Law Schools, Bench, and Bar: A Needed Partnership for Lawyer Competence and Professionalism

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LAW SCHOOLS, BENCH, AND BAR: A NEEDED PARTNERSHIP FOR LAWYER COMPETENCE AND PROFESSIONALISM

BARRY VICKREY*

The legal profession is still feeling the aftershocks of two 1970s earthquakes—Watergate and consumerism. The public impression of lawyers was affected, perhaps irrevocably, by the specter of ranks of lawyers, including a President and two Attorneys General, engaged in an effort to steal the country from the people. At the same time, the consumer movement—as exemplified in Bates v. State Bar of Arizona, the 1977 Supreme Court case protecting lawyer advertising—was teaching the public that lawyers were sellers of services to be dealt with in the same arm's length fashion as any other merchants.

During that era, I worked at the American Bar Association as the assistant to ABA President S. Shepherd Tate. I helped draft President Tate's response to United States President Jimmy Carter's 1978 broadside against lawyers. President Carter, influenced by his mentor, Admiral Hyman Rickover, and his own experience as a small businessman, blamed lawyers for a host of social ills, including diminished economic competitiveness. President Carter's remarks, as well as Rickover's, were reprinted in a leading professional responsibility casebook, but Shep Tate's response did not even get a footnote. It is a clear example of Teddy Roosevelt's characterization of the Presidency—U.S., not ABA—as a bully pulpit.

The Bush administration, led by Vice President Dan Quayle, renewed the Presidential lawyer-bashing. This is what happens when your popularity in the public opinion polls is even lower than the President's. Commentators pick up the message; Newsweek's Robert Samuelson, for example, wrote a piece entitled I Am a Big

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Lawyer Basher.\(^6\) Apparently, it is not enough these days to be a small or even average lawyer basher.

In the 1970s, the organized bar talked a good deal about the need to improve the image of lawyers. At the time, I thought it was a futile effort. Public attitudes about lawyers have been ambivalent, at best, for ages.

We repeatedly hear Shakespeare's line from Henry VI: "The first thing we do, let's kill all the lawyers."\(^7\) Rarely are we told that the line was spoken by Dick the Butcher, an anarchist who was plotting to overthrow the government. The point was that lawyers were protectors against anarchy. Of course, this compliment was written some four hundred years before a lawyer named Dick, and his lawyer aides, tried to subvert our government.

Notwithstanding the Henry VI compliment, Shakespeare was critical of lawyers in other writings.\(^8\) So Shakespeare was ambivalent about lawyers, as the public has been from at least his time to the present. Throughout these four centuries, while some lawyers have been revered for their public leadership and their language and logic skills, the public has generally been suspicious of the profession. There are undoubtedly many reasons for this suspicion. One is that we are usually associated with adversarial resolution of conflict, and society does not care much for adversariness or conflict, unless it involves Arnold Schwarzenegger or Norman Schwarzkopf. Another reason involves the identification of lawyers with the wealthier class in society—either that we are that wealthier class or that we serve it.

In the 1990s, I sometimes wonder if a futile effort to improve the image of lawyers is the moving force behind the organized bar's effort to promote professionalism. Perhaps that skepticism is just a reflection of my frustration—as a former member of the ABA Standing Committee on Lawyer Competence—over the confusion between "professionalism" and "competence". Some of the Standing

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Committee's efforts to promote lawyer competence—which to me seem concrete and practical—have been swallowed up by the fog—from my vantage point—of professionalism.

Notwithstanding my doubts about the motivation behind the professionalism push, I recognize that both professionalism and competence are good things. They certainly are relevant to legal ethics, the topic of this symposium, so I will discuss professionalism and competence and what law schools can do to promote both.

First, what do the terms mean? Vanderbilt University Law Professor L. Harold Levinson describes professionalism as a collection of moral duties to clients, to other persons in the same profession, to directly affected third parties, and to society. He identifies competent service as one element of the duty to clients. So professionalism is broader than competence and, thus, less manageable.

