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Renewable Bar Admission: A Template for Making "Professionalism" Real

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RENEWABLE BAR ADMISSION:
A TEMPLATE FOR MAKING "PROFESSIONALISM" REAL

Jayne W. Barnard*

The citizens of this country should expect no less than the highest degree of professionalism when they have entrusted administration of the rule of law—one of the fundamental tenets upon which our society is based—to the legal profession.¹

Re-examination was not originally required of medical specialists, but [the American Board of Medical Specialities] quickly recognized that a lifetime certification, even with required continuing education provided little incentive for doctors to keep up with new medical knowledge and techniques. Similarly, continuing [legal] education requirements alone are not sufficient to assure the integration of new law and procedure into a lawyer’s practice. Unpleasant as the prospect may be, but for the same reasons, re-examination is as necessary for lawyer specialists as it is for medical specialists.²

Thousands of hours and millions of dollars are spent each year ascertaining the character and fitness of the close to 60,000 applicants seeking bar admission.³ For each of these applicants, voluminous paperwork is assembled, references are solicited, background information is verified and a dossier, of sorts, is compiled. The results of these

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* Professor of Law, The College of William & Mary in Virginia. Thanks to Ben DiMuro, who (unwittingly) put this project in motion during a program entitled "What is Character? What is Fitness? Who Decides?," which I organized for the Virginia State Bar in June, 1999. Also to Taylor Reveley, Paul Marcus, Mechele Dickerson, John Levy, and Jim Moliterno, who read and commented on earlier drafts of this Article, and to other colleagues who participated in a workshop of this paper in November, 2000. Pia Thadhani, Emily Hayes, and Miles Uhlar, helped with research and cite-checking for this Article. Heather Stacey provided research for the State Bar program.

efforts are submitted to individual state bar admission agencies which then further massage the data. These agencies typically select out for more detailed investigation a handful of individuals whose applications raise "red flags." 

Most of the issues that raise red flags are predictable: serious mental illness; financial irresponsibility; academic integrity (issues such as plagiarism, cheating or lying on a law school application); substance abuse; arrests and convictions; and cognitive disabilities. There is also the occasional headline-grabbing case like the self-proclaimed white supremacist leader who promises to represent only white clients or the trouble-maker who, as a law student, repeatedly

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4. In Virginia, for example, the number of applicants whose paperwork commands even brief attention from the professional bar admission staff is quite small—less than one in five. The number of applicants who proceed to a full hearing before the Character and Fitness Committee is even smaller—less than two percent:

<table>
<thead>
<tr>
<th>Character and Fitness Actions in Virginia, 1995-1999</th>
</tr>
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<tbody>
<tr>
<td>Applications processed</td>
</tr>
<tr>
<td>Flagged problems (reviewed by staff)</td>
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<tr>
<td>Formal Review/Hearings</td>
</tr>
<tr>
<td>Before the Character &amp; Fitness Committee</td>
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<tr>
<td>Full Denial</td>
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<tr>
<td>Initial Denial of Admission/</td>
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<tr>
<td>Subsequent Licensure</td>
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<tr>
<td>Upon Rehabilitation</td>
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<tr>
<td>Withdrawals Without Decision</td>
</tr>
</tbody>
</table>

Letter from Stephen A. Isaacs, Director of Character and Fitness, Virginia Board of Bar Examiners, to author (Feb. 4, 2000).

5. See, e.g., Campbell v. Greisberger, 80 F.3d 703 (2d Cir. 1996) (affirming trial court's dismissal of plaintiff's challenge to a decision denying him bar admission, where he suffered from schizophrenia); Johnson v. State, 888 F. Supp. 1073 (D. Kan. 1995) (same, involving bipolar disorder).

6. See, e.g., In re C.R.W., 481 S.E.2d 511 (Ga. 1997) (denying admission to an applicant with a serious credit problem).

7. See, e.g., In re Radtke, 601 N.W.2d 642 (Wis. 1999) (denying admission to an applicant who failed to disclose an incident involving plagiarism while he was employed as a university lecturer prior to attending law school); In re Widdison, 539 N.W.2d 671 (S.D. 1995) (denying admission based on applicant's plagiarism in his law review note and cheating on an examination).

8. See, e.g., Unglaub v. Board of Law Examiners, 979 S.W.2d 842 (Tex. App. 1998) (denying regular licensure to an applicant who had a history of alcohol abuse).

9. See, e.g., In re Dorch, 486 S.E.2d 311 (W. Va. 1997) (denying admission to an applicant who had pleaded guilty to second degree murder, attempted armed robbery, and conspiracy); In re Kapel, 651 N.E.2d 955 (Ohio 1995) (denying admission to an applicant with an extensive history of traffic violations).

10. See, e.g., Clement v. Virginia Bd. of Bar Examiners, 1997 U.S. App. LEXIS 27951 (4th Cir. 1997) (upholding dismissal of applicant's claim under the Americans with Disabilities Act that her failure to pass the bar exam was a result of inadequate accommodation).

11. See Pam Belluck, Racist Barred From Practicing Law; Free Speech Issues Raised, N.Y. TIMES, Feb. 10, 1999 at A12 (reporting on the recommendation of an Illinois Character and Fitness Committee to deny admission to Matthew Hale, who heads up a race-hate organization). Based on that recommendation, the Illinois Supreme Court denied Hale admission to the bar. In re Hale, 1999 Ill. LEXIS 1639 (Ill. 1999).
caused his professors and his classmates indigestion.\textsuperscript{12}

For all this effort, the character and fitness screening process as it currently operates almost always fails to predict which bar applicants are most likely to disserve their clients or embarrass the bar. Informal tracking of this issue suggests that there is no correlation between problem character and fitness histories and later bar disciplinary actions.\textsuperscript{13}

Part of the problem is attributable to the fact that future misconduct among elite adults is devilishly hard to predict.\textsuperscript{14} What little academic work has been done in this area suggests that no single fact (save earlier, identical misconduct) is a reliable predictor of professional wrongdoing.\textsuperscript{15} But part of the problem is attributable to the fact that what we do know about lawyer misconduct is simply not the subject of the character and fitness inquiry. We may be asking the wrong questions. Or we may be asking them at the wrong time.

\textsuperscript{12} See Paul Glader, Former U. South Dakota Student Fights to Take Bar Exam, VOLANTE (University of South Dakota student newspaper), Jan. 28, 1999, available in LEXIS News Library, Curwens File (reporting on applicant who filed numerous complaints against his professors, threatened lawsuits against them, posted faculty salaries on the school bulletin board, organized student boycotts, and sold t-shirts depicting the law school dean in the nude). The Nebraska Bar commission denied his application, citing his abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, [and] turbulent "behavior." Paul Glader, Former USD Student, Banned from Bar Exam, Claims Civil Rights Violation, VOLANTE, Feb. 4, 1999, available in LEXIS News Library, Curwens File. The Nebraska Supreme Court denied the applicant’s appeal. In re Converse, 602 N.W.2d 500 (Neb. 1999).

\textsuperscript{13} D. Larkin Chenault, It Begins with Character, MICH. BAR J., Feb. 1998, at 139. At least one study suggests that there may in fact be a correlation between problem character and fitness profiles and later disciplinary problems. Carl Baer & Peg Corneille, Character and Fitness Inquiry from Bar Admission to Professional Discipline, 61 B. EXAMINER (4), Nov. 1992, at 5. That study, however, has been criticized as methodologically unsound. Patrick L. Baude, An Essay on the Regulation of the Legal Profession and the Future of Lawyers’ Characters, 68 IND. L.J. 647, 654-56 (1993).

\textsuperscript{14} See, e.g., Jayne W. Barnard, When is a Corporate Executive Substantially Unfit to Serve?, 70 N.C. L. REV. 1489, 1519 n.161 (1992) (quoting interviews with criminologists to the effect that "very little is known about the recidivism of white-collar offenders [and] there isn’t much [scholarship] that is predictive or useful"); Terrill R. Holland et al., Comparison and Combination of Clinical and Statistical Predictions of Recidivism Among Adult Offenders, 68 J. APPLIED PSYCHOL. 203, 203 (1983) ("[R]ecidivism has been resistant to highly accurate prediction, despite numerous and elaborate efforts to accomplish this purpose.").

\textsuperscript{15} See DAVID WEISBURD, STANTON WHEELER, ELIN WARING & NANCY BODE, CRIMES OF THE MIDDLE CLASSES: WHITE COLLAR OFFENDERS IN THE FEDERAL COURTS 50, 66 (1991) (noting that a surprising number of white collar criminals have a history of prior convictions). The study described in this book has a number of interesting observations about lawyers and others who get into serious, federal criminal trouble. Some of these observations might suggest additional predictors of professional misbehavior. First, most of the lawyers in the sample of convicted white-collar offenders "tended to be on the margins of their profession, practicing on their own or in small firms or partnerships and [had] attended less prestigious law schools." Id. at 53. Second, the mean age of offenders was in the mid-40s and over 90 percent of them were men. Id. at 50-51 (Table 3.1). Finally, "the most interesting fact about the white-collar offenders’ aggregate financial status is not the value of their assets but the extent of their liabilities. Many of our offenders have the material goods associated with successful people but may barely be holding their financial selves together." Id. at 65.
For example, who are the lawyers most likely to run afoul of the Rules of Professional Conduct? History tells us that lawyers handling criminal cases, domestic relations cases, personal injury cases, and real estate transactions are by far more likely to experience disciplinary complaints than practitioners in other areas. But we don’t ask in the character and fitness process what area of practice an applicant intends to pursue.

We also know that, by a wide margin, the most common complaint against lawyers, and the most common basis for bar discipline, has to do with neglect of files and failure to communicate with clients. And yet we don’t ask in the character and fitness process about an applicant’s experience with procrastination, writer’s block, time management skills, an inability to deliver bad news or an inability simply to say no.

We also know, of course, that very few young lawyers are the subjects of bar discipline. Typically, the lawyers about whom complaints are filed are over forty-five, with at least fifteen years of practice experience behind them. Often, lawyers brought into a disciplinary pro-

16. REPORT OF THE PROF’L REGULATION DEPARTMENT, VIRGINIA STATE BAR (1997-98), Chart 3 (indicating that disciplinary complaints were filed against lawyers in the following practice areas: criminal law (28% of the total complaints filed); family law (16%); personal injury (11%) and real estate (9%)); Barbara Ann Williams, Fiscal Year 2000 Report, VA. LAW REG., Aug.-Sept. 2000, at 7 (noting that “[i]n fiscal year 2000, for the fifth year in a row, the practice of criminal law generated the most bar complaints, followed by family law and personal injury law.”); ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, 1999 ANNUAL REPORT, Chart 3 (noting that complaints were received by practice area in the following order: (1) criminal, (2) domestic relations, (3) personal injury and (4) real estate).

17. This choice is, of course, logical since many bar applicants don’t yet know the answer to the question, or do but will quickly change their answer as practice opportunities present themselves.

18. See Leslie C. Levin, The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions, 48 AM. U. L. REV. 1, 49 (1998); REPORT OF THE PROFESSIONAL REGULATION DEPARTMENT, VIRGINIA STATE BAR (1997-98), Chart 4 (indicating that general neglect and failure to communicate together made up 41 percent of all disciplinary complaints); Williams, supra note 16 (“The most common complaints in fiscal year 2000 were failure to communicate and general neglect, in that order.”).

19. Similarly, very few women are the subject of bar disciplinary proceedings. ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, 1999 ANNUAL REPORT, Chart 13 (indicating that, of the attorneys disciplined in that state in 1999, only 7 percent were women).

20. David J. Beck, Legal Malpractice in Texas, 50 BAYLOR L. REV. 547, 549 (1998) (“For the years 1994-1996, the average age of the lawyers disciplined in Texas was between forty-seven and fifty-one, and the average length of practice of the disciplined lawyer was between fifteen to twenty years.”).

The profile is similar for malpractice claims. A 1990 study indicates that, of 300 malpractice claims seeking $1 million or more in damages, not one claim arose out of the acts or omissions of an associate or young partner. The Eighth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 133 F.R.D. 245, 287 (1990). Data from the Home Insurance Company, a malpractice carrier, indicates that, looking at claims made in Mississippi between 1984 and 1996, fewer than one percent were made against lawyers with under 4 years
ceeding are experiencing mid-life problems and financial pressures and then compounding the situation with substance abuse.\textsuperscript{21} (The typical lawyer misusing client funds, for example, is a "middle-aged, male sole practitioner confronted with all sorts of pressures and stresses, including drug, alcohol and psychological problems."\textsuperscript{22}) If the typical bar applicant is twenty-something years old, and the typical bad lawyer is at least twenty years older, then it is little wonder that the character and fitness screening process usually fails to detect those lawyers who will get into trouble.\textsuperscript{23}

What should we do about this oddly inadequate system? I suggest that, since entry-level screening may not be protecting clients and the public in the way that bar rhetoric suggests, some of the energy now devoted to the bar admission process might better be directed elsewhere. To be specific, perhaps it would make sense to make bar admission a progressive project, with different forms of screening at different stages of a lawyer's career.

I. THE PROPOSAL IN A NUTSHELL

Under my proposal, bar admission would begin (as it does now) with a fairly loose screen—only persons with serious, chronic, and recent problems would be excluded. Admission officials would not concern themselves with any but the most extreme examples of credit card or educational indebtedness.\textsuperscript{24} They would pay little to no attention to experience; 27 percent were made against lawyers with 4-10 years experience and 60.7 percent were made against lawyers with more than 10 years of experience. (The balance were uncoded for years of experience.). See Professional Liability Insurance Program Claims History, MISS. LAW., June 1996, at 26.

