and being understood by their clients were also better at drafting wills and preparing tax returns.

These few proposals are suggestive, not comprehensive. I leave the formulation of detailed research proposals to those who will see them through. What I have tried to show is that past deficiencies in evaluating lawyer performance are no excuse for not getting on with the job.