

1992

A Fresh Look at Lawyers' Education

Robert MacCrate

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Legal Education Commons](#)

Recommended Citation

Robert MacCrate, *A Fresh Look at Lawyers' Education*, 27 U. Rich. L. Rev. 21 (1992).

Available at: <http://scholarship.richmond.edu/lawreview/vol27/iss1/3>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

These are remarks made by Robert MacCrate at the T.C. Williams School of Law in October, 1992. Mr. MacCrate served as chairperson of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap, and is a former president of the ABA.

A FRESH LOOK AT LAWYERS' EDUCATION

*Robert MacCrate**

Over the past three years, Dean Harbaugh and I have been engaged — along with 20-odd other colleagues from bench, bar and law school on an American Bar Association Task Force — in taking a new look at the education of lawyers.¹ Our product is a report entitled “Legal Education and Professional Development — An Educational Continuum.”²

Our Task Force approached its project from a quite different direction than prior studies of legal education.³ We started by looking, not at law schools, but at lawyers: the total profession for which new lawyers must prepare. It is what one member of our

* Retired Partner, Sullivan & Cromwell, New York, New York; B.A., 1943, Haverford College; J.D., 1948, Harvard Law School.

1. Prior studies of legal education had repeatedly noted shortcomings in the preparedness of law students to participate effectively in the legal profession. A broad consensus had developed that something more needed to be done; but as to what, and by whom, there was little agreement. The Task Force was created by the ABA Section of Legal Education and Admissions to the Bar to seek a consensus for change.

Some of the prior studies of legal education include: *LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS* (1979) (“The Cramton Report”); *LAW SCHOOLS AND PROFESSIONAL LEGAL EDUCATION* (1980) (“The Foulis Report”); *REPORT OF THE TASK FORCE ON PROFESSIONAL COMPETENCE* (1983) (“The Friday Report”); *APPELLATE LITIGATION SKILLS: THE ROLE OF THE LAW SCHOOLS* (1985) (“The Frank Report”); *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM* (1986) (“The Stanley Report”); *LONG RANGE PLANNING FOR LEGAL EDUCATION IN THE UNITED STATES* (1987) (“The McKay Report”).

2. *AMERICAN BAR ASSOCIATION TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM* (1992) [hereinafter *TASK FORCE REPORT*].

3. *Cf. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION, LAW SCHOOLS AND PROFESSIONAL LEGAL EDUCATION* (1980) (“The Foulis Report”); *ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (Carnegie Foundation 1921); *DAVID HOFFMAN, A COURSE OF LEGAL STUDY*, (Baltimore, Joseph Neal 1836).

Task Force has referred to as "the world of lawyer performance in which law students will conduct their professional lives."⁴

Back in 1986, then Dean Mudd wrote, "[t]he essential starting point for a proper review of the professional preparation of law students is a complete and accurate picture of the work of lawyers."⁵ He called for legal education to be better related to lawyer performance — to be "performance-referenced."⁶ Heeding this admonition, the Task Force began its fresh look at legal education by assembling a comprehensive overview of the profession.

The Profession Today

There have been enormous changes in that world of lawyer performance since World War II: a four-fold increase in the number of lawyers, an epic change in the gender make-up of the profession, and a continually rising demand for legal services fueled by great growth in law and its complexity, accompanied by profound social, economic and technological change.

The Task Force found a profession approaching 800,000 lawyers scattered in an endless variety of practice settings. While 70 percent of the lawyers in private practice are sole practitioners or in small firms of 10 lawyers or less, their law offices differ markedly in the clients they serve, the type of law practiced and their urban, center-city, suburban or small town flavors.⁷ Virtually every individual lawyer, in this era of specialization, in whatever setting, is compelled today to concentrate in one or several areas of law.⁸

Since 1970 there has been a steady movement of law firms of all sizes from smaller practice units into larger. Private practice has become a spectrum of different practice units, differentiated not only by size but by the clients served, by the particular kinds of

4. John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189, 197 (1986).

5. *Id.* at 196.

6. *Id.* at 191, 196.

