

Cleveland State University

From the Selected Works of David Barnhizer

2013

"Practice Ready" Law Graduates

David Barnhizer



Available at: https://works.bepress.com/david_barnhizer/83/

“Practice Ready” Law Graduates

David Barnhizer

Abstract

Whatever view one holds on the idea of “practice ready” law graduates in the abstract it seems clear that it does not and could not mean that a new graduate can be fully capable of providing high quality services across the board to clients unfortunate enough to be using the services of the neophyte lawyer. If that were the case I can hear a client’s conversation with the brand new lawyer in a complex corporate merger with numerous parties, millions of dollars at stake, estate and tax issues, patent rights and differing valuations for the deal. “How many of these have you been involved in?” “I haven’t actually done any but I’ve read up on them and am ready to “hit the ground running. Don’t worry. I had really good Corporations and Tax courses. No problem. I got a high score on the LSAT and aced my Mergers & Acquisitions class so what could go wrong?” Or, “I made the 50th Percentile on the LSAT and got a “C” in M&A but didn’t do bad in the Negotiation course so cut me some slack. Somebody has to be my first client.” Or put “practice ready” in the context of a serious drug felony involving a criminal organization or a murder case. What does “practice ready” require in that situation?

Perhaps the matter becomes clearer if we ask ourselves the conditions we would prefer in having a doctor perform surgery on our brain or heart. What would we expect (demand or require) in terms of a “practice ready” doctor? What would we do if the person responded to our inquiries with the information that he had just graduated from medical school, hadn’t yet done an internship or residency, but had sat through a “really good course” on brain or heart surgery and medical diagnosis that included some “great videos” and observed similar operations on several occasions from behind the glass of a medical theater.

For me the clamor for a “practice ready” law graduate by the organized bar and lawyers is akin to the earlier demands that law schools teach professional responsibility. A reality of the professional responsibility demands by the American Bar Association and state supreme courts was by and large evidence of the fact that those institutions were incapable of or unwilling to take the difficult actions needed to “clean up” the abysmal situation of regulation of lawyers in the US. Demanding that law schools bear the “Professionalism” burden and that law students pass a national “legal ethics” examination is one of the greatest scams ever foisted on the law schools and the general public. It was little more than a pretense by the powers-that-be in the legal profession and judiciary that they had taken action that made lawyers “more ethical” even while avoiding their responsibility for actually cleaning up the system. “Practice Ready” is the latest professional “scam”.

No One Really Knows What “Practice Ready” Means

Although there has been an increase in demands that American legal education ought or must become more focused on producing “practice ready graduates” the idea of “practice ready” is poorly defined and elusive. I am certain that when some hear the words they immediately think about the most narrow and technical form of “skills” training that brings to mind something akin to a community college vocational school. This makes some cringe and others applaud. Some, including myself, consider the idea to have a much richer context than the narrow immediacy of new graduates able to provide instant and unsupervised economic benefits to a law firm that no longer operates according to an economic model involving mentoring or closely supervised on-the-job training. Seeking that richer context does not mean that anyone in the legal profession or in law schools actually has a clear and productive vision of what should be taught within the time, experiential and budgetary constraints of law school or how it should be taught.

One problem in figuring out how to approach this dilemma is that there is no obvious intellectual core in American law school teaching or scholarship, only a mosaic of disconnected pieces. For American law schools this is reflected in the organization of the curriculum into technically functional (rather than truly intellectual) compartments of law as represented in contracts, procedure, property and the like. This organizational form was created primarily as a matter of convenience. Certainly there was no intrinsic intellectual “magic” in the compartmentalization of the law school curriculum when the obvious fact—as any practicing lawyer will admit—is that legal matters inevitably contain multiple facets of law that interact, reinforce and sometimes undermine or contradict each other. A “contracts” situation may include procedure, state or local tax, estate and trust implications, dispute resolution possibilities, securities and so forth.¹

In discussing how orthodox systems behave Arthur Koestler has described this phenomenon in a way that fits the law school culture. He explains: “The emergent orthodoxy hardens into a “closed system” of thought, unwilling or unable to assimilate a new empirical data or to adjust itself to significant changes in other fields of knowledge....”² Jerold Auerbach explained what occurred in the context of American law schools, remarking that: “The contagious popularity of the case method perfectly expressed the new ambience of the late nineteenth century. Amid widespread fear of social disorder, American educators, law teachers included, turned for security to scientific expertise and professionalism, to meritocracy and elite rule.”³

One “Size” Does Not “Fit All” in Education or Practice

The legal profession is not monolithic and a legal education that is essentially operating from the assumption that “one size fits all” does not render all graduates “practice ready”

¹ See, David Barnhizer, “The Purposes and Methods of American Legal Education”, 36 *Journal of the Legal Profession* 1 (2011).

² ARTHUR KOESTLER, *THE ACT OF CREATION* 255, 256 (1964).

³ JEROLD AUERBACH, WHAT HAS THE *TEACHING OF LAW* TO DO WITH JUSTICE?, 53 *N.Y.U. L. REV.* 457, 458 (1978). SEE ALSO MICHAEL ARIENS, “MODERN LEGAL TIMES: MAKING A PROFESSIONAL LEGAL CULTURE”, 15 *J. AM. CULTURE* 25 (1991); ANTHONY CHASE, “THE BIRTH OF THE MODERN LAW SCHOOL”, 23 *AM. J. LEGAL HIST.* 329 (1979).

in the sense of operating within the client niches in which they will find themselves upon graduation and admission to the bar. The variations within the overall legal profession are significant. These involve not only the type of practice, the interests represented, the local culture of a geographic area in which the practice occurs, the institutional influences and pressures applicable to specific types of practice, the radically differing implications and effects of the scale on which a lawyer is operating along with the support system available for handling the matter. This doesn't touch the issues of numbers of lawyers against which a lawyer is competing, or whether it is a transactional, administrative or litigation-oriented practice and whether the lawyer is operating in a defense or plaintiff's mode. The challenge of designing a single legal education experience capable of producing "practice ready" law graduates does not respond to the complexity of that goal.

Whatever view one holds on the idea of "practice ready" in the abstract it seems clear that it does not and could not mean that a new graduate can be fully capable of providing high quality services across the board to clients unfortunate enough to be using the services of the neophyte lawyer. If that were the case I can hear a client's conversation with the brand new lawyer in a complex corporate merger with numerous parties, millions of dollars at stake, estate and tax issues, patent rights and differing valuations for the deal. "How many of these have you been involved in?" "I haven't actually done any but I've read up on them and am ready to "hit the ground running. Don't worry. I had really good Corporations and Tax courses. No problem. I got a high score on the LSAT and aced my Mergers & Acquisitions class so what could go wrong?" Or, "I made the 50th Percentile on the LSAT and got a "C" in M&A but didn't do bad in the Negotiation course so cut me some slack. Somebody has to be my first client." Or put "practice ready" in the context of a serious drug felony involving a criminal organization or a murder case. What does "practice ready" require in that situation?

Perhaps the matter becomes clearer if we ask ourselves the conditions we would prefer in having a doctor perform surgery on our brain or heart. What would we expect (demand or require) in terms of a "practice ready" doctor? What would we do if the person responded to our inquiries with the information that he had just graduated from medical school, hadn't yet done an internship or residency, but had sat through a "really good course" on brain or heart surgery and medical diagnosis that included some "great videos" and observed similar operations on several occasions from behind the glass of a medical theater.

Law School is Only One Part of a Lifelong "Learning Continuum"

My point is not that *some* law students can't be educated in ways that allow them to perform *some* legal tasks at an acceptable level of quality upon graduation. In some instances they can. This depends on a mix of factors. These include the nature of the pre-graduation educational experience, the type of legal task being performed, the degree of complexity or difficulty, the availability of some effective "back up" system, and the innate abilities of the new graduate. The fact is that law schools can prepare students to do certain types of legal tasks and that in some instances those new graduates may even

do those tasks as well or better than lawyers with several years of law practice under their belt.

Although there is a push by some law schools to offer what is being “framed” as “engaged learning” (clinical courses and externships) experience by itself does not make someone good at something. I know many people who are experienced at doing something but aren’t very good no matter how many times they have performed the tasks. Presumably the phrase “there’s no fool like an old fool” was invented for such situations and people. This failure of quality and refusal or inability to learn from experience and adapt one’s behavior can be due to poor habits, laziness, lack of the ability or willingness to learn from mistakes, lack of talent or intelligence, limited resources and numerous other factors.

So while experience is important it is not an inevitable generator of professional expertise. This includes “experience-based” legal education in which I have an extensive background. The various forms of “engaged learning” can be positive contributors but are no universal panacea in terms of producing “practice ready” graduates or even law graduates who excel after several years of functioning professionally.

