Golden Gate University Law Review

Volume 5 | Issue 2 Article 9

January 1975

The Right to Effective Counsel in Criminal Trials: Judicial Standards and the California Bar Association Response

Marlys Fredrickson Huez

Leonard D. Weiler

THE RIGHT TO EFFECTIVE COUNSEL IN CRIMINAL TRIALS: JUDICIAL STANDARDS AND THE CALIFORNIA BAR ASSOCIATION RESPONSE

The right to counsel guaranteed to federal defendants by the sixth amendment is a fundamental right applicable to state defendants through the due process clause of the fourteenth amendment.[1] It is settled that this sixth amendment right will not be satisfied by the mere formal appointment of an attorney.[2] Since Justice Sutherland delivered the opinion in *Powell v. Alabama*,[3] it has been accepted that the "duty [to provide counsel] is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective aid* in the preparation and trial of the case."[4] The *Powell* decision, considered with *Gideon v. Wainright*[5] and *Johnson v. Zerbst*,[6] mandates that the indigent accused in both state and federal felony prosecutions be accorded the effective assistance of counsel for the preparation and presentation of their cases.

The claim of convicted prisoners that their trial defense counsel was ineffective or incompetent is one frequently raised on appeal.[7] Such claims may appear in a variety of contexts including motions for a new trial, motions to vacate judgment and sentence, appeals, and most frequently in petitions for writs of habeas corpus.[8] Prob-

1. Gideon v. Wainright, 372 U.S. 335 (1963).
2. Avery v. Alabama, 308 U.S. 444 (1940).
3. Powell v. Alabama, 287 U.S. 45 (1932) (where indigent accused is unable to adequately represent himself because of ignorance, feeblemindness, illiteracy or the like, court must appoint counsel in capital offense cases).
4. *Id.* at 71 (emphasis added).
5. Gideon v. Wainright, 372 U.S. 335 (1963) (assistance of counsel in state trial on felony charge required by fourteenth amendment).
6. Johnson v. Zerbst, 304 U.S. 458 (1938) (whether waiver by defendant in federal court on felony charge of sixth amendment right to counsel was intelligent and competent may be decided in habeas corpus proceeding).
7. *See, e.g.*, Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962).
8. For further discussion see Waltz, *Inadequacy of Trial Defense Representation As a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

lems arise, however, because the United States Supreme Court has never enunciated any clear standards for lower courts and attorneys to follow in determining what is "effective assistance of counsel."[9] As a result lower courts have been reluctant to entertain such claims and fundamental rights of the accused have been lost.[10]

McQueen v. Swenson[11] is a step away from this trend because the reviewing court was willing to examine counsel's specific acts before and during trial and evaluate them in terms of possible constitutional violations. The significance of the *McQueen* decision lies in the court's analysis of what constituted ineffective assistance of counsel. Petitioner McQueen alleged that he was denied effective representation by his trial counsel because of the latter's "total failure to investigate the facts of the case."[12] Specifically McQueen challenged trial counsel's decision not to interview prosecution witnesses lest charges of tampering be made. No attempt was made to interview any of the forty-one witnesses endorsed on the indictment—twenty-six of whom testified at trial.[13] The United States Court of Appeals held that a defense counsel who interviewed only his client in preparation for a defense against a first degree murder charge failed to render effective assistance of counsel. *McQueen* in its analysis expanded the scope of the traditional "mockery of justice" standard and in so doing applied the newer standard of "reasonably competent" representation adopted by the Third, Fourth, Fifth and District of Columbia Circuits. This Comment, in addition to evaluating *McQueen*, will explore an alternative remedy—certification of specialists in criminal practice—which has been adopted by two states and is being considered by several others for dealing with the problem of incompetency of counsel.

I

The *McQueen* court stated that it was basing its holding on the traditional mockery of justice standard enunciated in *Cardarella v. United States*,[14] that

> [a] charge of inadequate representation can prevail "only if it can be said that what was done

9. Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1435 (1965).
10. *Id.* *See* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 928-29 (1973).
11. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).
12. *Id.* at 214.
13. *Id.*
14. Cardarella v. United States, 375 F.2d 222 (8th Cir. 1967).

