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## Teaching "Lawyering" to First-Year Law Students: An Experiment in Constructing Legal Competence

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# Teaching "Lawyering" to First-Year Law Students: An Experiment in Constructing Legal Competence

Franklin M. Schultz\*

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\* Member of the District of Columbia Bar. I would like to thank Professor Allan Vestal of the Washington and Lee University School of Law for his very helpful substantive and editing suggestions and for contributing his detailed knowledge of the make-up of the Law School's curriculum. I would also like to express my appreciation to former Dean Randall Bezanson for his continuing encouragement of my efforts to teach Introduction to the Lawyer's Role more effectively.

As soon as you can, please abolish Lawyer's Role or, at the very least, make it consistent. This three-hour writing class ends up being a great learning experience, as it was for me, or a complete disaster, as it is for many with whom I've spoken on the issue.

— Student letter to newly appointed Dean Sullivan

### *I. Introduction*

Introduction to the Lawyer's Role (Lawyer's Role) at Washington and Lee University's School of Law is one of the small number of first-year "lawyering" courses taught at American law schools.<sup>1</sup> I taught the course during the spring semesters from 1991 until 1994. My purpose in writing this article is to record some of my impressions and thoughts generated by teaching the Lawyer's Role course — in the context both of my experience practicing and teaching law<sup>2</sup> and of some recent empirical evidence<sup>3</sup> bearing on the apparent gap between the skills and values taught in law schools and those presumably needed in practice.

When I began teaching law at Indiana University in 1947, the faculty basically taught legal theory and method. Legal theory was taught by a combination of lecture and case analysis, as it had been taught since Langdell.<sup>4</sup> As for method, we tried to teach students "how to think like a

1. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 240 (1992) (reporting that only 29% of all graduating law students are exposed to first-year "Introduction to Lawyering" or similar course, but not identifying number of schools that teach such course) [hereinafter MACCRATE REPORT, after Robert MacCrate, former President of the American Bar Association, who chaired the Task Force].

2. I started practice as an attorney for the Federal Power Commission in 1946 and 1947, and then taught at Indiana University School of Law from 1947 through 1953. From 1953 until 1985, I was an associate and then a partner with Purcell & Nelson, later Reavis & McGrath, a small Washington, D.C. corporate-securities law firm. During this post-war period, I was a visiting professor at the University of Florida School of Law, the George Washington University Law School, and the University of Virginia Law School. In 1984 and 1985, I was the Frances Lewis Lawyer in Residence at Washington and Lee University School of Law. From 1986 to 1990, I was a visiting professor at the University of Iowa College of Law. I returned to Washington and Lee as a visiting professor of law in 1991, 1992, 1993 and 1994.

3. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL ED. 469 (1993) [hereinafter Garth-Martin].

4. Christopher Columbus Langdell, who in 1870 became the first dean of Harvard Law School, introduced the case method of teaching, in which the principal materials presented to the student were the reports of decided cases, the meaning of which was to be

lawyer," not how to act like one. We made no effort to teach practical applications of theory or to teach how lawyers develop strategy or tactics. Outside of the classroom and the library, there were only a few law-related activities. Most law students sought selection to the law review, as was the case when I was in law school just before World War II, and only a small number were chosen. Beyond a required first-year moot court program administered by a student board, there were, as I recall, no additional activities in the curriculum.

In the past fifty years, nontraditional, practice-oriented law school programs have proliferated. At Washington and Lee, in addition to law review and other publications,<sup>5</sup> there are five appellate moot court competitions,<sup>6</sup> two trial competitions,<sup>7</sup> two negotiation competitions,<sup>8</sup> and two client counseling competitions.<sup>9</sup> Students staff in-house clinics serving patients at the Western State Hospital, a state facility for patients with mental disabilities, and prisoners at a federal prison for women in Alderson, West Virginia. Students participate in public interest externships at the offices of the U.S. Attorney, the local public defender, and Lexington Legal Aid. Students participate in the Virginia Capital Case Clearinghouse, a program to assist practitioners involved in death penalty cases. Altogether, about one-third of the students at Washington and Lee participate in some form of practice-oriented program before graduating. Moreover, first-year and second-year students, particularly, gain experience in law firm summer clerkships — varying, of course, with the state of the economy — a rarity in my time in law school. Today, far more students do judicial clerkships following graduation than did so during the early post-war years.

I will confess that when I began teaching at Indiana I was skeptical about the value of nontraditional, practice-oriented programs. I did not want to be associated with a "trade-school." My principal teaching assignment

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worked out by study and in the classroom. By the time of World War I, almost all American law schools had adopted the case method. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42-43 & n.3 (1977).

5. The school has four publications. In addition to the *Washington and Lee Law Review*, students publish the *Capital Defense Digest*, the *Environmental Law Digest*, and the *Virginia Race and Ethnic Ancestry Law Digest*.

6. Students participate in the intra-school John W. Davis Moot Court Competition and represent the school in the National Moot Court Competition, the National Appellate Advocacy Competition, the Philip C. Jessup International Moot Court Competition, and the Vanderbilt First Amendment Competition.

- 7. There is an intra-school competition leading to a national competition.
- 8. There is an intra-school competition leading to a national competition.
- 9. There is an intra-school competition leading to a national competition.

was teaching Contracts to the entire first-year class. My approach was almost totally theoretical — I believed that teaching practical skills should be left to the bar. Perhaps I was influenced by my lack of private practice experience at the time. My own teacher at Yale Law School, Myres McDougal, chided us that we were taught how to reorganize a railroad but not how to replevy a dog. It must have been assumed that every graduate would apprentice with an experienced lawyer in some kind of law firm setting where he or she<sup>10</sup> would learn how to replevy a dog.