Formal, bounded education is only part of the equation involved in creating high quality professionals. Post-graduate experiences, along with the institutions that employ and benefit from the services of lawyers, and the organized legal profession all have responsibilities. One of the main problems is that the economic dynamics of the legal profession have created a context in which post-graduate mentoring of the kind I experienced when entering law practice has largely disappeared. This mentoring by experienced practitioners and judges willing to share their expertise provided a kind of quasi-internship or residency that to a limited extent mirrored those opportunities in the medical profession. Fledgling doctors are required to be part of a monitored transition to practice under the guidance of experienced and high quality professionals who see teaching new medical graduates as an integral part of their professional responsibility.

In theory the expanded processes of “continuing legal education” ought to be capable of contributing significantly to the ongoing development of lawyers following graduation from law school. The problem is that while significant sums are spent on CLE it has largely been captured by interests that are intent on creating a “CLE Industry” in which the central aim is maximized profit by offering high attendance volume programs with low overhead. CLE could well fill an important role but in my experience and those of many others, CLE as currently offered is mostly a banal and cynical imposition on lawyers that in far too many instances does little or nothing to promote the quality of the profession. It has become a profiteering “cottage industry” rather than an important professional contributor.

Mentoring and “making the rounds” is still an imperfect and uneven process in the medical field even with all the effort and resources that are devoted to the process, but a non-existent one in the legal field for most new law graduates. This can be mitigated to some extent in law school by the combination of coursework designed to allow the

student to construct a template for a general approach to law practice. In that regard we need to do more work on what the core template should involve. It can be further enhanced by some clinical programs, “simulated experience” courses in advocacy, transactional performance and strategy, and by externships of various kinds that include placements with institutional actors in the legal system under significant supervision by people committed to the students’ learning.

The Increasing Stress over Financial Resources and Staffing Requirements

One challenge is that as we opt to include more of the above elements in legal education we increasingly face growing resource demands required to staff and support the tasks. This challenge is particularly intense because it is occurring at the same time that the financial resources available for legal education are declining. The substantial pressure on resources being felt by more than half of American law schools is due to the radical slump in students entering US law schools coupled with the rising financial costs of an aging professoriate that has yet to fully realize the dramatic and permanent nature of the altered environment. This is setting up a situation in which the law school budgets and their hiring and faculty retention choices are forcing law schools into a “policy and design whipsaw” in which, for most law schools, the resources can never be enough to service the needs.⁴

A result of the declining resource situation is the creation of an inevitable tension between deans, traditional faculty, clinical and “skills” faculty and legal writing faculty. The pressure and conflict are growing as some less traditional faculty and administrators seek to implement change while others work to maintain their traditional vision of the institution. The fight will become increasingly bitter as traditional tenured and tenure-track law faculty find themselves in a struggle to preserve their jobs or avoid increased standards or changed or expanded duties with which they are not comfortable.

Another aspect of the law schools’ financial dilemma is represented by the unavoidable resource drain of financial resources that were previously spent on faculty being shifted to a significantly expanded administrative sector. This is caused by the need for added staff dedicated to such core tasks as financial aid, fundraising for scholarships and specialized programs, bar preparation, applicant recruitment, job placement for graduates and alumni relations, and publicity. What many law faculty do not seem to understand is that the rapid expansion in these administrative sectors is something that is a core part of a law school’s competitive position.

The diversions are self explanatory in the sense that students need to be recruited, funds need to be raised for scholarships that have become a critical aspect of attracting new students and this requires staffing. Students have needs for assistance in obtaining financial aid, part time jobs during law school and full time positions on graduation. These and other newer administrative needs siphon off significant sums from traditional faculty and teaching even though the needs are real and the costs unavoidable. The “pie”

⁴ On these issues, see David Barnhizer, “Redesigning the American Law School”, 2010 Mich. State L. Rev. 251.

is not only shrinking in absolute terms but being internally reallocated. The pressure on traditional tenure track faculty at a majority of law schools has not seen equivalent conditions in anything that might be called the “modern era” since the 1960s. Nor are conditions likely to improve. For a variety of reasons the changes are not temporary and they are still in flux.

Attempting to create highly labor-intensive “reforms” in this context is almost certainly doomed to fail. That is why I urge those discussing the needs and realistic possibilities to step back and consider what is needed, what is possible, what are the real priorities, and how do we improve legal education while avoiding panicked responses that undermine the educational integrity that is required while achieving little positive gain. For me the clamor for a “practice ready” law graduate by the organized bar and lawyers is akin to the earlier demands that law schools teach professional responsibility.

A reality of the professional responsibility demands by the American Bar Association and state supreme courts was by and large evidence of the fact that those institutions were incapable of or unwilling to take the difficult actions needed to “clean up” the abysmal situation of regulation of lawyers in the US. Demanding that law schools bear the “Professionalism” burden and that law students pass a national “legal ethics” examination is one of the greatest scams ever foisted on the law schools and the general public. It was little more than a pretense by the powers-that-be in the legal profession and judiciary that they had taken action that made lawyers “more ethical” even while avoiding their responsibility for actually cleaning up the system. “Practice Ready” is the latest professional “scam”.

“Thinking like a Lawyer”

There is a long-standing idea that the central educational goal of a legal education is to teach students to “think like lawyers”. We really do not know what it is to “think like a lawyer”. Nor have we done the hard work as an overall educational system to develop the methods and experiences that work most effectively to achieve the stated ends. We have tended to far too casually conclude that we do in fact achieve the goal as supposedly effective teachers.⁵ It would be an intriguing development if we knew what that meant—and engaged in a full and honest discussion about the extent to which that goal should or even can be achieved in the existing version of law school. The “think like a lawyer” formulation is overly vague unless we are able to specify what is involved in the process and describe and develop the educational methodologies and subject matters that implement the complex package.

⁵ RICHARD HOFSTADTER EXPLAINS THE SITUATION AS ONE IN WHICH: “THE WORK OF LAWYERS, EDITORS, ENGINEERS, DOCTORS, INDEED OF SOME WRITERS AND OF MOST PROFESSORS—THOUGH VITALLY DEPENDENT UPON IDEAS, IS NOT DISTINCTIVELY INTELLECTUAL. A MAN IN ANY OF THE LEARNED ... PROFESSIONS MUST HAVE COMMAND OF A SUBSTANTIAL STORE OF FROZEN IDEAS TO DO HIS WORK; HE MUST, IF HE DOES IT WELL, USE THEM INTELLIGENTLY; BUT IN HIS PROFESSIONAL CAPACITY HE USES THEM MAINLY AS INSTRUMENTS. THE HEART OF THE MATTER ... IS THAT THE PROFESSIONAL MAN LIVES OFF IDEAS, NOT FOR THEM. HIS PROFESSIONAL ROLE, HIS PROFESSIONAL SKILLS, DO NOT MAKE HIM AN INTELLECTUAL. HE IS A MENTAL WORKER, A TECHNICIAN.” RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE, SUPRA, N. ..

Lines have been drawn between what are thought of as radically different visions of the purposes of American legal education. These differences at the extremes can be defined as very practical technical education that seeks to produce what recently has been called “practice ready” lawyers contrasted with a considerably more abstract model of abstract theoretical intellectualism. Many people who are talking about the practical orientation of law schools appear to be speaking about the infusion of a greater range of what can be described as “technical skills”.

I often feel that one of the most practical courses I ever taught in law school was the Jurisprudence class I taught as a First Year elective. The reason is that political and moral philosophy underlies the very substance of law. Part of the learning relates to what we want our judges, legislators and lawyers to be aware of as they create and interpret law in the society. This includes the decisions of judges who interpret (and sometimes create) the law, and legislators who enact law. It includes bureaucrats and regulators who, in a system such as the modern regulatory state that we have developed, are a major component of law creation, application and interpretation.

In many instances these actors are not consciously aware that they are relying on the principles of philosophers such as Aristotle, Plato, Aquinas, Pufendorf, Grotius, Locke and Hobbes, Rousseau, Kant or Hume (to name a few). My experience was that educating law students in the body of fundamental assumptions and concepts that underlies our law creates a conceptual structure that enables them to interpret, understand and apply law with a fluency and depth of understanding they would otherwise not achieve. It offered the framework or template into which the “pieces” of law fit and the principles according to which doctrine is created and interpreted.

For a number of years I taught *Jurisprudence* as a first year course to law students in their second semester with a 30 student maximum for the course. The basic approach was to use Christie’s *Jurisprudence* text for the first half of the semester to familiarize the first year students with philosophical vocabulary and concepts. This involved a great deal of in-depth discussion and was also related in several instances to cases they were studying in other first year courses. Problems such as *The Case of the Speluncean Explorers* were also used as well as movies that included *Judgment at Nuremberg*. Primary coverage included Aristotle’s *Politics* and *Nicomachean Ethics*, as well as Aquinas, Grotius, Pufendorf, Rousseau, Locke, Hume and Hobbes along with several American theorists such as John Rawls and Ronald Dworkin.

