The Expanding Law School Curriculum Committee: The Move by Courts and the Organized Bar to Control Legal Education

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Introduction

Starting in the Fall of 1975, all law schools wishing to attain or to retain the approval of the American Bar Association—wishing to be or to remain accredited—will be required to:

Provide and require of all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibility of the legal profession and its members, including the ABA Code of Professional Responsibility are covered. Every law school is encouraged to involve members of the Bench and Bar in such instruction.¹

Effective on January 1, 1977, persons applying for admission to practice law in Indiana² will "be required to prove to the satisfaction of the state board of law examiners that the applicant is: . . .

(3) One who has as part of his or her work for graduation successfully completed each of the following designated subject-matter and semester-credit hour requirements, regardless of the course name in the law school curricula:
Conflict of Laws—2 credit-semester hours
Constitutional and Administrative Law—6 credit-semester hours
Contracts and Equity—6 credit-semester hours
Criminal Law and Procedure—4 credit-semester hours
Evidence—4 credit-semester hours
Federal Taxation—4 credit-semester hours
Legal Bibliography—2 credit-semester hours
Legal Ethics—2 credit-semester hours


1. ABA, Standards for the Approval of Law Schools, Standard 302(a)(iii) (as amended by the House of Delegates on August 13, 1974).
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Negotiable Instruments, Sales and Secured Transactions—4 credit-semester hours
Partnership, Agency and Corporations—4 credit-semester hours
Pleading and Practice (Rules of Procedure)—4 credit-semester hours
Real and Personal Property—4 credit-semester hours
Torts—4 credit-semester hours
Wills, Trusts and Future Interests—4 credit-semester hours

While the New York Court of Appeals does not condition admission on the taking of specific courses, it does require that all courses "be evaluated by authentic written examination, except where such examination is inappropriate, such as seminars and practice court courses or courses which are principally concerned with legal writing and research." The Court of Appeals for the Second Circuit currently has under consideration a recommendation from a committee of distinguished lawyers and judges that admission to practice before the Federal District Courts in the Second Circuit be conditioned on the applicant's successful completion of a course of study that includes: (1) Evidence; (2) Civil Procedure, including Federal Jurisdiction, Practice and Procedure; (3) Criminal Law and Procedure; (4) Professional Responsibility; and (5) Trial Advocacy. In addition applicants for admission either must have assisted in the preparation and attended the hearings of four proceedings in which testimony was taken, two of which must have been in federal court, or have observed six complete hearings in which testimony was taken on the merits of one or more disputed issues, including at least three in federal court. Effective January 1, 1976, as a condition to admission to appear before the Court of Appeals for the Second Circuit, applicants either must have argued at least three appeals of a substantive nature in state or federal appellate courts or have argued a similar number of appeals in a law school moot court program.

Finally—at least as this comment is being written in the summer of 1975—the Maryland State Bar Association has adopted a recommendation of its Special Committee on Advocacy that eligibility to take the Maryland Bar Examination be conditioned on the

5. Id. at B(7) and (8).
6. Id. at 192, Rule 46.
applicant having taken courses in evidence, procedure and trial practice.  

If a law school required courses on the history and ethics of the legal profession, evidence, procedure, including federal jurisdiction, practice and procedure, criminal law and procedure, trial practice, moot court and the various substantive courses listed by the Indiana Supreme Court, and required that all courses be evaluated by written examination except for seminars, practice court and research-writing courses, it would not be at all surprising. (It certainly would not have led to the writing of this comment.) While there might be differences within individual faculties about the requiring of one course rather than another, and even about requiring any specific courses beyond the first year or first semester, the fact that a law school required the same listing of courses as set forth by the various bench and bar groups would have caused little stir. What is surprising—and to many disquieting—is the fact that bench and bar are in the process of establishing the requirements rather than the law schools.

Until recently, legal education was left to the law schools, with bench and bar control being asserted only indirectly. The present comment, after examining the traditional mechanisms used by the organized bar and the judiciary to influence legal education, speculates on the reasons for the recent trend toward more direct control of law school offerings, and explores the implications of what seems to be a burgeoning trend toward bench and bar control of law school programs.