My pedagogical approach was almost totally theoretical — "almost" because, in the course of teaching Contracts, I suspected that there was a sizeable gap between certain doctrines and actual business practice, at least that was my hunch. To satisfy my curiosity I initiated an empirical investigation into the relationship between practice and doctrine in the Indiana construction industry — specifically, the binding or nonbinding effect of a subcontractor's firm offer to a general contractor. I was attracted to this problem by a Learned Hand opinion which held that a subcontractor's firm offer was not binding unless there was "consideration."<sup>11</sup> After I published my findings,<sup>12</sup> I included a major portion of the study in the "offer and acceptance" segment of my Contracts course. My students, particularly my older students who had entered law school after serving in the armed forces during World War II, seemed intrigued by this excursion into building construction practices and brought their own experience and insights to their understanding of Contracts doctrine, which enriched the classroom discussion. My recollection is that classes which integrated this type of practical experience were rare.

Only after I began private practice in Washington, D C. in the early fifties did I realize how little I had learned — in law school, in government service, or in teaching — about the practical side of the law for example, the art of interviewing and counseling a client, negotiating a deal, drafting a contract or a complaint, or even composing a demand letter prior to de-

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10. I note an unquestionably positive difference between my law school education and that offered today. There were only four women in my first-year law class of 120; in 1995, the first-year law class at Washington and Lee had 53 women in a class of 131.

11. *James Baird Co. v. Gimble Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933) (holding that contractor's use of subcontractor's offer in contractor's bid did not constitute acceptance by contractor and did not fit within doctrine of promissory estoppel because subcontractor's offer did not become promise absent consideration, thus subcontractor was not bound to deliver goods to contractor at price used by contractor in contractor's bid).

12. Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Indiana Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

ciding to prepare a complaint. At that time law firms, especially the larger firms, expected to invest three or more years in the training of a new associate before the associate would pay his (or occasionally her) way. Apparently, clients who were accustomed to having long-term relationships with firms did not object to being billed for part of that associate's training; in fact, an associate might wind up servicing that client for many years. Loyalties developed both between the associates and the firm and between the clients and the firm. Consequently, the firm did not need to call on the law schools to be responsible for training their apprentices. Much of the foregoing, of course, has been radically changed in today's legal practice environment.

Although I still hold to my original conviction that law students should master their "school figures" before they engage in "free-form exercises"<sup>13</sup> such as drafting instruments (and it is my impression that Washington and Lee does not shirk its responsibility in this regard), I no longer believe that law school training is simply another kind of graduate school study. It now seems to me that as teachers our primary mission should be to turn out beginning practitioners, and today that means blending doctrine with experience, even if that experience is sometimes only make-believe.

Washington and Lee has developed a "live" mix of practice with theory. The seriousness the school attaches to this "practice" approach to teaching is shown by the fact that three senior professors are permitted to devote one-half of their teaching load to the Virginia Capital Case Clearinghouse, the Alderson prison practicum, and the legal clinics; and that faculty members dedicate substantial amounts of time to serve as advisors, coaches, and judges for the various trial and appellate competitions.

The institutional commitment to this live mix of practice and theory is also demonstrated in more traditional course offerings. Although overall schools devote less than ten percent of institutional time to professional skills training,<sup>14</sup> Washington and Lee has incorporated practical exercises in many of its upper-level courses. "Business Planning" is a good example: Students use the principles of law they learned in corporate, tax, and other commercial law courses to develop a written plan for solving a complex business transaction such as buying, selling, or expanding a business or handling a business separation. Another example is "Estate Planning," which deals with practical problems in estate planning and emphasizes the drafting of

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13. This metaphor was used in a talk to young tenure-track law teachers by Dean William Hines, University of Iowa College of Law, where I taught prior to coming to Washington and Lee.

14. MACCRATE REPORT, *supra* note 1, at 241.

documents necessary for their solution. The "Legislation" course includes numerous drafting exercises calling for skills used in drafting and interpreting statutes. The "Secured Finance" seminar involves a small number of students in the negotiation, documentation, and closing of a series of sophisticated Article 9 transactions. The "Small Business Theory Seminar" examines legal issues in small business associations. In "Pretrial Advocacy," which covers all phases of civil and criminal litigation from the inception of a case up to trial, students conduct exercises in developing the theory of a case, fact investigation, client interviewing, witness interviewing, pleading, discovery, pre-trial motions, counseling, and negotiation. Other courses and seminars also require the students to perform "lawyer" tasks.<sup>15</sup>

Like Washington and Lee, many law schools have successfully incorporated various types of clinical and practice training in the second and third years; indeed, such apprenticeships and in-class exercises are fairly well accepted in the law school community. However, schools have paid little attention to what could be taught in this area to first-year students;<sup>16</sup> that is where Washington and Lee's experiment with the Lawyer's Role course comes in.

## II. *The Lawyer's Role Course*

As a threshold matter, let me briefly describe the small section Lawyer's Role course as I have come to understand it.<sup>17</sup> In the second semester,

15. This is possible, in part, because of the backgrounds of the Washington and Lee faculty. An unusually large number of the W&L faculty have had substantial private or governmental practice before teaching. The ten least-senior members of the faculty had an average of seven years of private or governmental practice before entering teaching, including work in small, medium and large private firms, various nonprofit organizations, and state and local governments.

16. MACCRATE REPORT, *supra* note 1, at 240. "At many law schools, imaginative introductory courses in legal writing, research and other professional skills have been added to the mandatory first year curriculum." *Id.* However, only 29% of all graduating law students are exposed to a first-year "Introduction to Lawyering" course. *Id.*

17. The official course description for Lawyer's Role is interesting:

Introduction to the Lawyer's Role. Much of the work of many lawyers is unrelated to litigation. This course will acquaint students with certain qualities and skills — e.g., counseling, negotiating, and simple drafting — necessary for effective lawyering in these matters while also requiring more general thinking about the role of lawyers in solving client problems. The aim is not to create skilled practitioners as such, but to provide students with a broader perspective on a lawyer's work that will serve as a useful framework for study of second and third year courses. Three hours.