The second half of the course was devoted to students analyzing the complete decisions in *Furman v. Georgia* (capital punishment) and *Roe v. Wade* (abortion). This was followed by extensive discussion, arguments, and role-playing exercises that included students serving as Supreme Court justices and lawyers who argued the cases to the Court. The goals included not only an introduction to jurisprudential concepts but demonstration of the roles of deep value systems and inchoate assumptions both in argumentation and in judicial decision-making. Because it was an elective offered to first-year students it also had the goal of helping them integrate the analysis in other

courses through helping them appreciate the conditions of judicial analysis and the imprecision of judicial doctrine. All I can say is that students entered the course afraid of the “foreign” nature of what they perceived as philosophy and almost uniformly left with a coherent interpretational system that allowed them to understand their doctrinal classes far better than other students. At least that is the message they consistently offered me at the end of the course.

We can also hope that exposure to such bodies of traditional wisdom that are both prudentially and morally based would support and influence our legally-trained actors in the pursuit and maintenance of the spirit of justice in American society. I suggest that without such a principled conceptual structure the field of law as a vast and complex mixture of substance, process and performance remains a largely disparate and disconnected set of mechanistic pieces. Without such a structure law schools are in fact producing technicians rather than professionals who can become masters of technique but who also have a sense of purpose, principles and functions that goes beyond that narrower closeting.

There is a very specific “technical” reason that law students, as individuals going on to “practice” law, need such a system of learning. A conceptual and philosophic structure offers an internal consistency that allows the law student to recognize, compare and distinguish the competing positions being articulated by legal actors. This creates an ability to better understand what others are assuming as the ground of their logic and further offers the capability to fashion arguments that “fit” within the conceptual structure of those who must be persuaded. This is the beginning of real understanding that allows the more technical skills learning to be translated into a coherent and effective system fully within the awareness and control of the lawyer.

Even though the logic of philosophy, technique and values seems compelling, the law schools have not offered such an approach with any degree of consistency or comprehensiveness. The law schools as a general matter have not been effective at communicating a philosophical and interpretive system, and have generally failed to offer a full set of the introductory skills of the lawyer to their students. The simple fact is that legal education in America is not a search for knowledge in its highest realms but an ill-defined hybrid undertaking. Nor are law schools consistently good at teaching the most important skills, conceptual structures and knowledge base involved in preparing graduates for the many challenges of law practice.

Listening to the laments of American law professors concerning the loss of the grand intellectual purpose of university legal education and its subordination to “technical”, “practical” or “skills” education would produce a corresponding compassion were it not for the fact that law schools in America have *always* been focused on skills and technical matters. They have been “clumsily practical” even while claiming their approach was theoretical and highly intellectual. This denial of reality has led to a confused and incomplete educational model.

The Fuller Meaning of “Thinking” like a Lawyer: Conceptual Skills and “Technical” Skills

I have never thought that the real meaning of “thinking like a lawyer” represents a passive state of mind but one involving the ability to actually function effectively as a lawyer in a dynamic and risky environment. This includes the ability to implement a path of professional action effectively. Of course during law school we cannot produce a polished lawyer who like Athena leaps fully developed from a “shell” of a three-year law school education. But if we cannot achieve *that* end in absolute terms, we *can* provide the structure, vocabulary, package of the foundational skills most essential to high quality legal activity, and a sense of the greater responsibility of a professional in American society.

This suggests that “thinking like a lawyer” is not only a method of rational analysis but a considerably more complex and substantive set of understandings, principles and awareness of one’s responsibility as a principled professional. It is not limited to “thinking” in a technical sense of narrow rationality and the ability to recognize distinctions in law cases and statutes but operates in dimensions of value, duty, technique, a wide array of knowledge about law and human institutions and behavior, and the ability to design and implement effective action. “Thinking”, therefore, involves the total package of praxis and practical wisdom, i.e., the ability to assess, understand, plan, act and react.

The point is that the formulation of strategic perception and the ability to design and implement effective action are dynamic and inseparably connected. They are intertwined elements of a single system. Each part reinforces and informs the other. To treat “thinking” and “doing” as separate phenomena rather than part of a singular system with interacting elements is to fail to understand the vital connections between the pieces. Concept, idea and action inform and enrich each other. When we speak of what is required to educate the best legal professionals, an exclusive diet of intellectualism is as inadequate as an exclusive diet of “technical” or narrow “skills” education. True effectiveness at the highest levels of quality requires the “total package”.

Lawyers as Advocates (and Counselors)

There is a critical difference between the lawyer’s role as advocate and as counselor. The advocate’s role is inherently deceptive rather than truth-directed. The counselor’s role is to provide intelligently weighted options to the client. The dilemma the advocate faces is not of recent origin. Aristotle described the role of the advocate as one where: “you must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify [your advantages] and depreciate [others’ positions].”⁶ Plato similarly argued the advocate “enchants the minds” of the court. He added, “rhetoric [is] . . . a universal act of enchanting the mind by arguments. . . . [H]e who would be a skillful

6. ARISTOTLE, THE EPILOGUE, IN *THE RHETORIC OF ARISTOTLE* 3, 19 (L. COOPER ED. & TRANS., 1932).

rhetorician has no need of truth—for that in courts of law men literally care nothing about truth, but only about conviction.”⁷

The dynamic of advocacy is inescapable and the overall system is not going to change enough to affect lawyers’ basic way of doing business. This means that lawyers spend their lives immersed in a culture of manipulation of people and power. They do this on behalf of their clients with the goal of gaining advantages from opponents who hold conflicting aims.⁸ It is an undertaking with consequences for those who participate in it. Law schools do a poor job of understanding this and fail to prepare law students for the effects of the culture in which they will spend their lives. Whether the law schools could effectively prepare students to deal with the ethical and moral pressures of law practice is an issue that remains open to question.

It has become increasingly popular to criticize the perceived deficiencies of the adversary system and the lawyer’s role.⁹ Anne Strick has challenged the validity of the adversary process by emphasizing the lawyer’s commitment to winning through advocacy over the attainment of truth. In *Injustice For All*, Strick called this “the treason of the adversary system,” and comments at length on how lawyers attempt to falsely justify the adversary system as a mechanism for the effective determination of the truth of controversies.¹⁰

Lawyers are Machiavellians by the terms of their professional oath and by the realities of dispute resolution. Even as counselors the lawyer must consider the full range of realistic options. The counselor, therefore, is not as divorced from the prospects of advocacy as one normally thinks because a continual part of many counsels is the need to ask oneself, “if we do this then the likelihood is that this will occur but there is a possibility/probability that we (or our potential dealmaker) will not be able to complete the deal and so I have to be able to protect my client against possible default.”

Machiavelli observed that an individual must be cunning and deceptive to survive. He writes: “One must be a fox in order to recognize traps, and a lion to frighten off wolves.

7. THE WORKS OF PLATO 292, 306 (I. EDMAN ED., 1928).

8. SEE, THOMAS L. SHAFFER, “ON LIVING ONE WAY IN TOWN AND ANOTHER WAY AT HOME”, 31 Val. U. L. Rev. 879 (1997); NICHOLAS TARG, “ATTORNEY-CLIENT CONFIDENTIALITY IN THE CRIMINAL ENVIRONMENTAL LAW CONTEXT: BLOWING THE WHISTLE ON THE TOXIC CLIENT”, 14 Pace Env’t L. Rev. 227 (1997).

⁹ MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS (1990); MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM (BOBBS-MERRILL 1975); MONROE FREEDMAN, “THE TROUBLE WITH POSTMODERN ZEAL,” 38 WM. & MARY L. REV. 63 (1996); MONROE H. FREEDMAN, “THE ETHICAL DANGER OF “CIVILITY” AND “PROFESSIONALISM”, 6 CRIMINAL JUSTICE JOURNAL 17 (SPRING 1998); NATHAN M. CRYSTAL, “LIMITATIONS ON ZEALOUS REPRESENTATION IN AN ADVERSARIAL SYSTEM”, 32 WAKE FOREST LAW REV. 671 (1997). JAMES E. MOLITERNO, “LAWYER CREEDS AND MORAL SEISMOGRAPHY”, 32 WAKE FOREST 781 (1997).