7. 6 ALI-ABA CLE REV., June 27, 1975, at 4.
8.  E.g., Cuthbert, Cuthbert, Boshkoff, Course Selection, Student Characteristics and Bar Examination Performance: The Indiana Law School Experience, 27 J. LEGAL ED. 127 (1975); 4 COLUMBIA LAW ALUMNI OBSERVER, March 10, 1975, at 3 (November 20, 1974, statement by Dean Michael I. Sovern, Columbia University School of Law, before the Committee on Qualifications to Practice before the United States Courts in the Second Circuit). The opposition has not been limited to those in the law school world. See statements opposing the recommendations of the Second Circuit Committee in the following issues of the New York Law Journal: Judge Jack B. Weinstein, Federal District Court, Eastern District of New York, December 5 and 6, 1974, page 1 of each issue; Association of the Bar of the City of New York, December 10, 1974 at 1; Federal Bar Council's Committee on Second Circuit Courts, December 19, 1974 at 1; Committee on the Federal Courts of the New York State Bar Association, January 27 and 28, 1975, page 1 of both issues.
Traditional Methods of Bench-Bar Control of Legal Education

Over the past many years, the courts and the organized bar have had the power to control all aspects of legal education. Traditionally, that power has been held in reserve and exercised with extraordinary restraint. By virtue of its “approval” or accrediting power, the American Bar Association has what amounts to life and death power over most law schools. The courts and state bar associations, with their control of the admission process, have a similar power over law students. Control of bar examinations is the dominant mechanism by which courts and the organized bar influence law school offerings. When students are notified of the subjects covered on the bar examination, the norm is and has been that an overwhelming majority quickly translate those subjects into courses they view as “required” whether or not the law school lists the courses as required or elective. In addition, lawyers and judges have never been reluctant to make known their views about legal education to law faculty members—either through a relatively formal joint committee structure or on a more informal basis. Those views, while not controlling, often have an impact on law school programs. Despite their power to dominate legal education, courts and the organized bar tended to limit themselves to persuasion and to influencing student choices of courses indirectly.

Despite longstanding complaints about legal education from some members of the bench and bar, most persons in the profession were willing to give the law schools a relatively free hand, probably because there was substantial agreement about the objectives of legal education, despite disagreements about the details. It is doubtful that such a consensus currently exists, either within the law schools or the profession generally. The destruction of the consensus may be at the root of the current efforts within the profession to dictate to the law schools. In 1971, as I was returning to fulltime teaching after five years as Dean of the University of Iowa College of Law, I described my own understanding of the objectives of legal education as follows:

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Law School Curriculum

The substantive coverage of course offerings, while obviously important, is really secondary to the task of helping students develop the ability to analyze and to solve problems. Over the years, legislation and court decisions may operate to eliminate much of the substantive learning from law school days. The ability to analyze and the approach to problem-solving cannot be eliminated in the same way.

Further, as a professional school, our goal is to provide as practical a program as we possibly can. I suggest that the most practical thing a law school can do is to provide a sound theoretical foundation for a lifetime career. The law school years properly should be viewed as the start of a lifetime of professional education. It is during the law school years that the theoretical foundation must be established if professional growth is to be a continuing process.

I believe that the views I expressed were consistent with the views of most law teachers and most judges and practitioners and that their wide acceptance explains in large part the willingness of the bench and bar to refrain from directly exercising the power they possessed.

As the result of the bench-bar restraint in asserting power, it appeared to most of us who opted for careers in legal education that a reasonable accommodation existed. There was a give and take. Educational decisions were made by the law schools, but with the knowledge of the latent powers possessed by the bench and bar. The process was one of mutual accommodation and restraint on both sides. If law school experimentation was too far removed from the students' perception of practicality—a perception closely related to bar examination requirements—student resistance would assure failure. There was room, however, for such experimentation, and continued experimentation is essential if legal education is to adjust to developing problem areas. Since law is not static, good legal education cannot be.

From the actions and proposals by various courts and organized bars as described above, it would seem either that these groups reject the concept of legal education I articulated in 1971 or that they have concluded that the law schools have failed to accomplish the goals. In view of their emphasis on subject matter issues, however, it seems rather clear that they have rejected the concept as, indeed, have many of those involved directly in legal education.

The Various Requirements and Proposed Requirements

The specific actions by the various bench and bar groups fall
into three categories: (1) Requiring a legal profession course; (2) Requiring specified practice-oriented courses; and (3) Requiring a large number of designated courses and specifying minimum credit-hours for such courses. Each of the categories would seem to call for separate analysis.

(i) The Legal Profession Course

Indiana and the American Bar Association require and the Committee of the Court of Appeals for the Second Circuit has recommended that the Court require that all students receive formal instruction on the legal profession and its ethics. Why that particular course or subject matter? Why not simply announce it as a subject on which questions will be asked on the bar examination and have students react as they traditionally have by enrolling in the course?