Catalog, Washington and Lee University School of Law, at 17 (1994-1995).

the first-year class is divided into six sections of approximately twenty students, each section to be taught by a professor with the help of a teaching assistant. A primary purpose of the course is to give all first-year students a perspective on how a practitioner deals with a problem that a client brings to a law office, and in the process to disabuse students of the notion that problems walk in neatly labeled as contract, tort, or any of the other labels associated with the first-year curriculum. A second purpose is to counteract the impression readily obtained from reading casebook cases that lawyers spend most of their time litigating in appellate courts. A third purpose is to *introduce* students<sup>18</sup> to the major nonlitigation skills one needs to practice.

The course includes preliminary looks at the art of interviewing and counseling a client; engaging in a negotiation with opposing counsel, such as a prosecutor offering a plea bargain to a defense attorney; and using mediation or some other alternative dispute resolution technique to resolve a dispute short of going to court. The course also attempts to teach students how to negotiate and then draft a business contract. All of this is generally accomplished by using role-playing exercises (an attempt to simulate real-life practice situations) accompanied by class critiques and discussion. In my class, I tried to set the exercises in the context of a substantive or procedural theory the students had studied in their required first-year courses.<sup>19</sup> In role-playing exercises in which students represent different parties, the Lawyer's Role teacher encourages students to consult with each other as one normally would in a law office; students are required to work independently only when a written product will be graded.

Although the above recital covers the core of the course, students are also taught library and computerized legal research — in my case, by my teaching assistant, a highly qualified third-year student known as a Burks Scholar, who also attends classes and serves as a tutor for all twenty students in the Lawyer's Role section. The course also includes a required moot court exercise (incidentally, this requirement may not seem to fit into the course's nonlitigation stance). The moot court exercise, usually done at the end of the semester, involves researching and writing a trial or appellate brief of about ten pages and making an oral argument to the instructor. Interspersed during the semester, depending on the instructor's predilections, may be excursions into jurisprudential problems such as the relation of law

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18. The course is called *Introduction* to the Lawyer's Role by design.

19. For example, for several years Professor Allan Vestal and I, in conducting our moot court exercise, used a wrongful death case as a vehicle for having our students brief and argue a personal jurisdiction issue they had studied in some depth in their Civil Procedure class.



to morality; discussions of current criticism of law schools and the profession such as Derek Bok's critique;<sup>20</sup> or explorations of ethical problems and dilemmas — the latter on the theory that it is none too early to expose embryonic lawyers to the complexities of professional responsibility. To this end, I used a collection of case studies put together by two Harvard law professors entitled *The Social Responsibilities of Lawyers*.<sup>21</sup> Finally, I should note that the course includes a heavy component of legal writing, and some re-writing, ranging from office memoranda and critiques of class exercises to formal briefs; this is intended to follow up the intensive writing program given in the first semester through the five-credit small section Contracts, Torts, or Criminal Law course.<sup>22</sup>

I should add that what I have just described is my own version of the course. Other teachers have used quite different approaches and techniques with considerable success.<sup>23</sup> However, in recent years when Lawyer's Role teachers met prior to the start of the spring semester, they agreed on the following general course objectives: each instructor would be responsible for teaching (1) Legal Writing (including Drafting); (2) Client Interviewing and Counseling; (3) Negotiation and Mediation; (4) Oral Advocacy; (5) Legal Research (case, statutory, and regulatory); and (6) some Sensitivity to Professional Ethical Concerns.

### III. *The Garth-Martin and Zemans-Rosenblum Surveys*

#### A. *Contemporary Practitioners' Expectations: Garth-Martin*

A survey of major segments of the Chicago and Missouri bars by Bryant Garth and Joanne Martin (Director and Assistant Director of the

20. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

21. PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* (1988).

22. First-year students have a first-semester writing section in a substantive course, which is conducted in a small section of approximately twenty students. Washington and Lee also has an upper-class writing requirement, which students can satisfy by participating in Law Review, by taking seminars that are structured around a written project, or by completing an independent writing project under faculty supervision.

23. For example, Professor Gwen Handelman has creatively structured her section of Lawyer's Role around the Americans with Disabilities Act. Professor David Wirth has used an environmental policy drafting negotiation, in which students represent various participants in the drafting of statutory guidelines on pesticide use. Other professors have built their courses around a variety of other topics, such as the administrative process surrounding food labeling requirements.

American Bar Foundation), which appeared in the December 1993 issue of *The Journal of Legal Education*,<sup>24</sup> caught my eye because of its relevance to the first-year lawyering course. I am writing this Article in part to call attention to the findings of this study and what it seems to say about the need for such a course in the overall law school curriculum.

As revealed by the article's title, *Law Schools and the Construction of Competence*,<sup>25</sup> the authors investigated how well law scholars are doing in teaching lawyer competence, and in that regard what are the expectations of young lawyers (fewer than five years out) and law firm hiring partners (in firms of five partners or more) in two practice areas: Chicago and small communities in Missouri. Competence is defined in terms of the recently published MacCrate Report, which lists ten lawyering skills "which the ABA Task Force felt essential to sound legal practice."<sup>26</sup> In designing their questionnaire the authors sought "to measure some of the changes that had taken place since the late 1970s, when Frances Kahn Zemans and Victor G. Rosenblum surveyed the Chicago bar for the American Bar Foundation."<sup>27</sup> Aware that both the earlier Zemans-Rosenblum Survey list and the MacCrate Report's list did not pay attention to the so-called "dirty" skill of obtaining and retaining clients,<sup>28</sup> the authors added that "skill" to their own list of seventeen skills.<sup>29</sup>

24. Garth-Martin, *supra* note 3.

25. *Id.*

26. *Id.* at 471. The ten Fundamental Lawyering Skills identified were: (1) Problem Solving, (2) Legal Analysis and Reasoning, (3) Legal Research, (4) Factual Investigation, (5) Communication, (6) Counseling, (7) Negotiation, (8) Litigation and Alternative Dispute-Resolution Procedures, (9) Organization and Management of Legal Work, and (10) Recognizing and Resolving Ethical Dilemmas. MACCRATE REPORT, *supra* note 1, at 138-40.