10. ANNE STRICK, INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF JUSTICE VICTIMIZES US AND SUBVERTS JUSTICE 124 (1977). BUT CONSIDER THE REMARKS OF LAWYER JEROME P. FACHER, THE DEFENSE LAWYER IN THE CASE THAT PROVIDED THE BASIS FOR JONATHAN HARR’S A CIVIL ACTION:

“IF A TRIAL ASPIRES TO BE A SEARCH FOR TRUTH, THE STUDENT MUST STILL ASK WHOSE “TRUTH” ARE WE SEARCHING FOR, WHOSE “TRUTH” HAS BEEN REVEALED AND WHOSE “TRUTH” DO WE ACCEPT? IS IT THE LAWYER’S TRUTH? THE PLAINTIFF’S TRUTH? THE DEFENDANT’S TRUTH? THE WITNESS’S TRUTH? THE JUDGE’S TRUTH? THE PUBLIC’S TRUTH? THE MEDIA’S TRUTH? WHATEVER THE ANSWERS TO THESE PHILOSOPHICAL PUZZLES, A TRIAL CONFRONTS US WITH A REAL LIFE CONTROVERSY WHICH MUST BE RESOLVED BY PRESENTING EVIDENCE, FINDING FACTS AND APPLYING THE LAW. IN LIGHT OF THIS REALITY, A FAIR TRIAL IN A FAIR ADVERSARIAL SYSTEM NOT ONLY RESOLVES THE CONTROVERSY, BUT, I BELIEVE, COMES CLOSEST TO FINDING THAT ELUSIVE AND UNDEFINED CONCEPT CALLED “TRUTH.”” JEROME FACHER, THE POWER OF PROCEDURE: REFLECTIONS ON “A CIVIL ACTION”, IN A DOCUMENTARY COMPANION TO A CIVIL ACTION xvii (LEWIS GROSSMAN & ROBERT VAUGHAN EDS., 1999).

[But] Those who simply act like lions are stupid. . . .” He goes on to add: “[A] prudent ruler cannot, and must not, honour his word when it places him at a disadvantage. . . .” The reason for this mindset is that: “If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.”¹¹

Machiavelli concluded: “[O]ne must know how to colour one’s actions and to be a great liar and deceiver.”¹² Part of the deceit is that the Prince, according to Machiavelli, “should appear to be compassionate, faithful to his word, kind, guileless, and devout.”¹³ The result is a variable or compromised form of uncertain morality.” The problem is that if you lie by commission or omission you become a liar. If you deceive you become a deceiver. Lawyers lie, deceive, are argumentative, and use their advocate’s skills to persuade others about their sincerity. These behaviors define who we are.

We practice deception. We flatter, cajole and misrepresent to gain advantage for our clients. We are “keen and shrewd”. At least many lawyers seem to fit this description.¹⁴ Being immersed in this culture of deception and manipulation imposes costs. Plato argued: “[The lawyer] has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous . . .” This is because: “from the first he has practiced deception and retaliation, and has become stunted and warped. And so he has passed out of youth into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom.”¹⁵

No one can say for certain that this culture can be changed through formal education and, even if it can be done, that it will work for every aspiring lawyer or even a majority. The culture of law practice possesses a weight, history and leverage that extends into its past and will continue into its future. New graduates can go into this context entirely aware of what they face and still be molded by the pressures, inducements, sanctions and rewards that such a system applies to its participants. This may even be the most likely outcome but we do not know the answer. We don’t know what is possible because we haven’t made a serious effort.

Four Aspects to “Thinking Like a Lawyer”

The concept of “thinking like a lawyer” represents at least four different but related functions that comprise an integrated package of the qualities of mind and the ability to identify and take effective action. American law schools made their “bargain with the

¹¹ NICCOLO MACHIAVELLI, THE PRINCE 99 (GEORGE BULL TRANS., 1961).

¹². MACHIAVELLI, ID., AT 99.

¹³. MACHIAVELLI, ID., AT 99.

¹⁴. KIM EISLER EXPLAINS SOME OF THE WORST BEHAVIOR. SHE REPORTS: “IN DESCRIBING WASHINGTON’S TOP DIVORCE LAWYERS, THE SURVEY IDENTIFIED FORTY LAWYERS CONSIDERED TO BE THE BEST AT HANDLING A DIVORCE IN AN EFFECTIVE BUT CIVILIZED MANNER. IT ALSO DESCRIBED TEN, ONES LABELED “BOMBERS” REGARDED AS THE BEST AT WHAT THEY DO AND STATING THAT: “WHAT THESE TEN OTHERS OFTEN DO IS TORMENT THE SPOUSES OF THEIR CLIENTS. THEY SOMETIMES ARE REFERRED TO AS “BOMBERS” OR “SHARKS””. SHE ADDS: “ALTHOUGH CONTENTIOUS, THE TEN DIVORCE LAWYERS KNOWN AS BOMBERS ARE AS ADMIRER BY THEIR CLIENTS, THE EVIDENCE SUGGESTS, AS THEY ARE DISLIKED, OR FEARED, BY PEACEMINDED ATTORNEYS.”

¹⁵. MARTIN MAYER, AT 4 (QUOTING PLATO).

Devil” well over a century ago and from a true intellectual and research perspective their rewards of scale and guaranteed enrollments of those aspiring to become lawyers have come with a price. Law schools are what Chroust called “academic-professional” schools.¹⁶

The Philosophical and Moral Dimension: One function is a combination of the philosophical and moral dimensions. This relates to the quality of understanding of the underlying conceptual value structure and language on which the Western systems of law, politics, philosophy and culture are grounded. So while law schools are to some degree *academic-research* institutions they are not only that or even primarily that. They are *lawyer-education* institutions whose purpose is educating students desiring to become lawyers rather than scholars.

The “Higher-Order” Technical Dimension: This brings into play the second meaning of “thinking like a lawyer”. This is what might be called the technical orientation, but it is a higher order variation of that idea beyond what most people consider when surfacing concepts of the technical dimension. This is because it includes the ability to interpret not only the fixed but the dynamic data of a situation within an overarching conceptual and substantive structure. The ability to do this involves many of the insights and methods inherent in the first understanding of “thinking like a lawyer”. But this technical dimension goes beyond the “merely technical” and includes a policy, purposive and applied theoretical dimension. In that enlarged understanding of “technique” the particular disciplinary compartment is examined and critiqued as a system judged against professed goals and functions. This critique includes strategies for improving performance and fairness.

The Specific Dimension of the Advocate and Counselor: Acceptance of the primary and even exclusive responsibility for educating lawyers imposes a duty to identify the essential skills, knowledge and values that are central to the lawyer’s work.¹⁷ This represents the third dimension of “thinking like a lawyer” and concentrates on the particular thought processes and actions of the advocate and counselor. This orientation is of particular importance to preparing students for the real world of law practice because advocacy inevitably involves distorting the material of a dispute when necessary to enhance the probability of success on behalf of a client.

This distortion is both deliberate and implicit. It contains a strong manipulative or Machiavellian impulse that generates moral dilemmas for those who work within the culture of advocacy. The process of advocacy is inescapable. It is powerful. And law schools do a terrible job of preparing their graduates for this overwhelming culture of manipulation, deception and distortion. If it is done well, however, the first dimension of “thinking like a lawyer” with its consideration of philosophy, ethics, justice and the like informs, mitigates and buffers this manipulative dimension of legal education. This is

¹⁶ On the development of the academic-professional school see, 2 A. Chroust, *The Rise of the Legal Profession in America: The Revolution and the Post-Revolutionary Era*, pp. 176-190.

¹⁷ This is the focus of the MacCrate Report’s concentration on the skills and values of the profession and its urging that law schools develop better strategies for addressing these needs.

because it is necessary to consider the limits on the advocacy process and deal with the tensions between societal and client interests.

The Transactional Dimension: A final dimension of “thinking like a lawyer” is the transactional context. While also within the purview of advocacy, this approach arguably contains elements that are more honest, less manipulative and less morally provocative and stressful. This also suggests, however, that these four dimensions are not independent and that they overlap in various degrees and contexts.

All these forms of thought and analysis are part of “thinking like a lawyer”. The question is the degree to which legal education can and should provide a firm foundation in these forms of thought and action for law students. As to what law schools *should* do, given their monopoly over entry into the legal profession, it seems obvious that they should be doing far more than currently. A problem the schools have never adequately addressed, however, is the extent to which they are capable of offering meaningful education in some areas that would reasonably be thought important for fuller professional understanding and effective performance.

The “Five-Foot Shelf” of Knowledge and the Context of the Rule of Law

I don’t want to range too far afield in this analysis because I have often found that my approach to things does not “synch” with how others see the world. So I will try to keep things simple. Charles Eliot edited *The Harvard Classics* with the idea that knowledge could be transmitted on a “five foot shelf” through a wonderful collection of works representing what he considered the best of human intellectual achievement spanning more than two thousand years.¹⁸

In this modern era where our educational system seems increasingly disconnected from the foundation of knowledge that underlies our institutions, laws and aspirations it seems even more vital that the foundation of what we call the Rule of Law be preserved. This cannot be accomplished without a base of shared understandings about humans in community and as individuals as well as coherent views on the roles and limits of government and other potent institutions. This foundation is not found strictly or even primarily in law books but developed in our cultural history, principles, institutional and political forms, and grounding values of the kind contained in the *Classics’* collection of Aristotle, Cato, Livy, Dante, Hume, Locke, Grotius, Pufendorf, Leibniz, Adam Smith and far, far more.