7. TASK FORCE REPORT, *supra* note 2, at 37-38.

8. *Id.* at 40-46. The Task Force found that while "[m]any [sole and small-firm practitioners] adhere to the modern day version of the general practitioner, particularly in rural settings," the combination of "changing law and new complexities ha[s] put an increasing premium on specialization to maintain competence and to keep abreast of subject matter." *Id.* at 38, 40.

legal work performed and by the extent salaried associates and other support staff are employed.⁹

There is a clear relationship between the size of a firm and the source of its income. As firm size increases the percentage of fees from individual clients drops. The larger the firm, the greater is the concentration of work for business clients.¹⁰

During the 1970s and 1980s, the greatest growth in law firms was among medium size (11 to 50 lawyers) and large firms (51 or more lawyers) that principally serve the business community.¹¹ But the Task Force found a significant segment of "new providers" of legal services outside the traditional forms of private practice. New forms of organization have been developed for providing legal services to individuals of modest means and new methods for financing such services. Increasing numbers of sole and small-firm practitioners are participating in these new delivery systems that together in 1991 were estimated to provide potential access to legal services for some 71 million middle-income Americans — approximately 28 percent of the population.¹²

In addition, there has been substantial new provision of legal services for the poor. Although some legal services have always been provided by various members of the bar to those unable to pay for them, during the past 25 years organized legal services to the poor have been greatly expanded by increased numbers of legal aid attorneys now funded both publicly and privately, and by public defenders employed by government. Such services have been significantly supplemented by many new programs of organized pro bono services furnished by lawyers in private practice.¹³ In addition, large numbers of lawyers now act as advocates for group legal rights, engaging in what has come to be called "public interest law," providing legal representation for groups of individual citizens who have similar economic or social interests.¹⁴

9. *Id.* at 31. "The financial rewards of legal work for individuals (except for personal injury claims) have in general been less than the rewards for representing business." *Id.* (footnote omitted).

10. *Id.* at 31-32.

11. *Id.* at 32-33, 35.

12. *Id.* at 32; *see id.* at 57-70 (discussing the development of mechanisms for the delivery of legal services to "middle-class working people," including legal clinics and lawyer referral services).

13. *Id.* at 34, 48-57.

14. *See id.* at 50, 70-72.

The Task Force, in its overview of the profession, identified two other major segments of law practice today. Historically, lawyers in private practice provided virtually all legal services, including services to corporate clients and to governments, but since the late 19th century there has been a steady trend toward bringing law work "in-house," both by corporations and by governmental departments and agencies. Many institutions and governments now employ salaried lawyers, instead of retaining individual lawyers and law firms on a fee basis, to handle at least part of their legal matters.¹⁵

Today, approximately 10 percent of the legal profession is employed in legal work on a salaried basis by for-profit and not-for-profit corporations.¹⁶ A similar in-house movement of legal work by government has brought a comparable percentage of lawyers into law departments of local, state, and federal governments.¹⁷

In assessing this world of lawyer performance, the Task Force concluded that a highly significant element to be taken into account is the unique manner in which the overall profession in the United States is organized and regulated. The Task Force Report describes how lawyers in the late 19th and early 20th century, visualizing a national profession of uniformly high standards, developed programs for common admissions and educational requirements.¹⁸ At the same time, the situs of legal education was moved out of law offices and apprentice training and into the law schools. In this manner, the organized bar and the law schools, with the support of the judiciary, began the process of creating an identity for a unitary legal profession in the United States with a common body of knowledge and know-how joined to a special body of values that the organized bar developed and espoused.¹⁹

15. *Id.* at 34.

16. *Id.* at 88.

Such employment places the individual lawyer in the dual position of being responsible to and sharing the culture both of the profession of which he or she is a member and of the institution by which he or she is employed. It is important that new lawyers entering this organizational setting of dual cultures be acquainted with how in-house counsel can properly accommodate in a principled manner to the two cultures and conduct themselves faithfully to the profession's ethical rules.

Id. at 95.

17. *Id.* at 95-102.

18. *Id.* at 103-119.

19. The Task Force states:

For a profession to create for itself an identity, it must not only claim as its own a special body of learning and skills . . . but it must also embrace a core body of values

Over the decades, with the active support of the organized bar, the law schools thus became the unifying experience for the great majority of lawyers, and the judiciary through its role in the admission to the bar of new lawyers became the profession's gatekeeper.