> by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court".[15]

The *McQueen* court further emphasized that the words were not to be taken literally, but rather were intended as a vivid illustration of the principle that the accused has a heavy burden in showing the requisite unfairness.[16] The idea of the petitioner's heavy burden, originating in *Bruce v. United States*,[17] was based on the theory that the right to effective representation of state defendants arose from the due process clause of the fourteenth amendment while a different standard applied to federal defendants who claimed violation of their right to effective assistance of counsel through the sixth amendment. The distinction resulted from the notion that a defendant's claim of denial of due process of law required a showing that counsel's representation was so lacking in competency or good faith that it was the duty of the trial judge or the prosecutor as officers of the state to observe and correct it. It must have been so outrageous as to make the proceedings a farce and a mockery of justice.[18] Thus, the due process claim which only required the court to look at the overall fairness of the proceedings was intricately tied to the mockery of justice standard. However, since *Bruce* was decided, the Supreme Court implied in *McMann v. Richardson*[19] that ineffective assistance, like the right to counsel itself, derives not only from the due process clause but also from the sixth amendment and its more stringent requirements. In the *McMann* decision the Court considered whether counsel's advice on a guilty plea was within the range of competence demanded of attorneys in criminal cases.[20] The *McMann* case indicated that the Supreme Court was analyzing state defendants' claims of ineffective counsel by a standard of "normal competency" rather than the less demanding standard of overall fairness required under the due process clause. It is just to apply the more rigorous standard to state convictions since the same sixth amendment guarantee is made applicable to them by the fourteenth amendment under *Gideon*.[21]

---

15. McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974), *citing* Cardarella v. United States, 375 F.2d 222, 230 (8th Cir. 1967).
16. 498 F.2d at 214.
17. Bruce v. United States, 379 F.2d 113, 116 (D.C. Cir. 1967).
18. United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953), *cert. denied*, 346 U.S. 865 (1953).
19. McMann v. Richardson, 397 U.S. 759 (1970).
20. *Id.* at 770-71.
21. 372 U.S. at 342.

The mockery of justice standard has put an unduly heavy burden on the defendant.[22] Those jurisdictions following the mockery of justice standard have recognized claims only where the representation has been shockingly inadequate.[23] The standard has been justified on several theoretical grounds. In the older cases an agency rationale holding the client responsible for the lawyer's errors was common.[24] However, even if such a theory were valid, it was difficult to apply it to appointed counsel situations.[25] In fact, agency concepts do not realistically apply to the criminal defense situation since an accused does not really represent to anyone that his or her lawyer (retained or appointed) is competent. The accused engages counsel to conduct the defense because the accused is either ill-equipped or wholly unequipped to protect him or herself; otherwise the accused would personally conduct the defense.[26]

Federal courts following the mockery of justice standard have used the concept of "state action" for avoiding the merits of claims of ineffective assistance of counsel.[27] The state action rationale was subsequently struck down in *Moore v. United States*.[28] It was argued that there can be no post-conviction relief on the basis of ineffectiveness of counsel where only private attorneys were involved. This position was clearly untenable since the judiciary is involved in a prosecution from the time of arraignment until sentence is passed. It has been well established that essentially private actions can be transformed into state action violating the fourteenth amendment when an organ of the state intervenes to place behind it the state's power of enforcement.[29] The state action rationale has not been adhered to in most jurisdictions following the "mockery" standard on ineffective counsel claims.[30]

A third theory which courts have used in applying the mockery

22. Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973).
23. *See, e.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (counsel's conduct of defense improper only if a "pretense"); Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965) (counsel's conduct of defense improper only if it made trial a "farce"); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948) (representation improper only if a "travesty"); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945) (conduct of defense improper only if "a farce and a mockery of justice").
24. *See, e.g.*, Sayre v. Commonwealth, 194 Ky. 338, 238 S.W. 737 (1922).
25. *See* Waltz, *supra* note 8, at 296-301.
26. *See, e.g.*, Williams v. Kaiser, 323 U.S. 471 (1945).
27. *See* United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953).
28. Moore v. United States, 432 F.2d 730 (3d Cir. 1970).
29. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935); Carter v. Texas, 177 U.S. 442, 447 (1900). *See also* Shelley v. Kraemer, 334 U.S. 1 (1948).
30. *See* Waltz, *supra* note 8, at 298-301.