21. G. Andrew H. Benjamin, et al., Comprehensive Lawyer Assistance Programs: Justification and Model, 16 L. & PSYCHOL. REV. 113, 118 (1992) (citing an American Bar Association study which showed that 27\% of all disciplinary cases nationwide involved alcohol abuse). Other state surveys indicate that 50-70\% of all disciplinary actions involve alcoholism and the prevalence rate might be higher if all disciplinary bodies were to determine the causes for lawyers' infractions. Id.


23. This is not to say that the character and fitness process does not occasionally screen out someone who simply should never begin a legal career. Just in the last two years, character and fitness screening has deflected from the practice an applicant with a history of fraudulent billings in his previous profession (dentistry), Shochet v. Arkansas Board of Law Examiners, 979 S.W.2d 888 (Ark. 1998); an applicant with a history of unprofessional conduct as an accountant, Lynn v. Board of Law Exam'rs, 1999 Tex. App. LEXIS 677; an applicant with significant arrearages in his child support payments, In re LaTourette for Admission to the Bar, 720 A.2d 339 (N.J. 1998); and an applicant with a sustained history of alcohol abuse and an accompanying history of dishonesty about his problem, In re Saganski, 595 N.W.2d 631 (Wis. 1999).

24. The current per capita credit card indebtedness in the United States is about $7,500. See Gregory Zuckerman, Borrowing Levels Reach a Record, Sparking Debate, WALL ST. J., July 5, 2000, at C1. The per capita educational indebtedness of 1996 law school graduates who had borrowed was somewhere in the neighborhood of $66,000. John Kramer, Financing a Legal Education, in LOOKING AT LAW SCHOOL: A STUDENT GUIDE FROM THE SOCIETY OF AMERICAN
an applicant's personal politics, litigiousness, views about the judicial system, racism, sexism, or interpersonal skills. Rather, they would focus solely on the obvious disqualifiers—serious abuse of alcohol or drugs, repeated dishonesty or illegal behavior, and severe cognitive or judgmental deficiencies.

Then after, say, three-to-six years, there would be a more deliberative review process by which lawyers would be evaluated by their employers, peers, opposing counsel, judges, a select group of clients, and others (including support staff)—identified both by the lawyers subject to review and by a wide range of persons familiar with their work. This type of review is known as multisource, or 360 degree performance evaluation and experts believe it to be preferable to the traditional top down type of evaluation conducted only by supervisors. It is also more comprehensive and informative than conventional peer review.

The 360 degree review process would be rigorous, systematic, and tailored to the lawyer’s specific practice. The issues on the table would be those related to professionalism in practice: (1) substantive knowledge of the law; (2) competence in basic lawyering skills; (3) timeliness in responding to clients and courts; (4) civility; (5) time management skills; (6) overall client satisfaction, and (7) ethical compliance.

Lawyers receiving high marks in this “first-tier” review process would not be subject to a second review for ten to fifteen years. Lawyers with less successful initial reviews might be subject to remediation in the form of counseling, coaching, mandatory coursework, withdrawal from specific areas of practice, or monitoring and follow-up by their firms, by local mentors, or by professional bar staff. And, as is the case now with entry level bar admission, a handful of lawyers could expect to have their applications for license renewal rejected.

A lawyer’s “second-tier review” would be similar to the first-tier review, but would give special emphasis to the time management and financial responsibility problems that we know are most likely to emerge in the mid-life stage of a lawyer’s career. In addition, such issues as mentoring of younger lawyers; office leadership skills; and pro bono performance (including various kinds of community service) could easily be added to the second-tier review, reflecting the concerns of a mature, mid-career lawyer.

LAW TEACHERS 32, 60 (S. Gillers, ed. 1997).
27. See supra note 20 and accompanying text.
Lawyers receiving high marks in this second-tier review process would not be subject to a third-tier review for another ten to fifteen years. And so on, throughout a lawyer's career. In effect, every law license would be limited in duration and subject to renewal only upon successful completion of the 360 degree review process. And each such review could be tailored to the nature of the lawyer's practice, the amount of time she had been a member of the bar, and individualized items based on self-identified problems and results from earlier relicensing reviews.

Of course such a process would be both time and resource-consuming, but it also would have a good chance of pre-empting many of the high-profile defalcations (and also the garden variety professional failures) that give the legal profession such a poor public image.\(^\text{28}\) It would also help to identify lawyers in trouble—those who need the support of a Lawyers Assistance Program and those who, for any number of reasons, should be considering reducing or phasing out their practices.\(^\text{29}\)

The primary idea would be to identify lawyers who are at risk before they can do too much harm to themselves or their clients. A second (but equally important) objective would be to identify exemplary lawyers and to commend them for their efforts and achievements. A third objective would be to provide constructive criticism to all lawyers, to aid them in their professional growth and development. Over time, the process also would provide a vehicle for "taking the pulse" of the bar.

II. THE PROS AND CONS OF THIS PROPOSAL

The arguments against this proposal are obvious: (1) it will require an increased commitment from the organized bar to the process of peer evaluation, which often is not an agreeable task; (2) it could be expensive in terms of the need for additional bar admissions staff, computer equipment, and volunteer time; (3) it will inevitably raise questions of anti-competitive conduct\(^\text{30}\) and even class bias;\(^\text{31}\) (4) it will invite litiga-

\(^{28}\) See The Gallup Organization, infra note 50.

\(^{29}\) Timothy G. Shelton, What Happens When Aging Lawyers Don't Know When to Quit?, L. PRAC. MGMT., July-Aug. 1992, at 41 (noting that "disability because of age . . . is a significant problem confronting the legal profession.").


\(^{31}\) See Amy R. Mashburn, Professionalism as a Class Ideology: Civility Codes and Bar
tion—indeed, sometimes quite expensive and complex litigation;\textsuperscript{32} (5) in a word, it is Orwellian; and (6) for those who fail their 360 degree review (and whatever remedial prescriptions may follow that failure), it will cause professional and personal distress.

The arguments in favor are equally obvious: (1) progressive evaluation of performance against stated criteria is a staple of human resources management. Without it, people often stay stuck at their level of competence (or incompetence) for years, not learning, not growing, and not achieving to their full potential. Rather than correcting their mistakes, they repeat them. Rather than enhancing their skill sets, they coast—and usually downward. But a system that articulates what is expected as workers progress in their careers, and measures their performance against stated (and rising) expectations, can maximize the chances that those workers will excel;\textsuperscript{33} (2) systematic periodic evaluation will provoke self evaluation, and a heightened sense of the profession’s demands—as anyone who has gone through post-tenure review can tell you, the process definitely concentrates the mind; (3) systematic periodic evaluation can uncover and correct the kinds of "silent" problems that may not yet call for disciplinary action but can still undermine the profession and shortchange clients. This is especially true of small but recurring infractions such as failure to communicate, delay in transmitting funds, or regular loss of docket control; (4) systematic periodic evaluation should ensure that the very worst lawyers will not continue to represent clients unless and until their misconduct is “voluntarily” reported to bar disciplinary authorities;\textsuperscript{34}

\textit{Hierarchy}, 28 VAL. U. L. REV. 657 (1994) (arguing that much of the impetus behind the current "professionalism" movement comes from big-firm lawyers and other bar elites who are seeking to advance the interests of their (corporate) clients).

32. Lawyers who have been disciplined under the current system have litigated a number of constitutional issues. \textit{See}, e.g., Warden v. State Bar, 982 P.2d 154 (Cal. 1999) (challenging the constitutionality of mandatory CLE requirements); \textit{In re} Goldstein, 995 P.2d 923 (Mont. 2000) (arguing that a process that vests both investigatory and adjudicatory functions in a single bar disciplinary panel violates the due process clause).

Certainly, someone disadvantaged by the license renewal process proposed in this Article would likely advance her own battery of constitutional claims. \textit{See} Toni M. Massaro \& Thomas L. O’Brien, \textit{Constitutional Limitations on State-Imposed Continuing Competency Requirements for Licensed Professionals}, 25 WM. \& MARY L. REV. 253 (1983) (setting forth due process and equal protection arguments that might be used to challenge a mid-career assessment program).

33. \textit{See}, e.g., DON R. MARSHALL, \textbf{THE FOUR ELEMENTS OF SUCCESSFUL MANAGEMENT: SELECT, DIRECT, EVALUATE, REWARD} 104 (1999) (making the point that periodic performance evaluation is “the only way to ensure that overall performance standards will continue to rise rather than fall or slip.”).

34. It is well known that many lawyers’ problems are known or suspected by other lawyers but not reported. \textit{See} \textit{Stanley Commission Report, supra} note 1 (noting that lawyers seldom report serious misconduct on the part of judges or other lawyers); Douglas R. Richmond, \textit{The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation}, 12 GEO. J. LEGAL ETHICS 175, 202 (1999) (concluding that the duty to report is “worthless when it comes to intra-firm reports of misconduct.”).
(5) a progressive periodic evaluation process could help lawyers to set goals and grow in their work, thereby alleviating some of the sense of malaise and despair that many lawyers now experience;35 and (6) systematic periodic evaluation could abate much of the suspicion and disrespect in which lawyers are now held by their critics. 36

Few of these arguments are new. During the late 1970s when concern was expressed that lawyers then lacked "competence," the organized bar considered—and rejected—the need for periodic performance evaluation.37 The organized bar met at length to discuss possible responses to the so-called "competence crisis;" the result of those discussions was the initiation of Lawyers Assistance Programs throughout the country38 and the rise of mandatory continuing legal education (MCLE) programs.39 These two developments—addressing lawyer impairment and currency of knowledge—provided important, but inadequate, first steps towards ensuring that lawyers performed ably throughout their careers.40

Questions about the need for periodic performance evaluation also briefly surfaced during the so-called "professionalism crisis" of the late 1980s.41 Then, though, the focus was mostly on civility, punctual-

36. See infra note 50 and accompanying text.
38. LAPs now exist in all 50 states. These programs address concerns ranging from alcoholism and drug dependency to depression, Alzheimer's disease, and psychosis. See LAP Directory (United States) (visited May 23, 2000) <www.abanet.org/cpr/colap/assistance.html>.
40. Another result of the competence movement was an elaborate proposal for a voluntary peer review program that would operate separate and apart from the disciplinary system. A.L.I.-A.B.A COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM (1980) (setting forth proposal); A.L.I.-A.B.A. COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, ENHANCING THE COMPETENCE OF LAWYERS 255-263 (detailing the problems involved in a voluntary peer review system).
41. Stanley Commission Report, supra note 1 (describing the "professionalism crisis"). During this period, the ABA and the ALI retreated from their commitment to an organized peer review system, replacing it instead with a program of "self-evaluation." See A.L.I.-A.B.A COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW: STANDARDS, METHODS, AND SELF-EVALUATION (1992).
ity, and unseemly practices such as breaking one’s word. The result was a number of tut-tutting studies, followed by an equivalent number of “creeds” and “civility codes,” and the rise of required professionalism courses. Though valuable, these efforts were almost entirely cosmetic.

Twenty years have now passed since the ABA first considered implementing a peer review program. Nine years have passed since that voluntary program was officially abandoned in favor of an even less threatening, less intrusive, and more lawyer-friendly “self-evaluation” program. In the interim, lawyer malpractice claims have risen dramatically, disbarments have gone up, other sanctions have gone

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46. See A.L.I.-A.B.A COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW, supra note 41.

47. Karen Wagner, More Lawyers Being Sued for Malpractice: Suing the Client for Fees is a Common Trigger, ILL. LEGAL TIMES, June 1996 at 1 (reporting that the number of legal malpractice cases nationwide increased about one and a half times faster than the number of lawyers between 1984 and 1994).


During the 12-year period from 1985 through 1996, the number of disbarments [in Minnesota] ranged from four to eight a year; the average number of disbarments over this period was six annually. That was then; this is now. In 1997, the Minnesota Supreme Court disbarred ten attorneys, a new record. In 1998, by disbarring the 11th and 12th attorneys of the year, the Court broke the previous annual record on July 30, with five months remaining. This is a total of 22 disbarments in 19 months, more than double, and approaching triple, the rate of the previous 12 years.
up, and the public's respect for lawyers has plummeted. Worst of all, there is now a growing bulge in the profession of mid-career lawyers, with more of them situated in the fifteen to thirty years-after-graduation "hot zone" than at any time in history. Many of these lawyers are experiencing classic midlife problems such as divorce, depression, and alcohol abuse. Others have simply grown tired or become burned out.

In short, if there was ever a time for the legal profession to seriously consider creating some kind of mechanism for systematic periodic performance evaluation, and resolving some of the tougher issues surrounding the evaluation process and its implementation, certainly now would be a good time. And we don’t need to wait for the threat of government regulation or consumer revolt to know that this is true. The fact is that the legal profession has entered a period of entropy—wealthy and self-satisfied, the organized bar now spends more energy trying to figure out how to fend off competition from the accountants or to preserve its privileges, than trying to build a more fulfilling, respectable career of which lawyers and their clients can be proud.

Like data on lawyer malpractice, national figures on disbarments are difficult to come by. The most recent comprehensive report on disbarment is based on data compiled in 1996. See ABA CENTER FOR PROF'L RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS: 1995 (1998).

49. From 1988 to 1998, for example, private reprimands in Virginia rose from 29 to 60; public reprimands rose from 3 to 17; suspensions rose from 4 to 13; and dismissals of complaints with terms imposed rose from 36 to 65. See REPORT OF THE PROFESSIONAL REGULATION DEPARTMENT, VIRGINIA STATE BAR, supra note 16, Chart 6.

50. See The Gallup Organization, Nurses Displace Pharmacists at Top of Expanded Honesty and Ethics Poll (last modified Nov. 16, 1999) <www.gallup.com/poll/releases/pr991116.asp> (indicating that, when respondents were asked about the honesty and ethics of various professionals, lawyers ranked in the bottom five out of 45 groups; Americans with a positive view of lawyers has fallen from 22 percent to 13 percent over the past ten years).