27. *Id.* See FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981) [hereinafter Zemans-Rosenblum Survey].

28. Garth-Martin, *supra* note 3, at 471. "One could say client getting is not a 'lawyering skill,' but, by all accounts, it has become a more important part of the practice of the law in recent years. Lawyers are more numerous and clients are less loyal. Lawyers spend substantially more resources today on client development than they did twenty years ago." *Id.*

29. *Id.* at 473 tbl. 1. The questionnaire updated the Zemans-Rosenblum list of skills by drawing on the MacCrate Report's list. Garth and Martin came up with the following list of seventeen lawyering skills and areas of knowledge: (1) Oral communication, (2) Written communication, (3) Instilling others' confidence in you, (4) Ability in legal analysis and legal reasoning, (5) Drafting legal documents, (6) Ability to diagnose and plan solutions for legal problems, (7) Knowledge of substantive law, (8) Organization and management of legal work, (9) Negotiation, (10) Fact gathering, (11) Sensitivity to professional ethical concerns, (12) Knowledge of procedural law, (13) Counseling, (14) Understanding and conducting litigation, (15) Library legal research, (16) Ability to obtain and keep clients, and (17) Computer

With a caveat about trying to summarize a 40-page article containing 15 full-page tables, I will restate the survey's major empirical findings:<sup>30</sup>

1. Oral and written communication skills are deemed to be the very most important skills necessary for beginning lawyers (rated in the highest category by 80 percent of the young Chicago lawyers surveyed).<sup>31</sup> They outrank other practical skills and more specifically legal skills such as substantive legal knowledge, legal reasoning, and legal research.

2. There are substantial gaps in what recent law graduates think could be taught in law school and what they actually learn in the practical areas, including especially oral and written communication and legal drafting. Indeed, there are notable gaps in all the more practical areas, including negotiation, counseling, and litigation skills.

3. The expectations of hiring partners in the law firm settings provide strong support for the importance of oral and written communication. The partners expect those skills to be possessed by the associates who come to work in the firms, even though they are apparently not taught much in the law schools.

4. The hiring partners, in contrast, have rather lower expectations in the areas of substantive law and procedural law. But they do, of course, expect the new lawyers to have acquired facility in legal reasoning.

5. As associates move toward partnership, legal reasoning continues to be of major importance, but the skill most commonly named as one of the top three for partnership is the ability to attract and retain clients.

6. One point is worth re-emphasizing: While there are notable changes in the hierarchy of skills, the critical importance of legal reasoning every step of the way is the key to defining the legal profession. "Ability in legal analysis and legal reasoning" is one skill that is taught with some success in the law schools and also remains critically important to getting hired and promoted in at least the law firm setting where most law graduates began their careers in Chicago in the past five years. That does not mean that other skills are not crucial to success, but legal reasoning covers best what unifies legal practice and legal education.<sup>32</sup>

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legal research. *Id.*

30. This restatement of the findings is taken almost verbatim from the twelve "basic empirical findings" of the study. *See id.* at 508-09. Omitted are most of the findings on rural lawyers, including solo practitioners and lawyers in small firms, who, practicing in settings where they are left more to their own devices, not surprisingly expect more from law school and are more disappointed with the results.

31. *Id.* at 474.

32. *Id.* at 508-09.

counterparts in government or corporate practice.<sup>41</sup> Similarly, government lawyers are more likely to rank knowledge of substantive law, sensitivity to ethical concerns, knowledge of procedural law, and litigation skills higher than private practitioners.<sup>42</sup> Given the fact that government respondents are more likely to be litigators, this variation is not surprising. In contrast, corporate respondents, who are least likely to be regularly engaged in litigation, do not rate knowledge of procedural skills and litigation skills particularly high.<sup>43</sup> Finally, it should come as no surprise that the ability to obtain and keep clients is clearly more important to private practitioners than to government or corporate lawyers.<sup>44</sup>

*B. Changes in Practitioner Expectations Over the Last Twenty Years:  
Zemans-Rosenblum to Garth-Martin*

Of interest to an inquiry as to how the Garth-Martin findings may relate to a "lawyering" course are the changes in lawyers' outlook that have occurred in the twenty years that separate the Garth-Martin and Zemans-Rosenblum studies. While recognizing that "much has changed in legal practice" in that period, the authors "focus on four particularly interesting contrasts that emerge from the comparison of the two Chicago surveys: professional ethics, fact finding and legal research, partner expectations in substantive and procedural expertise, and partner expectations in abilities to communicate and inspire confidence."<sup>45</sup>

*1. Professional Ethics*

The role of law schools in teaching legal ethics has dramatically increased. Zemans and Rosenblum studied education for professional responsibility and found the basic attitude was that ethical concerns cannot be taught in law schools and are something that evolve in practice.<sup>46</sup> The Garth-Martin survey demonstrates that today professional responsibility is very much in the mainstream of a legal education: Partners expect it to be

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41. *Id.*

42. *Id.* at 474-75.

43. *Id.* at 476.

44. *Id.* at 474-76.

45. *Id.* at 493.