One of my concerns about the present emphasis on professionalism is that it seems focused primarily on the duty to other members of the profession and, to a lesser extent, on the duty to directly affected third parties. The duties to clients and society are often neglected. As a result, much of what is touted as professionalism seems self-serving, that is, intended principally to make the lives of lawyers more pleasant and convenient. This is most apparent in the fervor to adopt what seem to me to be relatively trivial codes of professional courtesy.

Perhaps I do not see the need for these because I am not in the muck and mire of the everyday practice of law. If lack of courtesy is driving good lawyers from the profession or pulling them down to the level of the scoundrels, then of course we should try to prevent that. It is just that I thought good manners were supposed to be learned around the family hearth or in kindergarten, rather than from a professional code.

My experience in teaching professional responsibility is that most students already know the fundamental ethical principles that underlie the Model Rules of Professional Conduct. They do not, however, appreciate how these principles may apply in a professional setting or that a professional situation may create conflicts among these principles. To the extent the codes of courtesy are helping lawyers see how good manners apply in a professional setting, they


may be valuable; if they are necessary for lawyers to know that good manners should apply, then the problem is too basic to be solved by a mere code.

At least one professionalism program—Georgia's—adopts a fuller concept of professionalism.\textsuperscript{11} It explicitly pulls in the duty to society through its emphasis on pro bono service. This emphasis reflects another catchword—in addition to "image"—of the organized bar in the 1970s and earlier—"access". Given the unsuccessful effort of the Reagan Administration to kill the Legal Services Corporation followed by its at least partially successful attempt to capture it, expanding access to legal services may seem as futile as improving the image of lawyers. It is a more worthwhile effort, however, because it serves the needs of others and because it counters the identification of the legal profession with the wealthier class which contributes to our poor public image.

If professionalism is hard to define, what about competence? Since it is narrower—one element of the duty to clients in Professor Levinson's scheme—it is a bit easier to grasp.

Two of the best definitions of competence are contained in \textit{Lawyer Competency: The Role of the Law Schools} (the 1979 "Cramton Report")\textsuperscript{12} and in \textit{A Model Peer Review System},\textsuperscript{13} a report of the

\begin{itemize}
  \item \textsuperscript{11} Hulett H. Askew, \textit{How Does This "Professionalism" Effort Relate to Legal Services—And Why Should You Care?}, MGMT. INFO. EXCHANGE J., Mar., 1991, at 14.
  \item \textsuperscript{12} \textit{SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS} 9 (1979)[hereinafter ROLE OF LAW SCHOOLS]. The Cramton Report identifies "three basic elements" of lawyer competence: "(a) certain fundamental skills; (b) knowledge about the law and legal institutions; and (c) ability and motivation to apply both knowledge and skills to the task undertaken with reasonable proficiency." According to the report, fundamental skills include the following: legal analysis; legal research; collecting and sorting facts; effective writing in various applications; effective oral communication; interviewing, counseling, and negotiation; and organization and management of legal work.
  \item \textsuperscript{13} ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUC., A MODEL PEER REVIEW SYSTEM 11 (Discussion Draft 1980) [hereinafter MODEL PEER REVIEW SYSTEM]. This report defined competence as follows:

  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 (continued)
American Law Institute-American Bar Association Committee on Continuing Professional Education published in 1980. Drawing on these two definitions, the ABA Standing Committee on Lawyer Competence has focused on three aspects of competence: legal knowledge and skill, law practice management, and personal fitness.\(^{14}\)

The Standing Committee has not tried to set minimum standards in these three areas. Instead, the Committee assumed that there is plenty of room for progress in all three areas and has tried to place before the profession various ideas for improvement. The Committee also worked from an assumption that promotion of competence—and I believe this is also true for professionalism—requires a partnership among the three grand divisions of the profession: the bench, the bar, and the law schools.