The answer may be that the indirect method failed. Legal ethics questions have been asked on most bar examinations for several years. Students have known they would have to answer such questions, but, unless the law school required enrollment in an ethics course, students have not enrolled in as great numbers as they have in such courses as evidence, commercial transactions, corporations, taxation, etc. The indirect system simply failed to work. With many members of the profession undoubtedly feeling very strongly, and not at all unreasonably, that no person should be admitted to practice without having had formal instruction in the ethics of the profession, it perhaps is not surprising that direct action was taken.

One can only speculate as to why students failed to respond as they traditionally have to bar examination requirements. They may have decided that the subject matter (1) was unimportant; (2) was less important than the subject matter of other courses; (3) could be learned for bar examination purposes by self-study or a bar review course; (4) could be learned by self-study or observation over a relatively short time after graduation for purposes of guiding their conduct in practice; or (5) was being taught by a faculty member they preferred to avoid or who was viewed as being less desirable than other faculty members. A combination of reasons undoubtedly contributed to the large-scale student decision to avoid elective legal profession courses. I believe that for most students, the decision not to elect the legal profession course stemmed from a conclusion that other courses were more important coupled with a feeling that self study or a bar review course would suffice for bar examination purposes.
Accepting the failure of the indirect method as the reason for the move to a direct requirement of a course in legal ethics and the legal profession, it remains to be explained why the decision was taken when it was. The absence of required instruction in the ethics area persisted over several generations without calling forth a bench-bar directive to the law schools and law students. Here again, one can only speculate. Different reasons undoubtedly motivated those involved in the decisions. One likely explanation of the timing—at least for some—is to view the decision as one of the aftermaths or “fallouts” of Watergate. In the eyes of many—lawyers and nonlawyers alike—the actions of the lawyer-participants in the break-in and cover-up reflected adversely on the legal profession, and in a very serious way. It may be that uneasiness over the presence of so many lawyer-participants coupled with frustration over the law schools’ failure to react affirmatively to the long-held and strongly-felt desires of many judges and lawyers concerning instruction in legal ethics coalesced to precipitate the decisions.

While requiring legal ethics may be an understandable reaction to the role of the lawyer-participants in Watergate, no thoughtful person seriously believes that the conduct of these lawyer-participants would have varied one iota if more of them had taken a course on the legal profession, its history and ethics. It does not take a sophisticated understanding of the ABA Code of Professional Responsibility to know that obstructing justice is wrong; that perjury is wrong; that dishonesty is wrong; that loyalty to a cause or candidate does not justify the use of illegal means to forward that cause or candidate. Law students are adults. Their attitudes about honesty and integrity have been shaped long before they start law school. Neither a single course nor a group of courses is likely to have an impact on the honesty and integrity of lawyers of the future. Such instruction well may aid young lawyers in avoiding some pitfalls, but none that arise as a result of dishonesty or lack of integrity.

While it is impossible to pinpoint the precise reason for the timing of the various decisions to require that all law students take coursework in legal ethics, it seems likely that Watergate contributed very substantially to the decision. In terms of preventing future Watergates, it is most unlikely that coursework of any kind will help. It should be understood by those wishing to require the formal study of the ethics of the legal profession in law schools that the course is difficult enough to teach as an elective to students who are interested. It is very difficult to relate the ethics course to reality; to explain why the ethical considerations often are broader than the
disciplinary rules; to avoid having the course viewed as *Preaching I*. Studying the legal profession, its ethics and its history, can be a fascinating exercise and a useful one for students who are interested. It is more difficult to teach than most other courses to students who are taking it because they are required to take it. Despite all of the difficulties created by requiring a course on the legal profession, I believe that law schools should require such instruction for all law students. Understanding one's own profession, its background and its ground rules is sufficiently important to support such a requirement. The cost of the bench and bar establishing such a requirement, however, may outweigh the benefits gained. (See discussion below.)

(ii) Practice-Oriented Courses

For one who has been a law teacher for more than twenty years and who has seen the widespread development of legal clinic programs and the move of law schools toward a more practice-oriented curriculum, it is somewhat baffling to understand the timing of recommendations such as those made to the Court of Appeals for the Second Circuit. At least since 1949 when I started law school—and, I believe, at least since 1912 when my father started law school—legal education has never been as practice-oriented as it currently is. In view of the widespread development of a practice orientation throughout legal education, why have portions of the bench and bar decided at this time to insist that the practice portion of legal education be further expanded when in the past, with substantially less of a practice orientation dominating legal education, no action was taken?

