NEW MEXICO LAW REVIEW

Volume 19
Issue 1 *Winter 1989 (Symposium)*

Winter 1989

# The American Bar Association's National Conference on Professional Skills and Legal Education - Albuquerque, New Mexico - October 15-18, 1987

New Mexico Law Review

# THE AMERICAN BAR ASSOCIATION'S NATIONAL CONFERENCE ON PROFESSIONAL SKILLS AND LEGAL EDUCATION ALBUQUERQUE, NEW MEXICO OCTOBER 15–18, 1987

The National Conference on Professional Skills and Legal Education was held on October 15-18, 1987, in Albuquerque, New Mexico. The programs were conducted at the University of New Mexico School of Law which co-sponsored the Conference with the ABA Section of Legal Education and Admissions to the Bar. It was attended by over 200 legal educators, judges and practicing lawyers.

The primary goal of the Albuquerque Conference was to provide a forum for law schools to share detailed information about their professional skills programs and for faculty members and members of the Bar to develop an understanding of current trends and evolving norms in professional skills education.

This issue of the New Mexico Law Review contains the remarks made by speakers and panelists during the plenary sessions of the Conference. It was impossible to reproduce the small group sessions which developed a fuller exchange of ideas and information among participants.

It was also impractical to record and reproduce the presentations about specific courses and programs which were made by representatives from a dozen law schools. However, the Law Review staff has included a short description of each presentation. Additional information about any particular presentation should be requested directly from the presenter.

A related project of the Conference was to ask all Conference participants and the deans of all ABA accredited law schools to submit written descriptions of their professional skills courses and programs which they felt might be of interest to other legal educators around the country.

Materials were received from twenty-four (24) law schools which cover a very broad spectrum of subject areas and methods of instruction. These materials were indexed and distributed to all Conference participants in September 1988. Copies may be purchased from the Office of the ABA Consultant on Legal Education for $10.00 per copy.

By all accounts, the Conference achieved its primary goal of sharing information about professional skills instruction. The efforts of the New Mexico Law Review staff will ensure that a much broader audience will benefit from the insights of the speakers and panelists.

All participants in the Albuquerque Conference shared a hope that it would contribute to the long term improvement of professional skills instruction in American law schools, and, thereby, improve the preparation of lawyers for law practice.

Shortly after the Conference, the Honorable Rosalie Wahl, then Chairperson of the ABA Section of Legal Education and Admissions to the Bar, raised the possibility of creating a task force to address some of the many difficult problems

which continue to hinder the development of fully adequate professional skills instruction programs.

The Council of the Section of Legal Education and Admissions to the Bar and the ABA Board of Governors have approved the creation of an independently funded task force of the Section which will focus on professional skills instruction in American law schools. The task force is being assembled and funding is being sought for its work which is expected to take at least three years.

Credit for the success and the many pleasures associated with the Albuquerque Conference is deserved by too many people to name here, but special recognition is appropriate for Dean Ted Parnall and Associate Dean Peter Winograd without whom neither the facilities nor the superb administrative support would have been available; and for J.W. Eaves who allowed us to use his western town at Rancho Allegre as the setting for a most unique social event.

Roy T. Stuckey
Kathleen S. Grove
Conference Co-Chairs

## AGENDA

**Welcome to New Mexico and the Law School.**
Dean Ted Parnall, University of New Mexico School of Law.

**Remarks.**
The Honorable Rosalie E. Wahl, Supreme Court of Minnesota, and Chair, ABA Section of Legal Education and Admissions to the Bar.

**What are professional skills?**
**. . . and why should law schools teach them?**

Panelists will present a variety of views, including recent suggestions for redefining professional skills. The extent of a law school's obligation to provide professional skills instruction will be explored in relation to the responsibility of lawyers to provide competent professional services shortly after graduation from law school. Small group discussions will follow. The panel will include:

Professor Gary H. Palm, University of Chicago Law School, Chair.
Roberta C. Ramo, Esquire, Albuquerque. Former Chair, ABA Section on Economics of Law Practice.
Professor Donald G. Gifford, University of Florida College of Law.
Professor Peter T. Hoffman, University of Nebraska College of Law.
Carol M. Kanarek, Esquire, New York, New York. Chair, ABA Young Lawyers Career Issues Committee.

**An Overview of Professional Skills Courses.**

Panelists will describe some of the recent innovations and types of courses which are being used to enhance professional skills instruction programs. The panel will include:

Professor Dean H. Rivkin, University of Tennessee College of Law, Chair.
Professor Steven A. Reiss, New York University School of Law.
Professor Roger Haydock, William Mitchell College of Law.
Professor David A. Binder, University of California at Los Angeles School of Law.

**Presentations of Professional Skills Courses.**

**An Overview of Professional Skills Programs.**

While the Friday afternoon program will look at individual pieces of a professional skills instruction program, this segment of the Conference will describe how some schools are beginning to organize the pieces into comprehensive programs to provide structured, progressive development of professional skills. The panel will include:

Professor Elizabeth M. Schneider, Brooklyn Law School, Chair.
Professor Bari R. Burke, University of Montana School of Law.
Professor Victor M. Goode, City University of New York Law School at Queens College.
Professor Michael R. Sheldon, University of Connecticut School of Law.

**Presentations of Professional Skills Programs.**

**Overcoming Obstacles to Professional Skills Instruction.**

Panelists will identify the major reasons why some law schools are not developing comprehensive professional skills instruction programs and will discuss ways in which some schools have overcome these obstacles. Small group discussions will follow. The panel will include:

Dean John R. Kramer, Tulane University School of Law, Chair.
Dean Joe D. Harbaugh, University of Richmond, the T.C. Williams School of Law.
Professor Richard G. Huber, Boston College Law School. President-elect, Association of American Law Schools.
Jane Peterson Smith, Esquire, Director of Examinations, the Committee of Bar Examiners of the State Bar of California.

**Brief Remarks and Introduction of Keynote Speaker.**

Dean James P. White, Consultant on Legal Education to the American Bar Association.

**Keynote Address.**

Robert MacCrate, Esquire, President of the American Bar Association.

**Reactions of Selected Participants.**

Representatives of groups which have studied legal education and lawyer competence will share their views about the Conference proceedings and whether law schools seem to be moving in the directions which were recommended by their groups.

Willard L. Boyd, President, Chicago Field Museum of Natural History. Former President, University of Iowa. Member, AALS-ABA Committee on Guidelines for Clinical Legal Education (1980 report). Member, The Task Force on Professional Competency: the Role of the Law Schools, ABA Section of Legal Education and Admissions to the Bar (1979 report [the Cramton Report]).

William C. Hubbard, Esquire, Columbia, South Carolina. Chair, ABA Young Lawyers Division.

R. W. Nahstoll, Esquire, Portland, Oregon. Member, The Task Force on Lawyer Competency: the Role of the Law Schools, ABA Section of Legal Education and Admissions to the Bar (1979 report [the Cramton Report]); and member, ABA Special Committee for a Study of Legal Education (1981 report "Law Schools and Professional Education" [the Foulis Report]).

William Pincus, Esquire, Former President, Council on Legal Education for Professional Responsibility.

Justin A. Stanley, Esquire, Chicago, Illinois. Chair, ABA Commission on Professionalism (1986 report ". . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism"). Former President, American Bar Association.

S. Shepherd Tate, Esquire, Memphis, Tennessee. Chair, ABA Standing Committee on Lawyer Competence. Former President, American Bar Association.

**Concluding Remarks.**

Professor Robert B. McKay, New York University School of Law. Chair, AALA-ABA Committee on Guidelines for Clinical Legal Education (1980 report). Chair, Long Range Planning Committee, ABA Section of Legal Education and Admissions to the Bar. Member, Board of Governors, American Bar Association.

Professor McKay will summarize themes which surface during the Conference and give his view of their implications for the future development of the law school curriculum.

## SYMPOSIUM

ROY STUCKEY, Clinical Professor at University of South Carolina School of Law and Conference Chair:

The first goal of this conference is to develop a consensus of understanding about the present state of professional skills instruction in American law schools.

The second goal is predictive. As we develop an image of the current stage and status of professional skills instruction, we may begin to develop some sense of emerging trends which will allow us to predict the future of professional skills instruction and enable us to go home and ready our skills programs for the future. I'm not certain we'll be able to do that, but I hope we can. I think it's going to be one of the more interesting aspects of the conference to see whether certain themes and trends emerge between now and Sunday. Some believe we are on the verge of very significant changes in the way American legal education is

structured. Others believe we have gone about as far as we can go and we're going to level off in the near future. Perhaps we'll be able to understand the answers more clearly when this conference is over.

It is now my great pleasure to introduce to you the Dean of the Law School of the University of New Mexico, Ted Parnall. First, let me thank Associate Dean Peter Winograd and his staff and Dan Noyes, who's providing our audio-visual support, Mike Norwood, Fred Hart, Bill MacPherson and the other members of the New Mexico faculty. They have done a superb job helping put this conference together. We couldn't have had better cooperation, a better facility or a better place to have a conference like this. I want to express my appreciation to them and also to invite any of you who are thinking about having a conference to use this facility—it's a wonderful place to come.

Without any further introduction, I'll let Ted Parnall welcome you to the Law School.

THEODORE PARNALL, Dean of the University of New Mexico School of Law:

Thank you, Roy, I'm very pleased to welcome you to this conference and to our law school. It's gratifying to see among you so many old friends, so many fellow advocates of strong professional skills training. From the days of 1970 when Bill MacPherson started our clinical program to Mike Norwood's current leadership of that program, we at New Mexico have placed considerable energy and resources in teaching professional skills, and we welcome this conference as a time to share with you our ideas and our thoughts about the role of clinical education and profession skills training in legal education. I know that Fred Hart, whose support was so important to the growth of our clinical program, is very anxious to share his ideas with you during his small group sessions.

We will do our best to make sure that your time here is both pleasant and productive, and I hope you'll feel free to contact either me or Pete Winograd if we can help you during the next few days.

I'm especially pleased to introduce our first speaker this morning, the Honorable Justice Rosalie Wahl. Justice Wahl is well suited to begin this conference. She is, as you are well aware, a Justice of the Supreme Court of Minnesota, as well as the Chair of the American Bar Association's section on legal education. Even more, she is one of us, myself included, who has labored as a front-line teacher of professional skills. Our legal profession generally, and legal educators, and members of the judiciary specifically, have never been in as critical a place in the national sensibilities as they are today. I'm very pleased to introduce to you a Justice, a legal educator, a person with a very deep concern for the way legal education affects the profession, Justice Rosalie Wahl.

ROSALIE WAHL, Justice, Supreme Court of Minnesota, and Chair, ABA Section of Legal Education and Admissions to the Bar:

Fellow legal educators, members of the Bar, friends, it's a privilege and a pleasure to greet you here and to share the excitement of this broad ranging

conference on professional skills in legal education. We've come from all over the country—some of us from the practicing bar and the bench, most of us from the classrooms and the administrative offices of the law schools and from the front lines of clinical legal education.

We've come to celebrate the twenty years of effort and achievement since the Ford Foundation through the Council on Legal Education for Professional Responsibility (CLEPR) and Bill Pincus set in motion the clinical education movement for law students. Twenty years is not such a very long time actually, although it has brought some of us from a rather rebellious youth to mid-life, and it has brought others of us from mid-life to the foothills of age. My own credentials are, as the Dean set them out, that I served in the field of clinical legal education for four years.

I had the great honor and pleasure to be one of the two people who were given the assignment of establishing the clinical legal education program at William Mitchell College of Law along with Roger Haydock. For four years, Roger directed the whole program, but I directed the criminal clinical program in both the trial and appellate advocacy departments. For those four years, every morning during the week, I was with students at 8:30 in the court in Ramsey County, interviewing the people who had been brought in overnight, appearing with those people at arraignment, then later doing the assigned cases for the various students in the trials. Back at the law school, I was teaching at nights, doing all of the videotaping and all of the exercises, as well as a lot of discussion and a lot of work. We had a program of student directors, and I have counted it one of my greatest pleasures to have worked with them. Our students were basically fourth year, and Mitchell is a part-time school. They were senior law students, and senior law students can be pretty arrogant, but these people, when they went into court for the first time, were very vulnerable. They were also very vulnerable about going out into the practice of law. I was told by many of them that for the first time they had the opportunity to really get to know a professor at a law school and get to work very closely on the programs.

I went on from there to a less exciting job on the Court. But I have wished still, as I sat there, that every law student in every one of our law schools had the opportunity to be in court, to be in front of the bench with an indigent defendant and know what it's like to be holding the same end of the stick. We represented some of the most difficult clients that there could be, and whether those students ever again handled a criminal case, whether they ever again had a client like that, I thought they would remember. Wherever they sat in the law offices, wherever they sat in the legislature, they would know what it was like in this system—to see the system from the bottom up and to know what it was like to be there beside that person. When Justice Burger took after the legal profession, saying that so many were unprofessional and not highly qualified, I could say that I know at least 450 lawyers over the State of Minnesota, whom I had a great deal of confidence in and whom I would have trusted with my legal problems knowing that they would either handle the problems confidently or send them to somebody who could.

We have come here today not only to celebrate this period of time but also to take stock of where we are now—to ascertain perhaps the extent to which the clinical approach and methodology as well as the clinical and professional skills

training programs have become an integral part of the law school structure and curriculum. That is something that you know a great deal more about than I do, and I'm going listen very carefully, and hear all kinds of reports.

We've come here to share our problems and our solutions. Some of you have found solutions to those problems. We've come here, I think, to get our second wind, because as I say, twenty years is not such a long time, and we're in for the long haul. It wasn't done overnight—it can't be done overnight. We've come here to imagine the future, and we've come here to recommit ourselves to certain basic principles. Some of those principles were memorably set out by Gary Bellows and others when we gathered in Buck Hill Falls in Pennsylvania in 1973 to celebrate the first five years of the CLEPR stimulated movement of clinical education in the law. We were younger then, and we were filled with a very heady exhilaration because legal education could never again go back to the old approach of pure academic training. We were persuaded of that. Clinical legal education properly understood, Gary Bellows told us, is the methodology—it's a way of going about learning which can be applied to the whole curriculum. To all of us, the actual representation of live clients is a very vital element in the method supplemented by reflection, analysis, role playing, demonstrations that are videotaped and other effective techniques of learning from experience. That is precisely the purpose of clinical legal education Anthony Amsterdam continued a decade later, in fact eleven years later, at the McGeorge Conference on *Legal Education and the Profession: Approaching the 21st Century.*

The purpose of legal education is to teach students how to learn systematically from experience and simultaneously to educate them in a broader range of legal analysis and skills than have traditionally been taught. To Amsterdam, we clinical teachers are doing skills training when we teach "ends-means thinking," information acquisition, contingency planning, comparable risk analysis and decision making. These subjects are no less conceptual or academically rigorous than case reading or doctrinal analysis. The issue then is not whether the law schools should go on teaching legal analysis, or conducting skills training, but which legal analysis and skills the law schools should teach and how much of each. Have we really tried in law schools self studies to determine what skills, what attitudes, what character traits, what quality of mind are required of lawyers? Are we adequately educating students through the content and methodology of our present law school curriculums to perform effectively as lawyers after graduation? If we're not, we are failing the students. We're failing the courts who rely on us. When our court admits, as my court is doing, several hundreds of new lawyers, we are saying to the people of the State of Minnesota, you can trust these people. You can walk into their office, and you can trust them. We rely on the law schools; we rely on the accrediting process of the American Bar Association. If the law schools are not training the students to perform effectively as lawyers after graduation, or at least to know how to think, how to learn from their experience after they get out, then we will be failing the courts, and beyond that, we will be failing the public.

More and more judges believe that absent skills training, the lawyer is ill qualified to protect clients interests. Judge Edward Devitt, Senior U.S. District Judge for the District of Minnesota, has made the following indictment, albeit in a footnote, in a recent law review article: "Clinical skills education is the

neglected step-child of most law schools today." The Ford Foundation made grants totalling $10 million in the 1970's in an attempt to encourage law faculties to offer these much demanded lawyering skills courses. The effort was aborted with little dent on the century-old law school emphasis on book learning. Perhaps the effort has not been aborted, but if we don't keep moving forward we will lose ground.

For the 1986-87 academic year, 171 ABA approved law schools (which were all of those law schools reporting) offered professional skills training courses. One hundred and forty-nine of those schools offered both client contact and simulation skills training courses. There were only 32 schools that offered only simulation courses. But only 55 law schools of all of the law schools required for graduation clinical legal education credit hours, and most of those requirements were less than six credit hours. So we wonder a little bit how serious we are about it. We know that the ABA, through its legal education section and the accreditation committee, have standards which we seek to enforce. Standard 302 of the American Bar Association Standards of Approval of Law Schools requires that law schools offer instruction in professional skills. But the only course that's required by the Standards is a course in professional responsibilities specifically required of all candidates for the first professional degree. A law school's failure to offer adequate training in professional skills, whether through clinics or otherwise, has been held to violate Standard 302(a)(iii).

There hasn't been any ruling yet on what constitutes adequate training. As good lawyers you might argue: "What does it mean to have adequate training in your particular school or what does it mean to the accreditation committee?" Does it mean some critical professional training for every student? Standard 405(E) is an effort to move law schools to afford full-time clinical teachers a form of security of position, reasonably similar to those provided other full-time faculty members by the Standards. It's an effort to take them out of the status of second class citizens. Some law schools have moved, others are moving, some have yet to move.

You can tell from this that we are doing many things. And I thank each of you for the efforts you are making. But we're not doing enough. We have to work together, you in the law schools, we in the courts and in the Bar, and continue to push. The accreditation committee will continue to monitor a law school's clinical professional skills programs and the status of its skills teachers as reported by site inspection teams. Members of the bench and Bar will continue to participate in your trial advocacy programs, and other programs. Law school deans and faculties will have to recognize the importance of clinical programs to the profession and to the public. Courts, through their student practice rule, have provisions for representation by students to have a fee-generating program. Opportunity is there for the law school clinical program. At least three presidents of the American Bar Association have shown a very strong interest in clinical education, and I know that the clinical teachers have recognized that they have a good friend in Robert MacCrate. And you have been letting him know what the needs and the problems are, and I think rightly so.

We have to keep the matter in the forefront. And we have to ask ourselves hard questions. When we are asking ourselves those hard questions, ask this one: "Is it true that in prizing intelligence, and prize it we must, we as teachers

of the law have become inattentive to, indeed rejecting of, matters of the heart?". Curtis Berger claimed in an article in the *New York Times*, July 6, 1986, entitled "The Heart of the Lawyer?".

> Legal education is an intensely cerebral pursuit. Inside the classroom, students listen as we dissect court opinions, ridicule fuzzy-headed thinking, stifle passions as unprofessional. We praise our students by telling them they "think like lawyers," an ability requiring a wholly analytical matrix for dealing with problems.
>
> Within days after their arrival, our first-year students learn about law review, and it becomes an *Idee Fixe*, which we encourage, that their careers will suffer if law review, the quintessence of intellectual meritocracy, eludes their grasp (even though this will happen to 90% of them). Students soon conclude that if we—and society—are to judge them highly, they must prove themselves with their heads.
>
> I believe that the head is attached to the heart—not only biologically—and that is the pulsating heart of the professional man or woman legal education has avoided.
>
> I do not assert that legal education makes our graduates evil, but I do believe that legal education makes our graduates less feeling, less caring, less sensitive to the needs of others, less tolerant of the frailties of their fellow creatures, even less alarmed about the injustices of our society than they were when they entered law school.
>
> What concerns me is the mind-set and the heart-set into which we mold our students: That it is better to be smart than passionate, that people who feel too deeply tend not to think too clearly, that a fine intellect can rationalize any position or state of affairs, no matter how outrageous or indecent or unjust.

It's not that we're psychologists or sociologists or therapists—we're none of these. We're lawyers, trained to solve those human problems that lend themselves to human solutions, to legal solutions. But we are concerned about the social, political, and economic context in which those problems occur. And we care about the human beings who have those problems. We're lawyers like Nick Schapps, who was a student of mine when I taught at Mitchell, whose love of the law and love of the people led him from a comfortable, successful professional life in the Ramsey County Attorney's Office, to go as a VISTA volunteer to a far corner of Alaska to work with the native Eskimos and Indians, to die there tragically from pneumonia but doing what he wanted to do in a place where he said people really needed someone to fight for their legal rights and bring them justice. Those places are there and here as well, where an estimated 70% of the people still need someone to fight for their legal rights and bring them justice.

We're lawyers like Louis Brandeis, that incredible man and lawyer, who, before he went to the United States Supreme Court, forsook a lucrative law practice for the public arena as the people's attorney, paying his own law firm for his own time when he acted in that capacity and charging no fee for the services performed. He said, when asked why he did it, "I have only one life, and that is short enough, why waste it on things I don't want most. I don't want money or property most, I want to be free." By his example, Brandeis asked lawyers to start making moral judgments and to stop turning their backs on complex situations. In a 1907 address he declared, "what the the lawyer needs

to redeem himself is not more ability or physical courage, but the moral courage in the face of financial loss and personal ill-will to stand for right and justice."

After Governor Perpich of Minnesota announced ten years ago that he would appoint me to the Minnesota Supreme Court as its 72nd, and first woman, justice, a news story appeared in which I was quoted as saying that Louis Brandeis was one of my heroes. A friend of mine, whose father had been a philosopher at the University of Wisconsin and who, in her growing up, had known as a family friend Brandeis' daughter Elizabeth, whose husband also taught at Wisconsin, sent this article to Elizabeth Brandeis Raushenbush. I treasure "E. B.'s" reply to my friend. "It is good to thing," she said, "that there are still people admiring my father." I want to tell her that there are still people, including lawyers, who not only admire her father, but who are still standing even in the face of financial loss and personal ill-will, for right and justice. And we must be among them.

Thank you.

## What Are Professional Skills and Why Should Law Schools Teach Them?

GARY PALM, Professor at the University of Chicago Law School and Director of Legal Aid Clinic, Chair:

The format today is that each of the speakers will speak in order and then we will have a conversation among ourselves about our reactions to each other's presentations. We will not take questions at the conclusion because the small groups will convene immediately after this session.

The order that the speakers will talk, are first Roberta Ramo, who is a managing partner in the Albuquerque firm of Poole, Tinnen and Martin, where she is engaged in commercial practice. She is the former chair of the American Bar Association's Section on Economics of Law Practice.

Second will be Professor Don Gifford at the University of Florida College of Law. Many of you know Don. He has taught both clinically and academically, and we'll have some comments that combine insights from both of those experiences.

Third is Carol Kanarek. Carol practiced for several years with a large New York law firm, and she was placement director and legal writing instructor at the New York Law School. She is currently a consultant to law firms and other legal employers in New York City about recruiting and retention of associates.

Peter Hoffman is a Professor of Law at Nebraska. He's the director of the clinical program at Nebraska, and this year he is serving as chair of the Clinical Legal Education Section of the Association of American Law Schools.

ROBERTA RAMO, Esquire, Albuquerque. Former Chair, ABA Section on Economics of Law Practice:

I believe that this is the most important conference about lawyers and lawyering of the decade. You have among you the most thoughtful and powerful members of the private bar in Shepherd Tate, Sharp Witmore, Richard Nahstoll, Justin

Stanley and Robert MacCrate. But I feel some regret because I understand that I am speaking to the wrong audience. The remarks that I am about to make are for the deans of your law schools. I hope that you will consider them worthy of reporting.

To a person in private practice, the questions of the day are these: Are we training students to be fine lawyers in law school, and if not, why not? What are the professional skills of first rate lawyers? Let me answer these questions backwards, or from the outside in. Over the last ten years I have traveled the United States speaking in depth to lawyers in practice. I have found a significant depression among my colleagues at the Bar. There are very few lawyers I know in America who are completely happy doing their work. There are very few lawyers in America who feel the importance of their social role, and there are diminishing numbers of lawyers in America who feel the enormous personal sacrifices that one must make to achieve first class skills in the profession have been, on balance, worth it.

A slight detour. Last night, I went from the faculty meeting for this conference to give a talk about the New Mexico Symphony Orchestra with Neal Stulberg, music director of the Orchestra. The Orchestra is going to perform the Ives Second Symphony. Maestro Stulberg spoke about Charles Ives, who most of you know, I'm sure, was an insurance executive as well as a composer. His music was seldom performed during his life, but we are coming to realize that in many ways Ives wrote the quintessential American music. Ives, it was explained, composed music reflecting the soul of America. As I was listening to Neal and thinking about speaking today, it occurred to me that the practice of law is really the quintessential American profession. That is, we are the profession which constantly, and usually peacefully, weighs competing interests. We resolve disputes. We are the architects that allow the democratic system to withstand the battery of social strife. We put forth our energies and skills so that the desires of people with disparate backgrounds and values and goals can mesh into a single system—the democracy. We protect minority interests and work all of these conflicts out without violence or repression. Yet we sit and listen to people, from President Bok of Harvard to Former Chief Justice Burger, excoriate lawyers in the legal profession as though we were sapping the very life's blood of America.

They would do well to read the Kerner Commission Report from the 1960's. Remember that we had a great deal of terrible violence in the cities in the 60's. Most of us thought it was violence in response to racism, and indeed that was a chief element. But in fact, if you read the Kerner Commission Report, you will find that there was among the poor minority population an enormous feeling of frustration, because in the large cities of America and in the small towns as well, poor people were frozen out of the legal system. They did not have open access to lawyers and the courts. Thus, the only way they could resolve their disputes, from minor disputes with landlords and vendors to major disputes dealing with race and class, was in the streets. It was out of that report that a broad understanding about the role of lawyers and the importance of lawyers in America as a heterogeneous society began to be felt.

Having defined the social role of our profession, I must advise you that the law students that we all see walk through our doors are not trained to do the work assigned to us by American society. Most lawyers are not trained in law

school to do the work of their lifetime. In fact, tragically, most lawyers are not ever, during their professional lives, trained to do the work properly and so they feel inadequate and feel misunderstood, and, I am sorry to report to you that in some measure, they are both.

Let me give you a story by example and then I want to talk to you about what I believe the lawyer's professional skills are. Much to my shock and amazement, I was invited to Harvard Law School in 1986 to speak on a panel which was entitled, "Is There Life After Law School?" I suppose they assumed anyone who had made it from the University of Chicago back to Albuquerque, New Mexico must have a tale to tell. There were two lawyers in private practice on the panel, a man from a New York mega firm and me. The Dean of the Harvard Law School was the moderator. During the initial presentations I recall being the only person that he interrupted. He interrupted me shortly after I explained that one of the reasons that our firm came to Harvard only every few years or so to recruit was because we had not found a burning desire on the part of Harvard Law School students to come to Albuquerque, New Mexico into our firm to practice, even though one of my partners is a United States Supreme Court Clerk and indeed a graduate of Harvard Law School. I explained that the Harvard students assumed that they would work at the major firms in the big cities, make the big bucks and after five or six years, if it didn't look as if their partnership chances were good, they would send me their resumes and we would be thrilled to have them come to our law firm. Tragically enough, I told them what we had discovered was that at that point in their careers they were usually not trained in the skills we needed for us to consider hiring them. At that point, the Dean couldn't stand it. "Mrs. Ramo," he said, "you're telling me that your law firm in Albuquerque, New Mexico trains lawyers in a better fashion than the major national law firms of America?" Yes, we train lawyers to better do the complete work of lawyering. I am not telling you that we train people better to look at an isolated section of the securities law, an isolated section of the Internal Revenue Code, but in terms of the real skills of lawyering in a commercial practice, we can afford to and do train lawyers superbly to use the full range of legal skills that are necessary to practice in most first class law firms in America. Now, what are these professional skills?

*First, communication.* Where is it in law school that we actually learn to listen to people who are not professional lecturers? To establish facts from often overwrought clients not used to telling complicated stories? Where do we learn to talk, to persuade, to dissuade and to explain?

*Second, writing skills.* They are virtually non-existent in the ways in which we need them. I am astounded as I go to meetings of managing partners of law firms from all over the country to discover everyone singing the same song: No one knows how to write! I am not telling you that you are not training people to write first class law school exams. I am telling you that I have yet to find the legal problem that resolves itself in a blue book answer. Lawyers must write clearly and persuasively to be understood by both clients and judges.

*Third, thinking of creative solutions.* No client comes into my office or any office with a card which they hand to the lawyer which says, "This is a torts problem" or "My problem is clearly UCC Article Nine" or "Mrs. Ramo, here we have a constitutional question." In fact, the kind of cross-over of discipline

of the law with information from the greater world may be the key element to being a great lawyer in America today. Once we employed, as an associate, a graduate of one of the most prestigious law schools of the United States who was also a member of the law review. Having been given a rather complex case on behalf of a client, he did extensive legal research and came back to one of my partner's and said, "We lose." The partner said, "You mean we should just call the client in and say 'Sorry Fred.'" He said, "Well, the weight of authority is on the other side." He was not with us long!