With some legal educators, it may still be necessary to make the case that law schools have a role in responding to the challenges of professionalism and competence. A few may see the call to the law schools to join these campaigns as an intrusion on the law school’s higher aims. I believe that attitude is now in the minority; most legal educators see the need to respond to these professional concerns. If we do not, we are asking for trouble. Can we really expect the bench and the bar to let us have unbridled control over the foundational years of a lawyer’s professional development?

What are we in law schools currently doing to promote professionalism and competence? I will not pretend that I know what is going on in all or even most law schools. There is a lot happening. Many of the most innovative developments were discussed in the Standing Committee’s 1990 national conference, *Making the Competent Lawyer: Models for Law School Action*. Every law school has at least one copy of the excellent materials from the conference,\(^ {15}\) and any law school would benefit from reviewing the innovations described there. Although there is much more going on than I can keep up with, let me offer a few observations.

The most obvious thing we do in law schools to promote professionalism is require students to take a course in professional responsibility. We are mandated to do this by an American Bar

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\(^{15}\) *ABA Standing Committee on Lawyer Competence, Am. Bar Ass’n, Making the Competent Lawyer: Models for Law School Action* (1990).
Association accreditation standard adopted immediately after Watergate.\textsuperscript{16}

I have been teaching this course for a decade now, and I have mixed feelings about it. Many of my students—motivated negatively by the fact that it is the only required upper level course and by the quickly disappointed expectation that it is designed to prepare them for the Multistate Professional Responsibility Exam—are less than enthusiastic. Fortunately, these attitudes of some present students are balanced by the telephone calls from former students who have spotted a serious ethical issue and resolved it wisely; of course, I do not get calls from the ones who fail to see the issue until the disciplinary proceeding, if then.

One of the most important provisions of the ABA accreditation standard is the encouragement to involve members of the bench and bar in professional responsibility instruction. Unfortunately, I suspect many law professors—as I usually do—find it more convenient just to teach the class from one of the many casebooks or problem books available rather than to involve practitioners.

One way that some schools are achieving this involvement is through separate courses in professionalism, sometimes taught in the first year.\textsuperscript{17} Introducing professional responsibility concepts into the first year certainly seems to be a good idea, until you talk to one of the other first year instructors or other faculty members who would like to teach their classes to these especially eager students. But it seems that the development of separate courses on professionalism reflects either that professionalism has little to do with professional responsibility or that professional responsibility teachers have failed to make their courses relevant to practice, as contemplated by the ABA standard.

More promising is the effort of some schools to develop what are called comprehensive skills development courses, which incorporate

\textsuperscript{16} Standards for Approval of Law Schools and Interpretations Standard 302(a)(iv) (Am. Bar Ass'n 1991) requires

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instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Model Rules of Professional Conduct, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction.
\end{quote}

\textsuperscript{17} The First Year Professionalism Program at Case Western Reserve University Law School is described in Law Schools Emphasize Professional Responsibility, PROF. LAW., Nov. 1991, at 7-9.
instruction in legal ethics into clinical experiences.\textsuperscript{18} Especially if these courses involve members of the bench and bar, they hold great promise for motivating students to integrate better the ethical instruction they receive into their future practices. If the purpose of instruction in professional responsibility is to alert students to the fact that there is a body of professional responsibility law and then to allow them to practice the application of that law to lawyering situations, as I believe it is, these courses seem well designed to achieve this purpose.

There is some debate over whether simulated or live client experiences are preferable for these courses. This is an important issue, but not as important as the basic concept of teaching legal ethics through clinical experiences.

Aside from courses, one way we develop professionalism—or should—is through the expectations we place on students and faculty. As academics, we must recognize that some of our idealized notions about education must be tempered by the fact that we are engaged in professional education. For example, some may not believe that class attendance is crucial to learning, but we must recognize that as long as there is an accreditation standard requiring regular and punctual attendance,\textsuperscript{19} we have a duty to enforce it. If we do not enforce it, what do we communicate about our attitude toward professional standards? To give another example, some may think that adherence to deadlines for papers is less important than the quality of the papers, but what happens then to the lawyer who has not learned in law school to manage time well in order to produce high quality work in a timely manner? The word "malpractice" comes to mind.