of justice standard to avoid the merits of a claim of ineffective assistance of counsel is one stating that unless competency of counsel was raised at the trial court level it is not reviewable on appeal or by collateral attack.[31] Such a theory has been rejected with respect to collateral attack by habeas corpus in numerous cases.[32] Such a narrow view of state responsibility for the fairness of the process by which the state deprives persons of life or liberty has been justifiably rejected.

The *McQueen* decision recognized that the mockery of justice standard was a stringent one, but stated that it was "never intended . . . to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit."[33] Nevertheless, it is clear from a reading of the cases in the Eighth Circuit as well as other circuits that the mockery of justice standard has been used in such a way as to preclude a defendant from asserting his or her constitutional right to effective assistance of counsel. For example, in *Cardarella* the petitioner claimed his counsel should have known of or discovered evidence favorable to petitioner—two police reports which would have impeached witnesses who testified at the trial. The court stated that lack of diligence in discovering evidence which was not used at the trial was not necessarily to be equated with ineffective assistance of counsel.[34] Phrased in other terms, this could be considered inadequate pre-trial investigation—which was precisely what the *McQueen* court held to be a denial of effective assistance of counsel. In both *Javor v. United States*[35] and *United States v. Katz*[36] the reviewing court recognized that counsel was asleep during part of the proceedings. Yet both courts affirmed the lower court's holding of no denial of effective assistance of counsel. In *Hudspeth v. McDonald*[37] the court acknowledged from testimony in a prior proceeding that the testimony "established that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or less degree during the whole trial. But what of it?"[38]

31. *See, e.g.*, State v. Cook, 440 S.W.2d 461 (Mo. 1969); Fritz v. State, 449 S.W.2d 174 (Mo. 1970); State v. Dreher, 137 Mo. 11, 38 S.W. 567 (1897).
32. *See* Luton v. Texas, 303 F.2d 899 (5th Cir. 1962); Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).
33. 498 F.2d at 214.
34. 375 F.2d at 232.
35. Javor v. United States, 467 F.2d 481 (9th Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).
36. United States v. Katz, 425 F.2d 928 (2d Cir. 1970).
37. Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941).
38. *Id.* at 967.

The court continued that even if counsel was drunk that condition was not of such a magnitude as to require the court to take notice of it and did not render the trial a farce. As recently as 1968 the Ninth Circuit in *Vizcarra-Delgadillo v. United States*[39] held that defendant was not denied effective counsel although counsel failed to interview any prosecution witnesses and his investigation consisted of consulting with appellant on only two occasions and talking to the prosecuting attorney. Such cases indicate how extreme laxness by counsel has gone unredressed in jurisdictions following the mockery of justice standard.

Since recent Supreme Court decisions have expanded the scope of the right to counsel to every critical stage of a prosecution,[40] it seems illogical to guarantee counsel without guaranteeing adequate performance of the attorney function.[41] Four United States Circuit Courts of Appeal have abandoned the vague mockery of justice standard in favor of a standard of reasonably competent representation similar to that discussed by Justice White in dictum in the *McMann* decision.[42]

The Third Circuit in *Moore*[43] adopted a normal competency standard similar to the reasonable counsel standard adopted by the Fifth Circuit in *MacKenna v. Ellis.*[44] Both standards demand an exercise of customary skill which normally prevailed at the time and place. The standard is similar to the tort concept of ordinary care and skill and has been used as a standard of care for other professionals.[45] It also has the advantage of familiarity. The *Moore* court gave substance to the general standard by recognizing that representation involved more than the courtroom conduct of the advocate.