46. *Id.* (citing Zemans-Rosenblum Survey, *supra* note 27, at 172). The data for the Zemans-Rosenblum Survey was collected in 1975-76, immediately after the Watergate conspiracy exposure had run its course but probably before its impact within the bar had been felt.

It may be instructive to focus on how the young Chicago lawyers assess their law schools' capacity for teaching selected skills, and whether sufficient attention was given to those skills in law school. Garth and Martin reported gaps between what could be taught and what is taught for every one of the skill areas evaluated in their questionnaire. "There are notable gaps in the two skills deemed most important — oral and written communication — and in all the other 'practical' areas, including solving legal problems, negotiation, counseling, fact gathering, and conducting litigation."<sup>33</sup> The gap between the percentage of respondents who think oral communication can be taught and those who think that law schools give sufficient attention to the skill is 77 percent to 39 percent.<sup>34</sup> "In the case of written communication, 91 percent think it can be taught effectively in law school, a figure higher than for any other skill except legal research, which is about the same; yet only 55 percent think sufficient attention was provided in law school."<sup>35</sup> There are similar gaps for the other practical skill areas mentioned above, and "perhaps a surprising gap in the teaching of procedural law."<sup>36</sup> The largest gap, 80 percent to 24 percent, is in drafting legal documents; "[a]gain the law schools get rather low marks for their instruction in writing skills."<sup>37</sup>

Garth and Martin's survey also notes some areas of relative success in which law schools can and do teach desired skills; these areas include legal reasoning, legal research, professional ethics, and knowledge of substantive law. "Substantive law is the area most successfully taught in law school."<sup>38</sup> However, "there also are areas that are deemed not easily taught in law school. These include client relations, instilling confidence, and legal practice management."<sup>39</sup>

However, the authors caution that these rankings, "while useful as a general picture, are somewhat misleading, since [the] type of practice and practice setting significantly affect the perceived value of several of these skills."<sup>40</sup> For example, private practitioners are more likely to value the importance of most of the enumerated skills more highly than do their

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33. *Id.* at 478.

34. *Id.*

35. *Id.* Seventy-five percent believe that sufficient attention was given to legal research. *Id.* at 479 tbl. 4.

36. *Id.* at 478.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 474.

brought to the law firm; associates report that it is learned essentially through law school.<sup>47</sup> "Further — more than any other skill except legal reasoning, substantive law, and library legal research — sensitivity to professional ethical concerns is said to have been given sufficient attention in law school."<sup>48</sup> In fact, the ABA accreditation standards for law schools have required the teaching of professional responsibility since the early 1970s.<sup>49</sup>

## 2. Fact Finding and Legal Research

"The ascendancy of ethics as a matter of concern to law schools is matched by a decline reported by practitioners in the relative importance of fact gathering and legal research."<sup>50</sup> In the mid-1970s survey, fact gathering was the most valued skill among those surveyed: Almost 70 percent reported that the skill was "extremely important."<sup>51</sup> The current survey of young Chicago practitioners places fact finding nowhere near the top, with only 36 percent reporting that it was extremely important; the legal research figures are comparable.<sup>52</sup>

The authors find this decline in the relative importance of legal and factual research difficult to explain.<sup>53</sup> One possible explanation they advance is a "different division of labor today between what lawyers do and what paralegals and other support personnel do. Another explanation is that lawyers now believe it is more important to settle a matter quickly than to research the facts and law exhaustively: it is deemed too expensive to learn everything."<sup>54</sup> They note that "either interpretation is consistent with a shift in emphasis from the purely legal skills to more of an emphasis on communication and on business skills."<sup>55</sup> An increase since the 1970s in the importance given to oral communication supports this interpretation.<sup>56</sup> "While 83 percent of the young [Chicago] bar today think oral communication is 'extremely important,'" and a similar result is shown by the partner

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47. *Id.*

48. *Id.*

49. See MACCRATE REPORT, *supra* note 1, at 262-63.

50. Garth-Martin, *supra* note 3, at 493.

51. *Id.*

52. *Id.*

53. *Id.* at 497

54. *Id.*

55. *Id.*

56. *Id.*

survey, "only 51 percent in the Zemans and Rosenblum sample thought 'effective oral expression' was 'extremely important.'"<sup>57</sup>

I would take this explanation for the decline in the relative importance of research into facts and law a few steps further. First, computer legal research, which was not taught twenty years ago, has no doubt reduced the importance of library legal research in the view of the young Chicago associates who rely on it. Second, they may be saying that, on a relative scale, research into law and fact investigation do not loom as important today as communication and business skills. And third, they may simply be reflecting the priorities their seniors have set out for them.

### *3. Partner Expectations in Substantive and Procedural Expertise and in Abilities to Communicate and Inspire Confidence*

Garth and Martin's survey shows a notable increase in the importance of communication skills and client relations, compared with Zemans and Rosenblum's survey done twenty years earlier. Both fact gathering and legal research decreased in importance, while oral communication is more important.<sup>58</sup> As Garth and Martin note, "[H]iring partners quite clearly expect much more in the way of communication skills and in the ability to inspire confidence. The[se] business-related skills are clearly considered more important today than in the past."<sup>59</sup> It is also noteworthy that the lawyer today, particularly the business-oriented lawyer, is more serious about the problems of professional ethics.<sup>60</sup>

In comparison, the earlier findings reported that "57 percent of the sample expected oral communication skills to be brought [to the firm], compared to an extraordinary 91 percent today; 20 percent expected the ability to inspire confidence to be brought, compared to 53 percent today; 78 percent expected knowledge of substantive law to brought, 30 percent today; and 54 percent expected knowledge of procedural law, 28 percent today"<sup>61</sup> Thus, today's partners expect relatively less knowledge of the content of law and more highly developed personal skills than did partners in the 1970s.<sup>62</sup> Apparently, "law firms in the 1970s could afford to hire smart, knowledgeable law graduates with as yet immature communication and client skills,

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57 *Id.*

58. *Id.* at 509.