In addition to high expectations for students, we must have high expectations for ourselves as faculty. We must recognize that, as Carnegie Foundation President Ernest Boyer reminds us, teachers are transmitters of values.\textsuperscript{20} We have a responsibility to teach students professional values—diligence, thoroughness, concern for others, and justice, to name a few—through our words and actions.

Let me give a couple of examples that involve a subject that usually gets people's attention—sex. In connection with the Clarence


\textsuperscript{19} STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 305(c) (Am. Bar Ass'n 1991).

\textsuperscript{20} Ernest L. Boyer, Centennial Convocation Address at the University of North Dakota (Feb. 23, 1984). See also ERNEST L. BOYER & FRED M. HECHINGER, HIGHER LEARNING IN THE NATION'S SERVICE 55-62 (1981) (discussing the centrality of instruction in values in higher education, including law).
Thomas confirmation, it was imperative that every law school community discuss the issue of sexual harassment. In our school, a discussion was organized by our Law Women's Caucus and, fortunately, many male students and most of the faculty participated. On a related issue, law schools should be concerned about the increasingly reported phenomenon of lawyers taking advantage sexually of clients. But how can we discuss this abuse of power if we are not sensitive to the issue of law professors abusing their power over students?\(^2\)

One final word on the law school role in promoting professionalism: we need to participate in fulfilling the professional duty to society. Many law professors and law schools contribute much to society through public service, and we should reward that service. But we need to follow, as well, the lead of Tulane and other schools that have recognized that pro bono representation of the poor is a fundamental professional duty.\(^2\) All Tulane students are required to fulfill a pro bono requirement to graduate. All law schools should adopt this requirement and extend it to faculty as well.

The law school role in developing competence seems obvious. What else are we about if not this? But the question for law schools in the 1990s is whether our conception of competence is broad enough to meet the needs of the profession and the public.

The first element of lawyer competence that the Standing Committee on Lawyer Competence emphasizes is legal skill and knowledge. Most of us in law schools think we are doing a good job with this one. But data reported in *Syllabus*\(^2\) suggests we may not be doing a good job with respect to one crucial skill, communication.\(^2\) The data, generated by surveys of practitioners,\(^2\) suggests that

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23. The newsletter of the ABA Section of Legal Education and Admissions to the Bar.


25. The survey was conducted for the Task Force on Law Schools and the Profession: Narrowing the Gap. The Task Force, chaired by former ABA President Robert MacCrater, was created by the Section of Legal Education and Admissions to the Bar to conduct a comprehensive review of the respective roles of law schools and the practicing bar in developing lawyering skills and values. *MacCrate Task Force Issues Final Report*, SYLLABUS, Fall 1992, at 1.
practicing lawyers think that law schools can and should effectively teach law students how to communicate orally and in writing but are not giving these skills sufficient attention. This deficiency stands out from most other areas of skill and knowledge, for which those surveyed think we are coming closer to doing what needs to be done.

As a member and former chair of the Legal Writing Committee of the ABA Section of Legal Education and Admissions to the Bar, I am not surprised by the data as it relates to writing. I am personally aware of the concerns of practicing lawyers and judges about the writing of lawyers. Appellate judges talk about briefs that are, at best, unpersuasive and, at worst, unintelligible. Senior lawyers complain about associates who write memos that describe their legal research efforts without answering the assigned question. And we are all aware of the public ridicule, much of it justified, that results from our use of legalese.

The data on oral communication, however, represents a less familiar concern. Apparently, our instruction in appellate and trial advocacy, which is substantial in today's law schools, is not sufficient to produce effective oral communicators. So I have begun thinking about what else we can do. My thoughts keep taking me to the first-year property law class I teach and other "substantive" classes, where I think my students—I will not comment on anyone else's—are not getting the same instruction in oral communication that I got in my best substantive classes.