> The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to ar-

39. Vizcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968).
40. United States v. Wade, 388 U.S. 218 (1967) (right to counsel at line-up); Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel at preliminary hearing); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel during interrogation).
41. *See, e.g.*, United States v. Morrissey, 461 F.2d 666, 670 n.6 (2d Cir. 1972). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 2-6 (1971) [hereinafter cited as ABA PROJECT].
42. 397 U.S. at 770.
43. 432 F.2d at 737.
44. MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960).
45. *See* Moore v. United States, 432 F.2d 730, 737 n.27 (3d Cir. 1970); *see generally* RESTATEMENT (SECOND) OF TORTS § 299(a) (1965).

> range for their attendance. Such omission, of course, will rarely be visible on the surface of the trial, and to that extent the impression of a trial judge, regarding the skill and ability of counsel will be incomplete.[46]

The Fourth Circuit in *Coles v. Peyton*[47] and the District of Columbia Circuit in *United States v. DeCoster*[48] adopted a series of specific guidelines which defense counsel should observe in the representation of clients. Specifically, counsel should be appointed promptly and be afforded a reasonable opportunity to prepare the defense. Counsel should confer with the client without delay and as often as necessary to elicit matters of defense or to ascertain that potential defenses are unavailable. The D.C. Circuit also provided that counsel should discuss fully potential strategies and tactical choices with the client. Counsel should promptly advise the client of his or her rights and take all actions necessary to preserve them. The D.C. court also focused attention on adequate investigation:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And of course, the duty to investigate also requires adequate legal research.[49]

If a defendant can show a substantial deviation from any of these requirements, such will constitute a denial of effective representation unless the government can establish lack of prejudice thereby.[50] This shift in the burden of proving prejudice differs from the *McQueen* holding. Under the *McQueen* standard, the defendant

46. 432 F.2d at 739.
47. Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968).
48. United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973).
49. *Id.* at 1204.
50. *Accord*, Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968).

has the burden of showing that he or she was prejudiced as a result of counsel's incompetency. Only in this aspect, however, was *McQueen* in accord with other jurisdictions following the mockery of justice standard.

The *DeCoster* decision specifically referred to the American Bar Association's *Standards for the Defense Function.*[51] These standards considered with the court's specific guidelines do provide clearer notice to attorneys as to what is expected of them in a criminal defense case and eliminate much of the vagueness that is inherent in the mockery of justice standard. To date, however, the District of Columbia court guidelines have been the most comprehensive ones adopted by any court which has considered the problem of ineffective representation by counsel.

A review of the *McQueen* court's analysis of the facts makes clear that the court focused its inquiry on the attorney's conscious and deliberate choices.[52] The court rejected the traditional approach of examining counsel's conduct in terms of its effect on the "conscience of the court" (necessitating corrective measures by the court) in favor of examining the conduct in terms of a minimum standard of reasonable competency. The court looked at specific instances of counsel's conduct rather than the overall fairness of the proceedings. Particularly, the court focused on counsel's intentional decision not to interview the prosecution witnesses and his failure to visit the scene of the shooting. The district court had held both these decisions to be the results of the exercise of his judgment,[53] and therefore not to be interfered with by the court. Such a policy on the part of the courts not to second-guess the exercise of defense counsel's professional judgment had been firmly established by prior decisions.[54] Nevertheless, the reviewing court rejected the conclusion of the lower court and found counsel's conduct was an abdication—not an exercise—of his professional judgment. In fact, trial counsel's decision not to interview prosecution witnesses had less of an impact on the proceedings than did the decision of counsel in *Wright v. Craven*[55] to argue alternative defenses of entrapment and innocence, thereby negating defendant's credibility before the

51. ABA PROJECT, *supra* note 41.
52. 498 F.2d at 214.
53. McQueen v. Swenson, 357 F. Supp. 557, 562 (E.D. Mo. 1973).
54. Robinson v. United States, 448 F.2d 1255, 1256 (8th Cir. 1971). *See* Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970); Mitchell v. United States, 359 F.2d 833 (7th Cir. 1966); and United States v. Duhart, 269 F.2d 113 (2d Cir. 1959).
55. Wright v. Craven, 412 F.2d 915 (9th Cir. 1969).

jury. However, the *Wright* court held that counsel's tactical decision and mistaken understanding of the law of entrapment did not amount to a mockery of justice.[56] Thus, the *McQueen* decision in its analysis was closer to those cases decided by circuits which have renounced the mockery of justice standard in favor of specific standards defining reasonably competent representation.