51. In 1974-75, the number of lawyers admitted to the bar was 30,707. By 1979-80, the number of bar admissions exceeded 40,000. Since 1990-91, bar admissions have exceeded 50,000 each year. See Legal Education and Bar Admission Statistics, 1963-1999 (visited May 18, 2000) <http://www.abanet.org/legaled/LE_BAstats.html>.

52. Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 VAND. L. REV. 871, 874 (1999) (describing the studies showing that "the divorce rate among lawyers is higher than the divorce rate among other professionals.").

53. Id. at 875-76 (recounting the studies showing that "[l]awyers seem to be among the most depressed people in America" and that the legal profession operates "at extremely high levels of psychological distress.").

54. Id. at 876 (recounting the studies showing that "[l]awyers are prodigious drinkers" and tend to exhibit abuse and/or dependency problems at twice the rate of adult Americans generally).

55. See, e.g., John Gibaut, 'It's a Done Deal': House of Delegates Vote Crushes Chances for MDP, 86 ABA J. 92 (Sept. 2000) (describing the vote against a proposal to accommodate multi disciplinary practices).

56. See, e.g., Gail Diane Cox, Lawyers Have a Siege Mentality, NAT'L L.J., Feb. 22, 1999, at A6 (discussing the desire—ultimately abandoned in the face of pressure from the U.S. Department of Education—of the ABA House of Delegates to maintain authority over the accreditation of law schools).
III. THE MECHANICS

The challenge is simple, or at least simply stated: the traditional process by which the (very well-organized) bar admission function ceases upon licensure should be reconsidered. By this, I do not mean that, for some applicants, initial bar admission should be conditioned upon continued compliance with certain behavioral directives.\(^{57}\) That is a healthy development, but does not address the bigger question of what can happen to (even good) lawyers years \textit{after} they have been admitted to the bar. Nor do I mean that the standards now used to deny applicants admission to the bar should be applied to practicing lawyers in disciplinary proceedings against them, although that, too, might be desirable.\(^{58}\)

Rather, I mean that the skills, procedures, and resources now used to identify bar applicants who should be excluded from the profession at the initial entry point should also be applied to mid-career assessments. This means that \textit{all lawyers should be required to fill out an application seeking relicensure, be subjected to some form of character and fitness assessment suitable to their position and experience at the bar, and also have to demonstrate their practical knowledge of the law in their field, at least periodically throughout their professional lives.}

This is not, repeat \textbf{NOT}, a utopian (or "merely academic") exercise. We know this because we can look at some of the sophisticated ways in which physicians are now often "profiled" periodically to determine their fitness to practice medicine\(^{59}\) or to the periodic recertification process that tens of thousands of physicians now subject themselves to each year.\(^{60}\) Alternatively, we can look at the many other professions in which periodic performance evaluation has now become the rule rather than the exception. That is, airline pilots,\(^{61}\) public school

\(^{57}\) Several states already have some form of conditional admission procedure which permits license revocation if the lawyer fails to satisfy certain requirements such as attendance at AA meetings, periodic psychiatric screening, or random drug testing. \textit{See Alaska Bar Proposes Conditional Admission Rule, BAR LEADER}, Fall, 1999, at 9 (citing the states).

\(^{58}\) Often, applicants for admission to the bar are excluded for conduct that, had it been exhibited by an admitted lawyer, would not form a basis for discipline or expulsion. \textit{See, e.g.}, Frasher \textit{v. West Va. Bd. of Law Exam'rs}, 408 S.E.2d 675 (W. Va. 1991) (holding that the practice of holding new bar applicants to a higher standard of conduct than that applied to existing members of the bar is not a violation of the equal protection clause); \textit{In re Application of C.R.W.}, 481 S.E. 2d 511 (Ga. 1997) (Benham, C. J., dissenting) (observing that the basis for the majority's denial of an application for bar admission—failure to perform under a debt repayment plan—would not be a sufficient basis to discipline an admitted attorney).

\(^{59}\) \textit{See, e.g.}, Penny Tseliks, \textit{Do Profiles Change the Way Doctors Practice?}, \textit{BUS. \& HEALTH}, Feb. 2000, at 23 (describing the "profiling" now conducted annually for physicians who are reimbursed by major insurance companies).

\(^{60}\) \textit{See infra Section IV.C.}

\(^{61}\) \textit{See, e.g.}, Peter J. Wiernicki, \textit{Pilot Medical Certification: Current Standards and Procedures}, 64 \textit{J. AIR L. \& COM.} 477 (1999) (describing the periodic medical and psychiatric
principals, orchestral musicians, police officers, firefighters, systems engineers, accountants, and trial judges are already subject to systematic periodic performance evaluations of one type or another. Where, one might ask, are the lawyers?

With the use of the Internet, both paperwork and many of the costs of the process could be minimized. (The technology already exists by which an assessment program could be administered largely via the Internet, rather than by mail). In short, it is neither impractical nor prohibitively expensive to implement a periodic performance evaluation program. The question is, how to do so?

A. Conventional Concerns About Peer Review-Based Assessments

Lawyers have often protested that peer review is impractical for lawyers. They argue, first, that the elite lawyers who are likely to run such programs might not be able to distinguish between professional incompetence and choices imposed by economic realities. Second,
that peers and judges might not be able to articulate the specifics—as opposed to a general impression—of a lawyer’s inadequacies, thus giving rise to due process concerns. The biggest concern seems to be that determinations of incompetence or performance deficiencies must be “subjective” and therefore necessarily somehow unfair. This is a curious objection since many determinations in the law—probable cause, reasonable doubt, credibility of witnesses, and guilt itself—are subjective, and yet we comfortably live with these determinations every day.

Some of the conventional concerns about peer review are, of course, legitimate. Certainly, one would not design a process that might run afoul of the antitrust laws, for example, though this result can be easily avoided by investing the process in the state rather than in a voluntary organization. And class bias issues, or claims of “elitism,” can be minimized by a thoughtful and realistic articulation of what “professional competence”—as opposed to “perfection”—really requires. Practical questions, such as how to protect client confidences, how to maintain Internet security, how to identify and communicate with those clients who will be asked to provide an assessment of their lawyer, whether and how to assure anonymity of individual assessments, and how to resolve issues that will surely arise when asking support staff for an assessment of their employer’s work habits, are

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72. Hon. William W. Schwarzer, Comment, in ENHANCING THE COMPETENCE OF LAWYERS, supra note 40, at 240 (“[A judge can best identify a lawyer’s overall incompetence, but] the question is whether he can fairly and objectively and in a meaningful way communicate those deficiencies to a [peer] reviewer . . . .”).

73. See Peer Review, in ENHANCING THE COMPETENCE OF LAWYERS, supra note 40, at 261.

74. Other criticisms of peer review programs include problems of assessor reliability and bias:

Peer review, particularly where it requires references from a judge before whom the practitioner has appeared, and an attorney whom he or she has opposed in a case [is problematical . . . ] [I]t is not the role or duty of a presiding judge or opposing lawyer to closely observe the performance of the future applicant. Judges and other lawyers have their own obligations during a trial and are not likely to view a colleague’s actions in the same detail, and with the same objectivity, as the faculty in a medical residency program. Trial recollections, particularly those given some time after the event, will be spotty, tending to highlight matters of particular concern to the reviewer. Review of the recollections of a number of independent references by the committee may or may not improve the unreliability of peer review.

Kilpatrick, supra note 2, at 310.

Critics also note that peer assessment can be contaminated by the “halo effect” (where one area of the subject’s strength colors the assessor’s opinion in other areas), the “recency effect” (where recent observations carry more weight than more distant observations), or “past record anchoring” (where a long history of achievement carries more weight than recent observations). See John D. Copeland & John W. Murry, Jr., Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance, 61 Mo. L. REV. 233, 324 (1996).


76. See Daniel, supra note 71.
certainly real but are not insurmountable. (Lawyers, after all, are supposed to be problem solvers). And constitutional concerns about the fairness of the process or the clarity of the standards imposed are all the sorts of issues that lawyers confront every day.

Stated another way, the fact that the organized bar has so far lacked the will to implement any kind of systematic periodic performance evaluation program for the legal profession, or that lawyers are "hostile" to peer review as applied to themselves, are hardly reasons to reject the idea out of hand. If lawyers can devise workable performance standards for employees with mental illnesses and create complex decision matrices such as the Federal Sentencing Guidelines, then they surely should be able to develop a way to describe minimum performance standards for themselves and also find a way to credibly measure compliance.

Models might include the kinds of standards that are used in private law firms to identify which associates will advance toward partnership; those used by bar screening committees to identify which candidates will receive an endorsement for judgeships; those used to identify which lawyer-employees within the civil service system will receive a merit raise or promotion; or those used by state certification agencies when identifying which lawyers may hold themselves out as specialists. All of these standards are presumably higher (perhaps much higher) than would be imposed on lawyers seeking periodic relinclusion.


78. The procedural due process required in the context of license suspension or revocation may be considerable. See, e.g., Barry v. Barchi, 433 U.S. 55 (1979) (requiring a prompt post-suspension administrative hearing in the case of a horse trainer suspended for administering illegal drugs); Gershenfeld v. Justices of the Supreme Court, 641 F. Supp. 1419 (E.D. Pa. 1986) (requiring same in the case of a lawyer suspended for violation of the disciplinary rules). But, as noted below, the proposal in this article involves relicensure, not revocation. See infra note 99 and accompanying text.

79. A statement of what is required for relicensure will have to be "sufficiently clear so as not to cause persons of common intelligence necessarily to guess at its meaning and [to] differ as to its application." United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting Connally v. General Constr. Co., 169 U.S. 385, 391 (1926) (holding that a provision of the California Business and Professions Code prohibiting "offensive personality" was unconstitutionally vague).


83. See generally Kilpatrick, supra note 2 (describing the process and the types of standards used for certification).
censure but the point is, in setting out to define adequate performance, lawyers should not have to re-invent the wheel.

Nor should the numbers involved threaten them. Even assuming that—on a national level—some 75,000 lawyers would have to go through some form of license renewal each year,\(^8^4\) the number of those lawyers who will raise "red flags" and require some kind of follow-up attention should not be so many as to break the system's back.\(^8^5\) (And if I am wrong about this, it is probably better to know it sooner than later. There is really only one way to find out, moreover—by implementing a pilot project, such as the one described below.)

**B. A Pilot Proposal**

There are, of course, turf issues to be resolved in a proposal such as this. The bar admission process and the post-admission assessment process (which, sadly, is now confined to bar disciplinary agencies) traditionally have occupied scrupulously separate spheres. I do not examine this problem in this Article. Rather, I propose a pilot project in a low-population state (or some portion of a high-population state), with the turf issues to be worked out by the participants. This will take courage, by the way, especially in an environment where many lawyers are seeking to soften state licensing requirements in order to facilitate their multistate practices.\(^8^6\) That is, any state that becomes a first mover in this "race to the top" may find itself at a competitive disadvantage in terms of the lawyers who are willing to seek admission there. Or, then again, first moving states may benefit from this experiment. Clients presumably will value (and might even pay more for) a lawyer who has been subjected to a credible peer review process.\(^8^7\)

Just to jump-start the discussion by which such an experiment might proceed, I have appended to this Article a discussion draft of a

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\(^8^4\) This figure is based on approximately one million lawyers and legal services employees. See Bureau of Labor Statistics, Lawyers and Judicial Workers (visited Nov. 11, 2000) <http://www.bls.census.gov/cps/pub/empsit_oct2000>.

\(^8^5\) I base this assumption on what we know about lawyers in the disciplinary system. Currently, about five percent of all registered attorneys become the subject of a disciplinary investigation during a given year. ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, 1999 ANNUAL REPORT at 5. Close to 75% of those investigations result in no disciplinary action. But surely, there are many lawyers whose shortcomings do not become the subject of a disciplinary investigation during a given year. Without knowing for sure, one could safely predict that, in a systematic periodic performance assessment of lawyers, somewhere in the range of 2-5 percent of those reviewed would present a profile that calls for some form of remedial attention. Using a national sample of 75,000 lawyers annually, this would mean somewhere between 1,500 and 3,750 lawyers would become involved in remedial work each year.


\(^8^7\) This has been the experience with board-certified physicians. See infra Section IV.C.
performance standard for lawyers generally with additional provisions for courtroom lawyers,\textsuperscript{88} and the accompanying assessment instruments which might be submitted to (1) the courtroom lawyer seeking relicensure after 15 years of practice;\textsuperscript{89} (2) a representative group of the lawyer's clients;\textsuperscript{90} (3) a representative group of the lawyer's opponents, peers, and colleagues familiar with his work;\textsuperscript{91} (4) judges familiar with the lawyer's in-court work;\textsuperscript{92} and (5) members of the lawyer's support staff.\textsuperscript{93}

And, just to make sure that I cannot be criticized for taking the easy path of devising assessment instruments only for those lawyers whose work is conducted largely in public–courtroom lawyers–but not for those lawyers whose work takes place largely in private–transactional lawyers–I have also appended a performance standard for transactional lawyers\textsuperscript{94} and the assessment instruments which might be submitted to (1) a transactional lawyer seeking relicensure after 35 years of practice;\textsuperscript{95} (2) a representative group of the lawyer's clients;\textsuperscript{96} (3) a representative group of the lawyer's opponents, peers, and colleagues familiar with her work;\textsuperscript{97} and (4) members of the lawyer's support staff.\textsuperscript{98}

These materials are designed to stimulate critical discussion, and do not purport to be the final word either on the standards that should be applied in a lawyer relicensure process or on the documents and procedures that should be used. Indeed, these documents will require considerable massaging by the persons to whom they will be applied, and a consensus must be built that the standards and procedures reflect the jurisdiction's norms. Absent such massaging, any lawyer relicensure program that emerged would lack legitimacy.