Part of the movement obviously stems from Chief Justice Burger’s stated position that the law schools are not doing an adequate job in helping students prepare for the practice of law, as that practice takes them into the court system. 10 Many lawyers, judges and law professors agree with the Chief Justice, feeling either that

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10. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System?*, 42 Ford. L. Rev. 227, 232 (1973) (“A second cause of inadequate advocacy derives from certain aspects of law school education. Law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette as things basic to the lawyer’s function. With few exceptions, law schools also fail to provide adequate and systematic programs by which students may focus on the elementary skills of advocacy.”)
recent law graduates are less well prepared for the courtroom than were their predecessors or that the law schools have never done a good job in preparing students for trial practice.

To those whose observations have led them to conclude that recent law graduates are less well prepared for the courtroom than they themselves were, I suggest that requiring students to take evidence, civil procedure (including federal jurisdiction, practice and procedure), criminal law and procedure, and trial advocacy will neither cure nor improve the performances they deplore. In practical terms, well over 90% of all recent graduates are likely to have taken all of the newly required courses except that in trial advocacy.\(^1\) I doubt that the addition of that one course will raise the quality of the young trial bar in any perceptible way.

If recent law graduates in fact are less well prepared for trial practice than their predecessors—and the evidence on the issue certainly is not clear\(^2\)—I suggest that the inadequate preparation is unrelated to changes in law school curricula. If preparation is at a lower level now than in the past, it probably results from a lower level of law student diligence than existed in the past.\(^3\) My observation is that many law students do not work as hard as they did and

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11. While it is very unlikely that a majority of law school graduates have taken a course devoted exclusively to federal jurisdiction, most modern civil procedure courses spend an appreciable amount of time on problems of federal jurisdiction. It seems likely that such coverage would satisfy the recommended requirement.


13. The Federal Bar Council’s Committee on Second Circuit Courts, in opposing the adoption of the recommendations of the Second Circuit Committee, said that it “. . . agrees with those witnesses . . . who testified that the Proposed Rules are predicated upon certain assumptions which are of doubtful validity. The Committee [Federal Bar Council’s] acknowledges that there is a deficiency in advocacy in the federal courts but . . . [is] of the opinion that the deficiency is not primarily a consequence of lack of adequate training at legal institutions, nor is it necessarily the result of lack of experience. Rather, the root of the problem is a lack of diligence and requires an understanding of those facts motivating attorneys diligently to prepare and advocate their causes.” *New York Law Journal*, December 19, 1974, at 1. My own conclusion concerning the lessening of demands being made on law students and the lessening of the effort being put into legal education by students is a product of my own observations and conversations with persons teaching at other schools. The sample admittedly is inadequate and the conclusion is not intended to apply to all faculty members or all students.
that many faculty members make fewer demands on students than they used to. I believe—and the evidence on the issue certainly is not clear—that the lessening of student work and the decrease in demands being made on students are manifestations of a nationwide decline in respect for the work ethic, a respect that dominated legal education and the practice of law in the past. Even taking into account undergraduate grade inflation, recent law graduates, as a group, came to law school with better records than their predecessors. On the basis of test scores and grades, it would appear that as a group, those in law school during the past five or six years have had a higher aptitude for law study than their predecessors. The educational program at law schools over the last several years is basically the same program offered ten, fifteen and twenty years ago except that the introduction of legal clinic programs has made the instruction somewhat more practice oriented. As I perceive it, the only other significant change has been a lessening of effort being expended by many law students. Thus, if the problem is that the performance of recent graduates is of a lesser quality than the performance of their predecessors, I suggest that the solution lies in encouraging law faculty members to be more demanding than they have in the recent past rather than requiring curricula changes.

It well may be that at least some recent law school graduates—those who received degrees from 1969 through 1974—brought with them to practice many of the attitudes they developed as students during the days of campus turmoil. I believe that one would be reasonably accurate in describing those attitudes as including not only a lack of respect for authority but an affirmative hostility toward it. Manifestations of such attitudes in courtroom demeanor certainly would offend many in the profession and, perhaps, lead to the conclusion that the educational process in the law schools failed. Part of Chief Justice Burger’s complaint about the quality of courtroom practice relates to the lack of civility, and I believe that such lack of civility stems in part from the attitudes described above. Requiring a course in trial advocacy will not change attitudes; and it appears to me—and I believe to many of us now in law teaching—that the attitudes described above are not present in anywhere near the same degree now as they were a few years ago. Student

14. Here again, the data are limited to my own observations and conversations with persons teaching at other law schools. Obviously, the conclusion is not intended to apply to all those who received degrees during the years in question.
15. See note 10, supra.
attitudes at present seem to have reverted to those with which most lawyers and judges are familiar.

