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Introduction: Teaching Lawyering Skills

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Introduction: Teaching Lawyering Skills

This symposium on “Teaching Lawyering Skills” might mistakenly be seen as narrowly focused on the pedagogy of law school faculties. However, the topic in 1997 is inherently much broader, as the papers in this symposium issue of the *Nebraska Law Review* reflect.

What are “lawyering” skills? How are they acquired? By whom and in what manner should they be taught? What is the underlying purpose of such instruction? Why is it so important to the future of the legal profession? These are questions that persons in all segments of the profession are asking today and to which this symposium is addressed.

I suggest that a skill may be properly described as a “lawyering” skill only when it is fused with the professional values to which the legal profession aspires. The purpose of such teaching is to help law students and lawyers to participate effectively in today’s multifaceted legal profession and to enhance that profession. The roots for the teaching of law in this fashion run deep at the University of Nebraska College of Law.

When Roscoe Pound was appointed Dean of the College of Law in 1903 at the age of 32, he quickly made clear his vision for legal education: law schools must do more than what they were doing to prepare their graduates to participate effectively in the legal profession.¹ He called upon law schools to be engines of legal reform. He espoused what he called a sociological approach to law. Law students must learn how law works in society. He emphasized principles over rules and urged that rules be adapted to social, economic, and political change.

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* Retired partner, Sullivan & Cromwell, New York, NY; President, American Bar Association, 1987-88; Chair, ABA Task Force on Law Schools and the Profession, 1989-92.

1. Ten years before, in 1893, the ABA’s Standing Committee on Legal Education and Admissions to the Bar had recommended that law schools adopt a new “Practical Course of Study” to prepare the law student (virtually all men at the time) for his work as a lawyer.

His voice was heard far beyond Nebraska. Three years later, he was elected Chair of the ABA Section of Legal Education and Admissions to the Bar at the 1906 ABA Annual Meeting and gave his seminal address on "The Causes of Popular Dissatisfaction with the Administration of Justice."

Some 72 years later, another Chair of the ABA Section of Legal Education and Admissions to the Bar, Justice Rosalie Wahl of the Minnesota Supreme Court, created a Task Force on Law Schools and the Profession. Her concerns for a legal profession challenged by extraordinary change during the second half of the Century led her to charge the Task Force to determine what skills, what attitudes, what character traits, and what qualities of mind are required of lawyers today to sustain and preserve the profession as a respected, client serving, problem solving, public calling.

The Task Force approached its task from a quite different direction than prior studies of legal education in the United States. It started by looking, not at law schools, but at American lawyers, all lawyers, the total profession in all its dimensions.

In its 1992 Report entitled "Legal Education and Professional Development—An Educational Continuum," the Task Force presented its overview of the legal profession today against a background of how the idea of a single profession of law had developed in America and how, over the decades, with the active support of the organized bar, the law schools had become the unifying experience for the great majority of lawyers, and the judiciary in each state and territory had become the profession's gatekeeper for that jurisdiction.

Seeking to overcome the tendency in law schools to separate the teaching of legal theory from instruction in its practical application in society, the Task Force visualized law teachers, practicing lawyers, and members of the judiciary as engaged in a common enterprise—to build an educational continuum for all lawyers. At the same time, the Task Force recognized that participants in this common enterprise had different capacities and different opportunities to impart to law students and to lawyers the lawyering skills and the professional values required of them in the practice of law.

In response to Justice Wahl's charge to determine the skills, the attitudes, the character traits, and the qualities of mind required of lawyers today, the Task Force sought to initiate the development of a conceptual statement of the skills and values that promote the competent and responsible practice of law and that all lawyers should seek to acquire wherever they might work.

The statement of lawyering skills and professional values, proffered by the Task Force in its Report as a work in progress, analyzed ten generic skills that were thought to be essential to competent per-

formance by any lawyer.² Seeking to discourage the notion that competence in the law is simply a matter of attaining proficiency in specified skills, the Task Force linked its analysis of the ten lawyering skills to four central professional values, which successive generations of lawyers have come to acknowledge.³ The Task Force recognized that lawyering skills alone will not sustain a true profession; nor, without ideals, promote cohesion and pride in a profession among its members. A profession, to endure, must be supported by a common body of values to which its members aspire.