But it wasn't really a joke to us, because what we began to realize after listening to him was that we observed in very few of the law students that we hired a kind of passion for the rights and interests of each client. We want to find deep desire to make sure that clients' problems are solved not just in front of the courts, but in negotiation.

*Fourth, giving advice.* So many, many times we get long and erudite memos back, fabulous letters written by associates but they never tell the client what to do. They can analyze; they can weigh; they can see all 15 sides of an issue; they have analysis paralysis. When the client walks into a lawyer's office, they want to know what the primary and practical options for action are and what the lawyer thinks they should do. Yet, we spend very little time explaining to law students either the enormous weight of this responsibility or the difficulty separating legal advice from business or personal decisions that the client must make. We don't explain to them how to produce what the client wants and needs.

*Fifth, dealing with the pressure.* Law schools expend little or no effort preparing students to deal with life in an adversary system. We don't prepare them to deal with the emotional burden of being a lawyer.

Everyone in medical school knows that the internship is a hellish experience and the residency is not much better. There is teaching about the role of the physician, but we have students walk into our law firm every day who think that it is going to be very easy to learn to be lawyers. We find with shock and amazement that they are not prepared at all for dealing with the actual stress of handling not one case at a time, but twenty. They are unprepared to live a life in which you do not sit quietly in a library or even in an examination room for three hours, but instead a life in which research must be done in short periods of time, the telephone interrupts you constantly, and you rarely have the luxury of dealing with one matter at a time.

*Sixth, the financial costs.* Who among you teaches cost benefit analysis? Yet, for most of us it is a primary fact of life. When I teach financial management to law students, I use the easy way of explaining to them them why it is important. If you want to take pro bono cases, I explain to them, you have an ethical obligation to determine if you can afford to take the case in exactly the same fashion that you would treat a case for a paying client. In paying matters, increasingly the cost benefit analysis is the one that sophisticated clients want from their lawyers.

*Seventh, the technological revolution.* Another skill which law students must have to succeed in forwarding their client's interests is the skill of dealing with and using technology. Most lawyers in America understand computers in two very simple ways: First, they are faster secretaries—that is they are word processors that let us type things faster than we used to be able to type them. Second,

they let us do legal research in a more efficient way. That is not what computers are all about in modern society. If you don't understand computers, you will never be able to handle big time litigation, nor, for the most part, will you be able to handle the kind of financial modeling that will be required to do any major real estate work, any estate planning, or to deal with business clients.

Finally, a question: where are the students who understand about ethics and honor and compassion and their role in the practice? Ethics and Honor and Compassion—without those things the life of law is meaningless. I don't always have a great passion for the law, but I have a great passion for lawyers and their work. I think we have not been honest with law students in trying to tell them what the life at the bar is really about. We must review what it is that makes up the legal practice of most people and measure our clinical course offerings against that reality. So many clinical skills courses are related only to litigation. So little of the practice of law has anything to do with actually appearing in the courtroom. So very few matters actually end up in a full blown jury trial, and so very few of those actually end up in an appellate procedure. In my unscientific observation, we spend about 90% of our effort in the clinical law training people to do something which, even if they were litigators, they would do less than 10% of the time. In my view, our emphasis on teaching litigation in the law schools is as though in medical schools we were only teaching people how to do surgery, and letting the rest of the people bumble about medicine, assuming that it was easy since they didn't have to cut on anyone. The most interesting part of that supposition is that what we are seeing in medicine is exactly what we are seeing in the legal profession. There is less and less surgery because more and more things can be handled medically, and there is a major pressure to do less and less litigation because of its expense and time.

To answer Professor Stuckey's opening question about the future of legal education, I have grave concern that if it does not change radically in some aspects, the practice of law as we know it will be about as active in the year 2000 as the practice of philosophy is today. In the early part of the century, the Flexner Report reviewed medical education and made important suggestions for change which were adopted, allowing that profession to function in this century at a high level. I suggest to you that such a very hard look may be needed now at law schools, not to save the profession, but to save the nation. Because without law and without first-class lawyers, we may not exist as a democratic society, but we will disintegrate into warring sects with no common purpose.

And so, as I leave you today to three days of talk and discussion, I leave you as a lawyer who is enormously concerned about the future of the profession and with the hope that what you do will come to be considered, not abstract academic discourse, but rather the life's blood of training lawyers, without which this democratic society would not function.

DONALD G. GIFFORD, Professor at the University of Florida College of Law:

I stand in the unenviable position of being someone inside legal academe having to respond to the trenchant criticisms of contemporary legal education by Justice Wahl and Ms. Ramo. Let me begin by strongly endorsing the sug-

gestion that law schools are not doing all that they can do, nor all that they should do, to prepare students for a lifetime as lawyers. I reach this conclusion, however, from a somewhat different perspective than our earlier speakers.

During these remarks, I intend to apply several of the concepts we teach our students about basic lawyering skills to the issue of the role of professional skills education within the law school. Many of us, after all, are advocates for the teaching of professional skills, at the same time that we purport to teach students to be better legal advocates. What can we learn from our own teaching that will assist us in advancing the cause of professional skills education? Specifically, I think our advocacy of professional skills education could benefit from the following three types of analysis of lawyering skills that many of us teach in the classroom:

1. Have teachers of professional skills framed the questions regarding the teaching of professional skills in the proper form?[1]

2. Have professional skills educators used what they teach about fact investigation and case planning to present the history of legal education in a manner that supports and does not defeat lawyering skills education?[2]

3. Have advocates of professional skills education, when negotiating with their more traditional colleagues, chosen negotiation strategies wisely?[3]

The two questions that were posed to this panel were: First, what are professional skills? And second, why should law schools teach them? I think these questions are both inaccurate and politically counterproductive, because they imply that traditional law professors are not teaching lawyering skills at all. I agree with the comments of the earlier speakers that law schools are not teaching all of the necessary skills and perhaps are neglecting some of the most important ones. I think, however, that most of us who have taught clinical programs—on balance—would prefer to work with students who spent their first year of law school exposed to a fairly rigorous and traditional first year curriculum.

The proper form of the question is Justice Wahl's reformulation: not *whether* professional skills should be taught in the law school, but rather *which* professional skills should be taught in the law school?

This form of the question in not only more accurate, but also more advantageous when proponents of professional skills education deal with their more traditional colleagues. When the law professor, who teaches jurisprudence and conflicts of law and whose only professional experience prior to teaching was clerking with a federal Court of Appeals, is confronted with the question whether we should teach professional skills, she probably is threatened at some level. Coming from the American Bar Association, practicing lawyers, or clinical teachers, such a question suggests a "we-they" dichotomy. It suggests that the practicing bar and professional skills educators believe there is little which goes on in the traditional classroom which has any value to the lawyer.

1. For a discussion of the importance of framing questions in the proper form, *see e.g.*, G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 197-211 (1978); D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 38-52 (1977).

2. *See e.g.*, D. BINDER & P. BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 5-6, 120-21 (1984).

3. *See e.g.*, Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985).

The second lawyering skill that should be applied to the role of professional skills education within legal academe is the use of identical facts to support different arguments. Many of us have seen Dave Binder demonstrate how a single fact can be used by adversaries to support conflicting arguments.[4] Let us try the same exercise, not with a historical fact, but with a historical figure in legal education. It's time for professional skills educators to reclaim the legacy of Christopher Columbus Langdell. Now that is a radical, and probably uncomfortable, suggestion. The worship of Langdell, in some ways, did a significant harm to professional skills education. He isolated the training of lawyers from the real world. He suggested to us that Law is scientific, apolitical, and neutral—a suggestion that nobody in her right mind, not even our most traditional colleagues, would agree with today.

At the same time, Langdell's revolution in legal education left a legacy which professional skills educators have the right to claim. It was he, after all, who brought actual cases and judicial opinion into the law classrooms. It was Langdell who said that it was essential to teach law students in the first year how to analyze cases and make arguments. That is not all law schools should be doing to educate lawyers, but I do think it is a part of professional skills education, broadly defined. I am not suggesting Langdell as a new cult figure for clinical education, but I do believe that it is wrong for professional skills educators to concede his legacy to proponents of retrenchment and conservatism within legal education. Reclaiming the legacy of Langdell is a symbol of the reality that professional skills education is in the mainstream, not the periphery, of American legal education. The third—and most important—lawyering skill that advocates of lawyering skills education should consider is how to most effectively choose a negotiation strategy. The negotiation under consideration is the "meta-negotiation" between representatives of the practicing bar and clinical teachers, and the more traditional professors and law school deans who control legal education. In the past, proponents of clinical education and other forms of lawyering skills education sometimes have been successful and sometimes have been frustrated by pursuing what Jim White[5] and other teachers of negotiation theory would regard as a *competitive* negotiation strategy. Sometimes clinical educators have convinced the ABA House of Delegates to vote with them or have gained the requisite political allies on various committees. Sometimes they have succeeded in using threats of accreditation inspections to prompt law schools to devote adequate resources to clinical education. All of us with an interest in professional skills education owe an enormous debt to the people—many of whom are attending this conference—who have established the beachheads of clinical education in the law schools and who have made professional skills education an integral part of the American legal education.

I suggest, however, that the future of professional skills education within the law schools in many instances would benefit from another approach. Those of us who seek to advance professional skills education should borrow new negotiation approaches, such as the problem-solving approaches described by Pro-

4. *See also* D. BINDER & P. BERGMAN, *supra* note 2, at 120-21.

5. *See e.g.*, H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR (1977).

fessors Roger Fisher and Bill Ury[6] and by Professor Carrie Menkel-Meadow.[7] Let me begin with two specific ideas from problem-solving negotiation theory, although I do not think that these exhaust the ways in which problem-solving approaches can assist us in trying to get professional skills education out of the periphery and into the core of legal education.

The proponents of problem-solving negotiation advise that the negotiator should consider the underlying interests of the other party. What are the underlying interests of traditional faculty members and conservative deans? I have already mentioned that talk of more professional education in the law schools may generate professional insecurities. It is a second interest of traditional legal educators which I think is more important, however. One of their underlying interests is a firmly held and genuine conviction, with which I agree, that law schools have a dual role. Law schools educate lawyers, but law schools are also research institutions. I would like to defer consideration of the complex relationship between scholarship, professional skills education and traditional classroom education for a moment. Let me just state, at this time, however, that just as professional skills professors need to reclaim the legacy of Langdell, I think that they also should seize the mantle of truly creative and meaningful legal scholarship.

Before discussing professional skills education and scholarship, consider one other problem-solving approach to negotiation: the use of objective criteria to resolve disputes, as suggested by Fisher and Ury.[8] The question being addressed, "Which lawyering skills should be taught within the law school?" best can be analyzed if broken down into two component questions. These two component questions then can be answered by reference to objective criteria. The first issue, addressed by Justice Wahl and by Ms. Ramo, is: What skills are needed for a lifetime career in the practice of law? Dean John Mudd and other faculty members at the University of Montana Law School have surveyed practicing lawyers on precisely this question. Their survey results, as well as the reflections of experienced and insightful practitioners and judges, can provide the objective criteria with which to answer this first question.

The second issue is: Which skills are law schools better equipped to teach than law firms and continuing legal education programs? A generation ago, trial practice skills were the only lawyering skills other than traditional legal analysis, argument, and research and writing which had crept into the main tent of the legal education circus. But within the last twenty-five years, there has been an explosive increase in the variety of lawyering skills taught by law schools: interviewing, counseling, negotiation, cost-benefit analysis and case-planning, among others. These skills are being taught by law schools, I think, because law schools have unique abilities to research these areas and to teach them. First, law school professors draw upon their own practice experiences and, more importantly, the observations and reflections of those teaching clinical programs. Second, law school professors are in the best position to study the work of other

6. R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

7. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 (1984).

8. R. FISHER & W. URY, *supra* note 6, at 84-98.

university disciplines, such as social psychology, as they relate to lawyering processes including negotiation, counseling or interviewing. The last fifteen years has seen a massive infusion of work from other disciplines into legal education, as represented by the many excerpts of research and writing from these other fields contained in Professors Bellow and Moulton's seminal text *The Lawyering Process*[9] or by Andrew Watson's book, *The Lawyer in the Interviewing and Counselling Process*.[10] The skills that lawyers need as interviewers and counselors are not wholly unique to lawyers; they do bear some resemblance to the processes taught to psychiatrists and social workers.

It is time to reject the idea that professional skills education is not intellectually challenging. As law and the social sciences have become the most recent trend in legal education, traditional legal educators scarcely have noticed the important link between the professional skills studied in clinical programs and the scholarship of social scientists concerning lawyering processes. It's time for professional skills educators to seize the mantle of the truly creative opportunities for research and scholarship.

On my flight to this conference, I read an excellent manuscript prepared by my colleague Mary Twitchell, who is neither a clinical nor a professional skills education specialist, on the ethical dilemmas of lawyers working in teams.[11] What struck me as I read the manuscript was, although there was nothing in the legal literature which even raised these issues previously, clinical educators had been talking about these same ideas for many years at clinical conferences and in clinical course classrooms.

By not putting their analysis in writing, clinical educators fail to reach a larger audience. They also do not gain the professional respect of those who believe strongly in the research role of the law school. As clinical education has struggled, with considerable success, for the resources and professional stature needed to fulfill its teaching and service functions, it has neglected to place the same emphasis on research opportunities and obligations. For the most part, those of us who have taught clinical programs and other lawyering skills courses, have not fought hard enough for blocks of time to pursue research or created the necessary incentives to engage in research and writing. Teachers of lawyering skills have not established as a professional norm the obligation to share our ideas beyond the walls of the classroom.

Recently, there are encouraging signs that lawyering skills teachers are beginning to realize the importance of scholarship, both in its own right and as a means of bridging the gap between themselves and traditional academicians. In October 1986 the University of California at Los Angeles and the University of Warwick co-sponsored the first international conference on clinical scholarship at which more than twenty scholarly papers on lawyering skills and processes were presented.[12] At the AALS Clinical Section Workshop held in the spring of 1987, clinical educators began to analyze the commonly recognized lawyering skills such as negotiation, counseling and interviewing by breaking them down

9. G. BELLOW & B. MOULTON, *supra* note 1.

10. A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS (1976).

11. Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 Minn. L. Rev. 697 (1988).

12. A number of the papers presented at that conference are published in 34 UCLA L. Rev. 577-924 (1987).

into their fundamental building blocks—idea generation, questioning, judgment and values. Such analysis went beyond borrowing applicable concepts from social scientists and adapting their research for the use of professional skills education. The participants referred to these new forms of analysis as "methodological" breakthroughs; anybody else from the university setting would have referred to them as "intellectual" breakthroughs. Neither they nor others in legal education gave them the recognition their work deserved. Most of the ideas have not been published; perhaps that is why.

In conclusion, allow me to return to the original questions posed and now offer some tentative answers. The first question was "What are professional skills?" Those professional skills which the law school curriculum traditionally ignored but which are now being taught are nothing more than understandings of human interactions that lawyers use in their professional roles. The law itself, after all, is a set of human relationships, human interactions and human organizations.

Why then should professional skills such as interviewing, counseling and negotiation be taught in the law schools? Because no one else—not the mega-law firms, not the continuing education programs—have as their primary function the study of law in action.

Some law school professors interested in the lawyering processes and professional skills can continue to borrow from social psychology and other disciplines to enrich teaching materials and legal scholarship. Others will continue to conduct living laboratories in lawyering usually referred to as clinical programs.

How can it be that in a decade in which law and social sciences is the hottest topic in legal education that clinical programs and professional skills education, the part of the law school which has the only living social science laboratory on most university campuses, are often regarded as being of marginal importance to the mission of the law school and intellectually unworthy? Those of us who *teach advocacy* must do a better job of *advocacy* ourselves.

CAROL M. KANAREK, Esquire, New York. Chair, ABA Young Lawyers Career Issues Committee:

As I was sitting in the airport in New York yesterday, thinking about what I was going to say to you, a question suddenly occurred to me: "Why am I the first person in a hundred generations of my family to have attended law school?" No, I'm not going to plagiarize Joe Biden's plagiarism of British labor leader's Neil Kinnock's thoughts on the subject. But I think the question itself is particularly apt to this conference because it is one that the majority of today's law students could also ask themselves. And the answer to that question—"Why am I the first?"—is that law school has become the almost automatic choice for bright liberal arts majors who don't know what else to do with their undergraduate degree. This is in sharp contrast to previous generations of law students, who usually had a fairly accurate idea of what success in law practice entailed *before* they made the decision to attend law school. In essence, they received pre-professional skills education, usually through the observation of the day-to-day work of family members who had preceded them in the profession. Many of

today's law students, however, enter law school with no conception or, even worse, gross misconceptions of what the practice of law is all about. Most of them envision something that is a cross between *L.A. Law* and Cravath, Swaine & Moore: Exciting work, intriguing clients and an $76,000 starting salary.

What the typical law student does not understand is that law practice—contrary to what may be inferred by reading *The American Lawyer*—is, and probably will remain, comprised largely of small firms and solo practitioners. In fact, two-thirds of all lawyers in private practice are in firms with two or fewer lawyers. Among recent graduates the statistics are somewhat different, but most law students would still be surprised to hear that only about fifteen percent of new lawyers begin their careers with firms of one hundred or more lawyers. By contrast, almost thirty percent of new law school graduates become associated with firms of thirty or fewer lawyers. And if you remove from this picture the handful of law schools which supply the bulk of associates to the large law firms, the statistics are even more skewed towards small firm practice as the norm—even for new graduates. Yet most students at most law schools expect that, upon graduation, someone will hand them a secure, high-paying job simply because they have a law degree.

And those graduates who do start out in large law firms can no longer expect to spend their entire careers with those firms. A recent study that looked at the careers of 7000 graduates in four different class years from seven law schools in the northeastern United States revealed that, of those graduates who began their careers with law firms of 85 or more lawyers, one-third of the 1981 graduates, one-half of the 1974 graduates, and three-quarters of the 1969 graduates were no longer practicing in a large law firm in 1984. (By contrast, 65% of the graduates of the class of 1956 who began their careers in large firms were still affiliated with a large firm in 1981—28 years later.) (Leona Vogt, *From Law School to Career: Where Do Graduates Go and What Do They Do?*, President and Fellows of Harvard College, Cambridge, 1986.) Yet students who are heading to large law firms are woefully ignorant of these statistics. I wish they could see the hoards of large firm lawyers who come into my office every week with resumes that they felt would be their key to lucrative, secure employment for the rest of their lives; instead, they are finding that—after five to ten years of practice—they are unemployed and virtually unemployable. They discover to their dismay that the very specific skills they have learned are applicable to an economically viable large firm practice and only to such a practice. These lawyers are finding that they are not wanted in any other kind of practice setting—and they don't feel confident or qualified to go out and establish their own practices. And so many large firm lawyers will go from what they consider to be the pinnacle of the profession in their third or fourth or fifth year of practice, to marginal employment as an associate or "counsel" to some small firm farther down the line.

Most law schools do very little to dispel students' misconceptions about the nature of the legal profession. In fact, most schools contribute to the problem by sending their students the following dual message: 1) "The only professional goal worth attaining is a job with a large law firm," and 2) "If you succeed in obtaining such a job, your future success is assured." This message is conveyed in many ways: experience in law practice is de-emphasized as a criterion in faculty hiring; clinical courses and the faculty who teach them are given second-

class status; placement office efforts are largely directed towards those students who are headed for large firm practice; placement "success" (and—in many instances—institutional self-worth) is measured in terms of how many graduates become affiliated with large firms.

Such attitudes and practices are destructive and self-defeating. They foster a sense of personal failure in the vast majority of law students, which is, I believe, a major contributing factor to the recent decline in lawyer professionalism and career satisfaction. Students who feel hostile towards their law schools (and *many* do) are very likely to pass that hostility along to unsuspecting clients when they begin practice. And hostile students become hostile alumni: non-contributors and bearers of bad tidings throughout the legal community.

Law students for whom large law firm practice *is* a realistic option are equally poorly served by schools which emphasize that choice to the exclusion of everything else. First, it gives those students a false sense of security and fails to prepare them for the likelihood that they will either choose or be forced to leave the large firm arena at some point in their careers. Second, it pushes some students who are not suited for large firm practice to take such jobs against their own better judgment—another leading cause of career dissatisfaction among lawyers.

So what can law schools do to prepare their students more adequately for real world law practice? To begin with, deans and faculty members must educate themselves regarding the actual practice patterns within the legal profession generally and among their own school's graduates in particular. The data released annually by the National Association for Law Placement (440 First Street, N.W., Suite 302, Washington, D.C. 20001) is extremely useful in this endeavor. Once this information is obtained, both course offerings and career planning programs should be modified or expanded accordingly. For example, if ten percent of your students join large firms, then only ten percent of your placement office's efforts and programs should be directed at that employment sector. Similarly, mandatory clinics or clinically-oriented substantive courses are invaluable for students who will be affiliated with a small law firm at some point in their legal careers. Survey your fifth and tenth year alumni; you'll be amazed by how many wish that they had received better skills training during law school. And, finally, it would be extremely helpful if schools would begin to seek out faculty members who have law practice experience that is relevant to their students. This can easily be done without sacrificing academic quality, and would be the most valuable change that schools could make. The ultimate goal should be a true integration of substantive teaching and skills training; only those teachers who have "been there" can effectively do this.

Changes of this magnitude are difficult to accomplish, but the results will be well worth the efforts. And those schools that succeed in making their curricula relevant to the majority of their students are the ones that will survive and thrive in the 1990s.

PETER T. HOFFMAN, Professor at the University of Nebraska College of Law:

There are two problems with going last in a group of panelists. First, your time is gone, and, second, all of your ideas have been taken. Nonetheless, I've

been asked, as with the rest, to talk about why we should be teaching professional skills in law schools and what professional skills should be taught. Let me preface my response by saying, first of all, there is no uniform answer to these questions. The answers are going to depend on the particular school at which you may be teaching and curricular objectives of that school. But, despite this, we can develop guidelines to assist in our answering of these questions.

Let me start with what I consider to be the easier of these two questions: Why should we be teaching professional skills in the law schools? The answer to this is a response we have been hearing for over twenty years. In fact, you can go back to the writings of the thirties and even prior to that and you will see the same answer being given. But merely because it is an ancient and venerable answer by this point, does not mean it is the wrong answer. What is the answer? The reason we should be teaching professional skills is because the task of the law schools is to train law students for the practice of law.

This answer does not deny that there are other valid objectives and goals of law schools—to carry out legal research and analysis, to teach particular styles of analytical thinking, and so on. Nonetheless, the one common shared goal of all law schools is to train law students for the practice of law.

It is also not to deny that a number of our graduates go into other callings besides the practice of law. They go into business, they go into politics, they go into legal education. But the overwhelming majority of our graduates will continue in the future to go into the practice of law. From that it follows that skills, professional skills, are an essential component of the practice of law.

It should be quite obvious that every lawyer will make some use of professional skills. The range and type of professional skills will vary from lawyer to lawyer, but all of them will be using some catalog of skills. The type of skills are broad: interviewing or counseling, negotiating, factual investigation, inter-personal relationships, legal analysis, and so on. And this list is not exclusive. But even the appellate lawyer who rarely sees a client is usually required at some point to advise the client of what the prospects are on appeal, that is, to engage in counseling, to carry out legal research and analysis, and to present oral arguments.

But we do not have to rely on my assertion alone that professional skills are essential to the practice of law. I have often thought it strange that law schools rarely look to their own end product, our graduates, to gauge their success or lack of success in preparing students for practice. In short, we rarely ask our graduates: How did your legal education prepare you? Did it do an adequate job of getting you ready for your career choices? In fact, the usual sentiment I find expressed is that law faculties are the exclusive possessors of all useful knowledge about what is essential to effective legal education. Any suggestions concerning the bench, the bar, our graduates, or the public at large, are greeted with polite disdain. We have a monopoly, and it is a monopoly we are loath to share with anyone else. If you doubt what I say, look at the law schools' reactions to proposals from state supreme courts that there ought to be certain courses taken in law school; look at the reaction to proposals from your alumni about modifications in your curriculum. If you are in a school where those are greeted with an open attitude of "let's see if there is something useful here that might help us in our task of educating students," then I would suggest that you are in the

minority. This, of course, ends up being an extremely short-sighted and foolish attitude. If any other industry had been as responsive to customer demands as law schools have been, the Japanese would have put them out of business long ago.

Who else but our end-product, the student, is in a more advantageous position to tell us whether we are succeeding in our task of training them to the practice? While little data has been collected on a systematic basis as far as I've been able to ascertain, I will give one example here of a project carried out by my alma mater. I graduated in 1971 from the University of Michigan. Michigan had a curriculum then very similar to the curriculum which exists at most law schools today with one or two notable exceptions. It did not have any clinical programs at that time, and it had only the most basic (and I participated in them so I can assure you that it was only the most basic) skills training program. That program was only in trial advocacy and negotiation.

But one commendable thing my law school did was run a survey fifteen years after graduation (1986) of the members of my Class of '71. There were two significant findings from that survey that I think are generally applicable to every law school in this country. The first finding was, at the time they left law school, only half the class considered their negotiating and interviewing skills to be adequate, while more more than 95% believed their skills were sufficiently adequate to identify legal issues and conduct legal research. The second finding was, when asked what areas of the curriculum should be expanded, the respondents typically listed areas of skills training rather than substantive subjects. Recommendations to increase courses in legal writing, negotiation and trial techniques were far more common than the most often mentioned substantive area, which, by the way, was corporations. So there was a systematic survey of the end product of our legal education efforts, and what alumni were telling us was that we were failing in preparing them for their calling in life, the practice of law.

There is other anecdotal evidence which supports this lament. I can refer to my own students who frequently come back to me after graduation and say: "The courses you gave us in professional skills provided us with a substantial leg-up on our colleagues, and on our fellow graduates who had not had those courses. We are much further ahead than the students who never had this sort of course, and we are much better able to practice law than those students."

Another example is that I notice there is almost a perfect division in my own law school faculty between supporters and detractors of clinical legal education. The supporters, those who vigorously support clinical legal education, are uniformly those faculty members who after graduation practiced law—went out and actually practiced law. Those who are neutral or who are detractors are those who came into legal education from a background of clerkships, or the large firm practice where they were stuck in a corner analyzing documents for two years. Get the latter group of professors to go out and practice law, just for one year, and I know that I would have 100% support of the faculty.

Despite what I think are cogent arguments that skills training is necessary for the proper training of law students in the practice of law, the argument I hear in response, both in 1971 when I made these suggestions as a student to my faculty, and the argument I hear today, is that skills training is an expensive

undertaking that can be successfully deferred until after graduation when it can be provided by the law firms. What the faculty is talking about of course is the large law firms—the firms that we just heard about. The unstated assumption in this argument is that our graduates will be going off to those law firms. Let me defer for a moment whether those large law firms are in fact training students. For now, let us look at what is the reality of where our students are going after graduation. Are they going with the large law firms? Well that survey of my graduating class of 1971 showed that 15% of my class ended up as solo practitioners and another 29% are with firms of less than 10 lawyers. I currently teach at the University of Nebraska which is, I think fair to say, a standard state university law school. Our placement statistics show that 63% of those students going into private practice go into solo practice or with small law firms. In short, the assumption that the faculty is making when they say this training will occur in the large law firms just is not proving true. A substantial number of students are not going into settings where they can expect to receive close supervision and training in professional skills.

Even those students who end up in medium or large law firms may not be obtaining the training they received in earlier times, back when I assume this argument developed about the large firms providing training. As was pointed out, the starting salaries of most medium and large law firms require that young associates quickly begin paying their own way. This means that the long apprenticeships of earlier times just are not feasible today. They are not economically possible. Nor, I suspect, were the golden days as golden as we like to think they were. Looking back at my own experience, after graduation I went to work for a medium size Chicago law firm. My experience there, I can confirm, was the same experience that most of my colleagues were having at law firms of every size—large firms, medium firms and even small firms. That experience was that associates, more often than not, were tossed into legal situations with a sink or swim attitude. The senior associates and the partners had neither the time nor the inclination to provide supervision or guidance as to how to practice law. As a result, we made mistakes, and we learned from our mistakes, but we did so at our clients' expense.

The other argument I frequently heard back in 1971 and I continue to hear today is that professional skills are something new lawyers can learn on their own. In other words, you can learn to interview, counsel and so on by just going out and doing it.