In *McQueen* the court emphasized counsel's failure to do the necessary investigation and interviewing of prospective witnesses. This duty of counsel was specifically identified by the *Moore* court in its normal competency standard.[57] Additionally, the *McQueen* court examined counsel's specific conduct in terms very similar to the specific guidelines outlined in the Fourth and D.C. Circuits—particularly the duty to conduct appropriate factual investigation. The *McQueen* court did not follow the mockery of justice jurisdictions which look at the outrageous effect of the conduct on the court. Instead the court looked at the effect of the conduct on the lawyer's duty to his or her client. Thus, the *McQueen* decision in its analysis of what constituted ineffective assistance of counsel expanded the scope of the traditional mockery of justice standard. It is predictable that the adequacy and effectiveness of representation will now be measured by the standard of whether counsel's representation was reasonably competent.

This position has been subsequently recognized in *Clark v. Lockhart*.[58] The *Clark* case followed the reasonable or normal competency standard in holding that petitioner was not denied effective representation of counsel where counsel conferred with petitioner on several occasions and discussed the case with the arresting officers (who obtained the confession to rape) and the Deputy Prosecuting Attorney. The *Clark* decision distinguished *McQueen* precisely on the basis of counsel's investigation. Also from the *Clark* decision it is apparent that the reasoning of *McQueen* is not limited to capital cases. Rather, it is predictable that the Eighth Circuit will extend its new standard to all felony prosecutions just as the Third, Fourth, Fifth and District of Columbia Circuits have done.[59] Since the *McQueen* decision it is clear to both attorneys and clients that

56. *Id.* at 918.
57. 432 F.2d at 737.
58. Clark v. Lockhart, 379 F. Supp. 1320 (E.D. Ark. 1974).
59. United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) (aiding and abetting armed robbery and assault with a deadly weapon); Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (federal bank robbery); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968) (forcible rape); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960) (theft).

defense counsel's conduct will be scrutinized in the Eight Circuit by a standard more exacting than the traditional mockery of justice. The specific guidelines adopted by the Fourth and D.C. Circuits and impliedly adopted by the *McQueen* court give notice of the specific conduct which will be examined in determining whether an accused has been denied effective assistance of counsel. Now an accused, at least in these five circuits, has a reasonable basis for expecting competent representation.

II

State bar certification of attorneys as specialists in the practice of criminal law is an alternative method for insuring the quality of legal services provided by trial counsel. California and New Mexico have adopted specialization programs while several other states are actively considering them.[60] Both California and New Mexico are states which continue to adhere to the traditional mockery of justice standard.[61] This fact is significant since it indicates that state bar associations in these and other states are becoming more sensitive to the problem of ineffective assistance of counsel and are taking steps to deal with the problem at its source—that is, the attorney who mishandled the case at the trial level.

The California Pilot Program in Legal Specialization was adopted by the State Bar Association in 1970 and approved by the California Supreme Court in 1971. It is the only implemented program which conforms closely to the recommendations of the American Bar Association's Special Committee on Specialization.[62] Certification as a specialist is based alternatively on written examination at five year intervals or ten years of law practice, continuing legal education, and continuing substantial involvement in the specialty field.[63]

The California Plan provides certain minimum requirements for an attorney to be certified as a specialist in criminal law.[64] The attorney must have practiced law in California for at least five years prior to the date of application. The attorney must make a satisfac-

60. *Final Report—Committee on Specialization*, 44 CAL. ST. B.J. 493, 499 (1969).
61. People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963); State v. Moser, 78 N.M. 212, 430 P.2d 106 (1967).
62. Kovacs, *The California Pilot Program in Legal Specialization*, 1974 SPECIAL ISSUE 15. *See generally* Levy, *Is Specialization a Conspiracy?*, 4 JUR. DOC. 43 (1974).
63. Kovacs, *supra* note 62, at 18.
64. *Standards For Specialization Announced*, 48 CAL. ST. B.J. 80, 82 (1973).