The Task Force concluded that such skills and values of competent and responsible lawyers are developed along a continuum that neither begins nor ends in law school. Rather, the development starts before law school, reaches its most formative and intensive stage during the law school years, and continues throughout the lawyer's professional life. Moreover, the Task Force expressed the view that it is unrealistic to expect even the most committed law schools, without help from the Bar, to produce graduates who are fully prepared to represent clients without supervision.

The papers in this symposium generally accept the Task Force's Statement of Skills and Values as an appropriate delineation of the subject matter to be taught and acknowledge the importance to the profession of such instruction. The focus of the papers is upon what the law schools are and should be doing to improve the teaching of skills and values and to implement the Task Force's vision of building an educational continuum. Only passing attention is given to the role of the judiciary and the organized bar in the common enterprise of building that continuum.

2. The ten fundamental lawyering skills identified by the Task Force:

- problem-solving;
- legal analysis and reasoning;
- legal research;
- factual investigation;
- oral and written communication;
- counseling;
- negotiation;
- understanding of the procedures of litigation and alternative dispute resolution;
- organization and management of legal work; and
- recognizing and resolving ethical dilemmas.

3. Each of the four values begets a special responsibility, which together express the traditional ideals of the legal profession:

- the value of providing competent representation—the responsibility to clients;
- the value of striving to promote justice, fairness, and morality—the public responsibility for the justice system;
- the value of maintaining and striving to improve the profession—the responsibility to one's profession; and, finally,
- the value of professional self-development—the responsibility to one's self.

This symposium makes a significant contribution to the growing dialogue in recent years on innovative and creative ways of teaching lawyering skills and professional values while identifying the impediments that law teachers encounter in providing such instruction.

Professor Roy Stuckey, who was a member of the ABA Task Force, places in a historical perspective the current interest in teaching lawyering skills: a history that saw the practicing bar, beginning in the 1870s, gradually relinquish to the emerging law schools primary responsibility for the education of the bar. He proceeds to recount how the law schools tended to become preoccupied with the teaching of law as a science, leading to the call to the law schools by Dean Pound and others to teach how law operates in society and how lawyers accomplish results in the client-centered world of lawyering.

Professor Stuckey provides an authoritative account from within the law school community of the quest by clinical teachers to secure for the teaching of lawyering skills and professional values an established place in the law school curriculum, which leads him to conclude that legal education may be on "the brink of the first significant reforms in 100 years." To speed these reforms, Professor Stuckey urges that the teaching of problem-solving be the organizing principle for law school curricula.⁴

The papers of Professor Robert Burns and Professor Mary Jo Eyster both demonstrate the essential linkage of professional values to any teaching of lawyering skills. Professor Burns urges that ethics issues be presented to students in the context in which they will arise in practice, while Professor Eyster addresses the acute issue for practitioners of the role of honesty in ethical negotiations.

Professor Steven Lubet cautions that "practice makes permanent" and urges that care be taken in providing experiences to law students so that the lessons learned through practice be the correct ones, while Professor Stacy Caplow proposes a curricular design for a student clerkship clinic to take full advantage of the educational opportunities in judicial externships.

From the vantage point of directing one of the few prosecutorial criminal clinics in the country, Professor Karen Knight examines the contributions such a clinic can make to the education of law students.

The practical difficulties confronted in teaching legal writing to a computer-literate generation of law students lead Professor Lucia Ann Silecchia to offer practical suggestions for writing assignments, records of edits, and the revising process in working with today's law student.

4. Cf. Brest & Krieger, *On Teaching Professional Judgment*, 69 WASHINGTON LAW REVIEW 527 (1994).

The teaching of lawyering skills and professional values is moving to a central place in the law school curriculum. Over the past four years since the publication of the ABA Task Force Report, many law schools have undertaken self-studies to determine which of the skills and values enumerated in the Report are being taught in their curricula and to develop coherent agendas of skills instruction not limited to the traditional teaching of "legal analysis and reasoning," "legal research," "writing," and "appellate advocacy." Other law schools have significantly increased the opportunities for students while in law school to have clinical experience with clients. New teaching methodologies with interactive learning-by-doing have been introduced into the teaching of core curriculum courses, as well as in simulated client counseling and negotiation courses.

This symposium on the teaching of lawyering skills will help accelerate the movement of skills and values to the center of the law school curriculum, serving to enlist new generations of lawyers in building a finer, client-serving, problem-solving, public profession of law.