\textsuperscript{88} See Appendix I. As suggested above, I have not reinvented the wheel here. The standard is derived from that set out in ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM Part I ("Criteria of Attorney Competence") (1980). Additional thoughts are taken from ABA STANDING COMMITTEE ON SPECIALIZATION, MODEL STANDARDS FOR SPECIALTY AREAS (1990) and ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (the "MacCrate Commission Report") (1992).

\textsuperscript{89} See Appendix II.

\textsuperscript{90} See Appendix III.

\textsuperscript{91} See Appendix IV.

\textsuperscript{92} See Appendix V.

\textsuperscript{93} See Appendix VI.

\textsuperscript{94} See Appendix VII.

\textsuperscript{95} See Appendix VIII.

\textsuperscript{96} See Appendix IX.

\textsuperscript{97} See Appendix X.

\textsuperscript{98} See Appendix XI.
C. How the Process Will Work

A careful reading of the proposed assessment instruments will reveal that some of the questions asked are specifically related to the proposed relicensing standard, while others are more aspirational in nature. The idea behind my proposal is to generate a holistic picture of the lawyer, to identify strengths and weaknesses in her everyday performance, to identify targets for improvement and items for attention, and to permit the relicensing agency to distinguish between those lawyers who are competent but imperfect (the vast majority) and those who may be incompetent, corrupt, or so disorganized as to pose a danger to their clients.

These instruments would not stand alone in the relicensing process, by the way. Certain patterns or areas of concern could give rise to further interviews and information gathering. The ultimate objective would be to assess the lawyer’s performance and to help set specific goals for the next stage of the lawyer’s career. It is not intended to be an exercise in which the “bubbles” are counted and life-altering decisions are spit out by a computer. It is not, most importantly, intended to be a game of “gotcha.”

Rather, the whole process will depend on three assumptions: (1) that the persons administering the program will do so with goodwill and reasonable expectations, and without regard to the notion that the United States suffers from “too many lawyers;” (2) that lawyers who are found wanting as a result of the performance evaluation process will be given a reasonable opportunity to correct their inadequacies and conform their behavior to the standards required for relicensure; and (3) that whatever arguments might be made about what is required in the way of due process in a license renewal system will be resolved in favor of the practicing lawyer. That means that a refusal to renew a lawyer’s license will be treated—at least for due process purposes—as a revocation of the lawyer’s prior license, thus requiring a pre-deprivation hearing, an opportunity to be heard and to present witnesses, and an opportunity to exhaust one’s appeals before the refusal to renew becomes effective. This may be more than due process in fact requires, but seems essential to ensure the credibility and acceptance of any relicensing system.

99See, e.g., Stauch v. City of Columbia Heights, 212 F.3d 425 (8th Cir. 2000) (noting the distinction between a system of license renewal and a system of license revocation); City News & Novelty, Inc. v. City of Waukesha, 640 N.W.2d 870 (Wis. App. 1999), cert. granted, 120 S. Ct. 2687 (2000) (holding that an applicant seeking renewal of his liquor license is not entitled to exhaust his remedies before the refusal to renew becomes effective).
IV. ANALOGIES FROM THREE NEARBY UNIVERSES

A. Post Tenure Review

The proposal I have described here is a familiar model, at least to academic lawyers. It is the “hiring, tenuring, and post-tenure review” model to which many law professors are now subjected.100 Most professors are hired, then five years into their careers or so, are rigorously assessed and, sometimes, screened out. Then, periodically, their performance is re-assessed, taking into account the different stages of a professional teacher’s career.101 Most often, of course, the tenured professor continues in her tenured status. Occasionally, though, the tenure commitment is withdrawn and the professor dismissed.102

I recognize that a periodic screening not unlike post-tenure review already exists within the lawyers’ market (or at least some parts of it). Like professors, there is a “tenuring” decision made at the time of admission to partnership, and a “post-tenure” decision when profits per partner are allocated each year. But many lawyers, including those in solo or small firm practices, often are not subject to this kind of “tenure” review process.103 And it is precisely these lawyers—lawyers for whom a system of professional oversight, feedback, and review does not exist—that cause most concern for bar disciplinary committees.104

100. This process is also known as “renewable tenure.” For a criticism of renewable tenure in the academic environment, see Robert B. Conrad & Louis A. Trosch, Renewable Tenure, 27 J. L. & EDUC. 551 (1998).
101. For example, at William & Mary, the tenure decision is based on the traditional elements of scholarship, teaching and service. Post-tenure review takes these items into account, but also includes consideration of such factors as the faculty member’s performance in advising and mentoring of students, mentoring of junior faculty and leadership in collegial interactions. Factors such as the tenured faculty member’s mastery of new disciplines and/or materials, and his or her creation of new professional relationships within or beyond the College.
102. See Copeland & Murry, supra note 74, at 252 (discussing cases challenging dismissal following post-tenure review). The more common scenario when a professor “fails” post-tenure review is the offer and acceptance of an early retirement package.
103. Even today, about half of all lawyers practice by themselves or with one other partner. Margaret Kline Kirkpatrick, Partners Dumping Partners: Business Before Ethics in Bohatch v. Butler & Binion, 83 MINN. L. REV. 1767, 1777 n.56 (1999).
104. Manual R. Ramos, Legal and Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor, 57 OHIO ST. L. J. 863, 882 n.62 (1996) (reporting a study of the California Bar Association showing that, over a five-month period in 1994, 69% of disciplinary complaints involved solo practitioners, 23% involved lawyers in two-to-five lawyer firms, and only 8% involved lawyers in firms with 6 or more lawyers); Michael D. Goldhaber, Overbilling is a Big Firm Problem Too: New Study Details Rogues’ Gallery of “Blue-Chip Billing,” NAT’L L.J., Oct. 11, 1999, at A1 (discussing a study which found that, in Illinois, 72% of lawyers
Furthermore, even those lawyers who work within a large law firm may not be receiving the kind of comprehensive review—by judges, clients, opponents and others—that can give a complete picture of a lawyer’s shortcomings. Outside evaluators often bring a very different set of values to the process of assessment than do a lawyer’s partners, who may have a conflict of interest on the subject, especially if the lawyer in question is a generator of large fees.

In any event, we already have in post-tenure review a useful model of how periodic reassessment can work to improve an academic lawyer’s performance, to protect (student) consumers from incompetence and abuse, and to enhance the credibility of those who “pass the test.” It is no great leap from academic lawyers to practicing lawyers, regardless of the differences that separate them.

B. Driver’s License Renewal

Another way of looking at this proposal is to consider the process of drivers’ license renewal. Most automobile drivers, like most lawyers, change over time. Their skills may improve or decline, their reflexes may sharpen or fade, and their common sense may deteriorate. Few of us stay just as we were when we first received our drivers’ licenses. Recognizing this likelihood, many states require that drivers be re-examined every so often, and especially when drivers reach the stage in their lives when problems, such as poor vision or slowed response time, are most likely to develop. This permits remediation in

105. A few firms do seek client input as part of their regular lawyer assessment process. See Fortney, supra note 37, at 368 (describing the Perkins Coie approach).

106. See Jayne W. Barnard, Reflections on Britain’s Research Assessment Exercise, 48 J. LEGAL EDUC. 467, 486 (1998) (noting the kinds of professional conflicts of interest that can corrupt a peer review effort among co-workers).


most cases (for example, by requiring that the driver wear glasses or be limited to driving during daylight hours). In extreme cases, this process can also result in non-renewal of the driver’s license.

Some might find it offensive to analogize a lawyer’s license to a driver’s license. One involves a livelihood while the other, merely a convenience. One involves sensitive issues of judgment, empathy, and professional identity while the other involves primarily motor skills and attentiveness. Both licenses, however, have important implications for the holder and both can give rise to significant procedural rights. More importantly, both licenses are subject to abuse in ways that can be harmful to the public; both lend themselves to remedial measures that can protect the public short of license revocation; and both can be organized so as to require periodic renewal.

I propose that the legal profession periodically re-examine the fitness of lawyers—especially when they reach that midpoint in their careers when professional problems are most likely to develop, and again toward the end-stage in their careers when cognitive skills are most likely to decline. The process will work much like post-tenure review in the sense that it will be based in large part on peer evaluation and “customer” assessment, but, like drivers license renewal, will specifically focus on key periods in the licensee’s life.

C. Physicians’ Board Certification

The strongest analogy to the proposal in this Article is board certification for physicians. Currently, physicians—like lawyers—must be licensed by the state in which they practice. But over ninety percent of all new physicians today also voluntarily seek to be “board-certified” by one of the twenty-four national medical specialty boards. Certification involves meeting standards that are well beyond those required by the states for licensure. And while certification once lasted a life-

109. See, e.g., Ex parte Robinson, 86 U.S. 505 (1873) (holding that a license to practice law gives rise to a property interest and that the state cannot suspend or disbar a lawyer without providing due process); Bell v. Burson, 402 U.S. 535 (1971) (holding that a drivers license gives rise to a property interest and that, absent an emergency, the state cannot suspend such a license without conducting a predeprivation hearing).

110. See John J. Smith, The Specialty Boards and Antitrust: A Legal Perspective, 10 J. CONTEMP. H. L. & POL´Y. 195, 195 (1994). The national medical specialty boards include the American Boards of Allergy and Immunology; Anesthesiology; Colon & Rectal Surgery; Dermatology; Emergency Medicine; Family Practice; Internal Medicine; Medical Genetics; Neurological Surgery; Nuclear Medicine; Obstetrics and Gynecology; Ophthalmology; Orthopedic Surgery; Otolaryngology; Pathology; Pediatrics; Physical Medicine and Rehabilitation; Plastic Surgery; Preventive Medicine; Psychiatry and Neurology; Radiology; Surgery; Thoracic Surgery; and Urology.

111. See American Board of Medical Specialties, What is Board Certified? <http://www.certifieddoctor.org/whatis.html>: 
time, the medical specialty boards now grant only "time-limited" certifications and require periodic recertification of their members (known as "diplomates") every six to ten years.\textsuperscript{112}

Typically, recertification involves a combination of testing, peer review, and self-evaluation.\textsuperscript{113} More specifically, recertification for a family physician requires taking a comprehensive written test which is offered annually\textsuperscript{114} plus a systematic office record review.\textsuperscript{115} (As a practical matter, this involves weeks of preparation, expensive exam review courses, travel arrangements to testing locations, and a high degree of anxiety—it's "a real hassle").\textsuperscript{116} Recertification for an anesthesiologist requires a letter of endorsement from a hospital chief of staff (an evaluation of the quality of current practice conducted at the local level) plus completion of a written examination.\textsuperscript{117}

No physician is required to seek board certification—or recertification—in order to practice medicine. Many hospitals, though, limit their privileges to board-certified physicians\textsuperscript{118} and many consumers will only select a board-certified physician to handle their health care needs. Consequently, board certification—and periodic recertification—is

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In order to be certified as a medical specialist by one of these recognized boards, a physician must complete certain requirements. Generally, these include:

Completion of a course of study leading to the M.D. or D.O. (Doctor of Osteopathy) degree from a recognized school of medicine.

Completion of three to seven years of full-time training in an accredited residency program designed to train specialists in the field.

Some specialty boards require assessments of individual performance and competence from the residency training director, or from the chief of service in the hospital where the specialist has practiced.

Most specialty boards require that the person who seeks certification has an unrestricted license to practice medicine in order to take the certification examination.

Some boards require that the doctor has a period of experience in full-time practice in the specialty prior to examination for certification, usually two years following training.

Finally, each candidate for certification must pass a written examination given by the specialty board. Fifteen of the 24 specialty boards also require an oral examination conducted by senior specialists in that field.

Candidates who have passed the exams and other requirements are then given the status of Diplomate and are certified as specialists.

\textsuperscript{112} As of 2000, Ob-Gyn certifications are time-limited to six years. The certification for anesthesiologists lasts for 10 years.

\textsuperscript{113} See American Board of Medical Specialties, What is Board Certified?, supra note 111. For a general description of the recertification process, see John J. Norcini, Recertification in the United States, BRITISH MED. J., Oct. 30, 1999, at 1183.

\textsuperscript{114} See Certification and Recertification Examination Description (last modified Sept. 13, 2000) \texttt{<http://www.abfp.org/examdesc.htm>}.

\textsuperscript{115} See Requirements for Certification (last modified Sept. 13, 2000) \texttt{<http://www.abfp.org/recertif.htm>}

\textsuperscript{116} Telephone Interview with Richard Theis, M.D. (April 24, 2001).

\textsuperscript{117} See Recertification Programs (visited March 20, 2001) \texttt{<http://www.abanes.org/certification/recert.html>}

\textsuperscript{118} See, e.g., Busse v. American Bd. Anesthesiology, 1992 WL 372996 (N.D. Ill. 1992) (alleging that one cannot practice as an anesthesiologist at any hospital in the Chicago area without board certification).
now as essential to many physicians as licensure. These physicians have therefore learned to live with the need for (and cost of) retesting and periodic performance evaluation. They have recognized that patient confidence depends upon periodic reassessment and that a commitment to professionalism requires no less.

Let me be clear about this. The medical profession is now well ahead of the legal profession in addressing the problems of professional decline. Though its systems are not perfect, the medical profession is at least confronting the need to go beyond basic entry-level credentialing and to ensure continuing fitness for practice. Some of these developments are attributable to the demands of the federal government as third party payor; some to the demands of hospital administrators who—not being physicians themselves—employ a recertification requirement as a proxy for quality care standards; and some to the risk management procedures of insurance carriers and managed care organizations. The balance is attributable to the physicians and

119. Susan L. Horner, The Health Care Quality Improvement Act of 1986: Its History, Provisions, Applications and Implications, 16 AM. J. L. & MED. 455, 458 (1990) ("The curtailment or restriction of privileges can be devastating to physicians, because without them physicians can neither admit nor care for patients in the hospital, receive referrals or use the hospital's technology or equipment.").