Well, put aside for a moment the problems that you might cause for the client; more importantly, is not this the same argument that could be made about every law school course after the first year? That is, could not our students learn law by sitting down and reading it and never taking another law school class after the first year?

But this argument cannot correctly be made with skills training. There is something unique and distinct about professional skills when compared with other courses. That is, book learning does not and cannot teach how skills are applied in an actual practice setting. This knowledge can only be acquired by using the skills and then, in a systematic and organized way analyzing and reflecting on their use. Professional skills have no value except in their application, except through being used. Therefore, it is essential if we are going to

turn out lawyers who know how to practice law, that we must teach them professional skills through providing the opportunity to use and analyze them. That can only be done in the supervised setting of the law school.

The pressure is there from our graduates to include professional skills, but that is not the only source of pressure. The public already has a low opinion of lawyers, and that opinion will continue to decline. It has to decline in light of a situation where we, as was pointed out by Justice Wahl, turn out graduates who are licensed to practice law but know nothing about the basic skills of interviewing, negotiating, drafting pleas, and all of the other professional skills involved in representing clients; who have only theoretical knowledge; who can only learn at the expense of their clients.

Finally, as was pointed out, there are going to be competitive pressures here for the inclusion of professional skills in the curriculum. I have seen studies and predictions that as the pool of law applicants declines the schools which are most successful in placing their graduates are going to be those which survive. Those schools whose graduates are not able to obtain legal employment after graduation are those that are going to go by the wayside. It is only a matter of time before employers discover that students who have been trained in professional skills are a more valuable asset than those students who do not have that training. Students with skills training are going to be able to put in more billable hours, are going to require less supervision, and are going to provide a greater financial return for their employers. As that information filters back, those law schools that are doing the best jobs of providing professional skills training are going to be those schools which survive. Those schools which continue to concentrate only on the traditional forms of case analysis in preparing students for the practice of law are going to be the schools that cease to exist.

The second question was: what do we do, what skills do we teach? That question I will answer very succinctly by saying that the skills we need to teach depends very much on the employment practices of our graduates. The students who do go to the large law firms are going to need a different catalogue of skills than those students going into small firm settings. Our job as legal educators is to identify the skills that our graduates need in their particular settings. My students, as I earlier pointed out, tend to go, to small firms and into solo practices. They are going to need a different catalogue of skills than the students, for instance, graduating from the University of Chicago and tending to go into large firms. I am not going to try to identify what skills are needed by the graduates of each school, nor how they should be taught. What I am saying is that we, as conscientious legal educators, must identify the skills our graduates need and to structure our curricula to provide training in those skills for our students.

In conclusion, we are failing our jobs as legal educators and failing in our duties to our students, the legal profession, and society in general if we do not teach professional skills in law schools. If we do not teach them, then they will not be learned.

GARY H. PALM:

My job is to describe how the law and economics program relates to skills instruction. The recollection of the CLEPR beginnings are fitting to recall, be-

cause there are many who fear the live client (I don't know why we call it live client, I don't know any other kind of client). Bill Pincus, of course, was very influential and got us all going in this way, but I can't make up my mind. Sometimes I think we are past the hurdle where we wonder if we're going to continue to exist or not. One of the members of our visiting committee has said that the question is obvious, that you couldn't have a first rate law school without a first rate clinical program. I think we have a long way to go. We aren't meeting the demand in terms of the numbers. We certainly aren't providing skills training to all of the students who become lawyers, which is one proposal you've heard alluded to today.

I would just like to make a few comments from the field about this. First, I would teach most, if not all, of law school using actual cases, combining individual instruction through planned supervision by full-time law school faculty, combined with group teaching methods. In part it's the motivation that Bill Pincus found, but more important it's the professional responsibility that the students give to us and their clients.

Second, with the benefits of the Accreditation Standard 405(E) and the more firm establishment and entrenchment of clinical education, we have more clinical supervisors who are older, (and by that I mean they've been around awhile in the clinical movement). They have had sufficient experience in clinical teaching—they see it as a career. What is beginning to emerge is a rethinking of skills, the teaching of skill. You've heard already about the San Antonio Conference; the whole rearrangement of the skills; the way we think in the new cost cutting themes. They are beginning to reorganize their teaching and our concepts about lawyering skills.

I can tell you there's a lot of excitement out there. There's a lot of activity, but its always done in the context of fear—fear for whether they are going to remain a part of the academic community, fear for whether they are going to get tenure for what they publish. Now we need to find ways to support this work. I'm not saying we want another CLEPR, although I do think we need specific support for those teachers who are going to be thoughtful about these issues.

I'd like to give you, just quickly, some current thoughts by clinical supervisors about skills training and what lawyers should have. These are my own thoughts, and those of my colleagues in Chicago during the past few years. The first one is this notion of conversion to litigation from trial practice. Included in this is the need to see a coherent overall approach to strategy and the relationship of the individual component skills and tactics to the strategic goal. It is cutting across various areas of law and dealing with the problems in terms of the client. It is thinking proof and not assuming the facts, using the the Berger-Bender factors of analysis of proof and credibility.

Another area that is emerging is teaching how to create a theory of the case and to test it through the fact investigation and the discovery process; developing legal theories and factual theories; relating argument to early theory development; planning the appeal process and the analysis of the holding and the rules even after the client interview. It is teaching preparation methods and what litigators do with the office time. It is teaching the thinking process, the analytic method. Some of it's just straightforward, and talking about the introduction to the tools

in the law office, the yellow pads to the computers. But it is also opening up and exploring new ideas about preparation through research analysis. How does the lawyer analyze, the litigator analyze? What is the thinking process? What questions should be asked? What does the final action document look like?

Right now around various law schools in the world, there are protocols being prepared which will help lawyers and students in clinical programs ask themselves the right questions as they prepare for each skill. Written instructions to guide the practitioner—not forms or tips, but the thinking process. Planning instruments aid the practitioner in analyzing and recording the results in a usable format. There's a lot of work going on. The single innovation that I've heard about the most this year is taking the old group case conference and turning it into a learning and teaching process about the skills and their interrelationships in our overall litigation strategy. Some of that is being done through planning together in class. Another way is to use the actual preparation, the work product in progress, and have it critiqued and suggestions given for improvement. Then, the result is work product that actually benefits somebody. This is a method that the medical schools used for years. Have a conversation about skills issues, even substantive law, or procedural issues using the students' actual experiences. Use complex cases. Many lawyers are afraid of complex cases, are put off by them. Law school ought to be a chance for every lawyer to see a complex case and be introduced to it.

One of the most important things that I hear though is the one that Justice Wahl spoke about—professional responsibility. It's the one Bill Pincus started us with, Council of Legal Education for Professional Responsibility. Roberta alluded and discussed that in terms of pro bono. It is helping students and young lawyers and old lawyers like myself understand the standard of competence. It is that to which you should hold yourself, what your obligations to your clients are, and particularly your obligations to the poor. It is designed to see that we bring about a more just society and to see that each poor client gets adequate representation.

Last, we need to do an individual school-by-school needs assessment, a nationwide needs assessment for the next twenty years. A lot of the problem, supposedly, is the money. Well, let's figure that out and see whether it's alumni, foundations, the federal government, or the taking from other pots at the university or law school. How much can be a process of negotiation within the law school community? I think it's time to say that we should have mandatory skills and live client training in law schools for all students before they are allowed to go into practice. I imagine we must continue to have vigorous action by the accreditation authorities, to help move law schools, to urge them forward. I don't think it's going to come from the academy, and we aren't a large enough constituency within the institution. We need the help of the bar to accomplish this.

## An Overview of Professional Skills Courses

DEAN H. RIVKIN, Professor at the University of Tennessee College of Law, Chair:

Our panel this afternoon will describe how various law schools have implemented some of the ideas that were discussed this morning. Out of the profusion of professional skills courses that have begun in the past five to ten years, we've selected what we think is a fairly typical chronological sequence of courses that exemplify developments in this area. Starting with a lawyering course in the first year, leading to simulated courses that are appropriate for second and third year law students and culminating with fieldwork clinical courses that customarily are offered to third year students.

Our first speaker is Professor Steve Reiss of the New York University Law School. Steve has taught both clinical and nonclinical courses during his time at NYU. Before coming to NYU, among other positions, Steve was law clerk to Justice William Brennan, was a private practitioner in Washington, D.C., and currently, among other responsibilities, is Editor-in-Chief of the White Collar Crime Reporter. Steve will discuss first year skills courses, centering particularly on the experience at New York University.

STEVEN A. REISS, Professor at the New York University School of Law:

I'm going to talk about what has become known at NYU as the lawyering program, which is a clinically based course that is now required of all first year students at NYU. But I'd like to preface what will effectively be just a description of the program, with a couple of observations stemming from this morning's session, which re-emphasized a need to start integrating clinically based courses into the law school curriculum in the first year. It seems that we have not yet gotten over this notion that we're stepchildren. There is a lingering sense that we're still in the process of justification. I would have hoped we were beyond that.

Let me suggest four reasons for the need to have clinically based courses—a term I use quite consciously—in the first year. The first reason for the resistance from what I'll call the more traditional type teachers is an increasing academic inbreeding among traditional academicians. Rather than becoming more practice oriented, or more practically oriented, we've seen a move away from anything having to do with reality in a large part of the traditional academic courses. This is evidenced by the fact that law review articles are being cited less by the Supreme Court as one recent study showed. I think increasingly hard core traditional teachers view anything related to more practical pursuits as somehow not quite the highest calling. I remember a conversation that was related to me by a friend at Columbia, about some articles he was contemplating. There were two pieces he was thinking of writing. One was quite significant to a large segment of the bar. The other was a highly theoretical piece on a rather obscure dispute among academicians. A colleague of my friend, whom I won't identify, went into my friend's office and asked what he was working on. My friend described the two pieces. His colleague advised him to forget the first and concentrate only on the second. My friend asked why. His colleague answered, "You ought to realize that you are only writing for three or four people. Your goal ought to be to speak to only those three or four people." My friend replied, "Wouldn't it be easier for me to simply call them up?" I think that exchange epitomizes the syndrome we are struggling against.

Let me suggest three other reasons why there's a bit of tension—more than we might expect in this point in time. One is discomfort with the term "skills training." I am uncomfortable with it. And I think that if I am uncomfortable with it, my more traditional colleagues, and certainly your more traditional colleagues, may be more uncomfortable with it. I think the phrase "skills" denotes to many legal academics the Mr. Goodwrench image of people rolling up their sleeves and learning how to do something which anyone can learn how to do without a great deal of thought. It may be that we ought to start thinking about different ways to phrase these types of courses—courses in professionalism or professional competency—both of which I think are quite accurate in their description of what we do. But calling them "skills" I think raises the hackles of some people just by the use of the very word.

A third reason there may still be some lingering resistance is what, for want of a better phrase, I call the "Sixties" or "Lefty" problem. That is the perception among many traditional teachers that folks who do clinical legal education are somehow remnants of the Sixties. They still wear flannel shirts and drink Boone's Farm Apple Wine. In the minds of many, there is a political/social component to being a clinician. If you don't share that political/social philosophy or ideology, somehow you're not suited to being a clinician.

There's a very troubling proposition that spins off of that, namely that only students who share those types of social and political values are interested, or ought to be interested in clinical education. That is not only a troubling proposition, but one that is dead wrong. Nevertheless, it is pervasive. I surfaced the prospect at NYU of starting a prosecution side clinic. The prospect was greeted with some discomfort and even disbelief by some of my colleagues and some of the students. We have to get away from the notion that clinical education means ideological or sociological education of a certain sort. I may be at odds with some of the previous speakers on this.

Finally—and this is the most significant reason why we still experience some difficulties and why clinical type education has to be moved into the first year—there is a notion that somehow clinical education involves a type of thinking that is lesser than, not as difficult as, not as valuable as, not as esteemed as, the type of thinking we teach in traditional academic courses. That is a notion that has persisted. It pervades this dichotomy between clinical education and more traditional education. But ask yourselves, what is it exactly that the type of education we do in most courses—and certainly in almost all traditional first year courses—does? It teaches case analysis. It may also teach the synthesis of doctrine-doctrinal analysis. Those are two types of thinking which, for practicing lawyers, are of utility not so much in and of themselves, but because of the habits of mind they instill: hard edged thinking, constant questioning, constant reevaluation.

Clinical education involves many other types of thinking which are no less important and, in fact, equally difficult and equally rigorous. Let me suggest some that I think largely are ignored in more traditional type of courses. One is ends-means thinking. How do you get from point A to point B; what are the options; how do you go about thinking about the options; how do you go about getting started thinking about the options. A second kind of thinking—and it was mentioned this morning by Ms. Ramo—is cost/benefit type thinking. This is where you have a variety of options: what are the costs; what are the benefits;

how do you assess those types of options? Some of that may be done in more traditional courses, especially those with an economic flavor, but it is largely a type of thinking that is ignored. A third type of thinking is information-gathering and hypothesis-testing. We work in a world of imperfect information. We have to figure out what to do, given the facts we have, at a particular moment in time. What we decide to do in part is based on how easy it is to get additional facts, the cost of getting those facts, the relative worth of those facts, what hypotheses those facts are relevant to. That is the kind of thinking that is virtually impossible to utilize in a more traditional course because the facts are there. They're in the statement of facts. Students don't have to go through that type of thinking which, I submit, as a practicing lawyer I found among the most challenging type of thinking that lawyers do. Clinically based courses can instill and utilize these types of thinking.

One of the things I think we have been quite negligent about doing is explaining to our more traditional colleagues that clinical education is not just skills training. It is training in different types of analytical—and rigorous analytical— thinking that cannot be done in more traditional settings. Once they are convinced that, in fact, these courses offer the kind of rigorous thinking that they view the traditional courses offering, I think some walls of resistance may crumble a lot more readily.

Now having said that, I think one of the best things that can happen to clinically based courses is to move them into the first year. The first year is the paragon of legitimacy. Putting clinically based education in the first year sends a very powerful signal—this stuff is important. It's as important as civil procedure and torts and contracts and criminal law and property. All of which, by the way, are effectively taught in the same manner in most law schools. Clinically induced thinking is something that we ought to have as a very rock-bottom core of our curriculum.

NYU, starting last year, has done just that. It has required for all first year students in their second semester participation in the course that we now call "Lawyering." Moreover, during their first semester, the students' writing assignments are tied into things they will be doing during their second semester in the lawyering program. So, effectively the entire first year writing program is part of the lawyering program which comes to fruition in the second semester. I will describe in somewhat superficial detail the nature of the course and then describe how it fits in with what else we are doing at NYU.

I will describe first the mechanics of the program and second the content of the program. The mechanics are as follows: The students are organized into sections of twenty-four students. There's a reason for that. The course revolves around five exercises, which I'll describe shortly. The five exercises involve either two, three or four students. The smallest number that you can utilize given that fact is twelve, so each section of twenty-four students has two groups of twelve. Each group of twelve is effectively self contained. The faculty is allocated as follows: There are teams of faculty members, consisting of two full-time faculty members on the regular faculty and two what we now call lawyering instructors (they used to be called writing instructors and they are probably so called at most other schools). Lawyering instructors tend to be younger lawyers, although I must say in recent years we've had a number of people in that position

who've had substantial practice experience, and we've started to look for that more and more. So two regular faculty members and two lawyering/writing instructors constitute the faculty group. The faculty group has responsibility for three of the twenty-four student sections. So effectively there are four faculty for seventy-two students.

The first exercise is quite simple. It's an interviewing exercise done in pairs of two in which all the students have to be both interviewees and interviewers. They switch roles. The interview is a very simple, information gathering interview which involves gathering information for a law school committee. The exercise is not videotaped. Instead it is discussed in a large class setting. When I say large class, I should say the large class consists of twenty-four students. There is no class larger than the twenty-four student section.

The second exercise is a counseling exercise that proceeds in two phases. The exercise is done in groups of three. Two student lawyers do not work together, but deal with the client separately. The problem is a fairly simple tort problem involving potential liability for having a trampoline on the client's premises which is being used by kids who might injure themselves. There is a personal aspect to the problem in that the client does not want to get rid of the trampoline because his/her kids have used it as a way of integrating themselves into the community.

The first phase of the problem is an intake interview of the client by the lawyer. That interview is videotaped and critiqued by the faculty. The second phase of the problem deals with counseling the client and finding a solution for his or her situation. This phase of the exercise is also critiqued by the faculty. If it sounds like the second exercise involves a considerable amount of faculty time, it does.

The third exercise is a negotiation exercise. It's an exercise that starts being built in the first semester through certain writing assignments. The negotiation problem involves a dispute over the building of a swimming pool. One side represents the woman who's having the swimming pool built and the other side represents the contractor who has built the swimming pool. The problem is the swimming pool doesn't meet specifications. With the pool virtually completed, the contractor is not willing to re-do the pool completely because it costs too much money. The client may be willing to live with the pool that's less than perfect but the question is how much less than perfect. It is a classic small case negotiation. Each side represents one of the two parties. In the first semester, we have writing assignments that deal with such legal issues as substantial performance and contract damages which come into play in this negotiation session.

The actual mechanics of the exercise are as follows: Two students work with each other in planning the negotiation strategy for their side. They then conduct the negotiations individually. So everyone has a one-on-one negotiation session. However, we only videotape one of the two negotiations from each pair. The four people involved in a given negotiation then sit through the videotaped negotiation with an instructor or professor and critique that negotiation session. Those critiques are scheduled for two hours and they usually last at least that long. I should add that prior to the actual negotiation session there are also meetings with the faculty to plan and discuss the negotiation strategy. Again, I think you get the sense that there is a fair amount of faculty time involved in

this exercise and there is. I should add that it is the exercise that probably generates the most enthusiasm both among the faculty and among the students.

The fourth exercise involves students working in teams of three and casts all three students in the role of lawyers planning for an administrative advocacy session with an employee from the Department of Labor. All three students work together in figuring out how to get this official to take certain action on behalf of a client who has been fired for having his wages garnished. There is a tremendous mass of material that the lawyers have to go through, and one of the things the exercise does is simulate a very real world problem of having far more material to deal with than time to deal with it. The students have to make judgments about what's important and what's not important. They have to plan the informal advocacy session with the administrator, taking into account things like the difference between an administrator and a judge, what remedies there might be for certain types of action, and the relative merits of going through informal advocacy as opposed to formal advocacy in a law suit. Those planning sessions culminate in a meeting with the senior partner, who is played by a faculty member, in which the students describe their advocacy strategy, explain the reasons for it and present any materials they prepared for the session. Afterwards, the entire exercise is critiqued by the faculty person.

The fifth exercise is a trial exercise but a very, very narrow trial exercise. It involves the presentation of a document witness at a criminal trial, not an overly complicated witness, not a witness that has tremendous amounts to say about the merits of the criminal trial in which the witness will be testifying. But it introduces the students to the process of having to deal with raw evidence, having to deal with it in the context of evidentiary rules, and having to structure an examination for presentation in court.

The students work in four person groups. One student is the witness, another is the defense lawyer, a third student is the second chair to the defense lawyer and the fourth student plays the prosecutor. I can describe in much greater detail all the role complications that the exercise can breed, but I don't have time here. This exercise is also videotaped and is critiqued by one or more of the faculty members in charge of the group.

As I've mentioned earlier, in conjunction with these exercises there are also writing components. In the first semester, students do research on matters of substantial performance and damages. In the second semester, they do research dealing with problems of drafting regulations in the labor department in an area substantively related to the informal advocacy exercise. So the writing program, which is rich in and of itself, locks in with the lawyering program in a fairly unified way.

There are three major intersections of the writing program with the lawyering program. One is what I just alluded to—the substantive intersection. That is, the students work on substantive writing projects that have to do with the lawyering program problems that they are confronted with. The second thing the writing program does that is relevant to the lawyering program is that it gives students a variety of fact-law interfaces. In some problems the students are presented with a given state of facts and are told to do something like write a motion to dismiss. In other problems the students are given some established facts, some contested facts, some unknown facts, and forced to work with that

situation, for example, in the context of a motion for summary judgment. Finally, the third way the writing assignments tie into the lawyering course is that they give the students a role perspective. Sometimes the students are advocates for one side, sometimes they are advocates for the opposite side on the same problems. Sometimes they are put in the position of having to draft regulations for an administrative agency. They get to see a similar problem from a number of different perspectives. This, of course, ties into the fact that in the lawyering program they are put in different roles in different exercises. Sometimes they are a lawyer, sometimes they are a client, sometimes they are a witness.

Now, to come full circle, what does this do? It introduces students to a variety of types of thinking about the way lawyers do certain tasks that are generic lawyering tasks—interviewing, counseling, negotiation, the marshalling and presentation of facts. We don't have the lawyering course so that we can say to students: "Gee, that interview was just awful," or "You really screwed up that counseling session," or "That was a wonderful counseling session," or "You're the world's greatest cross-examiner since Edward Bennet Williams." We don't care how they do. What we care about is getting them into a method of thinking about what they've done—thinking about how they planned what they've done; and—I think this is most important—thinking about how to learn from what they've done. If the common law school notion, that it's only when you go into practice that you learn how to do anything, is true, at the very least we ought to be teaching people how to learn from their experience. If we're going to wash our hands and say, "Well, we can't teach you how to do it," the very least we ought to teach students to do is how to learn from what they will in fact be doing once they get out of law school. That, I think is a primary thrust of the lawyering program.

I think you now understand why I'm uncomfortable with the word "skills training." I don't view the lawyering program as a skills program. It is a program in certain types of thinking—experience based thinking—that are critically important to practicing lawyers and that can best be taught in the context of exercises that require students to function as lawyers or in other roles with which lawyers will have contact. Those types of thinking can be examined by faculty members through the use of videotaping and critiquing in a way they could not be examined through more traditional means.

Let me finish here because I know I am running over. The lawyering program does fit into a hierarchy of clinically based courses at NYU. It really is the base of a triangle. We do have second year or second tier offerings, which are largely simulation offerings. The top of the pyramid would be our live client clinics in which the students are responsible for handling real live clients. Obviously those are experiences that are offered to fewer than the entire number of students in the law school, although they are available to a substantial number. But with that, I will stop.

ROGER HAYDOCK, Professor at the William Mitchell College of Law:

We began to look at the question of what the evolutionary stage of clinical education ought to be. If we go through traditional courses, then a raft of skills

courses, and then some clinic field-work courses, what should be the next step is an inquiry into what clinical or legal education ought to be. What do we do as teachers, in the law school? Our goal at Mitchell is that the bulk of our graduates practice law. And so we need to provide them with an opportunity to learn how to practice law. It dawned on us that one way of doing that perhaps might be to have them practice law while they're in law school, under a certain system in which they may be able to better learn what it is they practice out there.

Then we looked at the various courses that we were offering. We looked at what we call traditional courses, we looked at what we call our skills courses, at what we call our clinic courses. We decided in each one of those courses we were teaching things like substantive law, procedural law, skills, theory, policy issues and ethics. If we were teaching all those different elements to different emphasis in all those courses, perhaps we should stop calling them different names. So we decided that we would stop calling each other clinicians and skills professors. I don't call them "classicians"; they don't call me "clinician." We were separating ourselves. The reality is that we all have the same goal, the same mission; we just went about it differently. Some of us went about it in terms of our expertise in substantive law. Some of us went about it in terms of teaching methods. But we all went about the same goal of trying to prepare our students for practice.

We thought about how it is we could teach the practice of law, how it is we teach someone to be a lawyer. And we looked at other programs that were mentioned this morning. We looked at Continuing Legal Education (CLE) courses; we looked at law firms. What do CLE courses provide to become better attorneys, and how do the law firms produce better attorneys? If you look at CLE courses the way we did, we found they teach substantive law and procedural law best. They don't do particularly well at what we call skills or clinical teachings. Law firms do somewhat well at role modeling, depending upon the mentor or the partner or the other attorneys in the firm. That is, if we ask the question how is it that when we practice law we become a practitioner, a large part of it is the role models with which we began practice. If we didn't clone ourselves after them, we looked at them and said, "They do some things well. They appear to be effective, and they do some things poorly." We didn't always quite figure out what it was but we would try to role model it.

Then we stepped back and said, "How is it that we become a practitioner?" When does that light bulb come on? When does that moment happen in your life when you wake up one morning and say: "Today I'm going to be a confident lawyer. I have now shed all of this insecurity, all of my lack of confidence about what I have to do. I have this strength today that I didn't have before." When does that moment come and how does it come to individuals? Rather simplistically, we looked at the law school model of how people become practitioners, and we looked at the first year. It seemed to us that in the first year, people were learning segments of the law. That is, they were learning bits and pieces. They were learning a doctrine here, a case here. They were learning an element, not unlike a chess player who is learning to simply know how the pieces move, learning the names of those pieces and sometimes what direction they go. Then there is a second stage where there is a kind of multi-task approach. They're

not only learning something, but also perhaps doing something, for example going to court and arguing. There are some multi-tasks going on. So not only were they learning the pieces and which way they move, but they were also learning two or three steps ahead.

Then there came a stage, and this may be when clinical education came about, where they began to learn patterns. When we look at some lawyers, when we look at partners, experienced lawyers, one notion that struck us was that the partners would look at a fact situation, and they would see a pattern immediately. They could articulate what that pattern was. An associate would look at that and would have to struggle in terms of issue identification, in terms of alternative solutions, in terms of advice, in terms of what's the best way of resolving issues like this. They weren't seeing the patterns, but they became experienced when they began to look at the partners or experienced lawyers and began to see the same patterns the other people did. So we thought: Is there a way we can try to replicate that process? Can we have people, in the law school setting, go through the learning of how the pieces move, the names of them, and trying to put together some patterns for them to replicate in practice?

We looked back and said, "What is there about the practice of law that we want them to learn about? Where do we want to provide them with opportunities?" We want to provide them with opportunities to deal with the physical context of practice. I mean courtrooms, offices, and what it's like to look and feel and be like a lawyer. We want to provide them with some opportunity to handle the human aspects of practice—contact, not only with clients but also with opposing attorneys and with judges. We want to provide them with the psychological aspects of practice—the emotions, the feelings, the insecurities, the frustrations, the joys. We want to provide them with some opportunities to learn about the spiritual aspects of practice—what we call ethics, morality, whether we ought to be doing this, and whether we ought to enjoy doing this.

Then we stepped back and said, "All right, if those are some of the things we want to focus on, how is it we are going to practice law in law school?" Well, we could open up a law firm, and indeed in Minnesota, thanks to Justice Rosalie Wahl and others, we can have the fee-income clinic. Our alumni have a different perspective on that, but, it is possible to have a fee-income clinic. We could practice law. There are some control problems in the sense of just how we provide the client at that moment on August 18. It's hard to advertise—on August 18 everybody with this problem come on down to William Mitchell—it just doesn't happen.

Then we thought we would simulate practice. Let me just describe briefly a course we call the Practicum. Basically, students register for this six credit course, and the first thing we do is what happens in practice—we swear them in. We have a justice come down in a robe who swears them in and gives them a talk about what it's like to be a lawyer in Minnesota and their obligations as lawyers. Then the second thing we do, of course, is have a party. Then we videotape the party and critique that. Because you've got to have social contacts, right? Then we give them an office in the school, we give them some stationary with their names on it and we give them a client. This client who is a dentist walks in. He says "I'm in the dentist business; I'm not sure if I should incorporate, or if I should go into a partnership with these people. I want to buy some property,

but it's not zoned right. If you can get the zoning changed, I want to buy this property." So they get into this corporate partnership real estate transaction. They have to sift through all these things. Then they meet with senior partners, who are faculty, either full time or adjuncts, who act as their senior partners and tutors in these particular areas on a rotating basis through the semester.

They take that problem for several weeks and then they meet with actual real estate agents, who treat the problem as if it were a real situation. They petition for a zoning variance and appear before the city council on the zoning variance. They appear before the real council and argue their case. They negotiate with the attorney for the other partners of the dentist in terms of working into an agreement over profits. When they deal with an attorney, it is an attorney who specializes in that area in practice and who treats them the way that he or she would treat new lawyers. They get a range of different experiences through that process.

Also, they deal with some of the office management problems. We have them prepare their own office manual. We don't have them lease any facilities, although we do have checking accounts for them where they have to pay bills and where their clients send them checks. They have to make a living at this as well. Occasionally, over the course of the past four years, two of those checks have been cashed by two Minnesota banks. We who teach at William Mitchell have learned something.