If the decision to require practice courses is based on a determination that several generations of graduates have been foisted on the public with too little practice training and a too theoretical education—and this certainly is and has been the view of many members of the bench and bar as well as persons in legal education—it is difficult to understand why the decision to act is being taken at a time when the law schools are reacting affirmatively to such criticism. As noted above, with the development of legal clinic programs in almost all law schools, legal education, on its own motion, has moved and is likely to move further towards a more practice-oriented model. Law faculties are no longer dominated by a relatively monolithic acceptance of the analytical-theoretical model of the past. The debate has shifted. The question currently is how much time should be devoted to such things as legal clinic, practice court and the like, and not whether any time should be devoted to such subjects. Left to their own devices, it is very likely that the law schools will move in the direction of increased emphasis on instruction in practice areas.

With the development of various electronic devices, simulation of practice experiences within the law schools has become substantially easier than it once was. And legal clinics—when associated with clinical seminars which analyze and intellectualize the practice experiences of students—have proved their educational worth. I believe that law schools are doing a better job of teaching "practice" courses than they did in the past. Despite the progress made over the past ten years, however, it probably is accurate to say that the law schools do not do, and are unlikely in the future to do as good a job in teaching the practice areas as they do and will do in other areas. Simulation, no matter how good, remains artificial; and the restrictions on the economic condition of legal clinic clients tend to limit the kinds of experience available through clinic courses. Recognizing the law schools' obligation to provide the necessary foundation, I urge that practice can be learned most effectively in the course of practice, and that continuing legal education programs specifically designed for the beginning lawyer should play a large part in providing a practical side to the education of young lawyers. Devoting a major portion of the law school years to "practice" courses is inefficient as a means of helping students prepare for a lifetime career, particularly when combining continuing legal edu-
cation with the experience gained during the first six months to one 
year of practice will do the job more effectively and more 
meaningfully.\footnote{16}

(iii) The Bottom of the Slippery Slope: The Indiana Rule

While the imposition of the American Bar Association’s re-
quirement of a legal profession course and the Second Circuit Com-
mitee’s trial-practice-course recommendation raise questions 
about the desirability of bench-bar control of law school curricula, 
they impose comparatively mild burdens on law schools and law 
students.\footnote{17} The same cannot be said of Indiana Rule 13 which 
requires that persons applying for permission to take the Indiana Bar 
Examination have taken 54 semester-credit-hours in specified 
course areas. In practical effect, the 54 credit-hour requirement may 
be even heavier than it appears. Thus, because of the arrangement

\footnote{16. I agree with those who argue that it is unacceptable to have clients pay 
the price of educating the recent graduate in the ways of practice, but suggest that 
clients may not be paying such a price. See comments of Judge Weinstein, supra 
note 12. If they are paying, the answer is not to require pre-graduation course work 
by law students. If lack of practice experience gives rise to inadequate client repre-
sentation, the answer may lie in limiting the recent graduate’s access to the court-
room in the absence of some supervision—perhaps provided by a court officer—and 
some mandatory gap-bridging programs offered by the organized bar and the judi-
-ciary.}

\footnote{17. For most law schools, the dollar cost of providing a course in trial practice 
for all students will be quite high. Practice is best learned by doing, having what 
was done critiqued, and repeating the process. In educational terms, a good trial 
practice course requires a relatively small enrollment. The necessary individualized 
supervision will require the addition of staff, and ideally experienced—and, there-
fore, expensive—staff. In rejecting the high cost as a reason for withdrawing its 
recommendation that a course in trial practice be a condition precedent to admis-
sion to practice in the United States District Courts in the Second Circuit, the 
Qualifications Committee pointed out that trial practice has been taught success-
fully in a large class setting, referring specifically to the course taught by Professor 
(now United States District Court Judge) Prentice Marshall. 67 F.R.D. 159, 169 
(1975). The Committee’s position appears to be that if Judge Marshall was success-
ful in teaching a class of 180 students—and from all I can learn, he was—all law 
schools can replicate that success in a large class setting. I disagree. Very few 
experienced and successful trial lawyers who are partners in prestigious law firms 
gravitate to law school teaching at the height of their careers; and even fewer 
possess the dynamism and extraordinary capacities of a Prentice Marshall. I sugg-
est further that as good as his course was, it would have been substantially better 
if taught in small sections.}
of courses at the University of Iowa College of Law, a student enrolled at Iowa wishing to sit for the Indiana Bar Examination would have to enroll in 72 required hours in order to satisfy Rule 13. And the Iowa College of Law would have to institute a two semester-credit-hour legal bibliography course rather than its present practice of integrating legal research and writing with the first-year substantive courses. (I am sure that similar problems would exist at other schools.)