59 *Id.*

60. *Id.*

61. *Id.* at 497

62. *Id.*

place them in the library, and allow them to develop."<sup>63</sup> However, in my opinion, law firms today tend to imitate their corporate clients in creating profit-centers which in turn necessitate more emphasis on billable hours and an earlier return on their substantial investment in new associates.

### C. Survey Conclusions and the MacCrate Report

One of the MacCrate Report's general conclusions was that "the skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career."<sup>64</sup> The Garth-Martin survey confirms this somewhat commonplace conclusion and adds that, in addition to law school, lawyers learn their practice skills from many different sources throughout their careers, such as repeated experience and observation and advice.<sup>65</sup> The authors add that not only must we think about the complexity of the sources, but we must take into account the significance of the practice settings: Urban lawyers' learning outside of law school comes mainly from their law firms; on the other hand, rural lawyers get less from lawyers in their firms, gain more from lawyers outside of their firms, from independent study, and from continuing legal education, and consequently tend to expect more from law school.<sup>66</sup>

Garth and Martin note that one could "argue that the key to improving practice is to take the highest ranking skills that have large gaps between what can be taught and what actually is taught, and then search for ways to close the gap."<sup>67</sup> The authors note that this direct response to their survey's findings would mean "pay[ing] much more attention to the teaching of oral communication, written communication" — the two skills deemed most important — and to all of the other practical skill areas, including "drafting

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63. *Id.* The authors note:

Today there is much less tolerance for a lack of client and communication skills; there is perhaps more patience with the development of substantive and procedural expertise in a world of increasing specialization. And, while it is deemed crucial to have an ability to obtain and retain clients by the time of a partnership decision, 92 percent of the partners expect that skill to be developed in practice. We can surmise, however, that the ability to inspire confidence and to communicate effectively contribute to developing good client relations.

*Id.* at 497-98.

64. MACCRATE REPORT, *supra* note 1, at 3.

65. Garth-Martin, *supra* note 3, at 482, 498.

66. *Id.* at 498.

67. *Id.*



legal documents, legal problem solving, negotiation, fact gathering, counseling and litigation."<sup>68</sup>

However, Garth and Martin note several concerns with "push[ing] this consumer perspective too far."<sup>69</sup> First, the authors ask how much law schools want to "pay special attention to those who are likely to practice outside a large firm or other mentoring settings."<sup>70</sup> For example, perhaps law schools more likely to feed small rural law firms or solo practitioners "owe a special duty to those who will be essentially on their own," given the large gap between "organization and management of legal work" learned in law school and desired by lawyers in the rural survey.<sup>71</sup> The second issue concerns the related question of how much deference partners' expectations deserve.<sup>72</sup> "We could ask whether law schools *should* close the gap in teaching such skills as negotiation, drafting legal documents, counseling, and understanding and conducting litigation, since partners expect very little in those areas and do not use them in making their hiring decisions."<sup>73</sup> On the other hand, the authors note that "law schools might renew their attention to communication skills and ability to inspire confidence," on the theory that "one way to get students hired — assuming [they qualify on] the [basis of their] all-important grades — is to foster the skills that one might acquire from a good finishing school: correct manners, social grace, and good grammar and pronunciation."<sup>74</sup>

Garth and Martin recognize the relationship between partners' expectations and what law schools produce. "If law school[s] were actually to improve the teaching of legal skills, for example, it might be that the partners would expect more."<sup>75</sup> They question how much education in law schools should "chase after the perceived requirements of practice. There are strong arguments for [taking] some steps toward the practical, especially for solo and small-practitioners. But obviously law schools have some obligation to consider what lawyers *ought* to know as members of a profession with particular privileges and obligations."<sup>76</sup>

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 498-99.

74. *Id.* at 499.

75. *Id.*

76. *Id.* (emphasis in original). In commenting on his new book entitled *The Betrayed Profession*, Sol Linowitz, a pillar of the bar and its frequent critic, said the legal profession

In this regard the ABA has recently weighed in with a recommendation that law schools implement the MacCrate Report by "develop[ing] or expand[ing] instruction in such areas as 'problem solving,' 'factual investigation,' 'communication,' 'counseling,' 'negotiation' and 'litigation,' recognizing that methods have been developed for teaching law student skills previously considered learnable only through post-graduation experience in practice."<sup>77</sup>

#### *IV How Do the Garth-Martin Findings Relate to the Lawyer's Role Course?*

I set out as the primary purpose of the Lawyer's Role course giving first-year students a perspective on how a lawyer deals with a client's problem at various stages, pointing out that generally such a problem cannot be categorized in terms of a single legal topic. A related purpose is to disabuse the student of the notion that lawyers spend most of their time in court. In the course of conveying this message, the instructor introduces the student to a number of nonlitigation skills. Of the six Lawyer's Role course objectives set out above,<sup>78</sup> the Garth-Martin findings have most to say about Legal Writing (including Drafting), Oral Advocacy, and Sensitivity to Ethical Problems.

Garth and Martin found that written and oral communication skills were rated in the highest need category by 80 percent of the young Chicago lawyers who responded.<sup>79</sup> Good legal writing is a major emphasis of the Lawyer's Role course. It is also a continuing theme throughout many of Washington and Lee's upper-class courses and seminars. Because in my own practice we usually told prospective associates that our lawyers spent seventy to eighty percent of their time writing, I would concur with the emphasis given to writing skills.