Later in the semester, about 1:00 a.m. on a Sunday morning, they'll get a phone call, each of them will, from their client, who's just been picked up by the police, and she asks whether to take the breathalyser or not. They have to give her some advice. The next day we all get together in the office, in the class, and announce different advice the students gave. Then they represent that person at a misdemeanor court in St. Paul. The case is calendared as all the other cases are. The only people in the court who knows its fake are the judge, the prosecuting attorney, the client and the student. When the judge sentences them we do not take simulation to that extreme where they actually put them in jail—it would then be difficult for us to get clients. But they do go through the process. The judge will make different rulings depending upon the situation. We had a case this semester—the daughter of a dentist comes to them and she is arrested for shoplifting. The father calls and tells them they have to represent his daughter. In the course of the interview with the daughter, they find out that her father is sexually molesting her so they have to deal with that phenomenon—what to do with the information, what to do with the conflict issue, what to do with the daughter who tells them certain things they don't want to hear and deal with those kind of ethical issues throughout that process.

One of them got a letter this semester from one of our clients who fired them. The client was so upset with the way she was treated she just fired the firm. So we had to deal with the function of losing a client as well as losing the money from her. We had a claim last semester among three partners in the firm, one of whom claimed the other two were racist. So we had to do a business divorce of that firm, as if it were real life and deal with the issues of racism that came up, as well as the male-female issues that will arise in terms of stereotypes.

We had to represent a potential plaintiff who owns an adult bookstore. They gave him 48 hours' notice that he had to be in federal court on a temporary

restraining order to prevent the city from enforcing a new ordinance to close the client down. This client is just not the client you want to live next door to, and so they had some real problems of whether they should represent this kind of character, what they ought to do, and whether litigation is the best answer. The best answer is calling up the city attorney saying, "listen, if you change two words in the ordinance we're okay." And so they resolved that case, and not by injunctive relief. They resolved it by giving the city attorney some language and going before the committee and arguing a change in the ordinance, because that's a much better remedy for their client at that stage.

We also had them do some pro bono work. This brought issues of whether they ought to do pro bono work, whether they could afford to do it, whether their firm could afford that kind of work in terms of representing some indigent clients. That's some idea of what happens in the course. Some things work, some things don't. We found attempts to blend the best of what we traditionally called skills courses in terms of uniform experiences along with the realities of actually representing people. Each semester we offer this to either twelve or eighteen students for six credits.

DAVID A. BINDER, Professor at the University of California at Los Angeles School of Law:

The course I'm going to describe is one that we call Fact Investigation, and basically it is a class in discovery in complex litigation. The course has three goals, but one that I want to emphasize is a very conceptual kind of a goal. What we want students to understand is how to go about systematically identifying the most probative evidence to look for during discovery and how to think about such evidence early in the case. How do students systematically determine what's going to be the probative evidence: What's most important?

Secondly, for reasons I'll explain in a moment, we would like students to learn how to keep track of basically two things: One, what evidence they have on hand as the case progresses, and two, what evidence it is that they want to continue to look for. Finally, we would like to have students think about selecting discovery vehicles and ultimately framing inquiry, whether that be in written form or oral form, in terms of seeking the specific items of evidence that they previously have determined are most important.

I don't know if the reaction to such a class is "Gee, that's a pretty narrow kind of course to have." Certainly that's what a lot of people think, but let me explain a little bit about why we wanted to put such a heavy emphasis on discovery. I'd like to talk about three things. First, I'd like to talk about trials. All of you, I suppose, at one time or another have been to trials and know what the standard complaints are about what goes on in the courtroom. The lawyer stands up; he's got the best threads in town; looks real fine. The rhetoric is terrific, the manners are impeccable, and the content is empty. Question after question after question is asked, but the examination is going nowhere, and it goes on day after day after day. The lawyer's questions rarely elicit pertinent evidence. Second, when we turn to discovery we see the same phenomenon. Take a deposition as an example. You sit there. It's the first day, and you wonder when the person on the other side is finally going to get around to asking some

question that really might develop some probative evidence. And at the end of the second day you're wondering the same thing. One of my colleagues and I were recently using this course in an actual live client clinic. Just the other day we sat through a deposition; the reporter's fees were $1,000 and I don't know what the lawyer's fees were. After the deposition, when we analyzed the testimony, we could only find six pieces of pertinent evidence the other side uncovered after a full day of deposition.

Besides considering trials and discovery, a third area to examine is settlement. When it comes to settlement time, there are many things that induce people to settle cases. Leverage has a lot to do with settling cases, and leverage often has nothing to do with the merits of the case. But from a societal perspective, we would like to think that when cases settle they are settled on their merits. By merits I mean the facts in relationship to the law. But if you look at what happens in settlement, you very often see that what is emphasized over and over again are non-legal aspects of leverage and not the facts or the law. Let me suggest one thing about the nature of practice that causes that phenomenon. You can go into just about any law firm in the United States after a piece of litigation has been going on for a little while and ask the firm to please identify for you exactly where the case stands. "Let's go through each cause of action and tell me please where we stand. I want to know what's our evidence, and what's their evidence, so if we want to have some negotiation about this case we can talk about the merits rather than about non-legal leverage." And the answer almost always is: "Well, we don't really have a record of exactly where we stand in this case. You know Jones is working on this aspect, Smith is working on that aspect, Black is working on that aspect, and Green is working on this aspect. We haven't drawn it all together yet. However, we certainly can go in and talk about settlement; I'm sure we can do it somehow."

The foregoing situations in trial, discovery and settlement suggest why we developed a course in fact investigation. I don't think a course in fact investigation will solve all the problems that I have just described for you. I wish the world were that simple. We could just have this wonderful course, and all these problems would disappear. But you and I know that that's not true. Nonetheless, I think the Fact Investigation course is a start in the right direction.

Now let me get at what I think are a couple of the major reasons that we do have the kind of problems that I have described. Of course, if you don't think my description of reality is accurate, then you're not interested in anything else I have to say. But let's assume that my description of reality is accurate and let me talk about a couple of things. I think that one problem lies in legal education. I don't care whether you call it clinical education or traditional education or what label you put on it. We do not teach our students to understand: a) what are facts, and b) what is evidence that proves facts. The result is that our students do not understand the theoretical links between doctrine, facts and evidence, and as a consequence when they become lawyers, their thinking about proof of facts is very fuzzy. Let me explain to you why I think legal education does so poorly with the topic of proof of facts. In our traditional case method courses, we give students the facts. I have never quite understood exactly how the appellate court gets the facts in cases where we have general verdicts. All courts get are naked transcripts. But somehow the courts get the facts out of those transcripts without any findings of facts down below. Nonetheless, in doctrinal courses, we

give our students what we say are the facts, so they never have to worry about what are facts or how do you prove them.

Next, turn to the course in evidence. The course in evidence, though I stand to be corrected on this, is not a course about how facts are proved. The course in evidence is a course about policy reasons for the exclusion of relevant evidence: how do we keep out hearsay; how do we keep out opinion evidence; how do we keep out character evidence. All this evidence at some level we believe is really probative. But we must be careful. For one policy reason or another this evidence should be excluded. Hence, we could look at legal education and say, if there is anything to be taught about how facts are proved, the one percent of the evidence course that is spent on Rules 401 and 402 (relevancy), just won't do the job. That's just not going to be possible.

There is a second reason which underlies the foregoing problems in trial, discovery, and settlement that I need to describe. I don't want to lay all the blame on legal education. This reason concerns how law firms organize or disorganize, if you will, litigation. I would not like to be a client in a lawsuit, whether it be a small lawsuit or a large lawsuit, if I went in to my lawyer in the middle of a case and said to my lawyer: "What is it we're trying to prove; what is it they're trying to prove; and where do we stand?," and the lawyer responded, "We have four people handling this case so I can't draw it all together for you." There's something wrong about the way law firms organize and carry out litigation when lawyers cannot provide clients with some kind of overall evidentiary summary of where a case stands. It isn't simply the fault of law schools.

The Fact Investigation course attempts to do two things to help solve these problems in legal education and law firm organization. One is to build some conceptual understanding of evidence and how it works. This is the course's primary goal. The other goal is to introduce a computer program that helps keep track of where a case stands from an evidentiary perspective. We don't use this computer program simply as a method of tracking the evidence, though we do call it an evidence tracking program. The program is set up in a way that I like to think also forces students, when they are tracking the evidence, to take into account the conceptual matters that must be dealt with in thinking about how one proves facts.

Now let me give you just a taste of the conceptual ideas. I can't begin to fully explore them here. And for those of you who are interested in pursuing this subject further, one of the presentations this afternoon is "How do we use this Fact Investigation course in the first year in combination with either a torts or a contracts class?" We have a computer here, and we'll try to show you how it works. Now let me spend a moment with some of the course's conceptual notion.

First of all, I will get you to agree, whether you want to or not, that 90% or more of evidence introduced at trial is circumstantial. We'll just take this assertion as an article of faith. Therefore, if we're going to understand about matters of proof, what we have to understand is how circumstantial evidence works. So I am going to give you a small hypothetical, and I'll ask you do a little work. I want you to assume that there's a nice Circle K convenience store down here near the Hilton where most of us are staying. Assume that our good friend, Roy Stuckey, over here has been accused of robbing that store last Saturday night before we all got here. I want to give you only one piece of evidence in this case—one piece of evidence, and I'll write that on the board.

(Speaker writes "S in store twice before" on board.)

That means that prior to last Saturday night, Mr. Stuckey had been in the Circle K store two times before. Now think about that piece of evidence for a moment, and talk to your neighbor if you like. Does that piece of evidence help or hurt on one element only? We're only going to consider the simplest possible element in a criminal case—the identity of the perpetrator. The alleged perpetrator is Mr. Stuckey. There is no question that there is strong evidence that he's been in that store twice before. Does that help Mr. Stuckey or hurt Mr. Stuckey? Please take a moment and talk to your neighbor.

(Audience talks among themselves.)

All right. I know lawyers can take that piece of evidence and argue both ways, but if you will, how many people think it helps Mr. Stuckey? How many people think it hurts Mr. Stuckey? How many think both sides are right?

Okay, let's talk about why either side can use this evidence. What we've got over here is "X." "X" represents the piece of evidence: Mr. Stuckey has been in the store twice before. "Y" represents the factual proposition in dispute here, namely the identity of the perpetrator. The prosecution's version of that factual proposition of identity is "S robbed the Circle K; S is guilty." The defense, however, wants to come to the conclusion, does it not, that Mr. Stuckey is not guilty—"S did not rob the Circle K."

Now, how is it that we can take this single piece of evidence and have half the room say "X" points to guilt and the other half of the room says "X" points to not guilty. Well, we are not going to play law school class. I am going to "lay out" what I think is the answer. The answer is that it depends upon the unarticulated premises that underlie your thinking. If you want to go the guilty route, your unarticulated premises or generalizations are something to the effect that people who have been in a store twice before are likely to have been there to "case" the joint, and people who have cased the joint are likely thereafter to carry out the robbery of that joint. On the other hand, if you want to go the not guilty route, you adopt different premises. You adopt a premise something like the following: People who have been in a store twice before are usually afraid they'll be recognized if they go back and therefore won't attempt to rob that store. But in both cases your inference piggy-backs on a generalization.

(Speaker writes the following on the board:)

| | *Inference* | |
|---|---|---|
| X | Generalization | Y |
| S in store twice before | (People in store two times before are there to case, etc.) | S robbed store |

| | *Inference* | |
|---|---|---|
| X | Generalization | Y |
| S in store twice before | (People in store two times before are afraid of being recognized, etc.) | S did not rob store |

Now, if we stopped there, that's a nice conceptual understanding of how evidence works. But what I want to try to illustrate for you is how this course begins to take these conceptual ideas and turn them into practical ideas for systematically identifying potential evidence for which you would want to look. We're only going to look for one kind of evidence here. We're going to try to get our friend Mr. Stuckey out of trouble. I want you to keep the premise in mind we're talking about here, that is, the premise that people who have been in the store twice before are unlikely to rob because they are afraid of being discovered. Let me write this on the board.

(Speaker writes the following on the board: "People who have been in a store twice before (usually) think they'll be recognized if they go to the store again.")

That's the first premise. And second, "People who think they'll be recognized if they go into a store again are unlikely to rob." Now what I'd like you to do is take only the second premise—People who think they are going to be recognized are unlikely to go into a store and rob it—and add to it the words: "especially when." Then ask yourself when that premise is especially likely to be true. Have your neighbor help you this time, even if you don't like him.

(Audience talks among themselves.)

Again, I'm just going to cut you off arbitrarily because we've got to move on here. Just give me some "especially whens;" just shout them out.

When there's another store nearby
When the clerk is the police chief's wife
When it's a small town and everybody knows each other
When the clerk is your mother
When previously they were in the store for a long time

I'm going to stop here because what I want to do is explain to you why you have just identified potential additional evidence to look for in this case. You have done so as a conceptual matter because you have come up with items of evidence that would narrow the generalization on which you started. So, for example, if we now said "People whose mother is the clerk of the store and who have been in there twice before are unlikely to rob the store." That's a heck of a lot more probative than our first proposition. By articulating the premise, something that Mr. Wigmore in 1939 told us it didn't make any difference whether we did or not, we get into a position to see how to make the premise (generalization) less subject to exception. You are able to identify the premise and when you recognize that the premise is a generalization you can then begin to add "especially whens" and come up with potential evidence to look for, which you find will make your underlying premise less subject to attack because of exceptions.

Now we've just talked about one tiny element in the simplest kind of case and this process is a lot more complicated than I've been able to talk about in just a few minutes with you. I think it goes back to re-emphasize the very important point that Steve started with. There's a lot of good, hard conceptual thinking that we can provide for our students that will help them to function in very practical ways in the world—to help them solve real world problems, problems that are endemic in our system.

DEAN H. RIVKIN:

My topic is the evolution of in-house clinical fieldwork courses. My talk will focus on developments involving and issues facing law school clinics. Today, most law schools support an in-house clinic or clinical program, as it's most commonly termed. Although the centerpiece of these programs are law school courses emphasizing the educational underpinnings of lawyering and all that concept connotes, most law schools still maintain the designation of "program" for their clinics. This acknowledges the broader roles that these entities play within the law school and, perhaps more importantly, within the bar and the community. Largely to their credit, law school clinics, for a variety of different reasons, have always been surrounded by controversy. They take unpopular cases, they use nontraditional pedagogy, and they require resources that other law school courses do not. These historic characteristics have probably more inquiries about the goals and methods of law school clinics than I suspect of any other set of law school courses.

The scrutiny, however, has been healthy. Today, the best law school clinics blend sophisticated teaching methods with innovative litigation strategies, and are becoming increasingly unburdened of the responsibilities of teaching *all* of the practice skills that are now being dispersed throughout the law school curriculum. More so than any other course, fieldwork clinics provide students rich opportunities to learn about the methods, tensions and judgments inherent in the practice of law. A short history of in-house clinical programs is important since there are some unhappy aspects of the history that are now becoming clearer to us.

Although a few law school clinics date back to the 1940's and earlier, indeed at Tennessee we are now celebrating the fortieth year of having a law school clinic, it was not until the late 1960's that clinical programs developed at most law schools. By assuming responsibility for litigation and learning, law schools committed themselves to an enterprise that at the time lacked a developed intellectual history and coherence. There wasn't, for example, a subject matter for the courses back then. There wasn't a proven pedagogy. There certainly wasn't a body of experience for dealing with the myriad problems that confronted these nascent programs.

What carried these programs in the early days of clinical education was a sense of excitement, a maverick feeling. Closely linked to the neighborhood legal services program, which itself was undergoing a major transformation from its legal aid days, law school clinics provided students with first-hand perspectives in emerging areas of law reform, including welfare, prisoners' rights, and public housing litigation and advocacy. This was a time when Section 1983 litigation was daring, and the best law school clinics were on the frontier of this movement. Educationally, these early law school clinics provided only haphazard learning experiences. Although most instructors were nominally members of the law faculty, they were isolated not only from the nonclinical faculty—some by choice—but also from each other. Often what was taught was the instructor's singular conception of skills, strategies, and tactics in particular cases. There were few attempts to generalize about skills or theories. Most students left stimulated by the experience, but it was obvious to student and instructor that, in these early

days, clinical fieldwork courses did not systematically tap the enormous potential inherent in the method or subject matter.

During the 1970's, law school clinics responded on a number of fronts. In retrospect, this response was probably an overreaction to the oft-heard criticism that fieldwork education was bereft of the intellectual rigor of the traditional law school classroom. The clinics' responses took four major forms:

1. The common tasks of lawyering—interviewing, counseling, negotiation, and trial advocacy—were examined to determine whether they contained features or, more popularly, "models" that could be applied in case after case. The enormity of this effort is evident. It literally required the creation of a whole new subject matter, replete with its own jargon, heuristics, classics, and even jokes.

2. An experientially-based pedagogy was developed. This entailed a reconceptualization of the traditional law school teaching model. It was discovered that one-on-one supervision, the hallmark of law school clinics, involved much more than the typical interaction between partner and associate in a law firm. Great attention was paid to the phenomenon of learning from experience.

3. The selection of cases came under intense scrutiny. Departing from the law reform idea, clinics moved in a diametrically opposed direction. "Short-cause" cases, those that a student could reasonably complete in the course of a semester or year, came into vogue. Indeed, the motivating image was that every case—seemingly no matter how routine—was a law reform case fit for satisfying dissection.

4. Professional responsibility in all its ramifications became intertwined with clinical education, often quite unreflectively. As clinicians, we knew that the clinic presented students with a dimension of professional responsibility that no other course could offer—namely, the necessity to act on one's ethical decisions—but we puzzled over the many possibilities of integrating these dimensions into our courses in other than didactic or superficial ways.

These directions drove fieldwork clinical education in problematic directions. Three stand out. First, the effort to capture and to analyze the complexities of the lawyering experience often lapsed into sterile reductionism. Models of the process became straitjackets, inhibiting rather than promoting students' growth.

Second, the selection of short-cause cases, to the exclusion of more interesting but unruly cases, often meant that clinics avoided the very kinds of matters that nurtured the movement in its early days. The perhaps inevitable bureaucratization of clinical legal education mirrored a similar phenomenon of routinization in many offices of the federal legal services program, although law school clinics possessed the built-in safeguard of fresh ideas and perspectives with each new class of students.

Third, the emphasis on pedagogy often generated highly stylized teaching methods. These methods often lacked the spontaneity and flexibility necessary for the educational environment of the clinic.

These unanticipated consequences of the decisions made by many fieldwork clinics have blunted the cutting edge of clinical education today. What's more, as if to prove that our aspirations about legal education could become reality, law school clinics took on a disproportionate share of the law school's obligation to teach about lawyering. The fieldwork clinic became, if not the repository, at

least the resource for every new skills course inaugurated by the law schools. Fieldwork clinicians, with skills in simulation and insights into practice, became valued colleagues of many of the nonclinical faculty. As these responsibilities mounted, the time and attention that fieldwork courses demanded became strained, as did many clinicians.

There is a silver lining, however, in this rocky evolution. It consists of lessons that are now becoming apparent and are being implemented in fieldwork courses around the country. First, the caseload agenda of clinics is becoming more diversified. This agenda often surfaced with students when they arrived in a clinical program. The students are not just handed a group of cases; there are explanations as to why these cases are being selected and how they fit into the overall purposes of the clinic. Today, clinics are recognizing the necessity of striking a measured balance between the two ends of what I am describing.

There are still clinics that assign students a very limited number of cases. Indeed, one law school clinic assigns a team of two students to one case for an entire semester, and the experience sounds quite effective. Under the circumstances, it gives the instructor and the students an opportunity to unravel each and every aspect of that particular case. The norm, if there is one, is for students to handle perhaps six to ten cases in the course of the semester, more in a year-long course. Cases in the "law reform" category clearly involve more supervisory time and effort. But I believe that it is becoming increasingly recognized that those cases present opportunities that short course cases simply don't. There are opportunities not only for students, but also for clinical faculty, an aspect that should not be overlooked.

Second, clinics today recognize the importance of context in their teaching and their litigating. By context I don't mean the old hackneyed notion of where the courthouse is, or the idiosyncrasies of particular judges or court clerks, however important they may be in certain instances. Instead, context in clinics comprehends a rigorous and accessible orientation in the substantive rules of a particular practice area, of the institutional arrangements and of the relationships that govern this area. As Tony Amsterdam observed last spring at the AALS clinical teachers conference, clinic students often display classic symptoms of psychosis. They are disoriented in time, place, and expression. To combat this phenomenon, law school clinics are stressing, through broad ranging readings and systematic analysis of practice data, the importance of understanding context. On a sophisticated level, clinics use computers to build histories on different district attorneys, detectives, case workers, or judges. Other clinics have established protocols where clinic students and supervisors dictate memoranda about the actors and institutions their students and clients confront. As long as clinics remain repeat players in the system, which most have been for some time, this type of historic data base and information is crucial to a contextual understanding of what advocacy in a clinic setting means.

Third, the pedagogy of clinical education is gradually escaping the confines that I discovered earlier. Clinicians are recognizing that learning takes place not only in structured one-on-one supervision sessions, which are still critical to the method, but also in group sessions, as Gary Palm described before. Teaching and learning transpires in spontaneous moments in the clinic, in the courts, on the streets, or wherever students and teachers puzzle over an obstacle or an

opportunity in a case. Unlike most law school interactions, where conversations between students and teachers are dominated by the expertise of the instructor, these exchanges between clinical students and teachers often involve a species of joint problem solving in a presumed atmosphere of trust. From the teacher's perspective, emotions and stresses exist that do not in the nonclinical classroom. I think Rosalie Wahl put it well this morning when she talked about the vulnerability of students in the clinic. I think it is also important to stress the vulnerability of clinical faculty and to understand these tensions in the context of practice and teaching.

Fourth, more explicit attention is being given to those systemic and personal issues the clinic is uniquely suited to address. For example, there is a clinic course being offered at Harvard this semester entitled "Direct Democracy." The course dwells on issues of law and social change at the grassroots level, which is where most clinics operate. The clinic also allows students and teachers to confront the insidious effects of institutional racism and sexism that, despite our efforts, still afflict the justice system. Take the criminal justice system, and the injustices that clients, lawyers, actors in the entire system face. What a rich ground for discussion and critical analysis aided by appropriate readings and data.

Finally, clinics are recognizing that they are in a special position to elaborate for students concepts of professional responsibility that go beyond the legalistic rules of the Code of Professional Responsibility or the Model Rules. More tailored attention is being paid to the concept of the lawyer role, to issues of domination in lawyer-client relationships or manipulation of adversaries and what toll these dynamics take on lawyers.

This is, I realize, a very broad agenda for today's clinic. But it is an agenda that I think draws on the best of what fieldwork clinics can do. Relieved of the necessity of drilling students in skills, law school clinics will be liberated to pursue areas of inquiry whose surface has only been scratched. I am sure that experimentation, with successes and failures, will continue. But if sufficiently supported, law school clinics hold the promise of expanding knowledge about the functional skills of lawyering and theoretical critiques about lawyering and the legal system.

## Synopses of Presentations of Professional Skills Courses

*Comprehensive Trial Advocacy Program (CTA)*

Professor Marilyn Berger, University of Puget Sound School of Law.

Puget Sound conducts a two-semester simulated lawyering skills course in pretrial and trial advocacy. The course is taught in sections of 20-24 students, and approximately 120 students are enrolled each year. The course concentrates upon integration of theory and practice of lawyering skills. The materials which Professor Berger and her colleagues have developed for the course will be published by Little, Brown next spring. These materials involve extensive text and simulation exercises based on one complex fact pattern for a civil and criminal case.

*New Clinics at Yale Related to Problems of the Homeless*
Professor Steve Wizner, Yale Law School.

Yale has received grants to help support two new clinics this fall, both of which deal with problems of the homeless. In one clinic, students will assist nonprofit groups which are trying to develop new housing for the homeless. Students will help establish corporations and will assist with contracts, mortgages, title issues and other legal needs of the nonprofit groups. In the second clinic, students will provide direct legal services to people who live in "welfare hotels."

*CUNY's Health and the Workplace Clinic*
Professor Vanessa Merton, City University of New York, Law School at Queens College.

The "Health and the Workplace Clinic" presentation will show how the major themes of the CUNY curriculum are developed in the context of a third year live-client representation program. Among the unique aspects of this program is the interdisciplinary approach of working with doctors and other health care professionals involved in environmental and occupational medicine. Students are introduced to a broad range of issues involved in the field of workplace health and safety through individual representation as well as work on informational and educational projects, advocacy projects, and related legal and policy research. The integration of law and lawyering and other cornerstones to the CUNY curriculum continues in the clinic where students learn the doctrinal, theoretical and lawyering issues involved in a field of practice which transcend traditional subject matter categories.

Professor Merton, co-director of the clinic, is a founding faculty member of the law school. A former associate in law at the Hastings Center Institute of Society, Ethics and the Life Sciences, she has lectured extensively on a variety of issues in clinical care and health issues. She combines this expertise with her experience of more than ten years as a clinical teacher.

*Externships*
Professor Karen Tokarz, Washington University School of Law, St. Louis; and Professor Vivian Gross, Illinois Institute of Technology, Chicago-Kent College of Law.

Professors Tokarz and Gross will compare and contrast their externship programs. They will also discuss how their courses relate to the December, 1986, Interpretation of ABA Accreditation Standard 306.

*Computer Applications in the New Mexico Clinical Program*
Professor Mike Norwood, University of New Mexico School of Law.

Professor Norwood will demonstrate at least two applications of computer technology in New Mexico's clinical program. One is a law office management system; the other is a system for developing a trial notebook as a case progresses through litigation.

*Integration of Clinical Methodology into First Year Torts and Contracts Courses at UCLA*

Professor David Binder, UCLA School of Law.

This presentation will build on Professor Binder's earlier comments about fact investigation courses during the panel discussion. Using a simplified hypothetical problem, the presentation will ask the participants to identify existing evidence in the case and also potential evidence they would like to obtain during discovery. It will then explore how a computer program being developed at UCLA Law School might be used to record this existing and potential evidence and examine why it might be useful to use a computer program for such purposes. Also the discussion will describe experimental classes at UCLA which combined the teaching of Fact Investigation with first year courses in Torts and in Contracts.

## An Overview of Professional Skills Programs

Professor Elizabeth M. Schneider, Brooklyn Law School, chaired the panel discussion. She has incorporated her remarks into an article entitled, "Integration of Professional Skills into the Law School Curriculum, Where We've Been and Where We're Going." It is included in the Articles section of this Law Review.

BARI R. BURKE, Professor at the University of Montana School of Law:

I worry a little that Montana is acquiring a reputation for curriculum changes that overstate the progress we have accomplished thus far in our long-term academic program planning project. Allow me to explain our current academic program, our process of designing and implementing that academic program, and our goals for the future. None of us believes that we have attained all we hope to achieve. Thus, this is more of a progress report than anything else.

Let me begin by introducing the University of Montana School of Law to you. It is a small law school. It has 225 students and approximately twelve full-time faculty lines although more than twelve faculty are teaching full-time during any particular semester. We are the only law school in the state. Until 1984, we enjoyed a diploma privilege; our students were admitted to practice without further examination. Our curriculum reflects our sense of responsibilities that attached to the diploma privilege: Of the ninety credit hours required for graduation, seventy-six were spent in required courses. Thus, we required, and interestingly continue to require, probably the highest number of specific courses of any accredited law school. Since 1966, we have required that each student complete four credit hours of clinical training; the students select one of nine clinical programs in which to satisfy the clinical requirement. Ninety percent of our graduates remain in the state to practice.

The state itself is geographically large, but sparsely populated. Less than 800,000 people reside in Montana. The small population spread through the vast space influences the structure of law practice in the state. Only one law firm

employs more than fifty attorneys, and only about ten firms employ more than ten attorneys. The practice of law in Montana thus allows few opportunities for specialization. The thought that we can allow our graduates to postpone professional skills training until apprenticeship in a law firm does not match our students' experience.

Our long range academic planning project began in 1979, when we welcomed a new dean, fresh from law practice, to the school. He asked the faculty to consider what the academic program of the University of Montana Law School should look like in ten years. Believing that legal education should be related to lawyer performance, he suggest we study the character of the practice of law in Montana to answer that question.[13] He appointed a faculty committee to design the process of collecting and synthesizing relevant information. That committee immediately realized that the school would need to gather information on the needs of professionals and clients as well as alternative approaches to teaching and learning. Obtaining this information required expertise outside our faculty, and researching and instituting any program changes required supplemental funding. We applied for, and received, a grant from the Fund for the Improvement of Post-Secondary Education and hired an educational consultant. With the help of our educational consultant, the committee first decided that studying the character of the practice of law meant surveying practicing attorneys. In fact, we needed to include attorneys in designing the survey questionnaire to help us decide what questions to ask attorneys. We hoped to avoid the predilection of law faculty to ask curriculum questions because curriculum questions produce answers. The committee worked with members of the bar throughout the state to determine the survey questions. We sent our questionnaire to all 1,554 practicing attorneys in the state.