Indiana's Rule 13 apparently was enacted in reaction to poor performances on the Indiana Bar Examination over a two year period. The Court seems to have concluded that the reason for the high flunk rate was the failure of students to have taken courses in specific subject matter areas. A subsequent study has demonstrated the lack of correlation between courses taken in law school and performance on the Indiana Bar Examination. Whatever the reason for Rule 13, its approach to legal education ignores the analytical aspects of the process, treats all faculty members as fungible, is totally rule oriented, and demonstrates little understanding of the process of legal education. Indiana's Supreme Court appears to have adopted an empty bottle theory of legal education—empty bottles (students) must be filled with wine (rules of law) prior to being

18. Unless the Iowa Law School changed existing course and hour requirements, a student would have to take the following courses to satisfy the Indiana requirements: Conflict of Laws (3 cr); Constitutional Law I (3 cr); Constitutional Law II (3 cr); Administrative Law (3 cr); Contracts (6 cr); Remedies (3 cr); Criminal Justice I and II (6 cr); Litigation Evidence (5 cr); Federal Income Taxation I (3 cr); Federal Income Taxation II (3 cr) or Taxation of Gratuitous Transfers (3 cr); Legal Bibliography (2 cr); Legal Profession (2 cr); Corporations I (3 cr); Corporations II (2 cr); Commercial Transactions (4 cr); Civil Procedure (5 cr); Property I (3 cr); Property II (3 cr); Torts (4 cr); Trusts and Estates (3 cr); Future Interests (3 cr).

19. At present, instruction in legal bibliography and legal writing are integrated in a small section program in the first year. Although the legal bibliography portion of the program is limited to three or four sessions with the law librarian, students immediately apply what they learn in the process of writing research papers and briefs. If Indiana's two-credit legal bibliography requirement were imposed, an Iowa graduate wishing to take the Indiana Bar Examination probably would have to take a post-graduate course in legal bibliography despite the graduate's ability to use law library materials without difficulty.


21. Id.
corked (admitted to practice) in Indiana. The "empty bottle" theory lost favor when the law schools adopted the case method for classroom instruction, and that was a long time ago.

As adopted by the Indiana Supreme Court, Rule 13 carries to its logical end that which the House of Delegates of the American Bar Association started with its single course requirement and the Second Circuit Committee proposes with its five course requirement. If many other jurisdictions join in the movement, legal education will become more stereotyped than it is and the possibility of experimentation will cease to exist.

Costs of Bench-Bar Control of Law School Programs

Many persons and groups have opposed the recent actions to impose subject-matter requirements on law schools and law students. Among the positions urged—particularly in reference to the recommendations of the Qualifications Committee of the Second Circuit—but not emphasized in this comment, are:

(1) The absence of evidence that defects in the legal education currently available are responsible for what is thought by some to be a deficiency in advocacy skills.

(2) The absence of evidence that advocacy skills will be improved by the imposition of the various subject-matter requirements suggested.

(3) The problem of the "balkanization" of legal education resulting from a proliferation of requirements by different bench and bar groups.

(4) The feeling that the objective sought by the bench and bar groups might be accomplished more effectively—or, at least, as effectively—by means of continuing legal education programs or improved bar examination techniques.

(5) The feeling that the creation of a trial bar will bring about an elite bar along the lines of the barrister-solicitor division in England and deprive litigants of the freedom to select their own counsel without substantial restriction.

(6) The bench-bar actions unduly interfere with academic freedom and academic decision-making within the law schools.22

The reactions in this Comment to the actions of the bench and

22. See note 8, supra.
bar groups obviously are reactions from within the law school world; my perspective is a law school perspective. From that limited perspective, it seems to me that in establishing requirements and in recommending requirements, the bench and bar involved have made clear their belief (1) that their experiences in practice and on the bench have made them more expert about legal education than those who devote their professional lives to such education; (2) that subject-matter coverage is the key to good legal education and that they are more competent to select that subject matter than those who will be teaching the courses; and (3) that the quality of the person teaching is less important than the subject matter being taught. To all three conclusions, I register my dissent.