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"has betrayed itself from within. We inherited a noble profession and we've made it a business. We've lost the ability to differentiate between what you *can* do and what you *ought* to do." Linda Greenhouse, *A Pillar of the Law Laments that a "Noble Profession" has Become Just Another Business*, N.Y. TIMES, Apr. 8, 1994, at B9 (emphasis in original).

77 Excerpted from Report 8A, a resolution adopted by the House of Delegates at the February, 1994 ABA mid-winter meeting. It was adopted over the strong objection of the Association of American Law Schools. See Letter from Carl C. Monk, Executive Vice President and Executive Director, American Association of Law Schools, to Deans of Member and Fee-Paid Schools (Feb. 14, 1994) (on file with the *Washington and Lee Law Review*); see also *ABA Reformulates Ancillary Business Rule, Reaffirms Support for Universal Health Care*, 62 U.S.L.W. 2497, 2500 (Feb. 15, 1994)).

78. See text following note 23, *supra*.

79. Garth-Martin, *supra* note 3, at 474.

Oral Communication is a different matter. The major oral advocacy exercise in the Lawyer's Role course is the oral argument on the moot court brief. In my class, and in several others, there is also a class demonstration and a practice oral argument conducted by the student Moot Court Board prior to the student's formal argument. I question whether these two ten-minute arguments meet the need for the training in Oral Communication indicated by the survey. My student evaluations repeatedly noted a real desire for more practice in oral advocacy, and I readily endorse this critique.<sup>80</sup>

Regarding Sensitivity to Ethical Problems, which the survey finds receiving sufficient attention in law schools, the Lawyer's Role course makes a modest contribution. Undoubtedly, however, the required three-credit professional responsibility course,<sup>81</sup> the inclusion of ethical discussions in substantive classes, and the numerous clinical experience opportunities contribute much more. It appears that Washington and Lee scores high in this respect.

The first-year program in Lawyer's Role seems to exceed both the importance and the attention levels indicated in the survey regarding Legal Research (case, statutory, and regulatory) using both library and computer methods. With respect to the remaining Lawyer's Role objectives — Client Interviewing and Counseling, and Negotiation and Mediation — Garth and Martin indicate considerable gaps between a law school's capacity to teach and what is actually taught and the need for such skills.<sup>82</sup> Considering the ground we have to cover with the other skills, I doubt that the Lawyer's Role course can do any more to close these gaps beyond introducing the subjects through readings and simulations. However, Washington and Lee students can study Negotiation and Mediation in depth in an optional upper-class seminar and in other substantive classes that involve the students in negotiations.<sup>83</sup>

With respect to the teaching of these nonlitigation skills, Garth and Martin make an interesting observation: With the exceptions of Negotiation

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80. I note that the Negotiation exercise offers a different, informal type of oral advocacy.

81. Washington and Lee offers a traditional Professional Responsibility course with which students can satisfy the professional responsibility requirement. They can also satisfy the requirement by taking smaller, substance-linked classes such as Ethical Problems in Federal Tax Practice and Ethical Problems in the Practice of Criminal Law.

82. Garth-Martin, *supra* note 3, at 479 tbl. 4.

83. Three examples of such courses are Real Estate Transactions, Secured Financing, and Sports and Entertainment Law.

and Alternative Dispute Resolution, which have generated a sizeable body of legal literature, the other nonlitigation skills, including Legal Drafting, have not interested legal scholars.<sup>84</sup> This is to say, they have not been widely written about. "Academia has trouble with the skills that are merely learned by doing, especially when, as is often the case, practical teaching appears to be more expensive."<sup>85</sup> This may account for their absence from the curriculum.

## V A Few Thoughts About the Future of Lawyer's Role

### A. "The first thing we do, let's kill the Lawyer's Role course"

Removing Lawyer's Role from the curriculum might be a popular decision.<sup>86</sup> It is disliked by some students and by some faculty members. Why do some first-year students dislike the course so intensely? I would list the following reasons: It's too much work. Students don't get the big picture — they don't have a sense of accomplishment, as in learning a conventional course, and they can't see where it will help them in practice. It's uneven — course content and work load vary from section to section. The grading seems unfair — it is subjective, unlike other first-year courses, and the students don't have a chance to participate in a practice session, such as interviewing a client, before they are graded on an exercise.

Lawyer's Role is not the first course to be criticized in these terms, but it is one course in the first-year curriculum to be so singled out. Of course, "too much work" is a common complaint by first year students; moreover, role-playing is a new and strange experience and has none of the solid building blocks of their other courses such as a casebook or a treatise. A real effort was made two years ago to meet the charge of "unevenness" by creating a uniform curriculum for all six sections, and I will comment on this in a moment. As for the "unfairness" charge, I have tried to remedy it in part by having one ungraded practice exercise before each graded one.

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84. Garth-Martin, *supra* note 3, at 504-06. Garth and Martin note that [t]he need to teach negotiation in the law schools is one of the battle cries of the clinical movement. Negotiation is considered by our sample of practitioners no more important to the practice of law today than it was in late 1970s, but a much higher percentage of law graduates today believe that law school [recognized] the potential value of the skill; and a much higher percentage also believe that it can be taught effectively in law school.

*Id.* at 505.

85. *Id.* at 504.

86. In the Spring of 1995, the faculty suspended Lawyer's Role for two years to experiment with another small section writing course in the second semester of the first year.

Lawyer's Role is also disliked by some faculty members, for many of the same reasons. The class is burdensome to teach — it combines the burdens of any intensive writing course with the challenge of having to come up with nontraditional course materials. There is no textbook for the course and the materials are difficult to prepare. The grading is subjective and, by its nature, not anonymous — an arrangement disliked as much by faculty members as by students. Furthermore, because of this faculty dislike, administrators may dislike the course because they find it difficult to staff.