I will not reveal the results of that survey.[14] I will instead tell you how we handled the information gathered in this survey. Using the survey results, the Dean and the faculty tried to respond to the question: What abilities do lawyers need to practice law effectively in Montana? Because such a large percentage of our graduates remain in Montana to practice, we decided to see what abilities "new" lawyers need in a state that presumes the range of knowledge and skill necessary to handle a truly general practice. We classified the elements of lawyering to develop a model embracing what we came to call "the dimensions of lawyering." We then attended to the connection between what lawyers do and what the academic program should include.

The committee found four dimensions to the practice of law: Knowledge, skill, perspective, and character. We defined knowledge as the general, as well as the technical, legal knowledge necessary to permit graduates to diagnose legal problems, to collect relevant information, and to offer appropriate courses of action. We defined our skill dimension broadly to include all professional skills needed to transform existing client situations into preferred situations. Thus, our skill dimension includes not only performance or operational skills but also the

13. Dean Mudd has presented his strong views on the strengths and weaknesses of traditional legal education and his alternative model in Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 35 J. Legal Educ. 189 (1986).

14. For a comprehensive description of the process of designing and conducting the survey and a detailed review of the results, see Mudd and LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 Mont. L. Rev. 11 (1988).

cognitive skills required to diagnose and analyze legal issues. We defined the perspective dimension as the ability to evaluate the role played by law and lawyers in different situations and to place the client's problem in its larger social context. The character dimension included the preferred personal attributes of lawyers (e.g., integrity and honesty, compassion and caring, realism and practicality, courage, and humility) and the interpersonal qualities necessary for a lawyer to work cooperatively and collaboratively with others to represent clients effectively.

After devising this classification of the dimensions of lawyers, the full faculty voted to begin at the beginning, by implementing corresponding changes in our first year program. We did this for the reasons that Liz Schneider and others have mentioned. The first year of law study affects students powerfully. It is then that we socialize students in large measure to "think like lawyers" and "act like lawyers." It is then that they learn how to study law. Too often it is then that they acquire bad habits or an overly narrow perspective on their future careers. And it is then that law students learn to impose reciprocal expectations on law faculty. Faculty teaching second and third year courses who experimented with "novel" or "innovative" methods of teaching or assessment, for example, received evaluations from students that some of those changes were not especially welcome or appropriate.

An additional reason for beginning at the beginning, as one of the conference participants mentioned yesterday, is that entering students may be bringing deficient pre-professional educations to law school. Not only may entering students be particularly naive about the practice of law and what the profession and practice demands, but their performance levels in terms of essential skills may not be as high or as strong as they have been in the past. The larger number of entering students unequipped with adequate skills, both analytical and operational, obligates law schools to address those problems from the beginning, from the time that students enter law school. For these reasons, we decided to attempt our initial changes corresponding to all four dimensions of lawyering in the first year program.

Buoyed by the confidence that traditional legal education has succeeded in imparting the technical legal knowledge necessary to practice law, at least to recognize doctrinal issues, we made only one significant modification directly corresponding to the knowledge dimension. We believed that a more systematic, and gentle, introduction to information common to all first year courses might be more effective for students and faculty. Thus we instituted a three week "Introductory Program." Our entering students begin law school by completing this introductory program before beginning four of the five regular first year courses. In addition to laying a common foundation from which to study law, we wanted to ease the transition from "pre-law life" to a rigorous professional program. Our student body today is diverse, with the average age of our entering students at thirty. Some of our students have not been in school recently and we are concerned about their study skills. The introductory program encompasses six "short courses": 1) Lawyering (what lawyers do); 2) Legal Profession (the lawyer as professional); 3) Legal History (the roots of the common law and equity); 4) Legal Reasoning and Jurisprudence (the conventions of "thinking like a lawyer" and the critiques of those conventions); 5) Litigation Process (the process of a lawsuit); and 6) American Legal System (a rudimentary civics course

covering the United States Constitution, legislation and its interpretation, and the structure of our judicial system). Although we tinker each year with the specific components of the Introductory Program, we are pleased by the student response to the program and the results we see in student performance as they begin their regular first year courses.

Unlike our confidence in law schools' ability to impart knowledge, traditional legal education offers the fewest examples or models for attending to the character dimension of lawyers. A significant number of our students work with clients immediately after graduation, without the benefit of mentoring or guidance by a senior practitioner. Equipping students with the sensitivity and skills necessary to represent clients effectively means the law school must assume responsibility for instilling in our graduates an ethic of care. For example, we hoped to foster greater academic, intellectual, and social interchange among students as a prelude to later collegial professional relationships. Part of professional interchange is the willingness and ability to give and receive critical comment on work style and work product. We also hoped to enhance interpersonal communication skills. In response to this ambitious set of goals, we created something we call the "Law Firm Program." As soon as the entering students arrive, we assign them to small groups. These small groups of six or seven students, called law firms, are directed by upper class students and supervised by first year faculty. We designed activities and set aside time to encourage students to do three things:

1. Provide support for one another. In their law firms, students support and encourage each other as they become acclimated to law school and its demands.

2. Practice lawyering skills. Most large and traditional law courses are not structured to allow students to practice interviewing, negotiating, trying a case, or preparing documents. The small group serves as a lab component to the formal classroom setting and in such a context upper class students can guide first year students through professional skills exercises.

3. Collectively resolve "discussion problems" that raised controversial issues. Assignments required students to reach either a verbal consensus or work product consensus.

Of all of our modifications in the academic program, I am especially taken by the law firm program. Not only does this structure allow us to address all four dimensions of lawyering, it also creates a forum for students to engage in discussions of current legal issues. Past discussion problems have raised issues of: 1) whether United States senators should consider ideology when deciding how to vote on a nominee to the United States Supreme Court; 2) whether a District or County Attorney should prosecute a man for allegedly aiding his spouse, afflicted with Alzheimer's disease, to commit suicide; 3) whether a hospital should perform a Cesarean section on an unwilling, terminally ill, pregnant woman. These are not easy issues for first year law students to discuss, much less to reach consensus on. The discussion problems call for students to make public judgments, at least in front of a small group, and to get a sense of how to work cooperatively to analyze a controversial issue.

I am not alone in calling the law firm program a success. Enthusiastically endorsing the program, students report that we have most effectively achieved our first goal, to give students support as they enter the intimidating environment of law school. They feel as though we have created a safe place for them to

explore the expectations of law school and the law faculty, and simultaneously develop strong relationships with classmates starting on the first day of law school. The upper class students take quite an interest in the first year students who express appreciation for their care and concern.

Integrating all four dimensions of lawyering in the first year academic program is our expanded legal writing and practice sequence. Although historically our law school had emphasized the skills involved in legal writing, reflected in a required two-year legal writing component, we had understaffed and underfunded that piece of the academic program. Currently, the first-year Legal Writing and Practice sequence is awarded seven credit hours and taught by a tenured member of the faculty. During first year, students not only learn standard legal research and writing skills, but also practice some fundamental lawyering skills. The students interview simulated clients (played by community members), negotiate claims (using the same problem that NYU uses), and, at the end of their first year, conduct a non-jury trial. Beyond developing conventional lawyering skills, and confronting our perspective dimension, students write a paper for our resident philosophy professor analyzing the jurisprudence of a particular case opinion.[15]

After that, it may look as though the first year academic program is fairly standard: contracts, civil procedure, property, and torts. Yet this idea of referencing what we teach to what lawyers do has infiltrated the regular courses as well. The contracts professor has transformed the contracts course into a planning course instead of its classical role as the premiere analytical course. The students draft provisions of contracts, edit one another's provisions, and then finally draft entire contracts by the end of the year. The civil procedure teacher has drafted a manual of sample pleadings and other forms for practicing attorneys in the state. He incorporates that manual into the civil procedure course. The property professor has created a set of "programmed learning" materials allowing first-year students to teach themselves portions of real property law.

The second and third year curriculum now reflects some changes as well, although we have not as yet implemented as many changes there as we would like. In the required third-year Estates course, students prepare wills and the documents required for probate. In the required second-year Business Organizations course, students solve simulated business problems involving the choice of business entity and tax considerations. They also draft business agreements and corporate documents. In the required second-year Individual Income Taxation course, the professor uses the "problem method" as his primary teaching method. The full faculty has set as its next goal implementing further changes in the upper division curriculum consistently with the four dimensions of lawyering.

Implicit in the four dimensions of lawyering are generic professional virtues. As professionals, lawyers must teach themselves and each other law throughout their careers. We hope to inculcate in our students a desire and the skills to continue to learn after they graduate from law school. Indeed, we hope to inspire in them a lifelong interest in the development of the law and the legal profession.

A commitment to learning is insufficient, however. Professionals need the ability to assess the quality of their own performance. In terms of the assessment

15. That resident philosophy professor has described our "required" jurisprudence program and its history. Huff, *A Heresy in the Ordinary Religion: Jurisprudence in the First Year Curriculum*, 36 J. LEGAL EDUC. 108 (1986).

practices of our law school, we are as interested in instilling in students the ability to assess their own work as to learn from our assessment of their work. That means assessment occurs in individual sessions. Each year, more than one hundred "external," i.e., non-faculty, assessors participate in the assessment practices of our law school.[16] External assessors, mainly practicing attorneys whom we train, work individually with our students to help students identify for themselves their own strengths and weaknesses.

Incidentally, one of the more innovative features of our work together is our summer institute. For one week at the beginning of the summer and for one week at the end of the summer, the full faculty meets to continue reviewing the curriculum and designing modifications. We continue to use the model of comparing what lawyers do with what our curriculum teaches.

Our work thus far has enabled us to establish a model by which we can someday say that a graduate of the University of Montana School of Law will be able to represent clients effectively. We think that we will be able to design an academic program that addresses the four dimensions of lawyering and that requires students to master the routine transactions handled by practicing attorneys in Montana.

In conclusion, I believe that it is important to note that our curriculum review has affected other aspects of our institution. As Liz Schneider advocated yesterday, we have a different set of criteria when we hire new faculty. We care about traditional competencies, but we also care about faculty interest in and commitment to a more performance based academic program that addresses all dimensions of lawyering.

VICTOR GOODE, Professor at the City University of New York Law School at Queens College:

When I was beginning to prepare this presentation, I found myself in a bit of a dilemma. I had to ask myself, "What is it that I can present to a group like this that is actually useful in terms of it being a model—a model that people could draw upon, could do more than simply identify with or find curious or admire from a distance? What is it about what we do that actually has some potential to feed into other programs and to actually help inspire or create or infuse a development of an integration of skills and practice at other law schools?" Now, that dilemma is obvious, because CUNY is a new school. It is only five years old. We had the unique and extremely rare opportunity to build a curriculum from the ground up and draw upon much of the pioneering work done by the clinical legal movement and many other educators who have critiqued and revised certain aspects of legal education. It was a rare moment indeed, and yet, not a totally isolated moment in the evolution of legal education. It is very possible to make substantial revision in the curriculum of an existing law school, and not start simply from the ground up.

16. For a summary of our adaptation of assessment center methodology, see Burke, *A Look at the Role of Assessment Centers in Improving Performance*, XVII Syllabus 1 (Dec. 1986) (unpublished newsletter of the ABA Section of Legal Education and Admissions to the Bar).

I'd like to take a look at some of the things CUNY has done and try to put them in context by looking at the course of professional responsibility or legal ethics. But before actually getting into that particular course and examining how we have chosen to integrate it both vertically and horizontally throughout the three years of our curriculum, it would be useful to take a look at some of the premises that form a context for that integration. Essentially what we're talking about here is a transition from traditional to an integrated approach. Many of you might be interested in some of the points of transition, what they look like, and what kinds of issues emerge at the various points of transition.

The legal ethics or professional responsibility course is a required course—it's taught at every law school. However, it's a course that's typically taught a little bit differently. It is usually less of the Socratic method, less of a didactic approach and more problem method discussion or other teaching methodologies that in some schools might be considered a little bit unorthodox, or certainly non-traditional. I'd like to look at some of the underlying premises, that in view of our choices about our program as a whole, has led to the integration that we've been able to achieve.

We have three goals in constantly reviewing and going back to these underlying premises. First, we realize that we are in the process of changing our thinking, changing the way in which we think about not only how we went to school, how we were taught, but how we have been socialized to think about legal education. It is a very subtle difference to come to an intellectual affinity about how one wants to do something differently. But to be able to apply that on a day-to-day basis and not drift back to older ways of thinking requires a constant awareness of what these premises are and what your theoretical approach to the curriculum is. We are explicitly changing the work style of law teachers—not an easy task but one in which I see a lot of interesting innovations already going on from earlier presentations in the program. And finally we are trying to change the student, to change the way students learn, and to make learning paramount and up-front in virtually everything that we do in law school.

The simple, almost obvious approach begins with the idea that doctrinal knowledge, and the analytical skill that's usually associated with it, is both deepened and broadened when that learning occurs within an applied context. This is a basic feature of many clinics. We call that the integration of law and lawyering. It is the first principle that we began to proceed upon.

Secondly, the most effective applied context is the actual experience. We had to figure out ways of reproducing an experiential learning format throughout the three years of the program. This, of course, meant that you could not have wide client representation in the first year. And yet, live client representation was our goal and is presently part of the third year curriculum. We wanted to develop experience with analytical tasks, with judgment in forming one's decision making, with research, with issues of collaboration, with the process of decision making and with teaching students to live with the consequences of their choices.

We think that is the essential element of being a professional and being a lawyer. And, it is consistent with learning professional responsibility by having responsibilities thrust upon a student at a very early stage in a variety of settings. It forces one to look at what is a responsible professional, not only in the context of what is taught in teaching methodology, but also within the context of how

we organize the school as a whole. This includes governance processes and other decision making processes in the school where we have removed some of the traditional barriers between teacher and student and called upon our students to begin to be competent professionals and responsible individuals from the moment that they walk into the law school.

We felt that the most effective teaching method to achieve these goals and to carry through these premises was a team teaching method. So once again, we chose to break down the traditional boundaries between teachers, as well as courses, and explicitly require, as part of our curricular design, team teaching and group decision making process. Currently this has evolved into three separate work groups—one for each year of law school. These work groups work very intensely together, not simply on simulation, but on a variety of decisions about what to teach, what gets taught when, sequencing and various choices that we make within the context of the given year.

We felt reflective lawyering is an essential skill. It can be taught, and one of the ways of teaching it in a course was to model it ourselves. That played into our choice of doing our work collaboratively. It was important that it could be evaluated, and it was very important to evaluate it.

The very subtle but important quality of involvement in constant change is a characteristic of lawyering and something that could be part of our teaching and part of our students' learning. The basic goal of our program, the broadest goal, is to produce a core curriculum that is fully integrated—integrated horizontally across courses within a given year and vertically from year to year, with the horizontal component in both the second and the third year of the program. Yet, we wanted to retain the balance between analytical tasks, performance tasks, and reflective tasks. We infused a writing component that covers the entire three year program and chose explicitly not to segregate it into either an introductory program or a specific writing or research course. As a result, our students produce substantial amounts of varied writing, running the full spectrum from simply a letter to a client, to interoffice memorandums, to briefs, to formal memorandums of law, to reflective documents, to planning documents, to a host of other things that give us a wide range from which to evaluate student performance. It also exposes the student to a wide variety of legal writing, the kind of legal writing that is most typical of what the students will do when they graduate from law school.

The first three semesters of our program carry out these goals primarily through simulation. A key feature is that we look at the first three semesters as a complementary unit, rather than simply as the first year, giving up the students to whatever the second year work group continues to do. This requires close collaboration between first and second year faculty members and the role of coordination both in the second year and in the first year. The goal of that first particular unit of the school is to prepare our students for a fourth semester externship in which they will be working under the supervision of attorneys in various law offices as well as a continued supervision of their teachers at the law school.

The fifth and the sixth semesters of our curriculum look more like a traditional law school in many ways. The course titles are not as esoteric; the division between the various doctrinal areas is pretty much intact. This is an area in

which students can begin to concentrate on subject matters that they want to go into in greater depth. But even in the third year and throughout the three years of the law school we have kept a key component called the House System Intern. The House System is a place where teachers work in small groups with students, a group of twenty students. The term "House" came up because we felt that it would be a supportive environment, a supportive learning environment for our students. To make it that supportive learning environment, we not only engage in our simulations with the students, we house ourselves in close proximity to each house. We keep our doors open as much as possible for informal conversation and dialogue with our students, and in fact we use the house in a variety of teaching modes—sometimes to give a lecture, sometimes to engage in discussion, frequently to carry out the various teaching requirements of the simulation, and to engage in weekly house meetings.

The first thing that we did was to take professional responsibility as a course, legal ethics as a course, and we began to divide it up. We divided a component of it into one of our own regular courses called The Work of the Lawyer. The Work of the Lawyer is a first semester course designed to orient our students to a variety of lawyering issues that they will confront in law school and in their profession. The professional responsibility dimension is a part of it, the major part, but by no means the entire part of the course.

The second thing we did with the course, Professional Responsibility, was to take it, infuse it into the simulations, and teach those issues and those concerns through the house system. It involved the entire first year faculty, and, even with our overall commitment to experiential learning, there was often some reticence as people began to grapple with how to effectively teach this. This is a reaction I am sure that many of you have heard as you have discussed some of these ideas with your own faculty. They occur within our faculty as well. But, they at least occur within the context of how to implement these goals, rather than whether or not to do it at all.

Despite those anxieties, each faculty member takes it upon himself to teach a component of some of these professional responsibility issues through the simulations. We provide a variety of writing assignments for the students that explicitly bring out the professional responsibility concerns that we think are important. We think it deepens the experience and provides the student and the teacher with an evolving sense of how that learning is taking place. Remember that what we are trying to focus on here is creating a different kind of evaluative and evolving judgment in our students. In looking at that evolution we try not to use methods like grading several of these components and taking an average at the end of the semester; instead, we explicitly look at the evolution over an entire semester and look for growth and development rather than merely getting something right in a particular assignment. We give extensive feedback on these issues, and we use both the traditional classroom setting, the house system, and individual conferences to give feedback. More recently, we have been concentrating on using group feedback methods as a more economical way of performing this particular task.

We have both a horizontal and vertical integration of this thing that once was called a course, Professional Responsibility, breaking the issues up and distributing them amongst the three years of the program. In the first year, for example,

we spend a great deal of time looking at the impact of the professional role on our students. In house, much of the work that we do in simulation focuses around that particular theme. In the second year, one example of how we continue this approach is to look at the professional responsibilities issues that are raised when our students are enrolled as governmental or agency lawyers. As it turns out, that is a rich source of employment for our two graduating classes so far, and because of the public interest orientation, many of our students wind up working in some form of governmental work. We find a variety of fascinating, important issues to explore about who is the client, what are the professional norms when one is working in that setting as opposed to a private law setting. All of these are focused on both in the third semester and fourth semester of the second year.

Also in the second year program, during our externships, we are able to use the students' experiences as externs in their law offices to bring back issues that they are in fact confronting in what we call our Rounds Sessions. The students not only are able to draw upon their simulated experience, or their knowledge base from particular readings, but also they begin to apply it. This is true even in their externships where they are externs in offices and bring back concerns and begin to get input both from their colleagues and from their teachers.

The third year is a combination of traditional courses, house, and clinics. Of course it should be obvious that we consistently look at professional responsibility issues in the clinics, and each of the third-year teachers has an assignment to develop their own professional responsibility issues consistent with whatever their course is.

In closing, I want to point out a couple of things. We have had a unique opportunity but not an opportunity that is solely germane to the CUNY experience. You do not have to replicate the entire CUNY vertical/horizontal integration method to begin the process of integration of skills and substantive doctrine. For many of you, the process will evolve in incremental phases, beginning first with one or two teachers around a particular course.

I'd like to follow up on something that Liz mentioned, and that is the importance to get leadership and support from the dean's office on these matters. When you approach integration you will find a need for additional resources, not simply in terms of dollars and cents as clinics need, but also in reorganized teaching assignments, and the importance of coordinating the complexity that an integrated approach takes.

We think there is much in CUNY that can be replicated in other institutions and so we'd like to extend an invitation to any of you who are interested to visit, to talk further with our faculty, to write us for materials that we have developed or just pick up the telephone and share some ideas that you might have with us, about ways in which that transformation can take place.

MICHAEL SHELDON, Professor at the University of Connecticut School of Law:

I come to this particular assignment talking about the idea of how a traditional law school can approach the question of sequencing; how it can approach the question of integrating professional skills training into the law school curriculum

without goring so many sacred cows as to result in the blood of clinicians, or others, on the floor, all over the place. How can one, in effect, tempt one's own law school to make these kinds of changes, boxing and packaging them in a way that will be palatable and effective and acceptable.

I come from a background where I am the director of in-house live-client clinics, a criminal-appellate clinic, and a criminal-trial clinic. They are very, very heavy on substantive law and learning procedure. Our notion is that students can't conceivably practice in the courts doing criminal work unless they are experts on criminal law and procedure. I take the page out of the Georgetown book, which I credit for the inspiration for the model I use for this program. As a result, one very interesting thing has occurred. Our clinical program has gone from the early days of being regarded as a soft program, in which people come in and talk about how to get to the courthouse and how to talk to clients, to one of the most rigorous academic programs around. Despite the fact that we call the first six weeks of it boot camp, and students are drained of all of their resources when they participate, they still love it, and they're still interested. They're still involved, and they're still skipping other classes. That's something which is communicated to the faculty as the benefits of such a program to the school—maintaining a level of rigor and maintaining a level of interest which is virtually unsurpassed by other courses in the curriculum. The question is how to translate these kinds of ideas to the general curriculum.

The second consideration that's been raised by members of our faculty is that when we start our second year program in these topics, why is it that all we're getting is blank stares and people asking when we're going to talk about the black letter law, and when we're going to tell them where they can find it, and isn't there a Gilberts? This concern has encouraged us to become very active in certain other parts of the curriculum, both working with people in a coordinating basis, and developing programs ourselves to use as models. The fact of the matter is that people are starting to look at themselves and what's happening in the first year. They're looking at the choice of a methodology as a way of focusing people exclusively on what is pertinent. I know all kinds of cops who only investigate crime scenes and look for what is pertinent; i.e., that which tends to support the thesis they've already formed. Thus, they lose all the exculpatory evidence in the process. In effect, law students have the same thing happen to them. This is re-enforced, even in the courses where the professors do non-traditional teaching.

The message is the same and everyone knows that. The question is how to inquire into these other topics so that those courses and other courses can be taught in a broader fashion. We want to do it in such a way as to make it efficient for those teachers who want to teach courses in a traditional manner, but who still wish to call upon students to react as potential lawyers. We want students to think about the dilemmas lawyers might face in enforcing or finding the limits of doctrine. Students should decide what rules are appropriate and what the impact of those rules is going to be on their lives as lawyers. The problem that they have now is they are without any experiential training early on. There is no common data base among the students on which to draw. So if one asks the students to role play, one has to commit to laying in the basic foundation of how one engages in role play and what expectations will necessarily be involved, so

that people can engage in a meaningful commentary with a shared data base. Or, one must engage in very bad role playing in which terrible lessons are taught, or abandon such inquiry all together and leave it for some future time.

Our faculty has decided that it is high time to take a legal writing course and make it into a lawyering course. We are looking for models which will enable us, particularly within the first year, to do just that. We want to share that data base with all students in a way that they can have the best of clinical education. We want a one-on-one relationship with supervisors who not only train in skills, but train to reflect upon experience in the use of skills, both for the purpose of developing the skills themselves, but also for the purpose of understanding how they fit within the matrix of activities that a lawyer must engage in to do the job of a lawyer in society. We want the students to reflect upon whether that is the optimum way in which to resolve social problems. We want, ultimately, to integrate that as a form of inquiry into the "substantive" courses so that meaningful, useful discussions within those courses can, and will, take place on the level of the practical ramifications of the adoption of this rule, this procedure, this practice for a lawyer's life. I'm not just talking about a lawyer's professional life, but also about when the lawyer goes home and tries to sleep at night after doing certain things. We want the students to play with doctrine in a certain way—What's manipulation? What's not? When is one actually using a rule to one's benefit, and when is one abusing a rule? Is the creation of this rule such as to create a life for a lawyer which is untenable, unlivable on some level? We're looking to have a course which is a lawyering process course throughout the first year. We're looking to supplement the legal writing course by incorporating aspects of it. We want to have a program in which the students would learn a skill, reflect upon a skill, practice the skill, receive and give feedback about that skill.

What has a student really learned about a certain case and how to think about it? What's the student thinking about, how is the student adapting to the role of dealing with a client? Ideally the student should start this process by being a client because he's never better prepared to understand what that means; when he comes into law school, trying to aculturate himself, and says, "What's this all about? I don't have any idea." A lot of blind modeling takes place, particularly if all one sees are Socratic teachers shooting thunderbolts from Mt. Olympus for the first year. You know a lawyer is meant to say, "No, that's not the way it is." So the question then is, how to do this. Well we don't know, but we're working on it.

What we're trying to do is to cut down the number of substantive courses given in the first year, the first semester in particular, to perhaps three. We want to dovetail this practicum with each of them, perhaps cutting two weeks out of each course in the semester where the practicum will specifically focus on that course. We're trying to involve the substantive teacher in the development of the model, in the planning of the feedback sessions. We want to have these people responsible for the development of the methodology and then carrying it off. But then you say to yourself, "How could it possibly work, even if someone is willing to allow this creeping communism to come in and take over the learning process course?" We're being invited to do it right now. It's a marvelous thing. It cannot work if the teacher of the clinical program is also a teacher of a live-

client program. Let me tell you, it can't work. So how does one make it work? One thing is to recruit on a honorarium basis, by giving a fellowship to lawyers in the community. I know we do this in trial practice courses. We should recruit a number of lawyers at the bar, commit ourselves as clinical teachers, and teach them how to teach.

Now perhaps that's presumptuous. Well, I think certainly I have become a much better lawyer by teaching because I have had to build. The new teacher comes in, and in the first class in criminal procedure, he wants to start talking about double jeopardy. And he's talking about Oregon vs. Kennedy, and setting up mistrials. But of course students don't want to talk about it. My supervisor, who criticized me in my very first criminal trial, said to me, "Mike you've got to object, get up and object, object." And I said, "How can I ride the bike with no hands before I learn to ride the bike?" I think students are really coming from that standpoint in a major way. I learned soon enough, thanks to his help and others, but it was very, very hard.

That's one of the basic ideas I have about trying to develop this sort of sequence curriculum. I want to involve the substantive teachers, albeit on a limited basis, in the training of people, the identification of subject. Then someone should be a coordinator who takes ten people, brings them in, has several meetings, develops curriculum. I actually develop generic curriculum. They develop curriculum pursuant to their own special interests and abilities. They develop specific problems fitting within the confines of the generic curriculum, and then they are able to deliver the kind of feedback on the detailed, consistent level that is required in order to have the best of clinical education take place. That in turn makes students start making demands of teachers to address these issues, and teachers start understanding that students have a shared data base from which to discuss them in a way that, over time, develops the integrative potential without doing away with the traditional course. That is the Holy Grail within the limited confines in which I operate where every faculty position is a line item on the state budget. We are very proud of our surplus, which means we don't make additional line items on the state budget. We have to try to bring the lawyers in. Instead of an externship where we would send the students out, we bring in the lawyers. We help them become better lawyers. We help them become teachers. We enlarge our faculty and our potential to deliver to the students.

The second major thrust we have in terms of this development is an idea which comes from Princeton University. Princeton has, in the Woodrow Wilson School of Public and International Affairs, a policy conference which is required for all persons who are going through their third year. It's a junior policy conference, and it's absolutely the most fantastic educational experience through which I have ever lived. It is the most intensive, wonderful thing, and it affords a basis for lawyers to engage in meaningful lawyering work that has nothing to do with litigation. It involves picking an area, such as surrogacy, or AIDS, and taking sixteen members of the first year class, five upper class students and a faculty member and dividing the conference into four different commissions. They each arbitrarily take a subject matter area and divide each of those areas up into a specific topic. We arrange it in a seminar fashion, in effect a policy task force where we invite experts who will talk to us.

The students are meanwhile doing research on particular areas that they are developing. They have the job of coming in with a policy proposal based on their own research in their own particular area. They have an obligation to sell that proposal in detail to the members of their commission. The commission works up a joint position paper proposing action to be taken with regulatory agencies, state law, etc. They come in with a joint proposal, and then they have to sell that to the entire conference. Each commission has an upper class student as its commissioner and four lower class students. Then there is one student who is in charge of the whole thing who has responsibility for coordination.

