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The Education of Competent Lawyers: The American Experience

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*By Roger C. Cramton**

The relationship between legal education and a highly competent legal profession is an important and complex one. Yet it is impossible to talk intelligently about "skills training" in a law school setting without having a working definition of what it means to be a good lawyer. Until one has in mind the attributes of the "competent lawyer", it is difficult to identify those areas in which the law school experience, as distinct from apprenticeship or other experiences, can make a distinctive or necessary contribution. And one cannot talk intelligently about lawyer competency without reference to the social environment in which a lawyer's activities take place.

These introductory remarks suggest the breadth of my assigned topic. It encompasses all of Murphy's Law ("anything that can go wrong will go wrong") in a large part of the Western World. Walt Whitman was once asked at a formal occasion to summarize the role of the university in modern society. He wisely demurred, "I'd rather not". Perhaps I should take the same course.

My difficulty is two-fold. First, my qualifications to address the issue of lawyer incompetency are modest at best. I am a legal educator, not a judge or practitioner. Second, my experience differs in many ways from yours. For nearly thirty years I have been involved in legal education as a student or teacher, but this experience is almost entirely confined to the United States. Although it is characteristic of Americans to view their experience as normative for all of mankind, whether this experience speaks to Israel's realities and problems is a matter which Israelis will be best able to judge. Perhaps a spark of recognition will be kindled here or there by what I say; and, in any event, observations from another corner of the planet may have, as Frank Allen has said, "a quaint anthropological interest". And perhaps we can learn something, at least about our differences, from one another.

At a sufficient level of generality, there is a great deal of agreement concerning the basic elements of lawyer competence. The most recent

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statement, that of the ALI-ABA Committee on Continuing Professional Education (*A Model Peer Review System*, at 11), is a good as any:

> Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

My remarks today will be addressed to three questions: (1) What should be expected of the law school with respect to these criteria of attorney competence? (2) Which of them are or can be effectively taught in law school? (3) How well does the law school perform in addressing them?

Let me begin with two caveats. The words "training" and "teaching" carry implications that should be made explicit. "Training" implies a technocratic and instrumental approach to education — a narrow vocational approach. And "teaching" implies that it is the teacher or the message that is important, not the learning. Perhaps these terms would be appropriate if one were preparing technocrats for technical roles, rather than preparing lawyers for the diffuse and complex roles they bear in our society.

I have a strong preference for "learning" as the appropriate term for the process we are discussing. For the central aspect of learning is that the initiative and energy must come from the learner; our task as teachers is to organize, inspire, and facilitate the learner in acquiring new knowledge, skills, and potentialities.

An ancient Eastern proverb, "When the student is ready, the teacher will appear", correctly emphasizes that motivation is critical to learning. Education is a complex and difficult phenomenon because it is largely dependent upon nurturing intangible qualities in the learner: intellectual curiosity, acquisition of a sense of mastery of ideas, the joy of applying ideas to the solution of ever more complex problems, and the like. Education must not be treated as if it were an obstacle course, a boot camp, but ideally should engage the whole person of the learner.

My second caveat is that law schools are and should be different even though we often talk about them as if they were all the same. A few

facts of life bear repeating: There is a pecking order in the law school world as there is in the legal profession; and law schools ranged along the hierarchical structure perform quite different functions, preparing quite different people for quite different careers. Although law schools have common elements, their differences are enormous. Although a conspiracy of silence tends to suppress any frank talk about these differences — which go far beyond modest qualitative differences in faculty, and library collections — they mean that legal education should vary considerably from one school to another since a somewhat different task is being performed in different institutions.

Law schools are also tyrannized by a paucity of models. Although they are very different in role and function, the stated aspirations of most law schools are limited to the models expressed by a handful of elite schools — whether or not these models have any application to the differing situation of the local and regional law schools that produce over two-thirds of American lawyers.

With these caveats in mind, let me turn to a discussion of the law contribution and performance of the ALI-ABA list of six elements of competence. I will consider them in reverse order.

A. INTELLECTUAL, EMOTIONAL, AND PHYSICAL CAPABILITY (Item 6)

Lawyers must be intellectually, emotionally, and physically capable in order to perform competently. The law schools advance this objective primarily by limiting admissions to students who have demonstrated superior academic qualifications during college years. At the most elite schools, the students are chronic over-achievers who are well endowed with energy as well as intellectual acumen.

Changes in the demand for admission to a legal education on the part of students during the last two decades have had the effect of dramatically increasing the qualifications of the entire law student population. When the demand reached its peak a few years ago, there was only one seat in American law schools for every 3.5 persons who took the law school admission test. All law schools could be selective in picking students.

No one knows what the future holds on this score. If other careers become relatively more attractive and law is perceived as overcrowded, the superior intellectual qualifications of recent law graduates will melt away. They will become a much more representative sample of college

graduates. If that happens, the lawyer competency problem will be aggravated.