Lawyering Skills and Values

The second phase of the Task Force's fresh look at legal education was to develop, for this diverse and highly differentiated world of lawyer performance, a comprehensive statement of the essential lawyering skills and professional values common to the competent and responsible lawyer, wherever the individual lawyer may be in that world.

The idea of developing an inventory of the capabilities of working lawyers was not new. Back in the 1940s, the Curriculum Committee of the Association of American Law Schools urged the development of such an inventory in order to determine how such capabilities might be taught to law students.²⁰ However, until our Task Force tackled the job, little was done to extrapolate from lawyer experience a comprehensive and systematic analysis of lawyering skills and values.²¹

Several models had been earlier developed for teaching some essential components of law practice, including lists of skills and sub-skills that should be acquired.²² In developing its Statement of Skills and Values, the Task Force drew on these prior explications of lawyering skills, but it cautioned against an ideology of technical competence alone. In its Statement, the Task Force emphasizes the essential linkage of lawyering skills to professional values in the hope that this holistic approach to lawyering will help avoid the perpetuation of the notion that competence in the law is simply a matter of attaining proficiency in specified skills.²³

which sets members of the profession apart and justifies their claim to an exclusive right to engage in the profession's activities. "Professionalism" lies in adherence to such values.

Id. at 108.

20. Karl Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945).

21. See Barry Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 270 (1974); Mudd, *supra* note 4, at 196.

22. See Commentary to Skill 1 in the Statement of Fundamental Lawyering Skills and Professional Values, TASK FORCE REPORT, *supra* note 2, at 148-51.

23. See TASK FORCE REPORT, *supra* note 2, at 317.

Acquiring the Skills and Values

From its review of the world of lawyer performance and its vision of the skills and values necessary in that world for competent and responsible practice, the Task Force reached the conclusion that legal education, professional development, and the acquisition of lawyering skills and professional values, must be viewed as a continuing process that neither begins nor ends with three years of law school study. In the third and final segment of its fresh look at legal education, the Task Force critically examines the entire process and makes recommendations to prospective lawyers, to the law schools, to the organized bar and other providers of continuing legal education, and to the licensing authorities as to how they each can contribute to the design of more effective patterns of career-long education and development.

In recognition that the prospective lawyer's professional development should begin prior to law school, the Report emphasizes, right from the beginning, the part that self-assessment and self-development together with individual motivation should play in the activities and decisions of prospective lawyers.²⁴ All too many law students seem to be passive consumers of legal education, simply assuming that whatever education they may receive in law school will prepare them to practice law. They lack an adequate understanding of the requirements for competent practice and of the process by which a new member of the profession prepares for practice and obtains competence, and they are not knowledgeable about the diverse and highly differentiated profession.²⁵

To overcome these deficiencies, the Task Force envisioned prospective lawyers becoming better informed consumers with more comprehensive and reliable information both about law schools and about careers in the law. In this way, prospective lawyers could actively participate in shaping their own individual professional development.

As one step to this end, the Task Force recommended that the Statement of Skills and Values be used by law students as a general aid in their preparation for practice and in seeking out opportunities to develop their skills and values in law school (in courses, extra-curricular activities, and part-time and summertime employ-

24. *Id.* at 225.

25. *Id.* at 228.

ment) and after law school (in postgraduate and continuing education, judicial clerkships, and legal practice).²⁶

I was delighted to learn that the T.C. Williams School of Law was one of the first schools in the Nation to adopt the recommendation of the Task Force to give the Statement of Lawyering Skills and Professional Values to all entering students. In this way, the Statement can be used as a personal aid in curricular planning and in any employment experience during the law school years.

The alacrity with which University of Richmond students were introduced to the Statement of Skills and Values is in keeping with the leadership role the school is staking out for itself in performance-referenced legal education. The school's three-year program of skills instruction could well serve as a national model. Expanding upon a two-year legal writing program that included interviewing, counseling, negotiating, drafting, motions advocacy, discovery, trial advocacy, and appellate advocacy, the sequentially planned program now entails two years of required skills instruction and an assortment of elective skills opportunities during the second and third years, including clinics, externships and advanced drafting (in discrete areas of law) — all stressing the client-centered world of lawyer performance.²⁷

The Task Force has recommended the integration into all law school curricula of quality skills instruction of the kind envisioned at T.C. Williams, rich in both conceptual and practical elements. I suggest that a new age of legal education is emerging in which law students, as informed and active participants, prepare themselves for the world of lawyer performance, and in which aspects of traditional law school instruction run the risk of becoming anachronisms unless infused with doses of performance-referenced teaching of a broadened range of lawyering skills and values.