That practice experiences of law school graduates should have an impact on legal education is clear. That in designing programs, law faculty members should consider their own practice experiences and those of their graduates is equally clear and not debatable. That those practicing law, by virtue of their practice experience, are more competent to fix law school curricula than are their former teachers, is not only unclear, it is indefensible. Despite what some judges and lawyers may think, the practice of the profession of law teaching provides valuable insights to the designing of curricula and the teaching of courses. All wisdom on the subject is not claimed for those of us in law teaching. Judges and lawyers have a substantial contribution to make. I urge only that the dominant voice—not the only voice—should be that of law teachers who are also lawyers and whose professional activities center on legal education.

The experiences the bench and bar bring to bear on legal education are important, but they tend to concentrate on the “now” and to disregard the fact that those enrolled in law schools now will be practicing law for thirty or more years. The reverse well may be true of many law faculty members, i.e., they tend to disregard the problems of the graduate representing clients within days or weeks of graduation and to concentrate on helping students gain sufficient background for a lifetime career. Obviously, it is necessary to strike a balance; and that is exactly what the law schools have been doing over the past five or ten years. I urge that we are closer to striking a reasonable balance now than we have been for generations. We should be permitted to continue that process in cooperation with bench and bar rather than at the direction of the bench and bar. I want to make it clear, however, that I believe—and strongly—that if legal education is to err, it should err on the side of analysis and
theory and preparation for the long term rather than on preparation for the first day, week, month or year of practice.

Most law graduates function under substantial supervision during their early days in practice. They should. They can learn the practical side of the profession more quickly, more effectively, and certainly more realistically while they engage in practice than they can in law school. I do not suggest that law schools ignore the problems of day one, week one, month one, or year one. I do suggest that a failure in law school to emphasize those time periods is remediable within the context of practice and continuing legal education, while the long term impact of inadequate analytical and theoretical education is substantially more difficult to overcome. Here, too, the striking of a balance is necessary. As I view the process, it appears that such a balance is in the process of being struck. I urge that the law schools in the process of striking that balance be permitted to continue the process without the pressures of bench and bar requirements being imposed. Each segment of the bench and bar have a relatively narrow perspective about the practice of law. Their experiences tend to concentrate; while generalists certainly remain, the tendency is for practitioners to devote most of their attention to relatively few areas of the law. And judges, of course, deal with an enormous variety of substantive problems, but always in the context of litigation. The legal profession itself tends to be “balkanized.”

If each segment of the profession attempts to impose its perspective on law school programs, a substantially skewed and distorted program of legal education is likely to result, depending on which segment of the bar succeeds in imposing its will on the law schools.

As noted above, I reject a concept of legal education in which substantive law coverage dominates program decisions. Most law school graduates can remember a course or two in which relatively few pages were covered and relatively few “substantive” rules were discussed, but in which, despite the lack of “coverage,” matters of great value were learned, and are now remembered and used. To view legal education as a collection of subject-matter courses is to distort the process and to destroy its uniqueness and its true value. I do not argue that subject matter is irrelevant, but that we retain a perspective that includes the overall goals of legal education. I

23. For an interesting analysis of the divisions within the profession, see Cohen, Confronting Myth in the American Legal Profession: A Territorial Perspective, 22 Ala. L. Rev. 513 (1970).
view some courses as “basic” and understand fully that others may disagree with my list. But whatever any single law faculty requires or does not require for graduation, the overwhelming mass of students enroll in all courses generally viewed as “basic” by all segments of the legal profession—those who teach and those who practice. Many in the law schools find it easier to teach students who have “elected” to take a course than those who are “required” to enroll. It is difficult to justify requiring courses which students take without the requirement and which faculty members believe are easier to teach as electives. Nothing is gained and the teaching task is made harder. Further, while student attitudes towards elective courses are influenced, at times, by the workload demands of the faculty member and the grading patterns of the past, I believe that in the main students select electives on the basis of a judgment that they will learn more worth knowing from the person teaching one course than from the other. I think it wrong to deprive them of that choice.

Alternative Methods for Improving Lawyer Competence

I am sympathetic with those in the bench and bar who are sufficiently concerned about lawyer competence to want to take action to improve it. I suggest to them that establishing specific subject-matter requirements within the law schools is one of the more ineffective methods for achieving the goal they—and I—seek. Other methods are available, methods much more likely to produce the increased competence desired and to do so on a much broader scale.

Mandatory continuing legal education as a condition for the retention of the license to practice law holds substantial promise for improving lawyer competence. If such a program is to have a significant impact on competence, credit for each “short course” should be conditioned on the passing of an examination designed to test understanding of the materials covered. Machine-graded examinations, following the pattern established in the Multistate Bar Examination, could be used, thus reducing the grading burden on those charged with administering continuing legal education examinations.