120. The cost of taking a recertification exam for General Pediatrics, for example, is $1090. American Board of Pediatrics, Dates and Fees for Recertifying Examinations (visited March 20, 2001) <http://www.abp.org/datefee/predate.htm>.

121. American Board of Pediatrics, Introduction to PRCP (visited April 29, 2001) <http://www.abp.org/PRCPINFO/general.htm#intro>:

The certification renewal policy was adopted because medical information changes rapidly and because the public requires assurance that certified pediatricians and subspecialists have kept their knowledge up-to-date. Recertification provides an opportunity for pediatricians and subspecialists to meet the commitment to professional accountability, and it sets standards for high-quality medical care. The recertification process recognizes the ABP's commitment to professionalism and its belief that lifelong scholarship and self-evaluation are required for clinical practice and care of patients.

Id.

122. A recent study, for example, suggests that many hospitals are not reporting adverse outcomes to disciplinary authorities at an appropriate rate. See Susan O. Scheutzow, State Medical Peer Review: High Cost But No Benefit: Is It Time for a Change?, 25 AM. J. L. & MED. 7 (1999).

123. See, e.g., Atul Gawande, When Good Doctors Go Bad, NEW YORKER, Aug. 7, 2000, at 60 (describing intervention programs for "everyday bad doctors," not those with serious malpractice histories but "the illustrious cardiologist who has slowly gone senile and won't retire; the long-respected obstetrician with a drinking problem; and [the] surgeon who has somehow lost his touch.").

124. See, e.g., Timothy Stoltzfus Jost, Oversight of the Quality of Medical Care: Regulation, Management, or the Market?, 37 ARIZ. L. REV. 825 (1995) (describing the Medicare Utilization and Quality Peer Review program created by the Health Care Quality Improvement Act of 1986).


126. See, e.g., Jost, infra note 124 (describing the mechanisms by which managed care or-
the medical specialty boards who have recognized not only that physicians must keep up in their specialties to be effective, but also that physicians must periodically prove they are keeping up or lose the privilege of continuing to practice as a specialist. The bottom line is that a large number of physicians are now undergoing serious periodic performance evaluation at least every six to ten years. That is twice as often as proposed in this Article for lawyers.

V. THE "GRANDFATHER" CLAUSE

The analogy between physician recertification and lawyer relicensure is not perfect, of course. First, physician recertification requires completion of a written examination, which might be proposed for mid-career lawyers but is not proposed here.\textsuperscript{127} Second, physician recertification is a private affair, conducted by voluntary organizations and not by the state. Consequently, some of the formalities (and due process considerations) required of state actors are not present. Even so, the medical specialty boards have typically elected to "grandfather" older physicians and to impose the recertification requirement only on those physicians who became board certified after the adoption of the recertification regime.\textsuperscript{128}

This choice, to make recertification voluntary for those physicians who were certified before recertification became a part of the system, and mandatory only for those physicians who knowingly entered the system after recertification was adopted, is a useful one in considering the lawyer relicensing proposal. Presumably, the choice to "grandfather" physicians was necessary to win their political support for the new mandatory recertification regime.\textsuperscript{129} The same could hold true in the case of lawyer relicensure. In other words, a state pursuing the

\textsuperscript{127} I suspect that the costs of preparing, validating, and grading examinations probably outweigh their value in assessing competence, at least the competence of experienced lawyers. Moreover, the kinds of problems that give rise to the majority of disciplinary complaints and malpractice suits—office disorganization, failure to communicate, and dishonesty—are unlikely to be detected by the results of a paper and pencil, or computerized, examination.

\textsuperscript{128} See e.g., DeGregorio v. American Bd. Of Internal Med., 844 F. Supp. 186 (D. N.J. 1994) (dismissing challenge by physician who failed the certification examination under the old regime then passed the examination under the new regime but wished to be excused from the recertification requirement). It should be noted that, even for public bodies, "grandfathering" may not be required by the constitution. See, e.g., Hearne v. Board of Educ., 183 F.3d 770, 779 (7th Cir. 1999) (holding that public teachers hired under a "teacher-friendly" tenure system could be terminated under the terms of subsequent, more "management-friendly" legislation and that the teachers had "no protectible property interest in the former system.").

\textsuperscript{129} Medical specialty boards were also advised by their lawyers that they should not attempt to alter the terms of the "contract" between the boards and board-certified physicians, because to do so would invite litigation. Telephone Interview with Norman F. Gant, M.D., Executive Director, American Board of Obstetrics & Gynecology (ABOG) (Oct. 17, 2000).
goal of renewable bar admission might have to phase it in, with only those lawyers admitted after, say, 2003 required to go through the periodic relicensure process in future years, but those admitted before that date encouraged to do so voluntarily. Admittedly, this would forestall the full benefits of the program for another thirty years or so (!), but it might be the only way to procure bar acceptance of the scheme.

VI. MARKET ALTERNATIVES

Let's assume, as history suggests, that the organized bar has no interest in investing in a program of renewable bar admission. Does that mean that some reliable mechanism of mid-career review cannot emerge as result of market forces? In theory, there are several non-regulatory sources by which systematic periodic performance evaluation could be initiated for lawyers.

A. Malpractice Carriers

One possibility is an incentive system by which malpractice carriers offer preferred pricing to lawyers who have gone, "voluntarily," through some kind of periodic performance evaluation, presumably one that has been designed and approved by the carriers. The first problem with this option is that malpractice carriers are generally more interested in loss prevention than in quality control, so the type of performance evaluation they are likely to embrace will be quite limited. That is, insurance carriers' interests tend to run to "systems" issues such as calendaring, conflicts checks, and maintenance of financial records and not to larger questions such as professional development, personal growth, and how to develop and maintain sophistication as a lawyer. In other words, as a practical matter, malpractice carriers have little financial incentive to look at many of the issues that should be at the heart of periodic performance evaluations. They may also lack the expertise to do so.

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130. This system has been quite successful, in fact, in stimulating voluntary recertification. Now, for example, about 50 percent of all recertification test-takers at the ABOG are physicians who are seeking voluntary recertification. \textit{Id.}

131. David A. Hyman, \textit{Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?}, 4 \textit{Conn. Ins. L. J.} 353, 371 (1997/1998) (providing that "since insurers care only about liability, they will focus on the subset of issues that give rise to such difficulties, rather than the more general field of attorney conduct").

The second, and bigger, problem with the malpractice carrier option is that only about fifty percent of American lawyers currently have malpractice coverage, and many of those who "go bare" are the lawyers who are the least insurable. A malpractice carrier-based system of incentives would thus fail to reach many of the lawyers who present the greatest threat of harm to their clients and for whom periodic performance evaluation would be the most desirable.

B. Law Firms

A second possibility is that law firms would demand periodic performance evaluation of their lawyers and would be willing to "outsource" that process, just as hospitals currently do with physicians seeking admission privileges. This might mean that law firms would require some kind of certification and periodic recertification by one of the voluntary bar associations as a condition of retaining one's status with the firm.

The first problem with this option (other than its antitrust implications if conducted by a private organization) is that law firms already conduct an internal performance evaluation (or think they do) when they evaluate their partners for compensation purposes every year. As noted earlier, this type of evaluation is typically limited in its scope, but most law firms would insist that they are, in fact, evaluating "competence" and "quality" every time they allocate partnership points. Thus, external review in their view would be redundant.

The second problem is that law firms, unlike hospitals, typically do not face significant malpractice exposure for simple negligence. Errors of judgment by trial lawyers, for example, are generally thought to be among the risks assumed by clients, and thus not compensable. Poor bargaining skills, unlike poor surgical skills, typically do not result in

134. See supra note 118 and accompanying text.
135. See supra note 30 and accompanying text.
136. See supra note 105 and accompanying text.
  Under the attorney judgment rule . . . an attorney is performing within the standard of care if he or she simply exercises reasonable judgment on a matter, even if that judgment turns out to be erroneous. The rule . . . applies to an error of judgment on an unsettled proposition of law (or a settled proposition of law that is not reasonably determinable), as well as an error in tactical judgment. The plaintiff seeking to pursue a claim of legal malpractice has a heavy burden to bear if the plaintiff's prior attorney had simply made a strategic decision that turned out to be wrong. Indeed, the plaintiff must show that the attorney did not exercise reasonable judgment, which is determined by whether or not the decision would have been made by any reasonable attorney under the same set of circumstances.
an award of damages. Thus, some of the incentives that drove hospitals to require external assessments of physicians do not apply in the law firm environment or at least do not apply to law firms yet. In addition, the rise of the limited liability partnership for law firms in recent years has relieved law firm partners of worries about personal exposure, so they lack a significant personal incentive to seek outside assessment of their partners.

The third problem with the law firm model is that not only is the "risk" side of the equation an inadequate motivator, but the "reward" side is equally inadequate. That is, few law firms would subject their lawyers to an external assessment process unless they could see some competitive advantage to doing so. Firms other than law firms often distinguish themselves by reference to "seals of approval" or other marks of quality, and if law firms believed that successful fulfillment of an external assessment process might give them a comparable marketing edge, then they might support the development of such a process. Limitations on lawyer advertising provide one disincentive to this kind of product differentiation. Another is specialization—there is little likelihood that law firms with a boutique or specialty practice would find competitive value in a generalized external recertification program.

The biggest problem with the law firm model, though, is that close to half of American lawyers are not associated with a law firm and so they would have no incentive to seek periodic reassessment if its primary purpose was to ensure continuing law firm membership. Just as in the case of malpractice carriers, relying on law firms to generate an external performance evaluation program would leave the biggest part of the problem untouched.

C. Entity Clients

A third possibility is that consumers with buying power—"entity clients"—might demand the equivalent of periodic performance evalua-
tion as a condition of continuing to contract for legal services. Some consumers of medical care (for example, pre-paid medical plans) may impose certification and recertification requirements on their approved providers; large corporate clients might do the same with their lawyers. These clients, after all, already impose billing restrictions, both as to substance and to form, and other requirements such as the creation of a work plan, collaborative budgeting, and allocation of work between outside and in-house counsel. It is not unthinkable that an entity client would also require some form of periodic assessment for the lawyers in the law firms with which it does business.

But why would a client insist on a process that would invariably translate into higher fees? Most in-house counsel believe (often incorrectly) that they already possess the skill to assess the adequacy of their own lawyers. Furthermore, they claim that they are only interested in individual lawyers and not in entire law firms. Thus, it might be one thing to require certification of every lawyer providing direct services to an entity client. It would be quite another to require assessment of other lawyers in those lawyers' law firms. Doing so would be gratuitous and, even if it were to occur, it would be unlikely to reach those lawyers presenting the greatest risk to the public; that is, those lawyers who do not serve entity clients. It is a classic collective action problem.

D. Lawyer Specialty Certification Boards

One final possibility for emergence of a systematic performance evaluation system for lawyers is that existing lawyer specialty boards might increase their coverage to include more types of lawyers and expand their coverage into states in which they are not currently recognized. As of today, twenty-one states recognize at least some forms of lawyer specialization; most have boards that "certify" or "accredit" lawyers as specialists. A number of these boards require that certified lawyers undergo periodic recertification.

142. See, e.g., The Client Speaks, ILL. LEGAL TIMES, Apr. 1999, at 1 (describing the kinds of expenses that corporate counsel decline to pay their law firms and the practice of "task-based billing" now required by many corporate clients).


144. Interview, Diane C. Yu, Associate General Counsel Monsanto Company, Corporations' Retention and Management of Outside Counsel, BNA CORP. PRAC. COMM., Sept. 20, 2000, at 8.

145. Kilpatrick, supra note 2, at 318.

The first problem with this model is that many lawyers do not think of themselves as, nor hold themselves out as, "specialists."¹⁴⁷ Unlike the medical profession, where specialization is the rule rather than the exception,¹⁴⁸ lawyers often think of themselves as generalists or as offering a multi-faceted practice. Trying to shoehorn these lawyers, even "voluntarily," into one or another of a limited list of practice specialties is unlikely to be favorably received, especially among rural or small town general practitioners. And, it is often these practitioners who present the greatest danger of harm to their clients.¹⁴⁹

A related problem is the matter of balkanization. The ABA's Model Standards for Specialty Areas recognize twenty-four specialties within the legal profession.¹⁵⁰ Under this system, a lawyer with a general business practice who wanted to seek certification might feel obliged to seek certification in Business and Corporate, Taxation, Securities, Bankruptcy, Labor and Employment, Real Property Law and Franchise Law. The medical profession faced a similar problem when it was forced to devise the "specialty" of family practice in order to accommodate physicians who were engaged in a general family practice that included obstetrics, pediatrics and geriatric medicine.¹⁵¹ There are now more than 60,000 board-certified family medical practitioners,¹⁵² but whether the legal profession desires to create a counterpart to the family physicians' practice remains an open question.

In any event, it might be better for the legal profession to reconsider its current approach to specialty certification and subdivide the legal profession functionally rather than substantively.¹⁵³ I have tried to do just that in this Article. But short of such a fundamental overhaul in

¹⁴⁷. In Texas, for example, which certifies specialists in 17 fields of law practice, less than 10 percent of Texas lawyers are certified specialists. See Texas Board of Legal Specialization, Frequently Asked Questions (last modified June 27, 2000) <http://www.tbls.org/faq/index.htm#q9general> (noting that 6,481 Texas lawyers—out of a total of 66,000—are board certified).
¹⁴⁸. Smith, supra note 110 and accompanying text.
¹⁴⁹. Ramos, supra note 104.
¹⁵³. It is reasonable to suggest, as I have attempted to do in the design of the assessment instruments appended to this Article, that a functional, rather than substantive, grouping of lawyers is workable. Such a grouping would permit assessment based on four categories, i.e., courtroom lawyers, litigators (trial lawyers who seldom go to trial), transactional ("dealmaking") lawyers and lawyers who deal with regulatory agencies, and generalists.
the certification process, the current model of state-based specialty
certification boards seems unlikely to generate a useful profession-wide
performance assessment process.