The end product of this conference is a series of negotiations which leads to the adoption of positions, the doing of lawyering work, the understanding of a legal process, the understanding of the practical ramifications of the development and the adoption of policy. It legitimates, indeed requires, inquiry in every subsequent course about the exact same types of questions. At the end of all this, they take the paper and don't just sit there and say, "A job well done, file it away, maybe ten years from now we'll read it." No, they go to the state legislature and they lobby it. They go to Congress and they lobby it. They do what we did when we went to Washington when we did ours. Our topic was the U.S. Foreign Policy in the 1970's. We went down, and we lectured all of these Senators. It was a lot of fun. They listened. In a state government, particularly if you have your law school at the locus of the state administrative agencies, there's a real opportunity to get something done. There's an opportunity to think creatively and effectively in a way that the state legislature may think is terrific because they don't have the resources to do it.

My suggestion is that there is no one absolute way in which to do this, but if one thinks about lawyering skills in the broad way, and in the operational skills way, one can engage students in all of these experiences. Hopefully, we can do this in the first year, at a time when they are most open to developing these perspectives, and they are most prepared to be critical of a paradigm they have not yet learned. They can still develop alternatives. In that way, the law school can become a much more interesting place. And the second and third years of law school can become just wonderful.

There's another question with respect to sequencing that is involved. Does one sequence skills training packages throughout the law school and does one require it? I think it's almost out of the question with respect to a school like ours, because the battle that gets fought is the battle of de-requiring things so that people have room to get involved in taking these programs. That's why my focus is on the first year. These are adults after all. In my sense, if you do it well, if you do it in a way that's convincing, it will work. No one will wish to do anything other than to take it and to follow along. And I think we ought to have enough self-confidence to think in those ways.

In that respect, I come to this conference with something a little bit different than the pessimism that some have suggested perhaps ought to exist. I have a feeling that this is a unique opportunity to take advantage of something which goes far beyond the questions raised at earlier conferences. The main question then was survival. How do we survive, how do we circle the wagons more effectively, how do we do our thing better within? I think there's actually a chance of "takeover," and I think it's being given to us on a silver platter. If

you can think about it in terms of saying, "All right, I'm willing for a while to step back from the thing I like the most (which is maybe trying cases, or maybe dealing one-on-one with students) to think about implementation of structure in a way that brings in lawyers and involves them in this process." There is a way to expand one's reach and, ultimately, to expand the efficiency of one's long range litigation program, which is something that should be built towards. It should be sequenced, but not in a required fashion beyond the first year because what that does is to invite everybody with every kind of topic in the world to require theirs as well.

## Synopses of Presentations of Professional Skills Programs

*New Mexico's Professional Skills Program*
Professor Mike Norwood, et al., University of New Mexico School of Law.

Building on the foundation of a "live client" clinical course which the students are required to complete for graduation, the New Mexico professional skills curriculum has evolved, without benefit of a master plan, into a comprehensive three-year program that continues beyond graduation with innovative CLE course offerings. The presentation about components of this program will take place in the clinical facilities.

*Montana's Professional Skills Curriculum*
Dean John O. Mudd, University of Montana School of Law.

Following an extensive research project to determine which skills are most needed by Montana lawyers, the faculty has identified specific skills and understandings about law practice which it feels each student should have upon graduation. The school has begun redesigning its curriculum to deliver instruction more effectively in these areas and to assess levels of achievement.

*Vermont's General Practice Program*
Professor Paul Ferber, Vermont Law School.

Professor Ferber has recently joined the Vermont faculty, and he will have primary responsibility for implementing this new program. The intent is to provide a specialized course of instruction geared to preparing students for the general practice of law.

*Systematically Designing Professional Skills Programs*
Dean Neil Gold, Faculty of Law, University of Windsor.

Professor Gold designed and directed the Professional Legal Training Program, an eight-week, skills-based intensive training program for candidates for admission to the Bar of British Columbia. He has also provided recommendations for programs in professional training in New Zealand, Victoria, Australia, Zimbabwe, and has consulted the Washington State Bar Association and many places in the Commonwealth.

Professor Gold will present the research and development agenda pertinent to assessing need, specifying desired outcomes and ordering instruction to achieve

desired results. Through the use of illustrations and by detailing the procedures to be followed and the questions to be asked, he will elaborate the process through which useful reflection and research can lead to instruction to produce efficient, effective and professionally responsible lawyers. In addition, he will relate his experiences as consultant and try to identify the problems which face those who seek reform and the means through which they might achieve it.

*Brooklyn's First-Year Program*
Associate Dean Margaret Berger, Brooklyn Law School.

Brooklyn is developing an innovative program in which each first-year student is assigned to a "seminar section" in which the student faculty ratio is no more than 32:1. Most of the "seminar sections" combine a traditional first-year course with intensive writing and other professional skills training. Margaret Berger, Associate Dean for Long Range Planning, will describe a variety of approaches that she and her colleagues are using and will comment on the positive impact this program had last year, as well as on the problems it poses for legal education.

*Boston College's First-Year Course: Introduction to Lawyering and Professional Responsiblity*
Associate Dean Bob Smith, Boston College Law School.

This course is designed to encourage first-year students to examine the underpinnings of the adversary system and their roles as lawyers in that system. Each section of approximately 32 students represents either the plaintiff or the defendant in a simulated legal dispute. This provides the context in which students explore both legal and ethical questions about the litigation process.

## Overcoming Obstacles to Professional Skills Instruction Panel Discussion

JOHN R. KRAMER, Dean of the Tulane University School of Law:

I am the literal heavy. For the last day and a half everybody has been putting the burden on the deans to resolve all this, and you have in front of you not a gaggle and not a pride, but an ego of deans. What we are going to do is to try to deal with the question of obstacles to professional skills training, or whatever you want to label it for your own euphemistic purposes. We're going to assume the form of a faculty committee meeting with the dean during which we, the faculty, consider whom to hire for next year. The three of us are the proponents of hiring two skills trainers/clinicians, who may from time to time integrate and merge with the traditionalists. Richard is going to be the dean. He's the traditionalist questioning the hiring of skills trainers and clinicians.

Let me tell you who everybody is. Jane Peterson Smith went to Hastings Law School and then went back there as Associate Dean from 1975 to 1981, but had also been in private practice prior to that. She is the director of examinations for the California State Bar and is primarily responsible for the development of the skills portions of that bar. She tests, she tells me, thirteen thousand people a year, some of whom come back twice during that year.

On my left is Joe Harbaugh who has been at about eighteen different law schools but only one as dean and there only for a couple of months. He went to Pittsburgh for his law degree. He made the mistake of working under Bill Greenhagh for two years as a Preltyman Fellow at Georgetown. He then went to Connecticut as a public defender to create the clinical program, then to Duke which had a major clinical program until he came so he stayed there for two years, and then he went to Temple, Georgetown and American University. He hasn't decided what he wants to do or where he wants to do it when he grows up. At the moment, he is at the University of Richmond, T.C. Williams School of Law where he is the dean—a houseless dean. Steve Wisner is prepared to help him get a home before the year is out.

On my right, and in this case definitely on my right, again an ex-dean, Dean Huber. Dean Huber had the joy of getting his degree at Iowa. He taught at South Carolina, Tulane and Boston College where he was Dean for fifteen years which was close to a record except for Gordon Shaber in modern times, resigning in the spring of 1987. He is about to become the head of the Association of American Law Schools in Miami this January and he'll hold that job for a year, but of course he is still teaching at BC.

With that the faculty meeting shall commence.

RICHARD HUBER, Professor at the Boston College Law School and President-elect, Association of American Law Schools:

We have a report coming in from the sub-committee of the Appointments Committee. What is your report today—who wants to make the report?

KRAMER: The three of us have agreed that we have two candidates to present to the faculty, both of whom have been involved at other law schools for several years as junior members of the faculty involved in skills training and clinical legal education.

HUBER: You know we have a faculty, many of whom are going to have some trouble with this recommendation, and I myself am having some trouble. Are these people technicians or are they going to be true professionals? You know we're getting a lot of discussion out of the ABA now—we want professionals, we just don't want people who are technically trained. What kind of people are these going to be? Are we going to get people who will teach our students to be professionals?

JOSEPH D. HARBAUGH, Dean at the University of Richmond, the T.C. Williams School of Law:

We wouldn't recommend anyone to you that wouldn't teach our students to be professionals in the broadest sense of the word, Richard. I assume what you're saying is that you don't believe that there's any intellectual substance to professional skills education. Is that true?

HUBER: Well, let's say that the areas of substantive law, at least, that are being taught by many of these people seems to me to be relatively elementary and often repetitive. I would like to have some indication, before you could expect my support on this recommendation, that this is not true. Is this the type of education they're going to give us?

HARBAUGH: It certainly depends upon the type of clinical and professional skills program that we envision for the school. You've certainly heard reports from the Albuquerque Conference of the breadth and depth of the clinical programs in U.S. law schools. The program does not have to involve insignificant and repetitive cases. If we want it to focus on complex cases, we certainly can do that. More important than it seems, Dick, is intellectual quality that goes well beyond just mere manipulation of doctrine in the substantive area. We are talking about all the richness that law and action bring. Law in action is not simply understanding a set of abstract principles, their being able to apply those principles in a world where individuals make decisions about what they want, how they want to achieve it and the like. Lawyers have to learn to deal with those complex situations—everything from the interaction with the client, the interviewing/counseling stages, the relationships with other professionals, the negotiation/mediation/arbitration stages, and the processes of our legal institutions, litigation and the like. The full panorama of lawyer activities are brought to bear on the abstract principles. It's such challenging intellectual activity which an effective clinical professional skills program can bring.

HUBER: You're going to do this to all our students in three years, is that right?

HARBAUGH: No, I don't think there's any way we're going to do that in three years. Like every other law school in this country, we've only got one full-time clinical teacher on the faculty. With a school of 500 or 600, there's no possibility that we're going to provide professional skills education for 150 students a year, even with three people. That kind of education is much too intense.

HUBER: Let me ask you this. We're going to have a lot of discussion, certainly among the faculty who are keeping quiet at the moment, basically on what we should be doing in a three year program. That is, there is at least a strong argument among some of our colleagues that if there's anything that schools are not really doing sufficiently well at the moment, it is teaching that delves into a body of law in substantial depth and exhausts it. This is training they're not likely to get in practice, but that they can get in law school. We ought to be sure we offer them opportunities to do that, and we have faculty that will be able to do that.

HARBAUGH: Are you suggesting that we are now, in our upper division courses, Richard, giving our students the opportunity to delve in depth in any substantive areas?

HUBER: I'm suggesting that we have two additional opportunities to get depth penetrators at this point.

HARBAUGH: Wouldn't it be easier to convert some of our existing faculty into depth penetrators, than to ignore the possibility of expanding in the professional skills area? You may be correct. I think you're right that too many of our courses beyond the first year are indeed survey courses. We are trying to cover an enormous amount of doctrine in a short period of time in order to convey information to our students, rather than having any kind of in-depth analysis of any particular doctrinal area. That would suggest we ought to change our curriculum to allow some of our faculty to do that in depth. That doesn't mean we ought to ignore the whole other area that's not being covered—professional skills education.

HUBER: In a sense you realize that we already have a superior clinical person who's running a good program for fifteen students each year. Do we need anyone more? What are our priorities? I've mentioned doctrine, this is one example. Another is clearly that of perspectives. Law school is, in a sense, the last time perhaps that our students are going to have an opportunity of studying things such as legal philosophy, of getting a good grounding in economics, a good grounding in certain areas of sociology and psychology that will be essential to them in the practice. It's going to be more difficult for them to get that outside of law school than it is to get clinical training. Let me put it this way: Is there any responsibility to the bar once we go ahead and graduate people to do anything further? Do we have any responsibility to determine if our people are capable of practicing law, i.e., that members of the bar are able to practice law.

KRAMER: I don't know that we have a responsibility to the bar so much as we have to the students. I'd like to take a twenty-five year look at where they will be. When you went to law school there were no courses called employment discrimination or environmental law, or pensions. Even the securities law course must have been a two hundred page book, and constitutional law—the first amendment had only been around for twenty-five years.

HUBER: Maybe you've had equal protection.

KRAMER: Well we don't have that any more either. This is a sad thing. I noticed this in Louisiana the other day; I got the list of deaths in the bar at the same time as we were swearing in 475 people. Only 48 people had died in the entire year in the bar in the State of Louisiana and most of those were well into their 80's. These kids are going to be practicing law for 55 years, except at the University of Montana where they come in as elderly, the average graduation age is 24-25. Two-thirds of the doctrinal curriculum twenty-five years out doesn't exist now. Whereas I agree with your emphasis on perspectives, hopefully we'll continue to exist unless we have totally short-run vision. The kinds of things we are talking about now are going to be crucial to those 55 years, whereas most of the doctrine is going to be obsolete.

HARBAUGH: And why is it you are assuming that areas such as sociology and economics cannot be better taught in the context of a clinical program? It's in the lawyer's office and the courtroom where economics is applied to the resolution

of a problem. It may be that the way to expose students to the use of economic principles and literature is in the professional skills program. It is the same way with sociology; the same way with other doctrine. Other areas of human knowledge can be applied as lawyers apply them all the time in legal practice. It's not that we shouldn't have a course in law and economics, not that we shouldn't have courses in law and sociology, but we also should understand that it's the laboratory that the clinic provides where such knowledge is applied by lawyers. Are you beginning to give up, Dean?

HUBER: No, I'm not going to give up; after all, we've got a lot of time. All faculty meetings run fairly lengthily and some of you who've been deans know that sometimes as a dean you'd rather wear a hair shirt or you'd rather get a cat-o-nine-tails and beat yourself with it for two hours than to go to a typical faculty meeting. And I'm having that problem at the moment.

UNIDENTIFIED SPEAKER: You know, we did not answer the question of whether the bar has the responsibility of doing this rather than us. You know, it's interesting, we assume the responsibility. . . .

JANE PETERSON SMITH, Esquire, Director of Examinations, the Committee of Bar Examiners of the State Bar of California:

Well, the bar exam certainly has a responsibility, and I think it is exercising it very well, having legitimated professional skills as an area where candidates must prove their competence. But it seems to me that we have a responsibility to the profession and to the public to make sure that all of the students who graduate from this institution have some fundamental competencies as attorneys. The perspective you talk about, the perspective and the ability to solve problems, is precisely the kind of fundamental competencies that it's our responsibility to train our students to have.

HUBER: On the other hand, looking at our placement statistics, I note that 14% are going to judicial clerkships and that 37% are going to law firms over 100. Are they going to need this education?

HARBAUGH: We can't predict, any more accurately than our students can, what they're going to be when they grow up. We have to identify some kind of fundamental area of competency and skill that all of them must be equipped with, regardless of what arena they enter after they leave us.

HARBAUGH: Dick, that's only 51%. Where are the other 49% of our students going? Now let's assume that you're right. All of our graduates are going into a judicial clerkship or government agencies where they supposedly have training programs, or into these large law firms. As you know from my annual report to you as a faculty member, I do part-time consulting for the Practicing Law Institute. As part of that work, I go to major law firms and to corporate law departments, and teach a skill area such as negotiation, because the law firm

cannot provide the service of training by itself, and they perceive inadequacies on the part of their lawyers. I can assure you that in the day or day and a half that I spend with those lawyers, they get far less than I am able to provide in my fourteen week, three credit law school course in negotiation.

HUBER: Let me get down to the fundamental issue here. Clinical legal education has been around for twenty years, more than that in a number of institutions. I have yet to see any report from this committee, or perhaps from others, that basically says that somehow or other, five years out of law school, people who have had clinical training are substantially better lawyers than those who have not. Is there any such statistical information that I can take to my conservative faculty and say: Look, we're training lawyers, we've got to train lawyers, this is the best way to train them? Or are we basically saying that this is a good education, which I'm not denying? It's a good education, but it is no better than other tracks in the law school. Therefore, perhaps it ought to be a part of the curriculum, but not necessarily as fundamental as other areas of doctrinal, analytical, and synthesizing studies.

KRAMER: You've hit upon something that's a problem generally. We really have no conception of what a good lawyer is five, ten or fifteen years out of law school. If our only test is how much money you've made, then clearly, in that period of time we are going to focus on the folks in the large corporate law firms. I have no reason to believe, by the way, that the large corporate law firms, who now seem to be advertising for litigators as much as anything else, are not going to find that they're much happier with students who are trained in the clinical and professional skills.

By the way, I predict something a little different than what we've heard for the last day an a half. Maybe in Nebraska they all go to small firms, but let me tell you some numbers that are frightening and that go to the point that Joe just made. The top 250 firms in this country go from 104 lawyers, at the bottom, to 800 or 900 at the top. This fall, the total number of partners and associates in those 250 firms was approximately 58,000. The next 250 firms (I don't have this year's numbers but I can extrapolate for last year's) go from about 62 to 104 in size and that's another 20,000 to 21,000 lawyers. The top 500 firms in the country are not by any means the bottom line definition of corporate practice, since they include only firms that are 70 or larger. You heard in Montana that the biggest firm is 50. That's true in Nashville, and there are a lot of firms in the 30, 40, 50 and 60's that are corporate law firms, dependent on corporate client retainers and not on individuals as the base of their practice. If you are talking about 80,000 in the top 500 firms, and placement data suggests that they are hiring at the rate of close to 15% a year, you're talking about close to 12,000 jobs in the top 500 firms, and that's not the end of corporate law practice. That's one-third, in fact, it's a little more than one-third, of the people who have passed the bar as law graduates every year. This means that one-third of our kids today are going into what is still only the top 10% of the profession. But clearly over the next ten years it's going to be 33% of the profession, and if you add those who are in firms of 30, 40, 50 and 60, you are probably having 40% to 50% of all graduates heading to corporate practice—not to individual, not to two and

three person firms. The law practice pyramid is being turned upside down. What we do know, and this is the real problem Dick, is that five years from now, a lot of those kids are going to be unemployed. Because there is no way those firms can absorb the 12,000 a year they are hiring, as partners five to eight years down the line. And they need these courses, not some doctrinal courses that will be out of date by then.

HARBAUGH: There's no way those firms are in a position to provide the kind of training to those students that we can, here and now. We heard from Karen yesterday what happens when people leave those firms. Because they are not getting the kind of broad based training that we're talking about, they may not be as employable as they think they should be. We may be casting them into solo practice or small practice situations without an adequate professional skills background. We've said for years that we want to give our students a foundation so they can teach themselves for the rest of their lives. The areas of law will change, doctrine will emerge, other doctrines will disappear. This will also happen in the professional skills area. We ought to provide a foundation for our students so they can teach themselves about developing professional skills for the rest of their career. All of our students ought to be exposed to those conceptual foundations.

HUBER: You understand a real dean wouldn't have let him continue talking when I tried to interrupt. Let me suggest to you, however, that is a pious and even interesting sentiment. However, an awful lot of clinics today seem to be litigation oriented. It's true Jack mentioned that people are advertising for good litigators, so obviously it is an important part of practice. But one thing that I, as an outside observer, have worried about is the fact that this litigation model does certain things. It exaggerates the adversarial model of lawyering. Most lawyering is done in some sort of an interpersonal relationship. You have to work with other lawyers in your firm. A lot of the work you're doing, even if it's negotiation, is not completely adversarial, and you're giving an arguably false model. You also are, I think sometimes because of the nature of the clients being represented, giving a sense that there's very great pressure to win. In a sense you're trying to vindicate the rights of those who, for various reasons, you feel are oppressed and who are oppressed in our society. But the pressure to win may be a poor professional responsibility or ethical message to be giving students. The sole, or nearly sole, message you're giving to students in a litigation model clinic seems to be at least an incomplete one. Now I'm not saying this is all these people are going to do. There are many models. But how do you respond to the worry on the part of some of your colleagues who come into my office screaming and hollering to complain about it?

HARBAUGH: Can we cut a deal? Can we put at least one of those in a non-litigation setting?

HUBER: Possibly, but go ahead and answer my question if you will. You understand that I am a very hard person to persuade, that I am known as an old curmudgeon for very good reasons. Therefore, I need answers and not deals at

this point. Now I realize you teach negotiation and this is exactly what you're planning to do at the moment. I'd rather have a win or lose adversarial model here. Either I win or you win. At least let's not negotiate at this point. We may want to do that a little later. To a certain extent, the litigation model has a problem and the problem arises as the whims of litigation occur, i.e., what comes into the office. Even though you have substantial control of the cases you can take, they probably follow five or six areas of law in the general course of events. If you use that litigation model, how do you respond to the question of both a pressure to win and the fact that there may be a limited area in which you're operating, either in the civil area or in the criminal justice clinic?

HARBAUGH: Well you're right historically. I think we're all a little history bound with the start of the clinical programs back in the sixties. We are the products of history. Most of us got into clinical education in part because of direct sympathy with the clients and the goals of the client. That's not normally the way a lawyer works. We went out and looked for our clients. We violated what was by then no longer serious law, and went for as many people who were tenants, who were consumers, and who were criminal defendants as we could get the courts to assign us. But I think that slowly is changing. The Albuquerque conference makes it very clear that the tie between legal service, in the sense of helping poor clients, and clinics is slowly loosening, never to end because otherwise there may not be very good mechanisms for helping a lot of these people.

But the new models are not all litigation models. To the extent they are litigation models, they get into more complex cases. The most important thing that some of these new people could do is to help us inject a variety of skills training. The word "skills" is better than "lawyering," and let me tell you why. I don't think these skills are specific to lawyers in any way, shape or form. Everything they talked about at the Albuquerque conference, from cost benefit analysis, to planning, to interviewing and counseling, to negotiation, is precisely what a businessman does all day long. It is precisely what people involved in the health services field do for the doctors' bedside manner. It is basically a function of interviewing and counseling. These skills are really university-wide and not specific to lawyering, but they ought to be involved in almost every course we can find in the law school curriculum. We're moving from a litigation model to putting this into torts, contracts, civil procedure, and criminal procedure to try to get business. There's a model at Harvard of a marvelous business representation course where you deal with small business people and take them through the interviewing, counseling, negotiation, planning and drafting stage for fifteen weeks. That's what these new people can help us do—get away from the old model.

You also have to express concern about the ethical question. What you're suggesting is that litigation clinics we have and we maintain somehow distort the whole ethical balance because there is the will to win on behalf of your client. First, let me suggest that is the ethical balance the profession has put on all advocates who work in a litigation environment. Second, there may be extremes. Students, because of immaturity, because the young lawyer doesn't know enough about the outer limits of ethical boundaries, may push too far because

they are a zealous advocate. Where is it better to employ this litigation model? Out in practice, where it's clear that young lawyers cannot be supervised in the way they were 25 years ago because of the economics of the profession? Or in the law school where we have dedicated clinical teachers who are supervising all of our students' litigation problems and can give them the feedback, support, analysis and critique that will help formulate the appropriate ethical dimensions for the rest of their career? The answer is obvious.

HUBER: Well, when you're pig-headed it's not obvious. Let me just shift though. You mentioned, for example, among others Jack mentioned, medicine. To a certain extent we've had a move toward, certainly not completely to, a medical model where you start talking about clinical and practical skills, lawyering training. Let me suggest another model. With all due respect, basically there's a question of whether most of us would assume that a doctor's education is good training for national leadership. Of course, I don't know how many Michigan football players, peanut farmers and actors we'd want in this position either. In many ways, even business education, in spite of what you indicate, has not produced a lot of leaders that have been very compelling. But lawyers have often produced national leaders. Is there something in the educational program that we have been using that does this, that gives graduates an opportunity to, if you will, think greatly, think with greater breadth? Do they obtain a greater coverage of fields of learning they may not have had before going to law school, things which in a sense are not so focused on the professional and are somewhat broader in social economic and political terms? Certainly, many of our more prominent and successful leaders in this country have been lawyers, and it is something to be said maybe for the education that we have been giving them at law school.

HARBAUGH: Don't you want our leaders to be problem solvers? The kind of instruction we are talking about providing our students, it seems to me, is precisely the sort of instruction that will strengthen their leadership qualities. It will certainly not take away from the other kinds of broadening experiences they can have while they are here at law school, but rather enhance it.

KRAMER: Well you are going back to Joe's comments that you can learn a lot of your criminology, you can learn sociology, you can learn economics in the context of problems that come into the clinics and the various programs that you may have, as effectively as you can if you have a basically more structured course.

HARBAUGH: Well, the people we are proposing you hire are going to integrate our faculty. They are going to bring new methodology into some substantive courses as well as working with live clients.

KRAMER: Yes, we're not looking to take over the curriculum, although that's not a bad idea. We're looking to balance it, you see.

HUBER: I can see right through what you're doing.

KRAMER: If we've got one clinician on the staff now, and we've got thirty to thirty-five faculty members, adding two people who are going to work primarily in the skills training field and infusing that into other courses is hardly going to switch the balance on this faculty. And in answer to your earlier question, back to the question of whether it's inheritance or environment that is responsible for lawyers as leaders, I think it's the aggressive genes and hardly something in this particular environment that gives them any particular leadership ability. I hardly think that civil procedure trains leaders. And I'm an old civil procedure teacher.

HUBER: Those of us who were raised on general and special assumpsits may disagree. One of the ways in which this program could run, if we are to hire these two people, could be outside placement in an externship program. Do any of you think externship programs would be one viable way of conducting such a program?

HARBAUGH: Well it's certainly one alternative that we can consider. Professional skills education encompasses everything from simulation in a traditional classroom, to simulation purely in a narrow skills area, to live client in-house clinics, to placement externship opportunities. The key to all of this, however, is there be involvement by members of our faculty in whatever clinical learning environment we create. It can be in a first year torts course, or an upper division corporations course, where they're using simulation problems. If we are talking about our professional skills courses, perhaps our professional skills faculty in trial practice, negotiation, counseling, and interviewing would be teaching it. If we're talking about in-house clinics, then we are obviously going to use our professional skills teachers as the supervisors of the cases. If we're using externships, we may use placement with other lawyers. However, we must have the involvement of our full-time faculty because it's there that we can give the critique and analysis that is not likely that the placement supervisor cannot provide. There are others who would disagree with that, who would say that we can simply rely on the placement supervisors. Yet, we do have an interpretation by the ABA of Standard 306 that will require us to have some form of involvement by the law school. Preferably, it's very active involvement by a member of our faculty.

HUBER: One advantage of being a dean is that you get to do a lot of accreditation inspections, and I am happy to hear you speak this way about outside placement programs. I think one of the real issues is that some of these programs do not seem to be educationally controlled nor are students suitably evaluated. Rejecting externships does limit the number we can serve, does it not? How many people are you going to serve with these two people?

KRAMER: You're talking about a delicate balance of cost expenditure. I took a quick survey last night and the ABA questionnaires from last year suggest that 98 of 174 schools had a full-time clinical teacher. The salary range was $20,000 to $98,600. The median was about $45,000. Now if at $45,000, figuring 20% for fringe benefits, you're talking $54,000 a teacher. In other words, we'll spend $108,000 on these two people we're going to hire. Now if you look at the cost

of a major clinic—when we were at Albuquerque we looked at the New Mexico Clinic—the New Mexico Clinic has four and a half full-time teachers all year long, plus six secretarial/paralegal types. They are clearly spending close to $400,000 there, but that's a clinic that serves 108 students a year, for $400,000. I'm sure we could serve many more students than that for our $108,000 investment. Maybe not quite as well, not as intense, but we can spread the money over a lot more people.

Obviously at the other end of the spectrum, if you just have out-house placements, with a supervisor who looks at daily or weekly diaries, you're talking about zero dollars, or close to it, but that, as I think Joe has said, is questionable on an educational basis. There are lots of intermediate models, some of which are as expensive as clinics. We heard about one at the Albuquerque Conference which was terrific because the price tag wasn't applied to it. That was the NYU model. That costs at least $350,000 to $400,000 a year in terms of secretaries, staff, and teaching assistants, and it chews half the behind out of ten teachers. I heard that one described, and I counted minimally 57 hours of one-on-one with the students in the class with the professor—not clinicians, not skills trainers—for just three exercises. That did not include 18 hours you had to spend looking at a counseling videotape. That didn't include the previous 50 hours you had to spend editing the tape or reviewing it before you actually reviewed it with the student. The cost of that, to cover the entire first year class, you're talking in the millions of dollars in terms of teacher time and lost scholarship opportunities. What we're talking about here is really rather a minimal investment but not necessarily the best education. One hundred and eight thousand dollars is cheap when you look at New Mexico and NYU.

HUBER: Well, you yourself found some figures there that, as you know as a dean, are somewhat deceptive. I think it's not unfair to say that the cost of faculty include not merely fringes but also all the support services for the kind of work they do, so you have to be a little bit careful in limiting this to $108,000. Let's look at a few other things that come to my mind and that people call to my attention. For example, do you expect these clinicians to teach clinical courses, practical skills courses? Will they use grades or will they use pass-fail?