B. PREPARATION AND FOLLOW THROUGH (MOTIVATION, CARE, AND DILIGENCE) (Item 5)

I have elsewhere emphasized the importance of personal qualities of motivation, care, and diligence to the competent performance of legal services. We know that most deficencies in lawyer performance that produce client complaints and disciplinary proceedings involve failures in this area. Moving beyond minimal competence, internalized standards of high performance are one of the most critical elements of the truly superior lawyer: one who cares about his clients, cares about law as an intellectual discipline (and therefore keeps abreast of its changes), and cares about his own image of himself as a lawyer. The clue to much lawyer deficiency lies in the old saw: "We know better than we do".

What can law schools do to cultivate these intangible personal qualities? First, by selecting for admission individuals who are highly motivated and hard-working, law schools can screen out lazy and unmotivated individuals and introduce into the profession individuals who have demonstrated care and diligence in their undergraduate work.

Second, law schools can inculcate disciplined work habits by the manner in which the curriculum is organized and by the application of rigorous standards. Although this is generally the case, there are some trends in the wrong direction. The demands placed on law students in the upperclass years at some law schools may have declined and softer grading standards sometimes may have allowed students to graduate whose work did not meet acceptable levels. There are too few occasions in law school in which students are required to do and redo work until it meets a reasonably high standard. The unplanned but nevertheless powerful trend toward a new form of apprenticeship — students working in law offices not only in the summer but throughout the academic year — offers increased opportunities for practical exposure but clearly reduces attendance, participation, and performance in upperclass courses. Law schools have not yet devised effective means of either utilizing or resisting the law-office training that law students are now getting (and which threatens to turn them into part-time students even though engaged in what is supposed to be a full-time programme). Faculties are wrestling with these problem areas at this time.

C. COMMUNICATION AND LIMITS (AWARENESS OF CLIENT NEEDS AND SELF-AWARENESS OF LAWYER'S LIMITS IN MEETING THEM) (Item 4)

A vital ingredient of a competent lawyer is an honest self-assessment of the limits of his own capacity: what he can do and what he should refer to others. Similarly vital is an ability to establish a sound professional relationship with clients involving two-way communication and sensitivity to the client's inmost desires. Implicit in these elements of lawyer competency are interpersonal skills of communication and sensitivity, on the one hand, and a model of the appropriate professional role, on the other. The topics are of enormous importance but are largely neglected both in law school and in professional dialogue.

I believe that there is a substantial gap between how the best lawyers behave and the ideology that most lawyers espouse. They talk as if a rule-oriented legalism, for example, was the correct jurisprudential model, but the behaviour of good lawyers reflects a much broader and more sophisticated jurisprudential framework. In short, the behaviour of the best lawyers tends to be better than their rhetoric on a number of significant matters.

Similarly, lawyers talk as if the "hired gun" was the only appropriate model of the professional role. Yet this model, infused by the ethics of loyalty but very little else, often assumes a dominant lawyer who controls rather than responds to the client. Different models of professional behaviour, involving a more collaborative role in which a lawyer cooperates with an informed client, are infrequently emphasized, even though these models provide the best examples of superior lawyer behaviour.

In the past, law schools have largely neglected these subjects. They have too easily ignored the subject or echoed the misleading rhetoric of the Bar. The advent of clinical legal education, a growth of interest in professional responsibility, and (possibly) a change in the composition of law students (more than one-third are now women and over one-tenth are from minority groups) are modifying this former neglect. There is hope that in the future the law schools will do a better job of communicating and critiquing models of professional role and behaviour. If so, law students will have a better opportunity to form an image of themselves as professionals; and the Bar will benefit from (although it will also feel the sting of) a vigorous critique of many current practices of the profession.

D. PRACTICE MANAGEMENT (EFFICIENT USE OF SUPPORT RESOURCES) (Item 3)

A lawyer cannot be competent unless the law practice is managed effectively. Although law schools should indicate the importance of such essentials as good file management and an effective tickler system, I hope it will not be taken as denigrating these matters if I assert that law schools have relatively little to contribute in this area. To the extent that a law student is engaged in law practice activities in a law school clinical programme, of course, the very best techniques of practice management should be exemplified. But systematic discussion of such matters as the selection of word-processing equipment is of very little interest in the law school setting to either teachers or students.

On most of these matters, the law office setting provides a more efficient and better learning situation. The young lawyer faced with the necessity of carrying on a practice is intensely interested in how the practice can best be carried on. Exposure to law office methods, conversations with more experienced lawyers, CLE courses, and the activities of commercial salesmen will be eagerly reviewed before decisions are made. Although an occasional law teacher will become interested in research and teaching in this area, the law schools are not likely to make a large contribution in the practice-management area.

E. KNOWLEDGE (Item 1) AND SKILLS (Item 2)

A competent lawyer is expected to have a great deal of knowledge about law and legal institutions. And he must be able to apply that knowledge in the resolution of legal problems. But what knowledge and what skills? Moreover, of the knowledge and skills a lawyer needs to perform a particular task, what portion should be acquired in law school as distinct from other settings?