Back in 1955, Dean Erwin Griswold of the Harvard Law School noted that it was "no longer possible for a student to know all the law" and urged that law schools should reverse the tendency to

26. *Id.* at 127, 327-28.

27. A further University of Richmond innovation in 1992 relevant to enhanced skills instruction is the required first year course in environmental law. The purpose is to broaden from the start instruction in the skill of legal analysis and reasoning by introducing first year students to statutory and administrative law — that now plays such an important role in American law — thereby supplementing traditional first year instruction in the common-law courses taught by the case-method.

teach "less and less about more and more."²⁸ Faced with the great growth in law and its complexities, he looked for new materials and new approaches "to teach more and more about less and less" with a focus upon the human relations element in lawyering.²⁹ I suggest that a thoughtful program of skills and values instruction, along the lines of the T.C. Williams program, may indeed be the way to teach prospective lawyers more and more about less and less, as they learn with their lawyering skills to address new matters, how to undertake things they have not done before (without being unduly frightened), and to accomplish results in the client-centered world of lawyering.³⁰

Bringing a fresh approach to legal education is not, however, a task solely for law schools. Indeed, it is unrealistic to expect even the most committed law school to produce graduates fully prepared to represent clients without guidance and support from experienced members of the bar. The Task Force urges law schools and the practicing bar to look upon the development of lawyers as a common enterprise, recognizing that legal educators and practicing lawyers have different capacities and different opportunities to impart to future lawyers the skills and values for competent and responsible practice.³¹

A fine example of what can be accomplished by legal educators and practicing lawyers approaching the professional development of lawyers as a common enterprise was the establishing in Virginia in the late 1980s of a mandatory two-day course for new lawyers in professionalism, stressing the core values of the profession and the ethical responsibilities of every lawyer. Jointly designed, the program is taught by bench, bar and law school faculty.

For a growing number of new lawyers, a substantial portion of their transition education occurs on-the-job, in programs organized by their employers. Law firms, corporate legal departments, and government agencies are all increasingly providing in-house training that is specifically geared to the newest attorneys in their organizations.³²

28. Erwin N. Griswold, *Law Schools and Human Relations*, 1955 WASH. U. L.Q. 217, 230.

29. *Id.*

30. *Cf.* Erwin N. Griswold, *Legal Education: Extent to Which Know-How in Practice Should Be Taught in Law Schools*, 6 J. LEGAL EDUC. 324, 326 (1954).

31. TASK FORCE REPORT, *supra* note 2, at 234.

32. *Id.* at 299-301.

On the other hand, a substantial number of graduates go from law school directly into individual practice or into relatively unsupervised positions in small law offices that provide little or no on-the-job training. The law schools and the organized bar have a shared responsibility to ensure that all new lawyers, either in law school or in the course of their transition to practice, have the opportunity to receive effective instruction in the skills and the values they require for practice.

The practicing bar has a special responsibility to determine how it can inject educational value into any work experience during the law school years and to develop, with the help of the law schools, models for strengthening the educational content of part-time employment and summer clerkships. Moreover, the practicing bar should be assiduous in discharging its responsibility for inculcating the values of the profession through its contact with students in part-time work and summer jobs, and as colleagues or mentors in the early years of practice.

The Common Enterprise in Virginia

This law school is fortunate to be situated in a state where the bar is displaying a constructive interest in legal education and hopefully a willingness to accept its share of responsibility for the professional development of lawyers. The Conclave on the Education of Lawyers in Virginia, in March 1992 at Wintergreen, was a splendid example of cooperative exploration by practicing lawyers, judges, and legal educators of how they can work more closely together to enhance legal education, both during the three years of law school, and thereafter during the balance of lawyers' careers.