My position is that without grounding in these or similar sources our social, political and legal actors become increasingly disconnected from the foundations that have provided the intrinsic substance of our beliefs—including those of our nation’s Constitutional Founding Fathers—and the core understandings that have led to the system’s development and evolution. The loss of this shared conceptual structure and language is important because at the point where we no longer have a set of shared values and

¹⁸ CHARLES W. ELIOT, EDITOR, VOL. 50, THE EDITOR’S INTRODUCTION, READER’S GUIDE AND INDEX, TO THE HARVARD CLASSICS (P. F. COLLIER & SON, NEW YORK 1910, 1938). ELIOT CONCEIVED HIS TASK AS CREATING A BODY OF KNOWLEDGE THAT WOULD FIT ON A FIVE FOOT SHELF IN 50 VOLUMES AND CONTAIN EVERYTHING HE THOUGHT REQUIRED IF ONE WAS TO BE LIBERALLY EDUCATED.

principles, it becomes irrelevant whether we style ourselves liberal or conservative. This is because we are simply spouting words and slogans that lack substance, as we are without the understanding necessary to explain and justify the points we seek to advance in our discourse.

It is vital that lawyers and judges—those charged with the responsibility for preserving the core elements of the system—be educated in ways that ensure their understanding of the grounding principles and in the skills and commitments essential for the performance of their professional roles at the highest level of quality.¹⁹ Human thought needs structure, grounding assumptions and values to shape experience and data on which to operate or the mind is simply a machine operating in a vacuum.²⁰ The relevance of that premise to the practice of law in America, and to the foundation of knowledge law schools provide their students, is that law and judicial choice are based, however implicitly, on a set of values that permeates our conception of government and community, of individual human development, of right and wrong, and the interpretations relied on in problem solving and advocacy.²¹

Charles Eliot, ironically the Harvard president who hired Christopher Langdell as Harvard Law School's dean, was correct in thinking that there is a set of foundational principles, works and resources that inform Western culture and its educational, political and legal system, forming a sort of "cloud" or invisible atmosphere of values and assumptions that guide our behavior and choices. These principles are embedded in the language we use and in our fundamental assumptions. Our learning in the highest liberal arts derives from such sources. Over centuries the authors and preservers of such works—individual and institutional—enriched each other's work to the point that the structure of Western civilization, including the Rule of Law, came to be supported by the analysis in ways we can't begin to understand and from which we cannot disassociate ourselves. They penetrate and permeate our language and conceptual structures.²²

A foundation of language and values is only a beginning and in any event is not intended to be unchanging. Legal analysis is best done on a foundation of actual knowledge, but law both in its conception and in action offers a dynamic and shifting environment in

¹⁹ LAWRENCE FRIEDMAN, *AMERICAN LAW* AT 257 EXPLAINS LAW'S IMPORTANCE. "[I]T IS THROUGH LAW, LEGAL INSTITUTIONS, AND LEGAL PROCESSES THAT CUSTOMS AND IDEAS TAKE ON A MORE PERMANENT, RIGID FORM. THE LEGAL SYSTEM IS A STRUCTURE. IT HAS SHAPE AND FORM. IT LASTS. IT IS VISIBLE. IT SETS UP FIELDS OF FORCE. IT AFFECTS WAYS OF THINKING. WHEN PRACTICES, HABITS, AND CUSTOMS TURN INTO LAW, THEY TEND TO BECOME STRONGER, MORE FIXED, MORE EXPLICIT."

²⁰ "ALL WE CAN DO BY REASONING IS TO LEARN THAT IF OUR FIRST ASSERTION IS TRUE, THEN ALL THE IMPLICATIONS, WHICH FOLLOW FROM IT ACCORDING TO THE LAWS OF VALID REASONING, MUST ALSO BE TRUE. BUT THE LAWS OF REASONING ARE SILENT CONCERNING THE TRUTH OF THE CRUCIAL FIRST PREMISE." EUGENE FREEMAN AND DAVID APPEL, *THE WISDOM AND IDEAS OF PLATO* (1963) AT 71.

²¹ ON THESE THEMES SEE, DAVID BARNHIZER AND DANIEL BARNHIZER, *HYPOCRISY & MYTH: THE HIDDEN ORDER OF THE RULE OF LAW* (VANDEPLAS 2009). ERNEST BECKER WARNS US OF THE DELICATE NATURE OF OUR ASSUMPTIONS: "THE WORLD OF HUMAN ASPIRATION IS LARGELY FICTITIOUS AND IF WE DO NOT UNDERSTAND THIS WE UNDERSTAND NOTHING ABOUT MAN.... MAN'S FREEDOM IS A FABRICATED FREEDOM, AND HE PAYS THE PRICE FOR IT. HE MUST AT ALL TIMES DEFEND THE UTTER FRAGILITY OF HIS DELICATELY CONSTITUTED FICTION, DENY ITS ARTIFICIALITY." ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2D ED. 1971).

²² On such themes see, *Hypocrisy & Myth*, id.

which change is one of the constants.²³ The mind of the lawyer operating *in* society to fulfill the responsibilities granted by membership in this powerful profession under the Rule of Law must have a substantive and valuation structure within which data are interpreted even while in a shifting culture important elements of the data are fluid and dynamic. This dynamism in fact creates an even greater need for anchoring principles. How to include the new data in the interpretations recognized through law is a challenging matter. Issues of justice, fairness, equality, balance, timing and political and cultural prudence combine to influence all aspects of the undertaking.²⁴ Factionalism and societal disputes further intensify the tension over what to include, when to do it and how to allocate the changing rights and duties.²⁵

Nine Elements of “Thinking Like a Lawyer”

The idea of “thinking like a lawyer” represents a form that combines strategic analysis, assessment and action. At this point my analysis takes an unusual step and seeks to enhance our understanding through use of a seemingly “exotic” framework.²⁶ In *A Book of Five Rings*, Miyamoto Musashi describes nine points a strategist must master. Since I have long thought these points represent the true meaning and composition of what it means when we say “thinking like a lawyer”, they are offered here as a focusing device. The *nine elements* are: 1). Do not think dishonestly; 2). Become acquainted with every art; 3). Know the ways of all professions; 4). Distinguish between gain and loss in worldly transactions; 5). Develop intuitive judgment and understanding for everything; 6). Do nothing that is of no use; 7). The Way is in Training; 8). Perceive those things which cannot be seen; 9). Pay attention even to trifles.

These nine elements are useful as the foundation of an integrated system reflecting the lawyer's approach to knowledge, awareness, and action. They represent the range of knowledge a lawyer needs and give meaning to the concept of “thinking like a lawyer” as not simply a technique or method but a quality that includes substance and knowledge. They offer a template for what we ought to be teaching in law schools. Nor is this knowledge limited to external information or hard data but includes extensive understanding of human nature and self. This strategic knowledge is gained by

²³ ROSCOE POUND, *NEW PATHS OF THE LAW* (UNIVERSITY OF NEBRASKA PRESS 1950). POUND ARGUES THAT THE PURPOSE OF THE LEGAL ORDER: “IS TO SECURE AS MUCH AS MAY BE OF THE WHOLE SCHEME OF INTERESTS, THAT IS THE WHOLE SCHEME OF MEN’S DESIRES OR DEMANDS INVOLVED IN LIVING TOGETHER IN CIVILIZED SOCIETY, WITH THE LEAST FRICTION AND WASTE.” 3

²⁴ “JUSTICE STATES THE FUNDAMENTAL METHOD OF LAW—THE METHOD OF PURPOSEFUL ACTIVITY THAT IS, ACTION DIRECTED TOWARD ENDS. LAW IS TELEOLOGICAL, AND JUSTICE IN ITS BROADEST TERMS IS THE STATEMENT OF THAT FACT AND IS IN A SENSE THE INSTRUMENT WHICH KEEPS LAW TELEOLOGICAL IN ITS METHOD. JUSTICE EXPRESSES AND CELEBRATES THIS PURPOSEFUL ORIENTATION OF LAW; IT IS FORMATIVE BECAUSE ITS USE KEEPS MEN SENSITIVE TO THEIR RESPONSIBILITY AND WILLING TO FIGHT FOR CONCRETE ACHIEVEMENTS. IT THUS IS THE EXPRESSION FOR THE MOTIVE POWER OF LAW....” EDWIN GARLAN, *LEGAL REALISM AND JUSTICE* (1941, ROTHMAN REP. 1981) AT 125.