HARBAUGH: I would suggest grading rather than pass-fail, but I think that's open for faculty debate. Why? Do you feel that it's preferable to do one way or the other, Dean?

HUBER: My inclination would be that grading is desirable in this context. In talking with some of my colleagues, sometimes on pass-fail very few students actually get failed.

HARBAUGH: How many students get failed in our traditional curriculum, Dean?

HUBER: Well, it depends what school I'm at and what year I'm at. We cited my history in law school. I think we flunked about 40% at the time I went through law school the first year, but somewhat lower at the moment at my present institution. I guess I'm suggesting this: in a sense, my perception is that

there is good lawyering and there's bad lawyering. If you are testing in conventional courses, at least it is arguable that you are testing a certain level of achievement. Granted we know there are imperfections in it, but to a certain extent a certain level of achievement is adequate, but it's not excellent, so you have an easier grading pattern there. But I think to a certain extent this is different in actual lawyering. Ms. Ramos, if I've read the transcript of the Albuquerque Conference correctly, pointed out that lawyering that is not complete, that does not meet a high level of performance, is really unsatisfactory. How do you assure that without some sort of a grading system?

KRAMER: Jane has a grading system that she applies, to what, 13,000 people? How does that work Jane?

SMITH: Very slowly. Certainly the model of admission to the bar tells us that persons are either minimally competent to practice law or they are not competent to practice law. The pass-fail model guides us into the profession. I'm not sure that I would agree with you, Dean, that one has to evaluate and separate the very fine performance from the next level down in order to be making an appropriate evaluation of competency to practice.

HUBER: This has never happened in any school I have been connected with, of course, but I have a sense, from some of my colleagues, that on the pass-fail system sometimes there are certain students, who either are marginal students and figure that this is a way to get pass credit, or who have fairly good averages and don't want to lower them. Therefore, they do minimal satisfactory work and can raise thus their GPA in other courses. I don't want to overemphasize that, but it does seem to me that the standards we are going to employ on our students is going to be important.

KRAMER: Well, even if you do pass-fail—you heard Jane say slowly, they do it slowly—that must mean that it is harder to do, and you have to give much more intensive consideration to the kind of work that goes into the skills part of the bar rather than the doctrinal part. But put that to one side, because I think that Joe and I are convinced you can grade them. The problem I've seen in the past in clinics is not on the bottom end, because very few people flunk anything in their third year unless they very purposely go about doing it. The problem tends to be on the high end. I know this from fifteen years at Georgetown, that the clinics rarely gave C or C+, they were all A and B on the average. Clinical grades would tend to be a grade higher than the regular seminars or large courses simply because you know the students. It isn't blind grading, and not only is it not blind grading, you've seen them perform so many more times than three hours on one afternoon in May. So you have a lot more there, and they have a lot more opportunity to show you how good they are, rather than how bad they are.

HARBAUGH: In large, it's our experience, especially in the latter half of the second year and the third year in law school, that students in clinical and professional skills programs invest more of themselves in the traditional latter half of

law school courses. Therefore, a portion of the higher grading can be attributed to the fact that not only are we grading for achievement, we're grading for effort that is put into the learning and experience. Effort ought to be rewarded in the same way that achievement ought to be rewarded. In fact, if it's only achievement we're rewarding, that would be a depressant to effective and active learning in the skills area.

HUBER: Let me move to another subject, not that I'm persuaded yet. This subject is essentially the issue of the faculty themselves—the credentials these people have as potential scholars. I'm faced with a University that has requirements that if you're going to be promoted you have to meet certain scholarship requirements. Presumably we're going to hire these people in a promotable position. Are they going to be able to do this intense, effective clinical training and still be able to meet the scholarship requirements imposed by this faculty as well as by University requirements?

HARBAUGH: That's certainly been one of the serious problems in the past. Most law schools, particularly in the early years of clinical education, have demanded so much from clinical teachers that the opportunity for scholarship was not available. If these two additional faculty interact with our traditional faculty by adding simulation based lawyering problems to traditional courses, it will hopefully help educate the rest of our faculty to the teaching demands of the clinical methodology: for example, teaching on a one-to-one basis, and the creation of new materials.

As you know, one of the serious problems that confronts clinical educators is the inability to block off one or two days a week for research and writing, an approach that many traditional faculty are able to follow. Nor are they able to close the door with the same amount of frequency as some of our colleagues who try to work on their scholarship each and every day. Those kinds of difficulties are going to confront clinical educators, and we ought to be prepared to make some adjustments, for example, by trying to involve more members of our faculty in the professional skills education enterprise.

KRAMER: Yes, first of all, remember these are not clinicians. There is a little difference here, although I hate to make that distinction. We are talking about skills trainers who are going to work with more traditional courses rather than people who are going to set up another clinic. That we already have, and we are going to keep. As a matter of fact, I'm nervous here, because from time to time the suggestion is made that if you want professional skills trainers, just take your clinical money and put it into that. I don't want this to be a cannibalizing enterprise in which we lose the best in order to obtain the good. I happen to think that clinical education, as expensive as it is, is the best.

But these people are free from caseload responsibilities. They will have more time to produce. Indeed, if there's a crying need here, it's for the research and development of materials that can be used in courses. This faculty has traditionally granted as tenurial material published material, case books and materials of that nature. This is what we need most. We need case material that we can

take and use in all the courses in the curriculum. I count as a tragedy now—I got beaten up by all the clinicians in America in 1979 when I tried to expand what was then Title 11 of the Higher Education Act of 1965 into Title 9 to provide for R&D money for simulation which would have been cheap. They were afraid all the money was going to be bled out of clinical education. The House of Representatives, in the bill they passed in August, has $5 million in Title 9 which is three and a half more than it's had for seven years and about one million more than it had at its peak in 1980. I don't know if that will stand or should stand, but that's a lot of money out there. It wouldn't take much R&D money to get this kind of thing going.

There's one other possibility here. If we get away from calling this lawyering, I think there's incredible inter-disciplinary ability here to collaborate in writing and research with people in our psychology department, with people in the business school, with all sorts of people on interviewing, counseling, negotiation, planning things. And of course you know this faculty, it's the latest hot thing, they lap up inter-disciplinary work.

HUBER: Well, I had a visit from the three "Crits" in our faculty and they just said "a pox on both your houses." However, let me talk money. Perhaps one of the advantages of a shifting discussion like this is that the scenario changes a wee bit. Now I see we are going to basically have tenure track professors who do some skills training in their courses rather than build up our clinic or create a new clinic, and those are alternatives that I'm glad to listen to. But in either context, what are the money demands going to be on the institutions for any of these roles that these particular faculty members are going to fill? Where are we going to get the money? I mention this because we're a private institution, or we're a public institution with a legislature that is trying to balance the budget. Our students are already complaining about paying $11,000 tuition and they're having to borrow, in many cases, the money to pay it. To what extent should we be increasing the costs of education at a time when tuition is already strikingly high. Should we not be trying to think of methods of consolidating education, of reducing costs, so that we don't start educating only the upper middle class and a few people (a much too limited group) that can somehow or other get some subsidy for their education.

HARBAUGH: We must think of this kind of training as being absolutely essential to our mission. If our priorities need to be readjusted in order to make that essential commitment to the competency of our product, then let this be the opportunity to do that. Certainly, you're the one who's going to have to decide how we can balance our budget and where the money is going to have to be reallocated. The commitment we have to make is to this kind of learning and to this kind of teaching in our institution.

KRAMER: I think the cost question has two ends to it. One is, we're supposed to do this right. Obviously if you go the full scale clinical model, if you go like New Mexico or if you even go to NYU on a massive first year program, we're talking lots more money than $108,000 today. But we're talking about doing it

over years. We're not telling you to hire 15 people now. We may be telling you two a year for the next five or six, but we're not telling you to do it today—that's one thing. The second thing is tuition . . .

HUBER: You don't think you're going to persuade me by telling me it's going to be worse in the future?

KRAMER: No, I just said we're going to continue to nag you to death. Creeping incrementalism is the only way the clinics ever got into the system. It never happened all at once. It did happen rather quickly as long as CLEPR was around, but since then it's been creeping, quietly. And this stuff has slowly crept into the curriculum. But I think that tuition is still too cheap. We know the model of full scale clinical education, and actually it isn't so terrific anyway. The medical school, the pure clinic, which is really in the schools in the District of Columbia and in those schools in the country that have lost state support, is about $20,000 to $22,000 per year. That is the realistic tuition for a full scale clinical education after the first year in the medical mode. Our tuitions are averaging about $8,000 in the private school this year. That's $12,000, $14,000 lower than it would be if we really did full scale clinics. Well, were not going to charge them $20,000. Let's suppose we went to $12,000. Is that too much?

Well it's too much perhaps at both ends of the equation. One is, it's going to scare kids away. Well I don't think it's going to start scaring them away anymore for several reasons. One is they see the $70,177 price tag at Cravath Swain. And remember the numbers I just gave you. There are 12,000 jobs per year in big corporate law firms. I'm not talking about medium-size corporate law firms. They are not all paying $71,000. In New Orleans the going wage is about $43,000 or $44,000, and that's low on the national scale. But they see that brass ring out there. They smell it. It's there in greater numbers than they really know.

Secondly, they've got loan money coming out of their ears. I know that scares people. But if you know you can pay off your loans by being one of the one out of three that goes to the large corporate firms, then that is less nervous-making. Let me give you the numbers in New York this year. This past summer, if you worked in New York, you earned $16,500. It was $1,100 a week for 15 weeks. In New Orleans where we gave them a sixteen week vacation most of my kids were able to earn $12,000. That's more than the tuition, pre-tax, just in the summertime alone. And I'm not talking about the more than 15 hours a week they work during the second and third year. The problem is public interest. It's first of all scaring them when they first come in and on the way out. We haven't solved that problem, I agree with you there. But if they want to avoid the brass ring, it's going to be tough to pay the loans back unless they somehow mix their bag and do non-public interest greedy work in the second year summer and second and third year nights and do public interest work when they graduate. We come up with some better programs for forgiveness on the other end.

HUBER: The forgiveness is good, but you're not telling me basically that we ought to be using clinics to educate people to take the brass ring and earn more. One of the disadvantages of being a historical animal rather than a modern one is, in terms of clinical education, in many cases having some sort of a public

service function, is commitment. Now you tell me that we can raise tuition almost infinitely because graduates are going to get high salaries at the end. That leads to the idea of "I did my pro bono while I was in clinic in law school, and now I don't have an obligation anymore because I've done it" type of approach.

HARBAUGH: I hope the alternative is not that they won't do any pro bono work in law school. If we instill part of those ideals in law school, there's always the hope, and certainly that was CLEPR, that people will spend a portion of their time in pro bono activity and the broader obligations of the bar. Then at least they'll be prepared to handle the skill aspects, the professional relations aspects, when they help clients generally.

I think incrementalism can work for integrative approaches if you have a critical mass of professional skills educators on your faculty. Many of us believe that we ought to have a lot more of professional skills education to get to that level. But you can't do it simply by hiring a professional skills faculty. You're going to have to have the assistance, the enthusiastic assistance, of our more traditional colleagues.

KRAMER: Creeping incrementalism did work with clinics. Now there were lots of reasons. CLEPR was there offering money. When CLEPR left the scene, for the last nine years, Title 11, now Title 9, has offered some money to thirty to fifty schools a year to keep the clinical role alive. After a while, absorbing $50,000 into the budget over a two or three year time frame is reasonably cheap. This may be actually more expensive because you're talking about doing it in a much bigger way. But there's no question in my own mind. I've now seen two faculties. Faculty members, even those who read the old yellow notes, do get restless in teaching the same old way, the same course for a number of years. There is a general drift (I don't know that we've ever measured it accurately) toward the problem method in a lot of upper level courses. That drift would accelerate the minute somebody was there to hand feed you instead of your having to develop the problems that would suit your course. And I think that the answer is in giving gifts to the traditionalists that make their lives easier and more interesting in terms of teaching. I think that can happen. I think the people are out there in this audience and beyond who have that ability. All you have to do is to listen to David Binder and know that if you could clone him we wouldn't have to have this conference. The trouble is we can't clone him, and we have to infuse him or inject him into the people who are not David Binder.

SMITH: Let me follow up on that comment. One of the obstacles that I've heard about a couple of times in the course of the last day or so is the lack of availability of good materials, particularly materials that are designed to be used in substantive courses and perhaps in first year substantive courses. I have eighteen performance tests available. Those eighteen tests are all problem task-related and the eighteen arise in the following substantive areas: Civil Procedure, Contracts, Criminal Law, Criminal Procedure, Constitutional Law, Community Property, Corporations, Evidence, Professional Responsibility, Real Property, Remedies, Torts, Trusts and Wills. All of these performance tests are available to you for use in your work, and I think they're the kinds of problems that you could pass

along to a substantive traditionalist for use in a substantive course. I don't know if that's incremental, or whether that's cross-breeding, or integration, or what that amounts to, but these materials are out there, and I'm going to be producing four of them a year until the composition of the California Committee of Bar Examiners changes, or Gordon Schaber finally gets his way and we quit having performance test problems. There's a lot of very good material being developed and the kinds of people who've been developing these problems for California are people in this room: Joe Harbaugh, Dea Moulton, Liz Schneider, Dean Rivkin, Elliott Milstein, Tom Guernsey, David Binder. There are a lot of very talented people working on these problems.

If you pick up a lavender brochure, you'll find descriptions of the eighteen problems that are available and you'll also find in the very front a San Francisco address where you can contact me to let me know which of any of these materials you'd like to have. They come as a reproduction of the test together with two answers of high quality that were actually written on a bar examination. [Write to P.O. Box 7908, San Francisco, CA 94120 for copies.]

Let me add that they are skill-directed, task-oriented problems that can be used in a very traditional way; that is, paper and pencil which is the model used on the California Bar Exam. They can be expanded into broad-based discussion problems or they can be turned into simulations. One that I wrote, Klare v. the Journal of Human Experience, I use as a model of classic problem-solving negotiation. It cannot be resolved in a traditional adversarial fashion, and I use it to introduce students to the problem approach to bargaining. So these problems can be used in a variety of ways, either in your clinical skills courses or in traditional courses.

If you don't mind a little critique to go with this simulation, I wanted to say that I thought that all three of you jumped ship and abandoned pretty quickly the public interest mystique that surrounds clinical work. I wondered if you did that because you thought that it was a good tactic to make clinics more saleable to the general faculty or if there was another reason for this?

HUBER: It was tough for me to argue that issue, I thought, when I'm supposed to be opposed to the whole thing.

HARBAUGH: I think we probably did abandon ship a bit too quickly, but the growth area for the future, if we're going to expand our present base, is beyond our public service model. That is, we should not erode our public service model, we should strengthen it. But the real area of expansion is in the non-public service aspects of lawyering. That is not only because of potential resistance on the faculty to what has been our historical roots; it is where we see an enormous amount of interest on the part of our students. I'd like to capture some of that interest. I'd like to get them into our professional-skills education program. I know where some of their interests are, in part because of the economics of legal education today, in part because of the placement opportunities.

I have a daughter who's a second year law student in Philadelphia who in the last three weeks interviewed the 28 largest firms in the city. She's calling to tell me about all her call-backs. She's going to be paid $1,000 a week next summer for working in one of those firms. That will pay for her third year in law school.

I am very troubled by it, but, at the same time, I understand existing economic and placement impacts. I would like to take advantage of the situation by grabbing those students and putting them in a professional-skills education program. Indeed, some client contact clinics involve business, tax, and those kinds of models. I don't want to lose our roots, but I think our real growth is not in the public interest area.

KRAMER: No, and I think there are other ways of getting at that. I've just been so lucky with my faculty this year. We have adopted for the first time, I think in the country, a mandatory community service requirement. No one graduates without putting in twenty hours of pro bono work in a carefully structured system. There are no grades. There will be supervision by members of the bar handling the cases with whom the students will associate. But that will be universal for second and third year students—twenty hours. That is one possible way of exposing everybody, at a cost to the law school that is rather a minimal administrative cost. There may be other ways of doing this.

I do think that the public interest mystique has a certain negative danger. We've been through this fight at every conference we've been to on clinics. I can remember in 1978 in Nashville, at Vanderbilt, there was a definite trend towards abandoning the service concept here. The answer is, all clinics that exist are basically public service to indigent clinics. They are going to remain. What we're talking about is moving out from them into other areas of the curriculum and expanding this kind of thing, and I don't think you can do that by adding five more public service clinics. They are too expensive and ultimately will meet too much resistance. When we started this in 1968-69, there was no such thing as a Federalist Society. You will find in many law schools in this country a far larger Federalist Society than there is a National Lawyers Guild. That wasn't the way it was.

UNIDENTIFIED SPEAKER: I wonder how a faculty, who sees its national ranking in terms of traditional scholarship and is faced with a steady state budget, where it gets one or two additional positions? How can you convince them that they should put their resources in this area as opposed to putting those five positions into people who are going to produce law review articles that will appear in the Yale Law Journal and be read by two or three people but still be considered good scholarship?

UNIDENTIFIED SPEAKER: I wanted to ask the question, but I wanted to pose it a little more starkly, so I'd like to ask it and then give you a chance to address it. I want to go back into role, and I want to give you the objection, that I hear most often, to adding people who can do skills training or skills education as well as traditional legal education. I am now the Neanderthal faculty member, the three of you are deans or people on the committee proposing the addition of another faculty member. What concerns me, colleagues are the opportunity costs here. We have the opportunity here to hire the editor-in-chief of Duke Law Journal. As you know we are now one of the top twenty law schools in the country along with eighty five other law schools. It's important for us if we're going to raise more money; and it's important for us if our graduates are going

to be hired by Cravath; it's important for you if you're going to have better consulting jobs; it's important for our dean if he's going to move to the University of Michigan after he's finished here, to have the articles that only the editor-in-chief of the Duke Law Journal can write. Why should we waste that opportunity and instead hire a different professional skills trainer?

KRAMER: I'll take a whack at that. There are all sorts of audiences to whom the law school faculties turn, and you have mixed a few of them—some of them from the dean's perspective, some of them from the faculty's. Let's try money. I think, to a certain extent, and I don't mean it in the crass sense, one of the reasons we're going to have the program we're going to have tomorrow morning is that you're seeing that the leaders of the bar are very concerned that the law schools not turn away and do seize this particular opportunity to move ahead in this area. Money comes from your alumni who happen to be members of the bar, with a few occasional corporate folks who've wandered off into the corporate sphere. Most of the alumni from whom I hear, and all those surveys taken of major law school alumni (the one I remember most recently is the one at the University of Pennsylvania) suggest very strongly that they would be delighted to see this kind of thing going on at the law school. Whereas the faculty may be concerned about the Duke editor-in-chief, the alumni really don't give a darn about that. That's something you may put in your dean's report. I don't think it'll get as many alumni excited as the thought that you're going into some significant kind of skills training.

HUBER: But again, putting on my role, we do raise, it seems to me, two issues. One is essentially the fact that it is still hard to find somebody who has fifteen hours of clinics being grabbed by Cravath, and I realize the American Bar Association and other leaders of the bar have been very supportive of clinical education as I candidly think we all should be. To a certain extent, the large law firms go back to the reputation of the school, and, even within the school, they do look for the editors of Law Reviews, they do look for high academic records. They are more interested in somebody who has taken Securities than they are in whether they've had a clinical law experience. Although in this room you're going to find that most people would agree a clinical law course would be more useful. You have that problem. A second problem which is harder to evaluate, but I think exists, is that if you take something like the Bok Report in which he said that too many bright people are going into law, I think you have to perceive it from a Bok-ian viewpoint which assumes there may be at the utmost 5,000 really bright people in each age cohort. And he is talking about where those 5,000 go, and they are likely to self-select themselves to schools that lead in certain directions. He wants more of them to go into engineering, more of them to go into other areas of business, but the fact is that he's talking about a small group.

Now, many of us don't have a lot of expectation of getting any large number of that group. Of course, these 5,000 are maybe self-anointed in the sense that they may know who they are. But I bet you there are another 30,000 to 40,000 who think they are in that same cohort. And they are also applying to the same law schools to try to get the same kind of education. If they don't get into one

of those law schools, they still want to get that kind of education. And in a sense, there is an admissions issue that is sort of intriguing; that is, whether it does impact us all as much as those schools which are considered extraordinarily high in academic terms and can essentially send any of its students to very select clerkships or very select law firms or even the best public interest firms. Are those schools places where the clinical programs are the strongest? I think there is that kind of a double issue.

Now I'm less perturbed by this than my comments suggest, but I do think that is another aspect of what you are suggesting. There can be some negative impact until we basically revolutionize legal education. I think that what is going on in clinical legal education is fine. But schools are at various stages, and unfortunately some of the schools with the presumed highest reputation are among those who have been least willing to shift their educational focus in the direction that I think most of us here would agree is the right direction in which to go to develop an educationally complete lawyer. This is what I see as the problem, for I see you focusing in a somewhat different way on faculty.

HARBAUGH: Isn't it the issue that Bill and Don raised: One way you attack it is the way Jack has said, for example, from the alumni perspective, to say that the alumni will respond positively. But, Bill, you and I spoke and you're not hearing from the Allegheny County Bar, screaming and ranting and raving, because Pittsburgh does not have an exceptionally strong professional skills program, and that's being kind to Pittsburgh's professional skills program. But the Allegheny County Bar is not ranting and raving about that.

On the other hand, the Allegheny County Bar may indeed respond positively if you promote the fact that you've just hired someone to do some very exciting professional education and research and describe those things in your alumni bulletin rather than promoting the esoteric article of the editor-in-chief of the Duke Law Journal, an article that only two or three of his or her colleagues will read, an article that will cause the eyes of the members of the Allegheny County Bar or the alumni of the University of Pittsburgh to glaze over when you describe it in the alumni bulletin.

But there are other constituencies that you ought to be talking about to your faculty. We certainly know that prospective students are interested in clinical legal education and professional skills programs. And law schools are fighting more and more for the 5,000 and the rest of the very bright people out there who are applying. One way to attract some of them is to suggest that you've got a strong professional-skills education program. At American University, we found in a survey of our students who applied that our international law and our clinical programs were the two reasons why the students were interested in American University. It was just about equal between international law and clinical education.

Furthermore, we ought to diversify when we reach out. If we've got twenty-five members of the faculty already, and we've got two new slots, how much is it going to add to our reputation to add two editor-in-chiefs to the faculty to produce two more articles a year when we're going to get sixteen or seventeen articles anyway? Incrementally, it's not that much more, as opposed to the kind of impact that you can have with good professional skills educators. It seems to

me that those are reasons that you ought to be able to use when you're attracting students to your law school, when you're influencing your alumni, and when you're effecting your placement because it does not add to your reputation significantly to attract the editor-in-chief of the Duke Law Journal.

KRAMER: Again, the alumni, as I said, are turn-aroundable. I want to re-emphasize the numbers of large firms I put out there because I think that they describe a major change in the profession that we do not yet recognize. Cravath interviews at a lot more schools than they would have even deigned to recognize the name of ten years ago. They have to because those major law firms are all out there looking for 12,000 bodies. There are 3,000 very good judicial clerkships in the state and federal courts. You are talking about, although we don't like to think of it, not enough lawyers being turned out, not for these jobs that are considered the plums. As I said, Cravath, I assure you, is digging lower than the editor-in-chief these days when they hire. Or if they do, they're going to an editor-in-chief at a school they didn't know existed in 1975. The drive for that top third of the class, and again count up law reviews: If there are twenty-five places on 174 law reviews that are the premier law reviews, you're talking about 4,350 kids, and the judges and the biggest of the big firms are looking for 15,000 kids. It's not the old days. We have kept myths in our mind that do not reflect the reality of 1987.

The one thing that does remain is the faculty self-image. That is the problem and I don't have a good answer for that other than the fact you should look carefully at some of the schools that are here, whether it's Northwestern, or Harvard, or Chicago. They are starting to have very good clinical programs and very good skills training programs. There are a lot of major schools that don't. Yale is here, and Yale was in trouble fifteen years ago, many of us remember, in the clinical area. Look where they are now. Creeping incrementalism has worked, even at the major schools.

HARBAUGH: Let me add one thing that I mentioned to Bill during our break. We replicate ourselves in clinical education, folks; we've been doing that for twenty years. Why should we be surprised that our traditional colleagues tend to replicate themselves? They're in the power slots in the faculty selection process, so it's likely that they are going to tend to be more successful at the replication game. There are clearly people in this country who are leaders in professional skills education—the David Binders, the Dean Rivkins, the Tony Amsterdams, others in this room and not in this room. They can be invited to your schools for a series of faculty seminars to demonstrate that professional skills educators have many of the same interests that the traditional faculty has. They have the same research interest, the same pedagogical interest. They believe that critical thinking and hard analysis are important tasks that they teach day in and day out. In this way, you can communicate to your colleagues that it's not a mistake to hire clinicians, that you're not hiring some kind of strange and wondrous beast, that it's alright to bring this beast into your midst. Show them that there are people out there that will be doing things somewhat differently, but they are going to be doing exciting things for legal education and for your faculty and students.

UNIDENTIFIED SPEAKER: On these myths and self-image, it's not that the editor-in-chief of the Duke Law Review is going to add five more articles. That's not the myth that leads to this preference of that person over this person. It's the myth that that person is going to write the one book that more than three people will read, that this next hire is going to be the "Law God," that he or she is going to make this school. To attack that myth directly is not nearly as effective as to buy into the myth for a moment and to say: "Yes, this professional skills person we're going to bring in is going to be the 'Professional Skills Law God' and is going to bring fame and fortune to our school." Bring in a few "Professional Skills Law Gods" for the faculty to see, so that you can invoke those names.

## Brief Remarks and Introduction of Keynote Speaker

KATHLEEN GROVE, Assistant Consultant on Legal Education to the ABA:

Our first speaker is Dean James P. White, Consultant on Legal Education to the American Bar Association. He's going to make a few brief remarks and then we welcome our keynote speaker, Robert MacCrate, President of the American Bar Association. I personally want to thank Mr. MacCrate for joining us, as this is, I think, the fourth city he has been in over the last three days. He has quite a rigorous schedule, but he has made time in his schedule to be with us.

DEAN JAMES P. WHITE, Consultant on Legal Education to the ABA:

Let me say how very pleased I've been with this conference. I think it's been a remarkable conference. The level of enthusiasm, the level of commitment, the opportunity to learn a great deal about what is going on in the development of clinical legal education has been an eye opener for me, and I'm sure for many of us here, even though we think we know something about clinical education and are most supportive of clinical education. I compliment everyone, and I particularly want to compliment Kathy Grove and Roy Stuckey, who have done a remarkable job in putting together this conference and making the events flow so smoothly, including the fact that no attendee at the conference was wounded in the gunfight last night.

The history of American legal education is most remarkable. In the past 100 years, the requirements for the practice of law in the United States have changed dramatically. We all know the American Bar Association was founded in 1878, and at that first meeting there was a proposal made by Carlton Hunt that there be a plan developed for the requirements of candidates for the Bar and for regulating the education of the Bar. In 1879 at this annual meeting, Mr. Hunt reported for the Committee on Legal Education and Admissions to the Bar, which was one of the first committees formed, perhaps the first formed by the American Bar. Mr. Hunt stated "there is little if any dispute now to the relative merits of education by means of law school and that to be gotten by practical training or

apprenticeship as an attorney's clerk without discouragement of mere practical advantages. The verdict of the most informed is in favor of the law schools."

At that time would-be lawyers had practical training in a lawyer's office or training in the law school but not both. As Robert B. Stevens observed in his book *Law School: Legal Education in America from 1850 to the 1980s*, Harvard set the style for legal education. Yet as we all know there were many critics of the typical American law school. Jerome Frank argued powerfully that law schools had become too academic and too unrelated to practice. In 1933, speaking to the American Bar Association Section on Legal Education and Admissions to the Bar, Mr. Frank stated that "law students should learn while in law school the art of legal practice and to that end law schools should boldly, not slyly and evasively, repudiate the force document of Langdell. They must decide not to exclude, as did Langdell, but to include the methods of learning by work in the lawyer's office and attendance at proceedings of courts of justice. They must repudiate the absurd notion that the heart of the law school is in its library." I assure you I will not read that last sentence when I speak to the law librarians. And so in the '30s and '40s and '50s law schools struggled with how to bring into the law school curriculum a more meaningful aspect of practical lawyering skills and clinical legal education. And then came Bill Pincus. In 1969, the Council on Legal Education for Professional Responsibility, or CLEPR as you came to know it, announced its first grant. In its first newsletter, Mr. Pincus made the following statement, and since he is not up for confirmation hearing, I believe I can read his statement:

> Like its predecessors, CLEPR is working to make clinical programs a regular part of a curriculum for course credit in most law schools approved by the American Bar Association. CLEPR maintains a clinic work that not only enhances knowledge and skills, but the experience also broadens the social concern of both students and faculty, making all participants acutely aware of the need for justice for all citizens, rich and poor. Furthermore, CLEPR believes a real lawyer's work is essential to truly meaningful clinical legal education to have students study about legal practice. To do only empirical research on a legal process or to have them do one part-time project involving clinical work excludes the central component of clinical practice: working face to face over a period of time with clients and handling their cases in preparation to actual presentation to the court or tribunal.