Bill Rakes, who chaired the organizing committee for the Conclave, kindly asked me to participate, but I had an unavoidable conflict in that the final meeting of our Task Force was fixed for the dates of the Conclave. Nevertheless, I have subsequently read with great interest the report of the proceedings. I took note of the interest expressed in having more judges and experienced practicing lawyers participate in the teaching mission of law schools, in promoting sequential learning experiences, and in offering non-traditional CLE (continuing legal education) courses that are designed for enrichment and stretching of the horizons of individual lawyers. All of these are matters that our Task Force also addressed.

The Conclave similarly noted, as did our Task Force, the remarkable development of in-house training programs in recent years. Many of the in-house programs are comprehensive, detailed, and focused on the enhancement of lawyering skills and professional values. The wide-scale development of these programs is a testament to the importance of such instruction for new lawyers as they begin practice in order properly to serve the needs of law firms and their clients. But if the recruits for these legal organizations are getting needed or highly useful training, one must ask: what of the much larger number of new attorneys who begin practice by themselves or in offices that do not provide such training?³³

This question led both our Task Force and the Virginia Conclave to urge legal organizations, with developed in-house programs of skills and values instruction for new lawyers, to share their experience with local and state bar groups and to assist the bar associations to enhance their programs of transition education.³⁴

I understand that the Virginia bar presently offers to new lawyers an ambitious, two-day bridge-the-gap program taught by practitioners at some seven locations in the state and encourages participants to purchase the *Virginia Lawyers Basic Practice Handbook* (list price \$100) to supplement the two days of lectures. But is this enough to prepare new lawyers entering unsupervised practice to serve with confidence their first clients?

There is a suggestion in the recent Special Report on Virginia CLE in the *Virginia Lawyer* that law schools and bar-sponsored CLEs in Virginia have quite different objectives and that their methods of instruction are inherently different.³⁵ This suggestion, if true, is unfortunate, but it serves to emphasize the importance of taking a fresh look at the legal education that occurs after law school, as well as during law school, and perhaps to rethink the role of some post-admission education in the educational continuum.

I suggest that both the content and methodology of CLE instruction might fruitfully be reexamined to determine whether the organized bar is playing as effective a role as it should in the common enterprise with the law schools of preparing new lawyers for

33. *Id.* at 300.

34. *Id.* at 335.

35. Gary Wilbert, *The Role of Legal Education After Law School*, VA. LAW., July 1992, at 56-57.

practice. Whether in law school, in transition education following law school, or in post-admission education, the Task Force has recommended that performance-referenced instruction have three dimensions:

(1) instruction in theory — development of concepts and theories underlying the skills and values being taught;

(2) student performance of lawyering tasks — opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation; and,

(3) critique — reflective evaluation of students' performance by qualified assessors.³⁶

Goals for the Future

The Task Force has proffered in the Statement of Skills and Values what it believes is the essence of lawyering and common to the entire profession.³⁷ Hopefully, it will be a stimulus and starting point for an ongoing exchange within the profession not only about the skills and values that a legal practitioner should have, but also about the type of education and training that lawyers should have at the various stages of their careers.

In order to promote that exchange within the profession, the Task Force makes a final recommendation that there be established an American institute for the practice of law with the central purpose of promoting excellence in the practice of law.³⁸ It would address on a continuing basis the entire process by which lawyers acquire and refine their lawyering skills and professional values. The activities of the institute would be in three principal areas:

(1) serving as a resource center and forum for those engaged in the professional development of lawyers in law schools and in continuing legal education;

(2) fostering research and development to enhance the profession's understanding of lawyering skills and professional values and of the means and the methods by which lawyers learn; and,

36. TASK FORCE REPORT, *supra* note 2, at 331.

37. *Id.* at 135-221.

38. *Id.* at 319-23, 337-38.

(3) developing a plan and organizational structure to promote continuing legal education and the dissemination of courses and programs.³⁹

It is my hope that the law schools and the organized bar, working closely with such an institute, will build an effective educational continuum that will successfully transmit to succeeding generations of lawyers the idea of a single, public-serving, client-centered profession, sharing the legal learning, the skills, and the values that will continue to distinguish a respected calling.

39. *Id.* at 321-22.