²⁵ THIS INABILITY TO FIND COMMON GROUND, INCLUDING THE CONNECTIONS CREATED BY SYMBOLS AND SHARED MYTHS, IS HIGHLIGHTED BY ROLLO MAY, *POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE* (W.W. NORTON, NY 1972). “THE DEEP SUSPICION OF LANGUAGE AND THE IMPOVERISHMENT OF OURSELVES AND OUR RELATIONSHIPS, WHICH ARE BOTH CAUSE AND RESULT, ARE RAMPANT IN OUR TIMES. WE EXPERIENCE THE DESPAIR OF BEING UNABLE TO COMMUNICATE TO OTHERS WHAT WE FEEL AND WHAT WE THINK, AND THE EVEN GREATER DESPAIR OF BEING UNABLE TO DISTINGUISH FOR OURSELVES WHAT WE FEEL AND ARE. UNDERLYING THIS LOSS OF IDENTITY IS THE LOSS OF COGENCY OF THE SYMBOLS AND MYTHS UPON WHICH IDENTITY AND LANGUAGE ARE BASED.” 68

²⁶ See, David Barnhizer, *The Warrior Lawyer* (1997).

increasing the quality of the information being processed. The elements involved in thinking like a lawyer include not only the acquisition of information but the ability to recognize and discriminate *among* pieces of information, to identify the implications of knowledge and action essential to achieve the desired goals, and to take action of a kind that represents the increased likelihood of achieving those goals.

1. Do Not Think Dishonestly

The inherent paradox in “do not think dishonestly” is that strategy is inevitably dishonest. A lawyer’s strategy is often premised on deception, trickery, taking advantage of others, fooling people and masking your intentions. If, for example, your client gives instructions to the effect, “come back with a settlement on these terms or don’t come back,” there are important strategic constraints you don’t want your opponent to discover. Or what if your client tells you: “we can’t afford the exposure of taking this case to trial. Fifty other cases hang on the outcome of this one. We can’t afford the publicity because it would hurt our sales too much. So whatever strategy you use, I want this case settled but I don’t want to pay more than \$3.5 million.” These actual positions are ones that cannot be admitted to someone with whom you are attempting to negotiate a settlement because you will lose leverage if the opponent knows your limits, authority or real goals.

This means that deception as to your intentions, authority and goals is an inevitable and necessary part of strategy. If your opponents are able to determine the real conditions under which you are operating they will have the knowledge needed to control you and shift the probable outcome in their favor. Access to the secret knowledge of your case gives them greater leverage. Do not think dishonestly therefore doesn’t mean you should not deceive your opponent. The key principles are don’t deceive yourself, and don’t think dishonestly. Don’t become caught up in the illusions woven by you or others. Have no illusions about yourself, people, justice, your client, or your opponent.

This definition of dishonesty and honesty is quite different from what we would generally consider moral or ethical. Manipulating and deceiving other people is involved in much of what lawyers do. An ordinary person would consider this behavior dishonest, ethically questionable or amoral. The lawyer must address this dilemma because the approach clashes with our beliefs about truth, honesty and openness. This behavior must be relegated to the “arena” within which lawyers compete because while it can be troubling even then, it is morally corrosive if allowed to seep outside its legitimate context.

2. Become Acquainted with Every Art

The lawyer must learn the insights and methods of a wide range of other disciplines. The practice of law demands an understanding of humans and human nature. This includes being able to recognize what people think, know, desire, fear and want. Achieving this level of knowledge involves substantial experience as well as being able to learn from that experience. But while experience is vital so is extracting meaning from the knowledge base that humans have created throughout their history. This base is represented in our works on literature, religion, ethics, history, science, philosophy,

psychology, sociology, strife, economics, and so forth. Such analyses seek to capture what humans are about and to understand the nature of the universe we inhabit and our place and responsibilities within it. These areas of knowledge are relevant to a great deal of law practice.

3. Know the Ways of All Professions

Not only is it necessary to seek voraciously after knowledge in the general sense, it is essential that the lawyer know the “ways” of all professions. This means that we should know the mission, the method, the secrets, the flaws, the assumptions, the techniques, the values of the various professions, including how they work and why. If we know this, we can identify strengths and weaknesses and be able to attack or defend critical points. Think about the importance of knowing the methods and underlying principles relied upon by economists, doctors, psychologists, statisticians, pathologists, chemists, police, etc. We must know them in order to be able to use them on behalf of our clients.

This knowledge of the *ways* (methods, assumptions, limits) of other professions is something we synthesize and integrate into our knowledge base. Consider the OJ Simpson murder case. The trial lawyers needed to understand statistics, chemistry, forensics, medicine, DNA methodology and its limits. They also needed to know about police procedures, the psychology of spousal abuse, intricacies of human nature, and much more that was never mentioned in law school. Lawyers on each side had to master the inner details, assumptions, and outer limits of these disciplines in order to deal with witnesses, create themes and strategies, and evaluate the truth and falsity of all aspects of the case.

4. Distinguish Between Gain and Loss in Worldly Transactions

This principle has to do with being able to know the nature of what is a realistic victory. It involves being able to discern what is valued highly enough by an opponent that it will enhance the probability of obtaining agreement and concessions either by your offering that outcome or conversely being able to threaten what the opponent values most. While it is important to know what people value as individuals it is often even more critical to understand what they value as representative parts of institutions.

As a lawyer you are in a competition to win and to gain advantages for your clients in worldly matters. This means you must be able to define the nature of victory in a specific situation and create strategies that help you achieve it. We are manipulating people to achieve victory and avoid loss. This is generally defined in terms of achieving tangible outcomes that are measurable in concrete terms. But understanding gain and loss is not simply an all or nothing, “in your face” zero-sum game. Often, more can be gained by allowing opponents to share in the gains. Otherwise, the short and longer-term costs of the process can end up exceeding the gains from the financial or non-financial perspective.

Again, understanding human nature is an integral element of achieving “good” outcomes because making people feel good and allowing them to save face has a great deal to do with winning. It is relevant to winning in the specific interaction, and being able to win (even by avoiding loss) in the future by not having made enemies who are intent on revenging themselves on us or on our clients.

5. Develop Intuitive Judgment and Understanding

The practice of law is not neatly or conveniently rational. Such things as guts, instincts, subliminal perception and the distillation of experience allow you to anticipate, recognize and react to stimuli seemingly without thought. These all describe real human abilities that operate on the edges of our conscious rationality. Being able to adapt almost instantaneously and making quick decisions are integral skills. The most effective people in terms of the ability to gain an edge and succeed in conflicts are able to make quick decisions without having to think about them on an explicit level before acting.

A simple example of this process is a dancer beginning to learn a new dance. In the beginning the person has to go through a conscious thought process that might sound something like: “I know my feet are supposed to go *here*, and my partner’s *over there*. But we keep bumping into each other.” A dancer who has to go through a conscious mental dialogue has not yet mastered the intricacy of the dance. A dancer needs instantaneous recognition of cues and the ability to make virtually simultaneous reactions in time with the music. If you have to think about what is happening and how you should respond, your timing, rhythm, and positioning are already flawed. While the dancer is thinking about what he or she is going to do, the body’s movements get out of synch with the music because the timing and rhythm is off.

The master lawyer is like the dancer who has fully internalized his/her art form. Such a dancer knows the depth, characteristics and parameters of the stage on which he/she works. The dancer knows where others involved in the performance will be at what time. The dancer knows the lighting and music, and can feel and respond to the audience and play to that source of energy. The dancer knows the air, surrounding and underfoot, feels the time between beats, and uses the power of expression and presence. Such awareness is part of mastery, regardless of the specific discipline.

Whether a dancer, musician, athlete, martial arts master, or lawyer, the only way we will be able to act quickly enough is to have developed intuitive judgment for the type of situation with which we are dealing. We must have trained constantly to make quick decisions, and must “teach our bodies strategy.” The lawyer’s task is often more complex than that of dancers or musicians following a choreographed sequence or musical score which they have practiced or performed many times. Close parallels are musical jam sessions in which the musicians take inspiration from each other, improvisational theater, or the Flamenco dance form with a symbiotic relationship between dancer and guitarist and singer where each creates rhythm, tone, mood, inspiration, and variation for the other.

Whether artist or lawyer, functioning on that improvisational and reactive level requires the substantial knowledge base already described as being essential to strategic mastery, but the knowledge base must be extended through experience, creativity, and a commitment to continued learning. All this is still not enough. The lawyer, like the dancer, must train continually and constantly practice, visualize, and evaluate what he/she is doing and needs to do.