tory showing of a substantial involvement (*i.e.* actual performance) in criminal law involving a minimum of one-third of his or her time and a specific number and type of cases in which he or she acted as principal counsel. The attorney must make a satisfactory showing of educational experience in criminal law by participating in or teaching one board-approved program of advanced study. A written examination is required to test knowledge, proficiency and experience in criminal law and related fields. Finally, all applicants must submit the names of eight references (including one judge) who will attest to the applicant's proficiency in the practice of criminal law. The reference forms require

> a detailed evaluation of the applicant's legal ability, including a comparison with other criminal lawyers, on a five point scale as to preparation, resourcefulness, knowledge of substantive criminal law, knowledge of criminal law procedure, effectiveness of court presentation, consideration of the interests of clients and reputation in the legal community for ability to try a criminal case.[65]

In addition to the above, the Criminal Law Advisory Commission will select four lawyers or judges who practice or preside in the same area to further evaluate the applicant's proficiency in criminal law practice.

A grandfather clause was provided in the Plan for attorneys who have practiced criminal law for a minimum of ten years. Applicants who qualify are excused from examination and educational requirements.[66] Effective January, 1975 six hundred thirty-two lawyers have applied for certification and five hundred and eight have been granted; about sixty per cent of those qualified under the grandfather provisions.[67]

The California Pilot Program has been received with mixed reaction.[68] General criticism has been levelled at the Grandfather Certification process. The exemptions from the examination and educational requirements for attorneys who have practiced ten years

65. Kovacs, *supra* note 62.
66. *See generally Standards for Specialization Announced, supra* note 64, at 81-82.
67. Interview with James H. Kovacs, Program Director, and Kathleen Murray, Assistant Program Director, California Board of Legal Specialization, in San Francisco, Jan. 23, 1975.
68. *See* Kovacs, *supra* note 62, at 26.

can be seen as a way of fostering, not discouraging, incompetency. However, lawyers certified under the grandfather provision are also required to obtain the necessary references. The references require an evaluation of a lawyer's *actual performance* and can be viewed as a less artificial measure of a lawyer's abilities to fulfill his or her responsibilities than is a written examination.

Other significant issues raised by the certification plan involve its voluntariness and the requirement of advanced study. Since no attorney will be prohibited under the plan from practicing criminal law if he or she is not certified as a specialist, query how much impact the plan will have on California criminal law practice. At the other extreme, however, is the possibility that at some later date the legislature or the State Bar will require certification to defend or prosecute an accused. This would be overt discrimination against the generalist attorney who may competently do some criminal litigation but choose not to obtain certification as a specialist. The advanced study requirement can be a hardship on newer practicing attorneys, particularly women and minorities, who may not have the money to purchase the advanced education. Constitutional problems may arise in the situation where a defendant is represented by a non-specialist and the prosecuting attorney is a specialist. To carry this one step further, should a different standard (either higher or lower) be applied to a specialist than a non-specialist if a claim of incompetent representation is raised? These issues have not been resolved, and this Comment is meant only to raise them for further consideration.

The program of certifying specialists in criminal practice arises in part from the state bars' increasing recognition and sensitivity to the problem of incompetency in the legal profession and their willingness to take some responsibility for this. For too many years incompetency has persisted and the disciplinary process has not adequately dealt with it. Certainly clients are justified in expecting a higher standard than mockery of justice from lawyers, just as patients expect more than a mockery of medicine standard from doctors. The decision in *McQueen* moves the Eight Circuit forward to a recognition of the fundamental nature of the right to competent legal assistance. The court, by focusing on the lawyer's specific conduct, gives fair notice to other lawyers as to what will be expected of them in the future. It is conceivable that a specialization program similar to California's plan would have given notice to the defense

counsel in *McQueen* that his policy of not interviewing prosecution witnesses was a dangerous one and, in fact, an abdication of his ethical duty to his client.

Marlys Fredrickson Huez
Leonard D. Weiler