In addition, lawyers—both young and old—who are inexperienced in the courtroom would be aided immeasurably by the assistance of a court-appointed official charged with supervising the inexperienced lawyer in the preparation and trial of law suits. In the
course of such supervision, the official would become aware of the competence level of individual practitioners and could design specific educational programs for those who need additional training. Clients would receive better representation. If the prescribed educational program is not followed, the official could report to the court and it could take necessary disciplinary action in appropriate cases.

The supervisory system suggested, coupled with a good continuing education program in trial practice—an example is the program of the Institute of Trial Advocacy—would be substantially more effective in improving trial practice than a required law school course or series of courses. Learning while doing is a truly effective way to learn practice skills. The same official well might be charged with observing the courtroom performances of lawyers who have experience but who demonstrate less than an acceptable level of competence. Recommendations from the official to such lawyers indicating the need for better preparation or special course work should be effective in improving the level of competence, particularly if backed by the court’s disciplinary powers if the “advice” of the official is not followed.

Effective use of the bar examination would accomplish the goal of improved understanding of legal ethics. If bar examinations were extended by from two to four hours and the additional time used to examine applicants for admission on ethical problems, the applicants would have the opportunity to demonstrate their mastery of the subject; and it is mastery of the subject and not the taking of a course that is desired and needed. Such a system would be consistent with traditional methods, would induce most students to enroll in a legal profession course and would be aimed directly at the problem. It may be that all persons in practice should be required to take the ethics portion of the bar examination every two or three years in order to assure that all lawyers understand the ethical standards by which the profession guides its conduct. Failure to pass the ethics portion of the bar examination, whether the failure is by a new applicant or by a practicing lawyer, could function to prevent either from practicing law. If a special ethics examination were given on a monthly basis, and those who failed were permitted to retake the examination, the harshness of the denial of admission or suspension would be ameliorated.

The few alternative methods suggested here do not exhaust the possibilities. As distinguished from imposing subject-matter requirements on law schools and law students, the alternatives sug-
gested deal directly with the competence issue and are much more likely to have an affirmative impact on lawyer competence at all levels.

Conclusion

Legal education obviously can be improved. Compared with the education offered in the relatively recent past, however, it appears to me to have improved appreciably. The large-class, sink-or-swim, all-survey-course model of the past has given way in many schools to smaller classes, individualized assistance to students and at least some intensive and in-depth study of a few areas of the law. Research and writing skills are emphasized substantially more than in the past, and for all students rather than being limited to those on the law review. The “Paper Chase” faculty member has become the exception rather than the norm, perhaps decreasing the effectiveness of the process for a few, but probably increasing the effectiveness for most by making law school for them something other than a harrowing obstacle course. The system has shifted to one that is more intensive and one in which there is substantially more personal effort being made by faculty members to help students learn to become lawyers.

Law school offerings have expanded, primarily in response to the changes in the legal system introduced by the enormous expansion of governmental regulation of relationships within our society. While a few traditional courses have been eliminated, and others have been combined or consolidated, most of the traditional offerings are still available. The expansion in substantive offerings has made legal education somewhat more interesting for students, but has not changed the main thrust of the process. Improvements have come primarily as a result of reduced class size, increased practice orientation and an attitudinal change rather than program changes. We can do better. I believe that we will do better. Increasing the number of specific courses required will not contribute to that improvement.

It should be understood that in urging that bench and bar refrain from efforts at direct control of law school curricula and to continue to exercise restraint in asserting their power, I am not asserting complete control of legal education for the law schools. I would estimate that at present approximately four-fifths or 80% of course selections made by law students are made in response to bar examination requirements. The law schools themselves respond by offering courses in the areas being examined. With only 20% of the
program currently available for trying new methods in new areas of the law, the law schools' flexibility is not very great. If students are required to take any substantial number of courses in addition to those in which they are now examined, the modest amount of flexibility now present will disappear completely.

It is not my intention in this comment to assert a territorial imperative and "demand" that the bench and bar remove themselves from my turf. It is my intention to urge that the bench and bar think carefully about the implications of what they have started; that they return to the restraint of the past and use their considerable persuasive powers rather than their raw power; that they keep in mind that they have been out of law school for a long time and that they should find out what modern law schools are actually doing before they take action to impose requirements on the schools; and that they consider alternative and more effective courses of action to accomplish the goal of improved competence within the legal profession. On the other side, I urge that law faculties take a hard look at the complaints about the products of legal education and attempt to develop an educational program that strikes a balance between the analytical and the practical needs of young lawyers.