A final dilemma is the obvious problem of voluntariness. No lawyer
is currently required to seek specialty certification and those who
do self-fund the certification process.154 Absent some form of coercion,
those lawyers most in need of mid-career assessment can simply avoid
it by declining to participate in the system.

Where does this leave us? Well, where we began. Currently we
admit tens of thousands of lawyers to the bar each year.155 Most of
them perform adequately—some of them brilliantly—throughout their
legal careers but many do not. Current market mechanisms are unlikely
to generate a reliable system by which these lawyers can be assessed
during the middle and later stages of their careers and helped to im­
prove or, where applicable, to withdraw. And yet, such a system is
logical as a matter of policy. The answer is a relicensing system that
focuses on personal growth, professional behavior, and fitness to prac­
tice throughout a lawyer’s career.

Like physicians, lawyers participating in such a system could be
afforded statutory immunity in connection with their efforts.156 Their
actions could also be protected from discovery in malpractice or disci­
plinary proceedings (much as the activities of Lawyers Assistance Pro­
grams are currently protected),157 if that is what it takes to get this idea
off the ground. The most important thing, though, is to consider seri­
ously what the profession expects of its members at progressive stages
of a lawyer’s career, to articulate those expectations clearly, and to
device a system by which lawyers will be encouraged to meet, or even
exceed, those expectations, to grow as professionals, and to thrive as
human beings.


155. Legal Education & Bar Admission Statistics, supra note 3 and accompanying text.


157. See, e.g., Maryland State Bar Ass’n, Lawyer Assistance Program (L.A.P.), <http://
www.msba.org/sec_comm/lawyerassist/background.htm> (noting that the program’s records
are non-discoverable); Illinois Lawyers Assistance Program, Inc., <http://www.abanet.org
/cpr/colap/illinois.html#confidence>(extending the attorney-client privilege to lawyers or
law students seeking assistance under the program).
VII. CONCLUSION

Establishing a program of renewable bar admission will serve three purposes: it will bring substance at last to all the fulminating about professionalism, it will protect the consumers of legal services, and it will restore some much-needed credibility to the practice of law.
APPENDIX I

Performance Standard for Lawyer Relicensing: General

To be relicensed, a lawyer must:

1. be able to gather and organize facts concerning a client's problem or situation;
2. be able to perform a legal analysis of a client's problem or situation;
3. be able to formulate a strategy for dealing with the client's problem or situation;
4. be able to communicate effectively with the client regarding the strengths and weaknesses of the client's position and the possible courses of action that might be followed;
5. be able to execute the course of action agreed upon between the lawyer and the client;
6. demonstrate a consistent adherence to the Rules of Professional Conduct;
7. demonstrate appropriate behavior and civility towards opposing counsel, court personnel, judges, opposing parties, and clients;
8. be able to manage his/her time effectively with respect to professional obligations;
9. be efficient in performing legal work;
10. be able to organize the work of subordinates (both lawyers and non-lawyers), train those who require training, and supervise their performance;
11. be able to recognize problems which are beyond his/her competence and be willing to inform the client of the need to refer such problems to another professional competent to deal with them.

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158. These items are taken largely from ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM, Discussion Draft (1980), Part I ("Criteria of Attorney Competence"), which includes extensive commentary on each item. Additional ideas for this listing are drawn from ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT--AN EDUCATIONAL CONTINUUM (The "MacCrate Commission Report") (1992).
APPENDIX I-A

Performance Standard for Lawyer Relicensing: Courtroom Lawyer$^{159}$

To be relicensed, a courtroom lawyer must:
(1) be able to organize a case for trial;
(2) be able to present an effective opening statement;
(3) be able to conduct an effective direct examination;
(4) be able to conduct an effective cross-examination;
(5) be able to present a persuasive closing argument;
(6) know and be able to appropriately apply the rules of evidence;
(7) know and be able to appropriately apply the rules of procedure (civil or criminal, as applicable);
(8) know how to effectively evaluate and settle a case;
(9) be willing and able to try a case to verdict when an appropriate settlement cannot be achieved;
(10) be able to distinguish meritorious claims from claims that are frivolous or where pursuit is contrary to the client’s best interest, and be willing to decline and counsel against the pursuit of such claims;
(11) be able to conduct litigation without unwarranted personal bitterness or animosity toward one’s opponent.

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$^{159}$ A "courtroom lawyer" is one who regularly prepares cases for trial, appears in state or federal court or other tribunals, and tries cases or similar contested matters. These items are taken largely from ABA STANDING COMMITTEE ON SPECIALIZATION, MODEL STANDARDS FOR SPECIALTY AREAS (1990).
APPENDIX II

Self-Evaluation Instrument for the Lawyer Who is the Subject of Periodic Review: Courtroom Lawyer 15 Years After Admission

Name ________________________ Attorney I.D. # ________________________

Admitted to Practice _____ Previously reviewed in ____, ____, ____.

In what areas do you currently practice? (Check all that apply)
  o Litigation (civil rights)
  o Litigation (commercial)
  o Litigation (criminal)
  o Litigation (tax)
  o Litigation (tort)
  o Litigation (domestic relations)
  o Litigation (intellectual property)
  o Litigation (general)
  o Administrative hearings (e.g., Social Security, Workers’ Compensation, etc.)
  o Other

Please name 12 current or former clients for whom you have provided legal services within the last two years.

Please name 8 judges before whom you have appeared within the last two years and who are familiar with your work as a lawyer.

Please name 16 lawyers who have been familiar with your work as an attorney within the past two years. You should include in this list at least five lawyers in each of the following categories:
  • lawyers who have opposed you on a contested matter
  • lawyers who have served as co-counsel with you in a contested matter (these persons may come from within your firm or office, or from other firms)

Note: If for some reason you are unable to name five lawyers in each category, explain why.

Please name 4 persons who have worked on the non-lawyer support staff in your office within the past two years.
Note: If for some reason you are unable to name four persons within this category, explain why.

How would you describe your personal time management skills?
- Organized and disciplined; tend to complete tasks on or ahead of schedule
- Regularly complete tasks close to deadlines but rarely fail to meet those deadlines
- Regularly miss deadlines; frequently late to court appearances and meetings
- Out of control; consistently late in meeting deadlines or keeping on schedule

How would you describe your skills in preparing a case for trial?
- Attend to detail, spend time with witnesses and reviewing applicable law, as necessary; always have a clear theory of the case.
- Sometimes details get lost in the process; generally, though, I assemble the facts and the law effectively; usually have a clear theory of the case.
- Often, I run out of time such that I cannot prepare witnesses as I would like, or cannot review the applicable law; sometimes I enter the courtroom without a clear game plan.
- Consistently unprepared for court appearances

How would you describe your effectiveness as a courtroom lawyer?
- Consistently able to present my client’s case effectively; I’m organized in my presentation; prepared for foreseeable objections and thoroughly know the law and procedure applicable to the case.
- Usually able to present my case effectively; able to lay out a coherent story, generally handle witnesses and legal issues adequately, and don’t get myself or my client into trouble.
- Occasionally unable to present an effective case; I lose control over witnesses or documents, lose track of my theory, or fail to effectively respond to objections or legal arguments.
- Consistently ineffective as a courtroom advocate.

How would you describe the quality of your professional interactions with clients, counsel, and judges?
- Consistently maintain civil and constructive relationships with others; there are no “raised voices” in my practice.
- Usually my relationships with others are civil and constructive; occasionally I lose my temper or become unpleasant.
Often my relationships with others are contentious and unpleasant.
Consistently fail to maintain professional demeanor.

To your knowledge, have you been the subject of any disciplinary complaints within the last five years?
Yes o No o
If yes, describe each such complaint and how it was resolved.

To your knowledge, have you been the subject of any claims for professional malpractice within the last five years?
Yes o No o
If yes, describe each such claim and how it was resolved.

Have you provided legal services on a pro bono basis within the last two years?
Yes o No o
Yearly average in hours: ________

Please describe the matter on which you provided services on a pro bono basis of which you are most proud or which gave you the most professional satisfaction.

Do you regard yourself as a mentor to lawyer colleagues?
Yes o No o

Do you regard yourself as a good source of information, advice, and professional guidance for lawyer colleagues?
Yes o No o

In your most recent period performance evaluation, the following items were identified as needing some additional attention:

Describe how you have addressed each item and how you would assess your performance today with respect to each item.

What issues concerning your practice would you like to discuss with members of the assessment team this year? Are there areas where you think you could use assistance in your practice?

Regarding overall competence

I believe that, as of the date of this questionnaire, I am (choose only one
answer):
- A talented and professional lawyer—a model for others.
- A competent lawyer.
- A generally competent lawyer but could use some help in the areas noted above.
- An ineffective lawyer who requires immediate remedial attention in the following areas: _____________________________.
- I am unsure.
APPENDIX III

Instrument for Clients (Courtroom Lawyer) (at least 6 responses will be required)

To: ____________________

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of ________.
You are receiving these questions because we believe you are a current or former client of attorney ___________________________.
Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you currently a client?
   Yes o  No o

If you answered “No”, are you a former client, within the past two years?
   Yes o  No o

If NO to both of these questions, please return this form. You need not answer any further questions.

If you answered “Yes”, please answer the following questions:

In your dealings with this lawyer’s office

Did the office appear organized?
   o Yes, always
   o Most of the time
   o Seldom
   o Never
   o I am unsure

Did the staff deal with you in a courteous, professional manner?
   o Yes, always
   o Most of the time
   o Seldom
   o Never
   o I am unsure
Were phone calls returned within 48 hours by a person capable of responding to your needs?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was correspondence you sent to the office responded to (in writing or otherwise) within 7 business days?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer explain the procedures that would apply to your case?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer offer you options as to alternative courses of action?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer explain the comparative costs of various options?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer get your approval before making major decisions about the case?
- Yes, always
- Most of the time
- Seldom
Did the lawyer perform tasks and file papers in a timely manner?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer do his/her best to reach an acceptable resolution of the case?
- Yes
- No

If documents (including payments) were to be transmitted to you, did you receive them without undue delay?
- Yes
- No

Did your lawyer handle this matter efficiently, in your view?
- Yes
- No

The lawyer's courtroom performance

Did you ever observe the lawyer in court?
- Several times
- Occasionally
- Once
- Never

In court, was this lawyer obviously and thoroughly prepared (on time, ready to proceed, etc.)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was this lawyer obviously and thoroughly organized (in control of papers, exhibits, and subordinates)?
- Yes, always
- Most of the time
- Seldom
Was this lawyer current in his/her knowledge of the applicable law?

- Never
- I am unsure

Did this lawyer behave appropriately and courteously with respect to the court, witnesses, court personnel, and opposing counsel?

- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

If your case went to trial, did the lawyer, in your view, present your evidence effectively?

- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer attack your opponent’s position effectively?

- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Is there anything else the assessment team should know about your lawyer’s performance in your case?

To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?

- Yes
- No

If yes, explain.

Have you ever observed this lawyer to be under the influence of
alcohol or drugs while at work?
  Yes ○ No ○
If yes, explain.

Is there anyone else familiar with this lawyer's work that the assessment team should contact for further information in connection with this review?

**Overall performance**

I believe that, as of the date of this questionnaire, this lawyer is (choose only one answer):
○ A talented and professional lawyer—a model for others.
○ A competent lawyer
○ A generally competent lawyer but could use some help in the following areas: ____________________________.
○ An ineffective lawyer who requires immediate remedial attention in the following areas: ____________________________.
○ I am unsure
APPENDIX IV

Instrument for Other Attorneys (Courtroom Lawyer) (opposing counsel, co-counsel, or other lawyers in the same firm or office) (at least 8 responses will be required, with a minimum of three from the “opposing counsel” category).

To: ____________________

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of ________.

You are receiving these questions because we believe you are familiar with the work of attorney _________________.

Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you currently in an “opposing counsel” relationship to this attorney?
   Yes ☐ No ☐

Have you, within the past three years, been in an “opposing counsel” relationship to this attorney?
   Yes ☐ No ☐

Are you currently working as an attorney in the same law firm or law office as this attorney?
   Yes ☐ No ☐

Have you, within the past three years, worked as an attorney in the same law firm or law office as this attorney?
   Yes ☐ No ☐

Are you currently working as co-counsel with this attorney?
   Yes ☐ No ☐

Have you, within the past three years, worked as co-counsel with this attorney?
   Yes ☐ No ☐

If you answered “No” to all the preceding questions, please return this form. You need not answer any further questions.
Are you familiar with ____________’s work as a lawyer in some way other than those set forth above? If so, how?

How familiar do you think you are with ____________’s work as a lawyer?
- Very
- Somewhat
- Hardly at all
- I am unsure

If your answer is “very” or “somewhat,” is your familiarity based on
- Extensive exposure to his/her work
- Occasional exposure to his/her work
- A single exposure to his/her work

Has this lawyer served as a mentor to you or others to your knowledge?
- Yes
- No

Is this lawyer a good source of information, advice, and professional guidance for lawyer colleagues?
- Yes
- No
- Don’t know

Regarding litigated matters over the past three years

Was this lawyer obviously and thoroughly prepared (on time, ready to proceed, etc.)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was this lawyer obviously and thoroughly organized (in control of papers, exhibits, and subordinates)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was this lawyer current in his/her knowledge of the applicable law?
- Yes, always
- Most of the time
Did this lawyer behave appropriately with respect to the court, witnesses, court personnel, and opposing counsel?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Did this lawyer appropriately resolve discovery disputes (without undue delay, without excessive court intervention)?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Were motion papers and other documents filed on or before deadlines?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Did this lawyer know and properly utilize the Rules of Procedure?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Regarding performance at trial

○ Check here if you have never observed this lawyer in the courtroom. If you checked this box, please skip the next series of questions.