6. The Way is in Training

Experience is essential to the lawyer's development but many people don't learn from their experience. They repeat the same mistakes again and again. Continual training is vital because you can't learn legal strategy by only reading, talking, or thinking about strategy. You must act and apply and think about what you have done and apply it some more and evaluate what you've done and gain from that experience. Becoming a lawyer at the higher levels is not simply about acquiring experience but having the ability to learn from that experience. This involves a process of filtering, interpreting, critiquing and refining worked out through a constant commitment to drawing out the fullest meaning from what has occurred. You can't learn the intricacies involved in "thinking like a lawyer" without constant practice and action, but practice itself is not enough and experience without insight is insufficient.

Training and intuitive judgment are intimately related. Much of your training is intended to internalize your knowledge and experience in such a way that you are able to perceive and act intuitively. Intuitive perception, judgment, and corresponding action are not entirely mysterious processes. In many ways they are learned and rational. The rationality, however, operates on more subtle levels, and with a richer complex of our intellectual and emotional resources than does conscious reason. This requires that we train ourselves to experience the reality with which we are dealing frequently enough so that we can recognize it as it unfolds and react to it intuitively in a way that seems instinctive but really isn't. What it means is that we have already seen the situation before or something sufficiently similar that it fits closely enough into the intuitive patterns of perception we are continually creating, refining, and extending into analogous contexts.

The essence of effective strategic action is in being able to anticipate and then respond quickly. Becoming proficient at timing requires that you put yourself into situations where speed and intensity are heightened, and practice functioning effectively in those situations. There is no substitute for testing yourself under equivalent situations, and then evaluating why you were able to function with the proper skill and timing, or why you failed. Simulations, no matter how real they are made to seem, aren't enough in themselves. They can help but no one can be a true strategist until he or she has had the opportunity to apply his or her ability to real situations where there are serious consequences for being wrong. In the fire of battle we have only ourselves to rely on. No simulation can create the same pressures like those involved in situations where the consequences of failure or the rewards of success are real, and substantial. But

simulating strategic situations is still extremely important and enables one to better evaluate strengths and weaknesses.

As a lawyer engaging in trials and negotiations, you strive to reach the point where you don't have to consciously think about what you are doing. The goal is to no longer have to go through a process of conscious linear logic in which, like the beginning dancer who thinks too much you have to say, "I see that he made an offer here and I think he's doing this, and his strategy is probably this, and so on and so forth." By the time the lawyer has figured all that out analytically, the movement has become out-of-time and with a corrupted rhythm. Intuitive judgment is the key concept because the strategist must respond quickly enough to avoid loss, or to take advantage of opportunities.

7. Perceive Those Things that cannot be Seen

Related to the idea of intuitive judgment are the principles of developing understanding for everything and learning how to perceive those things that cannot be seen. Such perception is easy to describe and hard to do. When you know humans, what they value, how they act and why, and are able to function intuitively then you can see past other's masks and illusions. When you have studied in the way required of the strategist you are able to perceive the structure, rhythm and timing of the strategic context. Things that confuse others will be clear to you.

Perception and sight are two methods of seeing. Perception is strong while sight by itself is weak because it is too specific and narrow. Sight in essence is the individual tree while perception is the totality that includes the forest and the trees. When you become accustomed to something you are not limited to seeing only through the use of your eyes. People such as master musicians have the music score in front of their nose when they play but this does not mean that they fixate on these things specifically. It means that they can *see* or *perceive* naturally.

Part of the ability to "see naturally" is derived from having obtained a great deal of experience. Through the combination of experience, practice, and reflection, the lawyer develops the ability to more accurately perceive an opponent's essence and the dynamic context of the environment within which events are taking place. Heightened levels of perception require a combination of intensity, focus, knowledge, experience, and method because the lawyer needs to hear more, understand more, and see more. It takes considerable training and commitment to achieve this kind of perception. Knowledge is essential to heightened perception because when we know the significance of things we can see them more clearly and recognize when something that ought to be present is absent. Although the logic sounds circular we don't perceive the meaning of things because we don't know what they mean. Once we know what things mean and what to look for, we will *see* them.

Much of the lawyer's strategic perception is derived from understanding the special language of non-verbal communication. Non-verbal language involves such things as posture, how you react to stimuli, as well as how quickly or slowly you react, how and

when you tilt your head, how you use your eyes, when you move back or forward, when you take notes, your nervousness and displays of anxiety, your lack of anxiety, inattention, when you underline something or take notes, and much more. Tone of voice, amount and direction of eye contact, how unsure or certain we seem when problems suddenly arise, whether we become upset or angry, and what triggers those reactions, are all part of non-verbal language which can be perceived.

A skilled lawyer can read the meaning of these non-verbal cues. This awareness is fundamental to litigation and negotiation. Many people are skilled verbal liars who are able to control the intonations of their voice and seem sincere and believable. But even if a person is adept on verbal levels of communication, they can give themselves away non-verbally. It is more difficult to deceive people on non-verbal levels, particularly if they are looking at you. If what is being said on the verbal level is incongruent with what you perceive on the non-verbal level, then the incongruence can be translated into terms useful for your strategy. Is someone speaking words that communicate confidence, while the posture, position or movements of their body, or their tone of voice is signaling hesitance and fear? What does the lack of “fit” mean between verbal and non-verbal cues, and between inconsistent non-verbal responses?

Interpreting the meaning of non-verbal language is only part of the lawyer’s task. The lawyer also uses non-verbal language to send messages to clients, opponents, witnesses, judges, and juries. Because we tend to believe the impressions we obtained from others’ non-verbal cues the strategist who communicates effectively on non-verbal levels can be persuasive. This insight is also important in terms of determining the meaning of an opponent’s non-verbal communication. All information must be cross-checked and evaluated. Nothing can be taken as true. A lawyer is quite capable of sending false messages that are taken as being more likely true precisely because they are being transmitted on the non-verbal level. The likely truth must be put in context, and everything an opponent does mistrusted.

Our ability to perceive is easily disrupted in particularly threatening, or accelerated and intense situations in which instantaneous perception and action are required. This can occur even if we are otherwise good observers in non-threatening situations, or in contexts with evenly paced and predictable rhythms, even if they are intense. Stress and the tendency toward overreliance on a plan of action often inhibit our ability to perceive clearly. What military strategists call the “fog of war” blocks our ability to perceive accurately and prevents us from making the instantaneous decisions needed to function effectively in conflicts. A combination of stress, fear, emotion, uncertainty and chaos is generated by intense conflict, including trials and negotiations.

Many people function well in intense situations as long as the rhythms are predictable. But much of strategy involves surprise, and creating deliberately altered conditions by which the opponent intends to throw you off balance, and then hopes to gain an advantage when you are startled. The lawyer must anticipate the unexpected and be able to overcome being surprised. Anticipation and focus are keys to strategy. The perception of timing, rhythm and flow is essential. The strategist’s perception is a total awareness,

one highly concentrated on specifics and details, while encompassing everything going on around you, within others, and within you. Trials demand a level of concentration probably not achieved in anything else a lawyer does. They involve total focus. In what seems to be a paradox, this total focus allows you to see the forest and the trees simultaneously, as well as what they have been and will become.

Think about Mark Fuhrman's original testimony on cross-examination in the Simpson murder case. Given the nature of the police culture in major U.S. cities, the harshness of the task facing street cops, statements by several people about Fuhrman's prior use of racially derogatory statements, and his request for disability retirement due to job-related stresses produced by working in the ghettos and barrios of Los Angeles, it was pretty close to impossible that Fuhrman had never used racial epithets. His denials were not likely to be true. He and the prosecution would have been better off to have admitted on direct examination that there were occasions when he had used what has come to be referred to as the "N" word. It was easy for defense lawyers to see past the illusion because they knew his denials almost had to be false. Prosecutors apparently thought they could get away with accepting Fuhrman's version because their prior experience in trying the average criminal case would lead them to think all they had to do was put a police officer on the stand, have him testify with the standard "copspeak" that characterizes a police witness, and that the jury would buy the story.

What was rarely mentioned in the various assessments of the trial was that the prosecutors were very inexperienced trial attorneys, not because of the numbers of trials they had under their belts, but because the typical criminal case is a "gimme" for the prosecution, a "slam dunk" or a "piece of cake". Urban prosecutors rarely go up against really good, well-funded and prepared attorneys so prosecutors such as Marsha Clark and Christopher Darden may have tried and won 100 jury trials but that doesn't matter. Their experience is roughly equivalent to Carl Lewis running 100 meters against a paraplegic. When such prosecutors with their "vast" experience have to try a case against sophisticated defense lawyers with substantial resources they often lose because they really don't know what they are doing and the "push button" cases they typically try have not prepared them for sophisticated "combat".