*B. My reply: "Let's save the core of the Lawyer's Role course"*

Should Washington and Lee continue the Lawyer's Role course? My answer is "Yes," but with several qualifications. To start with, assuming that one can accept the Garth-Martin findings as applicable to the profession as a whole (and not just to the Chicago and Missouri areas), one must ask whether, as the authors put it, law school educators should "chase after the perceived requirements of practice."<sup>87</sup> Don't educators have a primary obligation to consider what lawyers should know as members of a privileged profession, instead of what the bar wants them to know in order to succeed in practice?

There is also the question of what, in the teachers' view, the law schools have the capacity to teach. For example, rural lawyers may find a huge gap in "organization and management of legal work,"<sup>88</sup> and yet this may not be a skill law professors have the capacity to teach. Another good example of a subject which can be classified as almost unteachable is "the ability to inspire confidence." And certainly most law professors believe they should shy away from attempting to teach "ability to obtain and retain clients." Some would say that rainmakers are born, not made!

However, I find the changes in legal education in the last twenty years evidence that the law schools have recognized both the changes in practice, as shown by the two surveys, and the value of "teaching by doing." As noted, law review and moot court were the only experiential opportunities in my day, and they were only mildly faculty supervised. Washington and Lee has supplemented those two programs with intensive practice courses and with practice exercises in large classrooms, as well as with numerous clinics, internships and other practice opportunities, both during a student's academic years and during the summers.

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87 Garth-Martin, *supra* note 3, at 499.

88. *Id.* at 498.

Now for several qualifications about continuing the Lawyer's Role course: As I mentioned, we all agreed on and followed a uniform curriculum two years ago, and I thought it was quite successful. However, there is a consensus that the Lawyer's Role teacher's workload is unusually heavy because of the number of papers and individual conferences — circumstances that have discouraged some teachers from taking on the assignment. While a uniform curriculum has decided advantages, there may be more incentive for teachers to take on the course if they can use it to develop their own academic interests. Recent experience indicates that the course can be successfully taught using a particular subject the teacher finds interesting or which relates to that teacher's expertise; in doing so, a teacher can develop research and teaching possibilities for later upper-class courses or seminars.<sup>89</sup> I think this type of flexibility helps, on balance, both by making the class more attractive and challenging for professors and by making the class more interesting for students.

However, allowing such differences in course content will increase the tendency toward disparity in the amount of work expected of both students and professors. A less ambitious solution to the unevenness charge than a uniform curriculum would be to develop some general guidelines beyond the six course objectives listed above. For example, guidelines could cover subjects such as the total number of pages of writing (e.g., a range of 40 to 50 pages), the number of drafts that should be required, and the number of individual conferences. Such guidelines might reassure students that the workload was not intended to vary from one section to another. On the other hand, it would permit the teacher to choose the problems, materials and emphasis for the course.

Some lawyer skills cannot be taught effectively in a classroom, even in a class of only twenty students. Document drafting may be a good example. It may be better learned on a one-on-one basis, such as by sitting beside an experienced scrivener, a real estate lawyer, or a securities practitioner — drafting and redrafting, and learning to self-edit. This is the way my firm and others typically train young associates. The same can be said of some of the other skills the young Chicago lawyers believe can be taught effectively, such as "organization and management of legal work." My advice is not to try teaching them.

Moreover, not all of the Garth-Martin findings should be followed slavishly. Legal research and fact gathering may not be considered by practitioners as important as they were twenty years ago. However, I believe a

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89. Professor Handelman's course, described in footnote 23 *supra*, is an example.

law school faculty should insist on excellence, which means learning the necessity for thorough fact investigation and intensive legal research — that is, whatever it takes to solve the problem. There is no place in a law school for teaching students how to give advice "on the cheap" in an effort to enhance the bottom line.

I do not know how to solve the problem of extreme "grade-consciousness," which seems endemic in the first year. I would not feel comfortable with putting the entire course on a pass-fail basis; I don't have that much faith in human nature. This year, I graded most of the oral exercises and about half of the written exercises on a pass-fail basis. I graded on a numerical basis all substantial written assignments and several oral exercises where I could individually judge the student's performance. I also graded the moot court exercise on a numerical basis, both the final draft of the written brief and the formal oral argument. Incidentally, I find the moot court segment of the course to be its most rigorous exercise and have more confidence in judging it than the earlier simulation exercises. Other than the foregoing, I have no notion of how one can de-emphasize the extreme first-year grade-consciousness.

## VI. Conclusion

It seems evident that the Lawyer's Role course is one appropriate response to the changes in the law school curriculum that the MacCrate Report indicated as needed and that the Garth-Martin survey indicated was desired by practitioners. It is not surprising that the course causes some student and faculty dissatisfaction; it is radically different from a first-year student's other courses both in subject matter and method of instruction. Moreover, because it is experimental, it causes uncertainty, a state of mind that lawyers are better able to deal with than first-year law students. While instruction in such a course could be postponed beyond the first-year, it seems wise not to do so. Lawyer competence and adherence to high professional standards have never been in shorter supply, and the earlier law students can be introduced to the issues they raise the better.

Law school is better today than it was when I started teaching in 1947. It is better, in part, because our community is more inclusive and more a reflection of the society we serve. It is also better, I believe, because it has moved closer to the society in some important ways and better prepares students to be functioning lawyers. Of course, there always remains the risk that we will become too much the trade school I feared when I started to teach; that we will train students in the craft of the law to the exclusion of exploring with them the purposes and possibilities of the law.

Lawyer's Role is a demanding course for both students and faculty. It is a risky course — as the student wrote to Dean Sullivan, it can either be a complete disaster or a great learning experience. I think it is something the Washington and Lee Law School community does particularly well, in part because of the faculty and resources with which it has been favored. It is something the school ought to continue doing in some form.