In voir dire, this lawyer was:
○ Focused and effective in eliciting useful information
○ Able to communicate well but did not use voir dire strategically
In opening statements, this lawyer was:
- Organized and effective in conveying the facts of the case
- Sometimes confusing in setting out the facts of the case
- Ineffective
- I am unsure

In handling favorable witnesses, this lawyer was:
- Organized and effective in presenting essential information
- Sometimes confusing in organizing the documents and testimony
- Ineffective
- I am unsure

In handling adverse witnesses, this lawyer was:
- Focused, strategic, and effective in cross-examination
- Sometimes unable to elicit important information
- Ineffective
- I am unsure

In closing arguments, this lawyer was:
- Thorough, persuasive, and effective in conveying a coherent theory of the case
- Sometimes unable to build a persuasive scenario
- Ineffective
- I am unsure

With respect to the Rules of Evidence, this lawyer was:
- Knowledgeable and able to utilize the rules effectively
- Occasionally unable to invoke an appropriate rule
- Frequently unable to invoke a coherent objection or response
- Badly deficient in his/her knowledge and use of the rules

Was this lawyer an effective advocate in the courtroom?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Is there anything else the assessment team should know about this lawyer's courtroom performance?
General

Does this lawyer perform pro bono legal work?
   Yes o   No o

To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?
   Yes o   No o
If yes, explain.

Have you ever observed this lawyer to be under the influence of alcohol or drugs while at work?
   Yes o   No o
If yes, explain.

Is this lawyer a good manager of his/her time?
   Yes o   No o

Is there anyone else familiar with this lawyer’s work that the assessment team should contact for further information in connection with this review?

Regarding overall competence

I believe that, as of the date of this questionnaire, this lawyer is (choose only one answer):
   ○ A talented and professional lawyer—a model for others.
   ○ A competent lawyer
   ○ A generally competent lawyer but could use some help in the following areas: ____________________________.
   ○ An ineffective lawyer who requires immediate remedial attention in the following areas: ____________________________.
   ○ I am unsure
APPENDIX V

Instrument for Judges (Courtroom Lawyer)(at least 3 responses will be required)

To: Judge __________ 

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of ___________. Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you familiar with ___________’s work as a lawyer?
  o Very
  o Somewhat
  o I am unsure
  o No

Is your familiarity based on
  o Extensive exposure to his/her work
  o Occasional exposure to his/her work
  o A single exposure to his/her work

In handling matters before your court

Was this lawyer obviously and thoroughly prepared (on time, ready to proceed, etc.)?
  o Yes, always
  o Most of the time
  o Seldom
  o Never
  o I am unsure

Was this lawyer obviously and thoroughly organized (in control of papers, exhibits, and subordinates)?
  o Yes, always
  o Most of the time
  o Seldom
  o Never
  o I am unsure
Was this lawyer current in his/her knowledge of the applicable law?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Did this lawyer behave appropriately with respect to the court, witnesses, court personnel, and opposing counsel?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Did this lawyer appropriately resolve discovery disputes (without undue delay, without excessive court intervention)?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Were motion papers and other documents filed on or before deadlines?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Did this lawyer know and properly utilize the Rules of Procedure applicable in your court?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

Regarding performance at trial

○ Check here if you never observed this lawyer at trial. If you checked this box, please skip the next series of questions.
In voir dire, this lawyer was:
- Focused and effective in eliciting useful information
- Able to communicate well but did not use voir dire strategically
- Ineffective
- I am unsure

In opening statements, this lawyer was:
- Organized and effective in conveying the facts of the case
- Sometimes confusing in setting out the facts of the case
- Ineffective
- I am unsure

In handling favorable witnesses, this lawyer was:
- Organized and effective in presenting essential information
- Sometimes confusing in organizing the documents and testimony
- Ineffective
- I am unsure

In handling adverse witnesses, this lawyer was:
- Focused, strategic, and effective in cross-examination
- Sometimes unable to elicit important information
- Ineffective
- I am unsure

In closing arguments, this lawyer was:
- Thorough, persuasive, and effective in conveying a coherent theory of the case
- Sometimes unable to build a persuasive scenario
- Ineffective
- I am unsure

With respect to the Rules of Evidence, this lawyer was:
- Knowledgeable and able to utilize the rules effectively
- Occasionally unable to invoke an appropriate rule
- Frequently unable to invoke a coherent objection or response
- Badly deficient in his/her knowledge and use of the rules

Was this lawyer an effective advocate in the courtroom?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure
Is there anything else the assessment team should know about this lawyer’s courtroom performance?

**General**

Does this lawyer perform pro bono legal work?
- Yes ○  No ○

To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?
- Yes ○  No ○
If yes, explain.

Have you ever observed this lawyer to be under the influence of alcohol or drugs while at work?
- Yes ○  No ○
If yes, explain.

Is there anyone else familiar with this lawyer’s work that the assessment team should contact for further information in connection with this review?

**Overall performance**

I believe that, as of the date of this questionnaire, this lawyer is (choose only one answer):
- A talented and professional lawyer—a model for others.
- A competent lawyer
- A generally competent lawyer but could use some help in the following areas: ____________________________
- An ineffective lawyer who requires immediate remedial attention in the following areas: ____________________________.
- I am unsure
APPENDIX VI

Instrument for Support Personnel (Courtroom Lawyer) (a minimum of 2 will be required).

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of _________. You are receiving these questions because we believe you are a current or former member of the office staff of attorney _________________. Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you currently a member of the office staff?
   Yes o   No o

If NO, are you a former member of the office staff within the past two years?
   Yes o   No o

If you answered “No” to both of these questions, please return this form. You need not answer any further questions.
If you answered “Yes” to either of these questions, please answer the following questions:

How would you describe the lawyer’s personal time management skills?
   o Organized and disciplined; tends to complete tasks on or ahead of schedule
   o Regularly completes tasks close to deadlines but rarely fails to meet those deadlines
   o Regularly misses deadlines; frequently late to court appearances and meetings
   o Out of control; consistently late in meeting deadlines or keeping on schedule

Is this lawyer obviously and thoroughly prepared (for meetings with clients, before going to court, before meetings with other lawyers, etc.)?
   o Yes, always
   o Most of the time
   o Seldom
   o Never
   o I am unsure
Is this lawyer obviously and thoroughly organized (in control of papers, exhibits, and subordinates)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Is this lawyer current in his/her knowledge of the applicable law?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer deal with clients in a courteous, professional manner?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer deal with support staff and others in the office in a courteous, professional manner?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer make sure that phone calls from clients are returned within 48 hours by a person capable of responding to the client’s needs?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer make sure that correspondence sent to the office by clients is responded to (in writing or otherwise) within 7 business days?
- Yes, always
- Most of the time
- Seldom
Never
I am unsure

If documents (including payments) are to be transmitted to clients, does the lawyer make sure that they are sent out without undue delay?
Yes ○ No ○

Does this lawyer brief the staff on such matters as client confidentiality, conflicts of interest, and financial requirements (such as client trust accounts, handling of mail which contains checks, etc.)?
Yes, regularly ○ Once within the past two years ○ Never within the past two years

Does this lawyer perform pro bono legal work?
Yes ○ No ○ I am unsure ○

To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?
Yes ○ No ○
If yes, explain.

Have you ever observed this lawyer to be under the influence of alcohol or drugs while at work?
Yes ○ No ○
If yes, explain.

Is there anything else the assessment team should know about this lawyer's work performance?

Is there anyone else familiar with this lawyer's work that the assessment team should contact for further information in connection with this review?

Overall performance

I believe that, as of the date of this questionnaire, this lawyer is (choose only one answer):
A talented and professional lawyer—a model for others. ○
A competent lawyer ○
A generally competent lawyer but could use some help in the following areas: _________________________________
An ineffective lawyer who requires immediate remedial
attention in the following areas: ____________________.
○ I am unsure
APPENDIX VII

Performance Standard for Lawyer Relicensing: Transactional Lawyer 160

To be relicensed, a transactional lawyer must:
(1) be able to recognize and understand the client’s short-term and long-term business objectives;
(2) be able to quickly and accurately identify and assess the nature and magnitude of a client’s problem;
(3) be able to anticipate problems in the course of client representation and propose workable solutions;
(4) be able to advocate the client’s position effectively;
(5) be able to negotiate effectively towards a final product, with an ability to compromise when appropriate;
(6) be able to function within the bounds of his/her authority;
(7) be sufficiently knowledgeable about the antitrust, tax, securities, environmental, intellectual property, and other regulatory ramifications of a proposed transaction either to address the issues personally or to know when to consult specialized counsel;
(8) be familiar with, and be able to prepare the appropriate transactional documents (organizational documents, contracts, employment agreements, regulatory filings, etc.);
(9) be able to draft documents that clearly and accurately reflect the intentions/agreement of the parties;
(10) be willing to advise the client regarding the wisdom of, as well as the legality of, contemplated transactions.

160. A “transactional lawyer” is one who represents clients in business transactions, negotiates and documents those transactions, and provides transactional planning and related advice.
APPENDIX VIII

Self-Evaluation Instrument for the Lawyer Who is the Subject of Periodic Review: Transactional Lawyer 35 Years After Admission

Name ________________________ Attorney I.D. # ______________________
Admitted to Practice _____ Previously reviewed in _____, _____.

In what areas do you currently practice? (Check all that apply)
○ General Corporate/Business Representation
○ Corporate Finance/Securities
○ Debtor/Creditor/Bankruptcy
○ Tax Planning and Counseling
○ Environmental Counseling, Labor and Employment Counseling, Other Counseling re: Regulatory Matters
○ Real Estate Transactions
○ Estate Planning/Probate
○ Patent/Trademark

Other
○ Appearances before regulatory agencies
○ Court appearances

Please name 12 current or former clients for whom you have provided legal services within the last two years.

Please name 16 lawyers who have been familiar with your work as an attorney within the past two years.

Please name 4 persons who have worked on the non-lawyer support staff in your office within the past two years.

Note: If for some reason you are unable to name the necessary number of persons in any category, explain why. ________________________

How would you describe your personal time management skills?
○ Organized and disciplined; tend to complete tasks on or ahead of schedule
○ Regularly complete tasks close to deadlines but rarely fail to meet those deadlines
○ Regularly miss deadlines; frequently late to court appearances and
meetings
○ Out of control; consistently late in meeting deadlines or keeping on schedule

How would you describe your knowledge of and familiarity with your clients?
○ Knows a lot about business and business strategies; knows in some detail nature of his/her clients’ products, services, organizational schemes, and current performance objectives
○ Is generally knowledgeable about business and business strategies; also is generally knowledgeable about his/her clients’ products, services, organizational schemes, and current performance objectives
○ Has a minimum understanding of business principles and practices; doesn’t know much about his/her clients’ products, services, organizational schemes, and current performance objectives

How would you describe the quality of your professional interactions with your clients, other counsel, and others?
○ Consistently maintain civil and constructive relationships with others; there are no “raised voices” in my practice.
○ Usually my relationships with others are civil and constructive; occasionally I lose my temper or become unpleasant.
○ Often my relationships with others are contentious and unpleasant.
○ Consistently fail to maintain professional demeanor.

How would you describe your style as a negotiator (Part I)?
○ Comes prepared, knows the critical elements of the deal, knows what is of secondary importance and no real importance, and proceeds in an orderly fashion
○ Has a loose outline of what must be accomplished; may or may not clearly understand the facts or the law; sometimes wastes time on pointless or peripheral matters
○ Shoots from the hip; often does not understand the facts or the law; often wastes time on pointless or peripheral matters

How would you describe your style as a negotiator (Part II)?
○ Communicates clearly, listens carefully and patiently and keeps emotions out of the negotiation
○ Communicates adequately; is sometimes impatient or doesn’t listen well; sometimes substitutes bombast for reason or clarity
○ Is ineffective as a communicator; interrupts constantly; uses ridicule or threats as a weapon; participants inevitably feel awful at the end of the day
How would you describe your style as a negotiator? (Part III)

○ Regularly concedes
○ Concedes on expendable issues; but rarely gives away key points
○ Never concedes anything and for this reason, sometimes fails to achieve the client’s objectives

How would you describe your ability as a document drafter?

○ Is methodical, thorough, and efficient and uses language clearly to describe the terms of a deal, however complex
○ Is a great cut-and-paste artist–knows how to find provisions that have worked in the past but does not do well when custom-tailoring is required
○ Is sometimes careless; loses track of details and leaves key issues unaddressed
○ Is frequently sloppy, uses language imprecisely, and sometimes fails to capture the parties’ intentions

How would you describe your style as a counselor (Part I)?

○ Confident in my ability to give bad news to clients, and to help them make the best of a bad situation
○ Sometimes reluctant to tell my clients that the law prohibits the plan they have in mind; may overlook “borderline” violations
○ Rarely willing to tell my clients “no;” often ignores significant legal or ethical problems

How would you describe your style as a counselor (Part II)?

○ Imaginative and able to “think outside the box” to find new solutions
○ Steady and reliable but not especially imaginative in new situations
○ Seldom able to help; believes problem-solving is up to the client

How would you describe your style as a counselor (Part III)?

○ I regularly consider “the big picture”—e.g., is the proposed transaction a wise one, from a societal perspective?
○ I only occasionally discuss values—as opposed to pure legalities—with my clients
○ I only opine on the legality of the transaction; my personal values, or views of what is good for society, have no place in advice to my clients

In your most recent period performance evaluation, the following items were identified as needing some additional attention:

Describe how you have addressed each item and how you would assess
your performance today with respect to each item.