I think I know why: it is because my students and I are not expecting the right things from each other. My students are expecting me to have all the answers, and I am expecting the students to have very few of the answers. They want me to lecture, and I am reluctant to call on students for fear of embarrassing them. Consequently, I ask questions that are too simple, take answers that are too simplistic, and then proceed to explain, as if lecturing, the more complex issues. As a result, students get much less opportunity to practice talking about difficult legal issues than I did.

I still believe it is important not to intimidate students, because that impedes skill development by destroying confidence. But I also remember that my best teacher, Dean John Wade, had students stand and answer questions, but he did it in a caring fashion that reduced the intimidation. Standing to recite, as I did, may no longer be feasible, but I am committed to finding—by expecting more of students and myself—a way to turn the classroom back into a means of developing effective oral communication skills.

The second element the Standing Committee emphasizes is law practice management. This skill was specifically identified by both
the 1979 Cramton report\textsuperscript{26} and the 1980 ALI-ABA report,\textsuperscript{27} but law schools have been slow to move on this issue. In fact, I remember an ABA conference for law schools in 1979 in which some deans walked out on a speaker who said that law schools should teach law practice management.

Recently, Pace Law School Professor Gary Munneke published a coursebook on law practice management.\textsuperscript{28} I have taught a course—I called it Legal Malpractice Liability for marketing reasons—from Professor Munneke's materials. At least some students found the course worthwhile, but I am not sure a traditional law school course is the best way to provide this instruction. If a course is taught, it is highly desirable to involve a practicing lawyer in the instruction. It is also possible to provide students the information they need outside the traditional credit-generating course; John Marshall Law School, for example, provides this instruction through its placement program.

The best vehicle for teaching law practice management could be clinical education. Clinical programs, properly equipped as model law offices, would allow students to learn and then practice the best techniques of law practice management in a realistic setting.

However we choose to do it, students, especially those who go into small firms or solo practice, must have an opportunity to learn good management practices before their clients suffer from their lack of this knowledge. Even those students who go into large firms, where others manage the practice, can benefit from a reduction in the anxiety that comes from not knowing how the firm is managed.

Better practice management skills could relieve some of the stress experienced by those who manage law firms. At a 1991 Minnesota State Bar program on lawyer burnout I attended, managing partners reported that much of the stress of practice resulted from the pressure to bill more hours and at higher rates, and this pressure resulted in turn from their inability to control overhead expenses. These managing partners seemed to feel powerless to deal with this problem, which faces all businesses. Lawyers should be able to learn ways to control overhead from other businesses, but this will not happen until someone takes the responsibility for teaching lawyers management skills.

The final element of competence emphasized by the Standing Committee involves personal fitness to practice law. The statistics in this area are truly frightening. A study by the Washington State Bar, for example, indicated that almost one-fifth of the lawyers in that state

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\item \textsuperscript{26} \textit{Role of Law Schools}, supra note 12, at 9.
\item \textsuperscript{27} \textit{Model Peer Review System}, supra note 13, at 11.
\item \textsuperscript{28} \textit{Gary A. Munneke, Law Practice Management} (1991).
\end{enumerate}
were impaired by chemical dependency, and the impaired segment rose to one-third when impairment from serious depression was added. Because of the seriousness of this problem, the Standing Committee has given this issue a great deal of attention. As a result of these efforts, the ABA has created a Commission on Impaired Attorneys to aid state lawyer assistance programs.

The seeds of impairment for lawyers are often present in law school. In fact, the stress of law school can bring on the manifestations of serious personal problems, including chemical dependency. And yet effective assistance programs for law students are sadly lacking. This is due, in part, to limited resources and, in part, to limited awareness of the need. Beyond that, it may also reflect a general lack of personal concern for students which pervades the law school experience. For the sake of both our students and their future clients, this must change. We must give attention to the personal, as well as the intellectual, development of students. Just finding the money to pay for counselors is not enough. Teachers and administrators must reorder their priorities to allot more time to students as persons, and not just faces in the crowded classroom.