8. Pay Attention Even to Trifles

If you observe everything and make sure all your loose ends are taken care of you are far less likely to be surprised. "Trifles", or seemingly small things, are surprisingly often pieces of the signals or data we need in order to understand what is going on. An opponent may have control of his or her illusions but there can be small, seemingly insignificant things that allow us to see the hidden truths. Remember that most of what we do as legal strategists involves reconstructing a past reality to make it seem favorable to our client's interests. Or we are projecting a future reality (the deal) that appears to be beneficial to the negotiating parties. In either situation there is an element of illusion.

The problem is that it is almost impossible to make the illusion perfect. Our job is to perceive the imperfections and know what they mean. Consider the Simpson criminal

case again. Only a totally thorough analysis of every piece of evidence in the case revealed the tiny strands of imperfection that could be added up to create arguments of reasonable doubt. One expert witness was forced by the defense to admit a statistical error. Another noted that a video of evidence in Simpson's home was not in the proper time sequence, suggesting something devious in the record-keeping.

In most criminal cases these details would be overlooked, as well as others that surfaced in the Simpson case concerning factors such as dryness of blood samples on swabs, defects in evidence gathering techniques, and much more. Because everything in that case was examined with intensity it offered a paradigm of how defense counsel should approach trial evidence. Of course, virtually no criminal defendants have the resources needed to prepare a case with such thoroughness, nor do they have an extraordinarily cooperative judge such as Lance Ito, who essentially allowed the defense to say or do whatever they wished, often based on the most tenuous foundations.

9. Do Nothing that is of No Use

Everything you do should be for a reason that advances your case. Your opponents will be attempting to divert you into tangential activities that waste your time and resources, and keep you from focusing on how to win your case. Don't waste time, be inefficient, dither around or fritter. You may choose to seem to be doing these things, but be sure it is only because of the impression you have chosen to make, and that there is a reason for your actions. The corollary is that the lawyer seeks to suppress the opponent's useful actions while encouraging, provoking or allowing his or her useless actions. Of course, this simple statement belies an extremely complex process involving anticipation, recognition, assessment, judgment, decision, action and reaction. It also requires the strategist to be able to distinguish between useful and useless actions, and to react in an appropriate and timely way.

An Example of a Useful Approach in Educating “Almost Practice Ready” Graduates: A Course in Strategy

It is somewhat misleading to refer to the array of approaches lawyers use to perform well in law practice as exclusively or mainly “technical” because this risks creating the impression we are speaking mostly of isolated tactics and techniques defined mostly by a sort of internalized “task functionality” appropriate to a segment of practice. There is an overarching and coherent system of professional skills, attitudes and values that comprise excellence in professional performance. The approach includes an orientation best described as “helping students understand the importance of transcending technique” while still mastering the various elements of technique. This approach offers a central element of effective strategic thought, planning and action, an area in which I have a great deal of interest.

Strategy is a total discipline. Strategic awareness involves the ability to synthesize a full range of knowledge and technical skill and to convert that to a concrete decision and

focused action. The discipline of strategy becomes part of the person. It requires self-awareness, the ability to rapidly perceive and interpret events, and to make immediate choices of action under pressure. Part of this demands mastery of the subtle and complex skills of execution, tactics and communication. Although I infuse strategy in all the courses I teach, I introduce students to the approach in a course called *Lawyer's Strategies* that uses a book I wrote titled *The Warrior Lawyer* to open students up to a coherent strategic methodology.²⁷ The book utilizes insights from Chinese and Japanese military and martial arts classics to create a conceptual structure and strategic vocabulary that is applied to American law practice.

The legal strategist must have the knowledge to use the full range of tools and weapons and be capable of using them in ways that allow their best use at the proper time--and in the right way to achieve maximum effect. Technical mastery is important because no one can excel without mastering technique. The full range of techniques is understood by the strategist to represent only one part of the total strategic system. Such understanding is necessary for competence but insufficient for excellence that demands an aesthetic quality.

I emphasize strategic awareness as an essential focus for legal education because strategy is far more complex, encompassing, and subtle than the limited (and limiting) realm of techniques and tactics. The problem for the teacher is that there is a natural tendency for us to fixate on narrow areas of technique. We confuse mastery of specific technical approaches with the understanding of overall strategy. This is because it is easier to learn how to excel at a narrow task and we convince ourselves that our mastery of task and technique is more profound than it is. Many lawyers are like the *sword-fencers* of Musashi's time who became so fascinated with technique that they lost sight of the larger system within which conflict operates. Such lawyers fail to go beyond the specific context and thus never gain an understanding of the total system within which they function. Because of this, they never transcend the limitations of technique.

Acquiring skill, strategic awareness, and judgment requires a combination of experience, intuition, ability, and discipline. Strategy improves our ability to evaluate, diagnose, and resolve the problems and opportunities our clients bring to us. The abilities involved in issue recognition and analysis are important in the initial phases of developing legal and factual alternatives in the individual case. Beyond recognition and analysis a lawyer must be able to choose between the issues and alternatives in order to select those most appropriate for obtaining the most beneficial consequences for clients. What is required in this type of strategic analysis is the ability to conceive a plan of effective implementation.

The course in *Legal Strategy* was limited to 24 students. A central part of the approach used Chinese and Japanese military and martial arts strategy applied in the context of American law practice in areas of evaluation, development of case strategies, negotiation, mediation, arbitration and trial. There was extensive use of role-playing exercises in

²⁷ DAVID BARNHIZER, *THE WARRIOR LAWYER: POWERFUL STRATEGIES FOR WINNING LEGAL BATTLES*, (BRIDGE STREET BOOKS 1997).

which students were responsible for developing and implementing strategies and critiquing performance, including their own and others. At the end of the course the students found themselves thinking in a different pattern than when they began. They had become strategists.

The course brought the lawyer as strategist together with the process of planning and action taking place within a dynamic system. As such, the effective legal strategist must not only be able to “see the forest *and* the trees” but must also be able to anticipate and perceive changes that are likely to happen and are occurring and to then adapt to the shifting field of play and take effective action. Part of this process includes planning and the acquisition of critical information, but goes far beyond that to involve the ability to perceive more fully and engage in honest self-critique of the kind needed for professional growth.

The course in strategy helped law students create a fuller understanding of the dynamics of the legal system within which lawyers operate. It helped the student to develop awareness of how the pieces involved in law practice operate as part of an integrated system rather than analyzing the various processes only in discrete compartments. The force that ties all the pieces of law practice together into a coherent system is strategy—which can be understood as the ability to both plan and take action to achieve desired goals, or to at least significantly increase the probability of achieving a client’s goals.

Several themes provided the foundation for this course. They include the use of power to achieve one’s goals as well as defending against others’ attempts to use power and leverage against you. Being a lawyer means manipulating people and that is a fact with which many are uncomfortable. Being a principled lawyer involves accepting responsibility for the fate of another person while setting limits on the extent of the manipulation and deception that takes place. A second theme of the course involved understanding and being able to deal with the hard realities of law practice and recognizing the moral dimensions of law practice.

A vital theme of the course was the quality of perception needed to be a good lawyer. The successful strategist is able to perceive both the details and overarching processes of planning and action, and to do so at a time when decisions can be made that are meaningful. Most people tend to see things in pieces rather than as part of a coherent process and dynamic system. Even when people see things in wholes rather than piecemeal far too many tend to fixate on the plan rather than the qualities of adaptation and flexibility that are essential in the real world. In both business and military strategic planning, for example, there is a recurring tendency to develop complex strategic plans that bear little resemblance to the unfolding realities of engagement and action. The problem is that so much effort and resources have been put into the plan that it takes on a life of its own. This can blind strategists to what is actually happening.

The discipline of strategy helps produce efficiency in evaluation and action because it enables lawyers to become better at diagnosing and evaluating cases. Improved methods of diagnosis and evaluation enhance the efficiency and speed with which a lawyer

determines the value, options, timing considerations, expense, and outcome probabilities of cases. Diagnosis and case evaluation are a large part of what clients pay for, and are among the most important skills if clients are to be effectively counseled about their best options and the costs and consequences of actions.

Conclusion

For me, the combination of an improved educational focus on the “deep” body of knowledge and principles that underlie the Rule of Law and legal profession and the creation of a learning process that allows the law student to become a strategist is what can be done in law school in a two or three year period of formal education. The techniques of specific functional tasks are far less important for producing high quality graduates who go on to become high quality lawyers and judges than the templates of principle, higher learning and strategy.

Calls for a legal education that produces “practice ready” lawyers is delusional from the perspectives of possibility, available resources and the best use of the resource of university law schools. But asking that legal education be significantly improved and that new graduates possess the conceptual structures and professional approaches that enhance the probability that they will be excellent professionals in the best sense of that concept is something that certainly ought to be a central element of the debate over the appropriate (and best) role to be served by formal legal education. I have tried to sketch out some ideas about what these approaches might be and how the goals can be accomplished.