What issues concerning your practice would you like to discuss with members of the assessment team this year? Are there areas where you think you could use assistance in your practice?

Have you provided legal services on a pro bono basis within the last two years?
Yes ☑ No ☐
Yearly average in hours: _______

Please describe the matter on which you provided services on a pro bono basis of which you are most proud or which gave you the most professional satisfaction.

Do you regard yourself as a mentor to lawyer colleagues?
Yes ☑ No ☐

Do you regard yourself as a good source of information, advice and professional guidance for lawyer colleagues?
Yes ☑ No ☐

To your knowledge, have you been the subject of any disciplinary complaints within the last five years?
Yes ☑ No ☐
If yes, explain:

To your knowledge, have you been the subject of any claims for professional malpractice within the last five years?
Yes ☑ No ☐
If yes, explain:

Regarding overall competence

I believe that, as of the date of this questionnaire, I am:
☒ A talented and professional lawyer—a model for others.
☒ A competent lawyer
☒ A generally competent lawyer but could use some help in the following areas: _________________________.
☒ An ineffective lawyer who requires immediate remedial attention in the following areas: _________________________.
☒ I am unsure
APPENDIX IX

Instrument for Clients (Transactional Lawyer)

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of __________. You are receiving these questions because we believe you are a current or former client of attorney _________________.

Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you currently a client?
   Yes ☐   No ☐

If NO, are you a former client, within the past two years?
   Yes ☐   No ☐

If NO to both of these questions, please return this form. You need not answer any questions.
If YES, please answer the following questions:

In your dealings with this lawyer's office

Did the office appear organized?
   ☐ Yes, always
   ☐ Most of the time
   ☐ Seldom
   ☐ Never
   ☐ I am unsure

Did the staff deal with you in a courteous, professional manner?
   ☐ Yes, always
   ☐ Most of the time
   ☐ Seldom
   ☐ Never
   ☐ I am unsure

Were phone calls returned within 48 hours by a person capable of responding to your needs?
   ☐ Yes, always
   ☐ Most of the time
Was correspondence you sent to the office responded to (in writing or otherwise) within 7 business days?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

In dealing with the lawyer regarding legal problems:

In discussing your problem, did the lawyer demonstrate knowledge of your business, and the business environment in which you operate?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer appear knowledgeable about the current laws and regulations applicable to your problem?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer explain the procedures that would apply to your case?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer offer you options as to alternative courses of action?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure
Did the lawyer explain the comparative costs of various options?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer explore with you the possible business consequences of various options?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did the lawyer get your approval before taking action to solve the problem?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

In meetings with you and others, was this lawyer obviously and thoroughly prepared (on time, ready to proceed, etc.)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was this lawyer obviously and thoroughly organized (in control of papers, exhibits, and subordinates)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Did this lawyer behave appropriately and courteously with respect to others in meetings and negotiations?
- Yes, always
- Most of the time
○ Seldom
○ Never
○ I am unsure

Did the lawyer help you reach an acceptable resolution to the problem?
   Yes ○  No ○

Did your lawyer handle this matter efficiently, in your view?
   Yes ○  No ○

How would you describe this lawyer's knowledge of and familiarity with your business?
○ Knows a lot about business and business strategies; knows in some detail nature of our clients' products, services, organizational schemes, and current performance objectives
○ Is generally knowledgeable about business and business strategies; also is generally knowledgeable about our clients' products, services, organizational schemes, and current performance objectives
○ Has a minimum understanding of business principles and practices; doesn't know much about our clients' products, services, organizational schemes, and current performance objectives

How would you describe this lawyer's style as a negotiator (Part I)?
○ Comes prepared, knows the critical elements of the deal, knows what is of secondary importance and no real importance, and proceeds in an orderly fashion
○ Has a loose outline of what must be accomplished; may or may not clearly understand the facts or the law; sometimes wastes time on pointless or peripheral matters
○ Shoots from the hip; often does not understand the facts or the law; often wastes time on pointless or peripheral matters
○ I am unsure

How would you describe this lawyer's style as a negotiator (Part II)?
○ Communicates clearly, listens carefully and patiently and keeps emotions out of the negotiation
○ Communicates adequately; is sometimes impatient or doesn't listen well; sometimes substitutes bombast for reason or clarity
○ Is ineffective as a communicator; interrupts constantly; uses ridicule or threats as a weapon; participants inevitably feel awful at the end of the day
How would you describe this lawyer's style as a negotiator? (Part III)
- Regularly concedes
- Concedes on expendable issues; but rarely gives away key points
- Never concedes anything and for this reason, sometimes fails to achieve the client’s objectives
- I am unsure

How would you describe this lawyer’s ability as a document drafter?
- Is methodical, thorough, and efficient and uses language clearly to describe the terms of a deal, however complex
- Is a great cut-and-paste artist—knows how to find provisions that have worked in the past but does not do well when custom-tailoring is required
- Is sometimes careless; loses track of details and leaves key issues unaddressed
- Is frequently sloppy, uses language imprecisely, and sometimes fails to capture the parties’ intentions
- I am unsure

How would you describe this lawyer’s style as a counselor (Part I)?
- Confident in his/her ability to give bad news to clients, and to help them make the best of a bad situation
- Sometimes reluctant to tell his/her clients that the law prohibits the plan they have in mind; may overlook “borderline” violations
- Rarely willing to tell his/her clients “no;” often ignores significant legal or ethical problems
- I am unsure

How would you describe this lawyer’s style as a counselor (Part II)?
- Imaginative and able to “think outside the box” to find new solutions
- Steady and reliable but not especially imaginative in new situations
- Seldom able to help; believes problem-solving is up to the client

How would you describe this lawyer’s style as a counselor (Part III)?
- Regularly considers “the big picture”—e.g., is the proposed transaction a wise one, from a societal perspective?
- Only occasionally discusses values—as opposed to pure legalities—with his/her clients
- Only opines on the legality of the transaction; personal values, or views of what is good for society, are not part of his/her advice
To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?
   Yes o    No o
If yes, explain

Have you ever observed this lawyer to be under the influence of alcohol or drugs while at work?
   Yes o    No o
If yes, explain.

Is there anything else the assessment team should know about your lawyer’s performance?

Is there anyone else familiar with this lawyer’s work that the assessment team should contact for further information in connection with this review?

**Overall performance**

I believe that, as of the date of this questionnaire, this lawyer is (choose only one answer):
   ○ A talented and professional lawyer—a model for others.
   ○ A competent lawyer
   ○ A generally competent lawyer but could use some help in the following areas: ____________________________.
   ○ An ineffective lawyer who requires immediate remedial attention in the following areas: ____________________________.
   ○ I am unsure
APPENDIX X

Instrument for Other Attorneys Familiar with the Attorney's Work
(Transactional Lawyer)

To __________________

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of ___.
You are receiving these questions because we believe you are familiar with the work of attorney _________________.
Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you currently working as an attorney in the same law firm or law office as this attorney?
   Yes ○ No ○

Have you, within the past two years, worked as an attorney in the same law firm or law office as this attorney?
   Yes ○ No ○

Are you currently working as co-counsel with this attorney on any matter?
   Yes ○ No ○

Have you, within the past two years, worked as co-counsel with this attorney on any matter?
   Yes ○ No ○

Are you currently in an "opposing counsel" relationship to this attorney?
   Yes ○ No ○

Have you, within the past two years, been in an "opposing counsel" relationship to this attorney?
   Yes ○ No ○

If you answered NO to all of these questions, please return this form. You need not answer any further questions.
If you answered YES to ANY of these questions, please answer the following questions:
Are you familiar with ____________'s work as a lawyer?
- Very
- Somewhat
- I am unsure
- No

If your answer is "very" or "somewhat," is your familiarity based on
- Extensive exposure to his/her work
- Occasional exposure to his/her work
- A single exposure to his/her work

Has this lawyer served as a mentor to you or others to your knowledge?
- Yes
- No

Is this lawyer a good source of information, advice and professional guidance for lawyer colleagues?
- Yes
- No
- Don’t know

Is this lawyer a good manager of his/her time?
- Yes
- No
- Don’t know

Is this lawyer efficient in performing legal work?
- Yes
- No
- I am unsure

In your dealings with this lawyer during the last two years, has he/she been obviously and thoroughly prepared (on time, ready to proceed, etc.)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was this lawyer obviously and thoroughly organized (in control of papers, exhibits, and subordinates)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Was this lawyer current in his/her knowledge of the applicable law?
- Yes, always
Did this lawyer behave appropriately with respect to participants and opposing counsel in negotiations?
○ Yes, always
○ Most of the time
○ Seldom
○ Never
○ I am unsure

How would you describe this lawyer's style as a negotiator (Part I)?
○ Comes prepared, knows the critical elements of the deal, knows what is of secondary importance and no real importance, and proceeds in an orderly fashion
○ Has a loose outline of what must be accomplished; may or may not clearly understand the facts or the law; sometimes wastes time on pointless or peripheral matters
○ Shoots from the hip; often does not understand the facts or the law; often wastes time on pointless or peripheral matters
○ I am unsure

How would you describe this lawyer's style as a negotiator (Part II)?
○ Communicates clearly, listens carefully and patiently and keeps emotions out of the negotiation
○ Communicates adequately; is sometimes impatient or doesn't listen well; sometimes substitutes bombast for reason or clarity
○ Is ineffective as a communicator; interrupts constantly; uses ridicule or threats as a weapon; participants inevitably feel awful at the end of the day

How would you describe this lawyer's style as a negotiator? (Part III)
○ Regularly concedes
○ Concedes on expendable issues; but rarely gives away key points
○ Never concedes anything and for this reason, sometimes fails to achieve the client's objectives
○ I am unsure

How would you describe this lawyer's ability as a document drafter?
○ Is methodical, thorough, and efficient and uses language clearly to describe the terms of a deal, however complex
Is a great cut-and-paste artist—knows how to find provisions that have worked in the past but does not do well when custom-tailoring is required
- Is sometimes careless; loses track of details and leaves key issues unaddressed
- Is frequently sloppy, uses language imprecisely, and sometimes fails to capture the parties’ intentions
- I am unsure

Does this lawyer perform pro bono legal work?
- Yes 
- No 

To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?
- Yes 
- No 

If yes, explain.

Have you ever observed this lawyer to be under the influence of alcohol or drugs while at work?
- Yes 
- No 

If yes, explain.

Is there anything else the assessment team should know about this lawyer’s work?

Is there anyone else familiar with this lawyer’s work that the assessment team should contact for further information in connection with this review?

Regarding overall competence

I believe that, as of the date of this questionnaire, this lawyer is
- A talented and professional lawyer—a model for others.
- A competent lawyer
- A generally competent lawyer but could use some help in the following areas: ____________________________.
- An ineffective lawyer who requires immediate remedial attention in the following areas: ____________________________.
- I am unsure
APPENDIX XI

Instrument for Support Personnel (Transactional Lawyer)

The following questions are asked in connection with a regular, periodic performance review of all licensed attorneys in the State of ________. You are receiving these questions because we believe you are a current or former member of the office staff of attorney _____________________. Your response will be shared with the attorney, though it will be presented anonymously. That is, your specific responses will not be identified as having come from you.

Are you currently a member of the office staff?
   Yes o No o

Are you a former member of the office staff within the past two years?
   Yes o No o

If you answered NO to both of these questions, please return this form. You need not answer any further questions.
If you answered YES to either of these questions, please answer the following questions:

How would you describe the lawyer’s personal time management skills?
   o Organized and disciplined; tend to complete tasks on or ahead of schedule
   o Regularly complete tasks close to deadlines but rarely fail to meet those deadlines
   o Regularly miss deadlines; frequently late to court appearances and meetings
   o Out of control; consistently late in meeting deadlines or keeping on schedule

Is this lawyer obviously and thoroughly prepared for meetings with clients, meetings with other lawyers, etc.?
   o Yes, always
   o Most of the time
   o Seldom
   o Never
   o I am unsure

Is this lawyer obviously and thoroughly organized (in control of papers,
exhibits, and subordinates)?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Is this lawyer current in his/her knowledge of the applicable law?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer deal with clients in a courteous, professional manner?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does this lawyer deal with support staff and others in the office in a courteous, professional manner?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer make sure that phone calls from clients are returned within 48 hours by a person capable of responding to the client’s needs?
- Yes, always
- Most of the time
- Seldom
- Never
- I am unsure

Does the lawyer make sure that correspondence sent to the office by clients is responded to (in writing or otherwise) within 7 business days?
- Yes, always
- Most of the time
- Seldom
- Never
o I am unsure

If documents (including payments) are to be transmitted to clients, does the lawyer make sure that they are sent out without undue delay?
   Yes o  No o

Does this lawyer brief the staff on such matters as client confidentiality, conflicts of interest, and financial requirements (such as client trust accounts, handling of mail which contains checks, etc.)
   o Yes, regularly
   o Once within the past two years
   o Never within the past two years

Does this lawyer perform pro bono legal work?
   Yes o  No o

To your knowledge, has this lawyer violated any of the Rules of Professional Conduct?
   Yes o  No o
   If yes, explain.

Have you ever observed this lawyer to be under the influence of alcohol or drugs while at work?
   Yes o  No o
   If yes, explain.

Is there anything else the assessment team should know about this lawyer's work performance?

Is there anyone else familiar with this lawyer's work that the assessment team should contact for further information in connection with this review?

Overall performance

I believe that, as of the date of this questionnaire, this lawyer is
   o A talented and professional lawyer—a model for others.
   o A competent lawyer
   o A generally competent lawyer but could use some help in the following areas: ____________________________.
   o An ineffective lawyer who requires immediate remedial attention in the following areas: ____________________________.
   o I am unsure