Answers to these questions must reckon with two important facts: the enormous variety of what lawyers do; and the rapid change in the content of legal rules and procedures. From a competency standpoint, knowledge and skills are task specific: the question is what information and abilities are necessary to carry out a particular professional task. The answers are quite different depending on whether one is talking about a general practitioner handling a real estate closing of residential property, a patent lawyer filing a protest against a patent dealing with chemical processes, or a litigator about to go to trial in a complex multi-party product-liability case involving difficult issues of scientific causation.

The basic law programme at American law schools (leading to the J.D. degree as distinct from specialized LL.M. or other advanced programmes) must be concerned with common-denominator knowledge and skills – what most or all lawyers should know or be able to do. What every lawyer should know (general legal knowledge) consists largely of knowledge concerning basic institutions and processes, basic legal doctrine and practice, and an introduction to the theoretical foundations of law. Common-denominator skills can be divided into general skills of understanding (analysis, learning, and communication) and special skills of application (interviewing, fact investigation, counseling, negotiating, persuading, drafting, and trial advocacy).

Law schools do quite a creditable job in communicating basic knowledge to law students and in enhancing analytical ability. Most law graduates can do legal research reasonably effectively; and their ability to utilize legal materials in framing an office memorandum or appellate brief is reasonably good. Their performance in other areas is less commendable. In short, law schools at present get excellent marks in terms of skills of legal and factual analysis; good in terms of knowledge of basic doctrine; fair in terms of communication skills; and poor in terms of theoretical knowledge and skills of application.

Why have law schools done so little with skills of application such as interviewing, counseling, negotiating, drafting, and trial advocacy? I believe they can and should do more. But an understanding of some of the reasons for absence of instruction in many of these areas may produce greater patience on the part of the profession during a period in which the law schools are addressing these issues.

Some time ago it was believed that lawyer skills could not be effectively taught in the law school setting. There was doubt as to whether such matters as interviewing and trial advocacy were intellectual subjects apppropriate for attention in university law schools. Teachers and course materials were either nonexistent or unproven. And resources to deal with these difficulties were limited.

At present the focus of discussion has shifted. It has been established that interviewing, trial advocacy, and other skills of application can be introduced effectively in the law school setting; good teaching materials are increasingly available, as are good teachers; and there is a growing consensus that these matters involve processes of considerable intellectual interest. As a result, discussion has shifted from "can't" to "shouldn't".

The major themes of current discussion are worth brief mention. First, efforts to teach practice skills are labour intensive and new resources in higher education are now virtually non-existent. Efforts in this area require a shift of resources from other areas and their effects elsewhere must be considered. Law schools now perform two tasks that cannot be performed elsewhere: teaching of legal and factual analysis; and creation of new knowledge and insights concerning law and legal institutions. It would be a shame, if, in order to teach practice skills, law schools sacrificed more important tasks which no other institutions are prepared to perform.

Second, it is possible that there are other and better ways of teaching practice skills. On-the-job experience remains the cheapest and perhaps the most effective vehicle. Continuing legal education, including specialized institutes such as NITA, have an important role in this area. And development of new forms of "transition education" may also serve to introduce practice skills to young lawyers.

Third, an abrupt change in the content and focus of legal education may have unforeseen consequences on the character of the university law school. As law faculties add individuals with different interests and competences, internal tensions may have adverse effects on faculty unity and collegiality. Similarly, if the scholars on these faculties are conscripted for legal writing and other intensive skills teaching, their scholarship may suffer or universities may encounter difficulties in attracting and retaining the best minds. Freedom of scholarly inquiry rather than routine drill in writing exercises is what attracts such individuals to the university law school. The fears expressed above, similar to those voiced by judges when proposals are made to enlarge or change their courts, reflect a recognition that university law faculties are a precious and fragile organism and that rapid changes in personnel and focus may have undesirable consequences.

Fourth, there is a danger in institutions undertaking too much. Dean Sandalow has commented on the schizophrenic attitude of the American people toward higher education. It combines a naive faith that higher education will solve all of our problems (the university as a social service institution) with a distrust of "pointy-headed intellectuals". Dean Carrington has remarked that in the simpler days of the past, primary and secondary education were limited to more fundamental matters such as reading, writing, and thinking. Today these schools undertake to do everything, since the school's function is viewed as preparation for all of life. There is some evidence that in spreading

themselves so thin, elementary and secondary schools may not be doing anything very well.

Law schools are placing increasing emphasis on the basic skills of applying law and they will enlarge this effort in the future. They should be given encouragement and support in these efforts, not the whip or the lash. The changes have got to come from within legal education to be effective. Even if the profession knew what it wanted to impose, efforts to require particular subjects would be effectively circumvented by law schools and would be counterproductive. As I have already said, different schools have different needs and should be expected to respond in differing ways.

One final thought. Sometimes our conversations on topics such as lawyer skills focus on important but secondary matters that are the nuts and bolts of the topic. Our inquiry becomes too technical and instrumental in character. It omits the truly important things of the spirit that energize change and improvement, such as the vision of a great idea.

Oscar Wilde, anticipating a society in which the slavery of machines has banished the slavery of men, declared: "A map of the world that does not include Utopia is not worth glancing at, for it excludes the one country at which humanity is always landing". Utopia must be on our maps of lawyer competence; with some lines showing how to reach it from this place and this time.