At the same time we are trying to help students overcome their problems, we must also be aware that there may be some whose character deficiencies should keep them out of the legal profession. Specifically, we must find ways to cooperate with bar admissions authorities in screening out those who are not fit to practice law. It will not be easy to help both law students and bar admissions authorities, especially since we are not doing enough to help either one at present, but we must try.

The Standing Committee has recently sponsored a forum for law school and bar admission leaders to talk about the character and fitness process. This working group has had three sessions of wide-ranging discussion, and I think this process will produce some good ideas for encouraging cooperation.

This brings me back to the need for a partnership of the bar, the bench, and law schools to promote professionalism and competence. More important than the specific areas in which cooperation is needed is the need for creation of a process of ongoing cooperation among these three segments of the profession. The Standing Committee has fantasized about a day when each state would have a legal profession management team composed of that state's law school deans, presidents of state and major local bars, and the chief justice or other

appropriate justice of the state supreme court. These leaders of the profession would meet at least annually to assess the status of the profession, identify pressing issues, and develop plans for cooperative efforts to promote improvement in the profession. Through regional conferences, the Standing Committee brought together these leaders, hoping that they would then take the next steps in their own states. So far, this has not happened.

No one seems willing to take the first step. Supreme court justices are either indifferent or fear that they will appear to be abusing their power to regulate the profession. Bar presidents change every year, so they focus on short-term activities. Law school deans, even those who stay around longer than bar presidents, either fear intrusion on the educational process, have little interest in professional concerns, or, more likely, are simply distracted by the other demands of their jobs. For whatever reason, all three are neglecting the desperate need for a comprehensive, cooperative approach to improving the profession.

I will close with one example of the need for cooperation. For some time, I have been concerned that, for some students, what I try to teach in my professional responsibility class is being undermined by the shoddy practices that these students see when they work for some lawyers. In one instance, the shoddy practices may even have included a lawyer advising a student to engage in illegal conduct. Thanks to the work of Professor Larry Hellmann of Oklahoma City University School of Law, my concerns are now borne out by empirical evidence. In a recent article in the Georgetown Journal of Legal Ethics, Professor Hellmann reports on the disastrous effects that some students' work experiences in law firms during law school have on these students' sense of professionalism. 30 Professor Hellmann reports that many students are exposed to unprofessional conduct by attorneys that shocks them in terms of its frequency and seriousness. . . . Many students, feeling quite vulnerable in terms of their future careers, tend quickly to develop an unfortunate level of tolerance for the unprofessional conduct of others, and that tolerance threatens even the students' own devotion to some of the more important professional ideals that the law schools are being asked to instill in their charges. 31

31. Id. at 543-44.
A NEEDED PARTNERSHIP

This is a problem that needs a coordinated response from the bench, the bar, and law schools. The courts could discipline the lawyers, of course. A particularly courageous dean might try to prohibit students from working for certain lawyers. But neither of these approaches responds to the pressure on students to work which results from inadequate financial aid and other economic factors. Nor do these approaches take advantage of the positive educational benefits that can result from a good clerking experience. I do not know what the best solution to this problem is, but I believe that supreme court justices, deans, and bar presidents, working together, could develop better solutions than the limited steps that any can take unilaterally.

Law schools should be involved in promoting professionalism and competence. Law school deans are probably in the best position to take the first step to create a partnership with the bench and bar to improve the profession. If all of us do not take on this task, we will see Dick the Butcher's wish come true. But it will not be just outsiders killing the lawyers; already we can see the signs of lawyers killing each other and themselves through, for example, "Rambo" litigation tactics and chemical dependency. I believe, as Dick the Butcher did, that lawyers--perhaps with some modifications of our role and practice--are essential. It is time we get on with the serious business of saving our important profession.