In 1973 the revised standards for the approval of law schools by the American Bar Association, chaired by Dick Nahstoll, one of the panelists this morning, provided in Standard 405 for increased education in training and professional skills. In 1977, under the joint sponsorship of the ABA section and the Association of American Law Schools with CLEPR funding, a joint committee on clinical guidelines was created, chaired by Bob McKay and having Sandy Boyd as one of its members. Its purpose was to review the accumulated body of experience with clinical training in American law schools and to provide guidance to law school faculties wishing to integrate clinical training programs or to evaluate existing programs. In its 1980 report the committee stated, "The committee was not commissioned to endorse clinical training or to develop standards by which to measure performance. We are emphatic in our judgment that the nature of

each clinical program and the extent in which clinical training should be made available to the students is a matter of individual institution determination." That committee came into existence during the Presidency of Justin Stanley, who had made a number of observations about the course in American legal education and the need for training after law school, and the report was issued during the presidency of ABA President Shepherd Tate, both of whom are panelists this morning.

We are honored to have as our keynote speaker for this final session the current President of the American Bar Association, Robert MacCrate. MacCrate received his BA from Haverford College and LLB from Harvard Law School. He has served in such roles as counsel for Governor Nelson Rockefeller of New York, as special counsel to the Department of the Army in the Mai-Lai incident, a trustee of the Lawyers Committee for Civil Rights Under Law, a trustee for the Practicing Law Institute, a former president of the American Judicature Society, and chairman of the Fund for Modern Courts. He is a member of the Board of Managers of Haverford College, which recognized his many contributions several years ago by awarding him an Honorary Doctor of Law. Most importantly, he is President of the American Bar Association with commitment to legal education and to clinical legal education. He led the drive for law faculty group membership in the American Bar Association. I'm proud to say we now have something over 100 schools that have joined the ABA in this group membership, bringing in something over 1,700 new law faculty members. This weekend his activities were very complicated, but he adjusted his schedule and flew here late last evening to deliver his keynote address, so we are very appreciative to Bob for his efforts, not only coming here, but his ongoing efforts in support of American legal education. Mr. MacCrate.

ROBERT MACCRATE, Esquire, New York, New York. President of the American Bar Association:

The last words of the American expatriate poet, Gertrude Stein, were addressed to her companion, Alice B. Toklas. Although most such stories in my experience are apocryphal, some still bear repeating. In the received version, Alice leaned over the dying Gertrude and whispered, "Madam, what is the answer?" Stein's last words, in reply, were "Alice, what is the question?"

I note that I am billed as a keynote speaker—but at the end, not at the beginning of this conference. That is rather unusual enough; however, permit me to draw upon the poet's insight reflected in her final words.

You have spent a weekend seeking answers. Now I would like to post a question. You have been considering the future. Pursuing this reverse methodology, I should like to examine first the past in order later to phrase my question to you.

The first historical avenue I would like to visit with you is the evolution of the American legal profession. It is a subject that continues to intrigue me. It is a remarkable story of self-creation.

In the beginning in America, we inherited the English common-law system,

and with it the English form of professionalism. After an early era in the colonies during which lawyers were somewhat despised, the profession by the time of the Revolution had become an essential part of the fabric of American life. It was not only respected as a profession, but regarded as a necessity to our social order and to our government.

However, in the early years of the Republic itself, in the period leading up to the Civil War, esteem for the profession seriously waned. Democratic Jeffersonian disdain for a self-created, professional elite reached full-flower in the age of Andrew Jackson. Legislatures struck down admission requirements. Many states allowed any adult citizen to practice law, no matter how lacking in training, competence or legal skills.

This situation got entirely out of hand by the middle of the century. An untrained lawyer held to neither professional qualifications nor professional ethics was a menace to the public. Moreover, law in America had come to occupy a place that made it unthinkable that it should be practiced by other than those educated and trained in its special skills.

But standards for education and for admission to the bar varied widely, from the nugatory to the exclusionary. In Indiana, all that was required to practice law was adulthood, citizenship and good moral character—whatever that was. In contrast, in Pennsylvania there was a prelaw educational requirement, then a registration requirement for those who proposed to study law, followed by a prescribed requirement of legal education with a sponsor-preceptor and finally a residency requirement and two separate examinations by a county board.

Although training of some sort was generally recognized as essential, the nature and quality of this training was unstandardized and virtually inchoate. Training was almost exclusively practical and procedural, as future lawyers were educated not in schools but by other lawyers. There was very little unifying substance in the profession. Few principles crossed jurisdictional boundaries.

This was roughly the situation in 1878 when the American Bar Association was formed. In time the ABA came to articulate the aspiration, ideals and ethical standards for an American legal professional and to suggest a single concept of the American lawyer to replace the former aggregation of procedural craftsmen who were only united by the name "lawyer."

At the outset the ABA established a Committee on Legal Education and Admissions to the Bar, charged with developing a program looking to a unitary profession with common admission and educational requirements which would be a standard warranty of quality throughout the nation. The first major accomplishment of the ABA was to wrest legal education from control of the practicing profession. By virtue of the educational standards established by the ABA, and the general support which the Association provided, law school was ultimately accepted as a substitute for office work or clerkship.

Eventually law school training was virtually the only way to become a lawyer in this country. At the same time, law schools were not developed simply as training schools run by the profession, but as part of the modern university movement.

The second historical avenue I would ask you to follow with me is that of legal education.

At least in the English model, legal education has been the exclusive province

of the practitioner. The profession ran the schools, if there were schools, or educated lawyers through apprenticeships, if there were none. The profession controlled who was admitted to its ranks.

In early America, there was no such thing as "legal education." Early American legal figures were generally trained either in England or through the apprenticeship method. The concept of "legal education" as something distinct from the practice of the profession simply did not exist. A few universities had early chairs in law, such as that held first by George Wythe at William and Mary, but training was almost exclusively in law offices.

The apprenticeship system, in addition to being a practical training ground for future lawyers, also economically benefitted the profession by limiting the numbers who entered the law. Implicit in the apprenticeship system was a personal relationship that called for a personal endorsement of the apprentice, raising still another obstacle to entry.

But in a rapidly expanding country, and one founded on a democratic ideal, this system failed in two ways. It neither filled the growing demand in America for lawyers nor did it satisfy the desire of an increasing number of Americans to learn the law, which played such a central part in their lives and was increasingly seen as a path to personal advancement.

The early proprietary schools, of which Judge Tapping Reeve's Lichtfield Academy was the prototype, were the early response to the need to augment apprentice training. In reality, these early schools were actually only a means through which one man could have many apprentices, all at once, in a classroom. The training remained primarily technical. Mainly it produced individually skilled craftsmen.

This was the era of rote learning of the law, of rule-teaching. It produced lawyers who looked upon the law as a body of rules. They argued their cases in terms of rules, before courts that decided their cases on the basis of rules. The law was seen as an autonomous body of rules, largely unchanging and unresponsive to change elsewhere in the society.

However, during the second half of the nineteenth century, there was an increasing drive to take up the study of law as part of "respectable" university learning. It was upon this scene that Christopher Columbus Langdell and the case method entered in 1870. It has been said that prior to Langdell, law as a set of rules was taught through one of two-and-a-half methods: first came the "lecture" system; second, growing out of the literature this method produced, came the "textbook" method. The half was comprised of the "quiz" used in conjunction with the other two modes. In a sense, the so-called "quiz" method has survived in the Socratic exchange which became part of the "case" method.

Today, Langdell is most frequently identified as the originator of the case method, which has been called the most significant contribution generally to educational theory which an American has produced. But in 1870, he may have done something even more important to the development of legal education in America by introducing the idea of the law as an inductive science whose principles could be discovered in cases and be empirically studied. In the 1870s it was possible for the law to become a respectable part of university learning only as a science. You will recall Thorsten Veblen's assertion that "law schools belong in the modern university no more than a school of fencing and dancing."

When we consider that Veblen's comment was made in 1921, you can well imagine what Langdell faced in 1870.

However, considered as a science as urged by Langdell, law came to be perceived on a common level with other university disciplines, and became part of the mainstream of American education as the university movement grew in the late nineteenth century.

The reaction came in the 1930s to the scientific treatment of law from a group we today call the "Realists." They perceived of law as an instrumentality, as a means of getting things done—an altogether realistic approach. This was the era of Jerome Frank, who argued for "lawyer schools," and of Karl Llewelyn. In a sense, this movement reached its culmination in the 1960s when William Pincus and the Ford Foundation, through its CLEPR program, instituted legal education for professional responsibility and the attendant development of clinical legal education as we know it today.

The third historical avenue I would like to look at with you is perhaps the most neglected in discussions of legal education and the profession. But I suggest that it is the most important: namely, the development of the law itself.

In the beginning, of course, was the word, and the word was God, by whatever name so called. Almost all primitive societies perceived the law as something transcendent in nature, something coming from above, from some nonmortal position of divine authority. It is little wonder that law was originally in the hands of priests, and that the clergy were so central to the development of law, administering it as their their own prerogative for hundreds of years. In sum, the law was with God; God was the law; and men obeyed, not made, that law.

Soon, of course, law became embodied in autocratic authority figures, generally the ruler of a nation. Under the Romans, the great body of the corpus juris civilis came into being. Eventually, this was accepted as authoritative throughout continental Europe. It did not take root in England, however, where, after 1066 and the Norman conquest, the common law developed—described as "common" because it became common to all men throughout the kingdom. This law, of course, was judge-made. It was not put into written form as were the Roman Codes.

One of the great milestones along the road of the development of the common law and of our own legal heritage was, of course, the signing of Magna Carta in 1215. The legend of Magna Carta tells us that it put the king under law, limited his actions by the collective will of the people, provided for no taxation without parliamentary consent, and guaranteed to all Englishmen due process of law and trial by jury. While Magna Carta has come to symbolize all these things, in reality, many of them were actually the later work of common-law lawyers and parliamentarians. Nonetheless, we can see in Magna Carta not only the presaging of the U.S. Constitution, but in its interpretation in England a presaging of later constitutionalism in the United States.

Five hundred fifty years after Magna Carta, in the decade before the American Revolution, we find Blackstone attempting in his *Commentaries* to reduce the common law of England to a series of principles in what may be seen as the beginnings of the idea of law as "science."

In the early American colonies many systems of law co-existed. Generally,

law was imposed either by the clergy, based on the Bible, or by the royal governors, based on their personal sense of justice. There was, however, no rule of law as we know it today.

The U.S. Constitution late in the eighteenth century gave explicit expression to the radical idea of a rule of law: law not from some otherworldly source nor embodied in the person of an autocratic leader, but law originating from the people, articulated in a written document and based on the consent of those living under its rule. It is on the rock of this rule of law, I suggest, that the American house of legal theory and practice has stood and developed.

It is not my intention now to trace this historical avenue of the development of law beyond the signing of the Constitution. But what I have sought to convey is a sense of the underlying movement toward where we are today—in the development of the profession, from a caste of priest-like interpreters of the law; in the development of legal education, from the learning of an authoritative and autonomous system of rules; and in the law itself, from a transcendent and otherworldly authority beyond challenge and doubt. It is what Professor Calvin Woodward of the University of Virginia has called the process of "secularization"—that is, a movement of the law away from a linkage with the divine, to a body of rules established by men for their own good and for their own governance.

So far we have looked at the profession, legal education and the law as three discrete paths. They are, of course, all as one, in the stream of our history.

I assume that you did not come here to praise the case method; but I know that you have not buried it. However, by looking at some of the reasons for the success of this American invention, I believe I can find the proper way to phrase the questions which should be asked as to what legal education should be and what it should seek to become.

The Carnegie Foundation, in the early part of this century, commissioned a series of educational surveys, one of which was the Flexner work on medical education. In 1913 the Carnegie Trustees approved a plan for the Study of Legal Education in the United States. It was to have several aspects: an examination of the existing law schools, the methods of instruction, bar examinations, and the relation of these matters to the quality of legal education. It was from this study that the seminal works of Alfred Z. Reed were ultimately produced.

At the outset, however, the Trustees felt that a general treatment of educational philosophy and of methods of legal instruction was required. For this task the Carnegie Foundation turned to the distinguished Austrian jurist, Dr. Josef Redlich, Professor of Law in the University of Vienna. He came to this country in 1913 to investigate the method of legal education. He produced a book, *The Common Law and the Case Method in American University Law Schools,* which stands as a classic today.

Like most scholars, Dr. Redlich considered the case method to be one of the great American innovations. However, he attributed its success strictly to ". . . the peculiar condition in which Anglo-American law finds itself, as unwritten law, in the present stage of its development." He found it to be demanded by the nature of the law it sought to teach.

In Dr. Redlich's words,

> Unchecked by the voluminous output of statutory law, in all conceivable fields of law and in all the states of the Union, the law of America has still remained, above all things, common law. It may even be maintained that the numerous legislative performances that prove the incapacity of democratic bodies to give anything like correct legal expression to their products of law, and the great number of such statutes, which usually amount to nothing more than clumsy bills of particulars, with no attempt to develop legal concepts,—that all this has actually helped to preserve the ascendancy of the common law in spite of its often fossilized or insufficiently developed principles. And this is so, even where, as in the field of Civil Procedure, an attempt has been made to "codify," or to formulate anew, separate branches of the law. *But common law is case law and nothing else than case law.* [Emphasis in original.]

He continued:

> The whole law lies in the reports of single cases which have been accumulating for centuries. Common law is case law, and the handling of such law is the practical calling for which the American student demands preparation.
>
> Considered from the point of view of the people, law always appears an all-embracing network of legal relationships which exist between one individual and another, and between individuals and the state; as universal order indispensable to life, and growing out of life as it were spontaneously. Wherever this order is violated or contested, however, in any point, it is the sovereign judge who by his decision creates the law, and thus continually reestablishes the old order.

And so we find Dr. Redlich's approval of the case method not to be based on the usual attributes cited in its favor—such as the suggestion that it is an inductive, empirical, scientific method, or that it trains law students to "think like lawyers," or that it is relatively inexpensive in operation, allowing large teacher/student ratios. Instead, Dr. Redlich approved the case method because it was superbly well suited to the law it sought to teach.

Within the profession, we are obviously in a time of great change. The numbers coming to the law have increased dramatically. The numbers of women, in particular, are stunning in their increase. We are a younger profession, and a profession which is beginning to reflect the culmination of the social trends of the 1960s. A new breed of would-be lawyer is standing at the gates of the profession.

We have progressed from the day when lawyers were a caste apart, semi-priestly in nature, and from the day when the law was perceived and taught as little more than a set of rules. In that context, we can understand what a revolution the case method was; for the first time, law students were seemingly examining "primary" materials, in the form of appellate cases—the cases being to the law student, in the words of Professor William Kenner, what the specimen is to the mineralogist.

However, as Jerome Frank and others pointed out, there is a great danger in confusing appellate *reports* with *cases*. Real-life cases are rife with confusion and human complexity, while appellate reports represent the reduction of these

situations to legally palatable form. As the clinical legal education movement has prospered, the true "primary" source has come to be emphasized: that is, the individual, the human being behind the case, the client.

This shift in emphasis seems to me to be all-important to our consideration of the way in which law is taught. It explains the success of clinical education particularly in the light of the changes in the law itself.

Perhaps nowhere have the changes during the past 100 years been so profound as in the law itself. They are bracketed by the birth of tort in the Industrial Revolution, and, in Grant Gilmore's phrase, the death of contract in our own time. Legislative and statutory law have achieved a new prominence, unthinkable at the turn of the century. The codification movement of David Dudley Field gradually captured legislative halls. Land-use controls, zoning, the internal revenue code, environment and securities regulation, workmen's compensation and social legislation and the extraordinary development of the administrative agency have followed. The rise of administrative law has been compared in importance to the rise of equity. I would pause to note that most of this has occurred since Dr. Redlich wrote in the early years of this century suggesting the reasons for the success of the case method.

One might also inquire whether the United States was ever a true common-law country. The common-law tradition fitted a compact England with a common heritage. In America, the geographic sprawl alone worked against one common law as a unified system. Why else was it thought necessary to have an American Law Institute to author authoritative restatements of American common law?

It has been said that the case method never adequately fulfilled its purpose as a pedagogical method, certainly not standing alone. As early as 1892, Professor Christopher G. Tiedeman argued that a middle ground must be found between the case method and what he called "legal clinics." Tiedeman's penetrating observations regarding law in America underscored the limitations in the case method:

> Law is not *made* by the courts, at the most only promulgated by them . . . law is not the independent creation of the judicial mind, but is the resultant of the social forces reflecting the popular sense of right. . . . all law, so far as it constituted a living rule of civil conduct, whether it takes the form of statute or of judicial decision, is but an expression of the popular sense of right through the popular agents, the legislator or the judge as the case may be.

Tiedeman continued:

> I [believe] all the more firmly that neither the judge nor the legislator makes living law, but only declares that to be the law, which has been forced upon them, whether consciously or unconsciously, by the pressure of the popular sense of right, that popular sense of right being itself but the resultant of the social forces which are at play in every organized society.

What Professor Tiedeman argued in 1892 seems to have become common wisdom today. We have seen the shift in emphasis in the law to the individual—toward a greater participation by the individual in the fashioning and use of the law and the focus on the place of the individual within its structure.

Perceptive scholars are today noting what they describe as the "loss of au-

tonomy" of the law. It may also be seen as the culmination of the process of secularization about which Professor Woodward wrote some two decades ago. Quite properly critical of Langdellian "science," these scholars inform us that law alone no longer may be studied in some splendid isolation, but must take its part in a larger context, more closely related to other academic disciplines and drawing from them. They tell us that the traditional notion of the discrete study of law will in time no longer meet the needs of society.

In a sense this confirms and fits the thought of the Scottish philosopher David Hume, who drew a distinction between judgments of fact and judgments of value. Although his dichotomy has sparked considerable debate, it still provides a framework within which to consider what all of this means. Put simply, Hume said that judgments of fact are expressed in descriptive statements by propositions that assert what *is* the case. Judgments of value are prescriptive statements that assert what *should be* the case. Judgments of fact can be verified by empirical inquiry. Judgments of value cannot.

In the law, as opposed to the "hard sciences," we are, I suggest, concerned primarily with matters of value—values relating to the conduct of individuals and groups, how those individuals and groups should act in relation to each other and to the state. Such conclusions cannot be empirically derived—*pace* Langdell. His success at a particular moment in our history rested not so much on his method, I suggest, as on the fact that his method was tied to the state of the law as it was then perceived: an autonomous, inductive mechanism free of values, unconnected to and independent of the men and women who made it.

But today we know that a profession such as the law cannot be reduced to an empirical basis. Morality is not an empirical science. A knowledge of empirical or nonmoral facts alone does not provide a sufficient basis upon which logically to conclude what we *should* do.

Now that the law has come down from the mountain and lives among us, we are faced with difficult questions. What *is* the purpose of legal education? Does legal education meet the needs today of the profession? Is the profession meeting the needs of the public? We may be able to teach what the law is, but can the sort of moral, nonscientific, nonempirical skills needed for complete lawyering be taught? And if so, how?

Judge Frank Coffin, in a recent and extraordinarily perceptive piece in the Nova Law Review, stated that "The great question is whether the law school and the profession have anything to contribute to each other."

I would go one step further, and reach the final question I promised you at the beginning of these remarks: do the law schools and the profession have anything to contribute to the law—that is, to the public, for whom the law exists?

I mentioned Alfred Z. Reed's studies of legal education for the Carnegie Foundation. In his 1921 report, *Training for the Public Profession of the Law,* Reed went beneath his charge, which was to examine the law schools of the country, to look first not at the *form* of legal education, but for its *purpose,* just as Dr. Redlich went not just to the form of the case method, but to the reason for its success. Reed begins by stating,

> Whatever incidental purposes are cherished by particular law schools, the main end of legal education is to qualify students to engage in the professional practice of the law.

He continued,

> This is a public function, in a sense that the practice of other professions, such as medicine, is not. Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. Their functions are in a broad sense political. . . . [This] springs even more fundamentally from the fact, early discovered, that private individuals cannot secure justice without the aid of a special professional order to represent and to advise them. To this end lawyers were instituted, as a body of public servants, essential for the maintenance of private rights.
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> . . .
>
> The proper organization of the legal profession is not . . . primarily an educational problem that might be solved under any form of government in much the same way. It is primarily a part of the general problem of political organization, the solution of which in a democracy presents peculiar difficulties. It is only by approaching it from this point of view that we can understand what has been done, what can be done, and what ought to be done to make the American legal profession an efficient instrument of popular government.

I strongly subscribe to Reed's view of the practice of law as a public profession. That is why, as you sum up this conference in the session to follow, I would suggest that the primary focus of your inquiry should be on the importance of lawyering skills and of moral values in the larger context of the service we may render to the society we serve.

The clinical movement has brought the emphasis of the law to its proper focus, on the individual. Now we must strive to train lawyers how to deal with the individual on the complex of law today. Lawyers have been taught by rule and by value-free inductive principles. Can we train them to operate as agents of justice within the community?

The story of legal education in America has not been completed. It is an ongoing story, shaped by the particular tensions and competing values at work in our society and inherent in our system of governance. It is our great privilege each to have a word in the writing of that story. It is our great responsibility to choose our words wisely.

## Reactions of Selected Participants

WILLARD "SANDY" BOYD, President, Chicago Field Museum of Natural History. Former President, University of Iowa. Member, AALS-ABA Committee on Guidelines for Clinical Legal Education (1980 Report). Member, The Task Force on Professional Competency: The Role of the Law Schools, ABA Section of Legal Education and Admissions to the Bar (1979 report [the Cramton Report]):

In order to cover as many as possible of the issues that have been raised at the conference, I will address a question to each of the six panelists. I hope that each of these questions moves into the next question.

In the context of Mr. MacCrate's excellent environmental statement, we turn

first to Mr. Hubbard representing young lawyers and ask who goes to law school and why do they go to law school?

WILLIAM C. HUBBARD, Esquire, Columbia, South Carolina, Chair, ABA Young Lawyer's Division:

Well, that's not exactly the total question that you gave me yesterday, that's the second half of the question. I was asked to answer the question of what is the purpose of law school now and in the foreseeable future? Who are we trying to educate and for what? Normally it's a real plus, I think, to be the first one out of the box and out of the starting box on a panel like this because maybe you can steal somebody else's thunder before they have a chance to steal yours. When I saw this particular question, I became a little concerned that maybe I was like a fish out of water trying to answer a question as broad and as complex as the one posed to me: Fortunately, like manna from heaven, Bob MacCrate came from New York and I think he essentially answered the question, in a way at least, in the last part of the remarks in some words, that I wholeheartedly adopt and accept and would urge that you give careful consideration.

What is the purpose of law school now and in the foreseeable future? The obvious answer is to educate and train students to become good lawyers. But I'm sure that you didn't ask me to come two thousand miles to state the obvious and certainly after hearing many of the speakers of this conference, and having attended this conference, what I thought was an obvious answer does not seem so obvious now. Yet even after further reflection, my answer remains the same and where I perceive the real debate is not really with the purpose of law school, but rather how to best achieve that purpose. Mr. MacCrate's heard this story before, but many of you may not have heard it. Back in August at the University of South Carolina, we had a commencement exercise and we were fortunate enough to have the Archbishop of Canterbury, the Reverend Robert Runsey, come give the commencement address. During the course of that address he described a certain pharmacy outside of London in the countryside of England, the door over which was emblazoned the sign, "We dispense with Accuracy." I'm not sure whether law schools are, or are not, dispensing with accuracy, but the question certainly is raised: How are we in law schools dispensing legal doctrine and professional skills? There seems to be a consensus that law schools are generally doing a good job in dispensing knowledge or doctrine, and regarding professional skills, my answer, in a sense, is a very positive one. We are doing a better job than we were ten or fifteen years ago at some schools, but that does not appear to be a consensus of the academic community. Professional skills development should be a primary focus of legal training, and I think that the time is now come to make that last big push to gain general acceptance for the teaching of professional skills in law schools.

But there are other elements of legal education that must be addressed as well, and those factors also address the second part of the question that was posed to me. Who are we trying to educate, and for what? Mr. MacCrate cited the statements of Judge Kaufin in the Nova Law Review article, and if you will

permit, I'd like to also cite a portion of his statement in that particular law review article in answer to the question posed to me. Judge Kaufin said that since the law school has its reason for being in the education of lawyers, it has an obligation to do what it can to insure the survival of a noble and humane profession through whose demands and rewards will continue to attract the bright, hard working, and socially concerned young men and women. The school also has an obligation to infuse, into its three-year stewardship of its students, whatever it can effectively teach of the values, attitudes, and disciplines that will be demanded by that profession. Judge Kaufin has touched on some very important components of legal education, where I believe the real push in the future needs to take place.

Yesterday, Bari Burke in her presentation described those four factors essential for one to be a good lawyer. Those are knowledge, skills, perspective, and character, and it is to those elements of perspective and character that our law schools need to give more emphasis. Because if law schools assist law students in gaining a broader perspective of the role of lawyers in a civilized society, and if law schools do a better job of emphasizing those attitudes, values, and disciplines that raise the character of a lawyer, then the profession and the public will benefit. Stated another way, if law schools promote the ideas of professionalism as so eloquently set forth in Mr. Stanley's report on the ABA Commission of Professionalism, then we will be making, in my judgment, some substantial and real progress.

What the profession needs at this point, now more than ever, are lawyers who view themselves as public servants, as officers of the court. Lawyers need to recognize their role as defenders of our system of ordered liberty. But we won't get that kind of lawyer unless our law professors recognize their importance as role models and discuss the importance of public service and pro bono work. The seeds have to be planted in the law school. Once a young lawyer begins to practice, the suggestion that each lawyer needs to work to improve the profession, and the suggestion that lawyers need to deliver legal services to the elderly, the disabled, and the disadvantaged, will fall on deaf ears. I'm convinced now more than ever that our law schools have the best and the brightest that our profession has to offer. You as teachers can make a significant difference in promoting the public good. I urge you to seize the opportunity because in that way we can insure the future of our profession and do a much better job in serving the public interests. Thank you.

SANDY BOYD:

Mr. Hubbard has spoken of public service but returns to the delivery of legal services as being the hallmark of a lawyer. Therefore, is the delivery of competent legal services the essence of legal education? That is a very important question to answer when examining the purpose of law school. Mr. Tate, since you represent our profession's concern with competency, what do you think are the professional skills necessary for the delivery of legal services in this society and what do you think is the role of the law school in preparing people to be competent in those skills?

SHEPHERD TATE, Esquire, Memphis, Tennessee. Chair, ABA Committee on Lawyer Competence:

Sandy, first of all, I think I would be remiss as an attendee if I did not agree with what Dean White said about the planning of this meeting, the excellent presentations, and the stimulating discussions. Then to highlight that, I thought a demonstration of professional skills and a Hollywood filming of the use of professional skills were quite amazing.

Very quickly, I do want to mention that I have had an interest in clinical education for many years. As Dean Rivkin said, it started forty years ago with Charlie Miller at the University of Tennessee. When I was President-Elect of the ABA, I was privileged to be with many of you at the first clinical education conference at Vanderbilt University. An interesting aspect of that meeting was the push to obtain funding for clinical education.

Recently, because of Eugene Thomas and Bob MacCrate, I was given the privilege of being the Chair of the ABA Standing Committee on Lawyer Competence. It is, forgiving the chairperson, an excellent committee; and one of the very fine members is Frank Walwer, who is at this conference and is the past Chair of the ABA Section of Legal Education and Admissions to the Bar, a co-sponsor of this conference. The first thing we decided was that we needed some action. So the agenda of the day is action. We had some fine studies: the Cramton Report that Dick Nahstoll and Sandy worked up with others, the Ron Foulis Report (Dick also participated in that), the Friday Report, etc. We thought we would put these and other studies on competence to good use and started having regional conferences on lawyer competence. The first one was in Atlanta last March, and we invited people from ten southeastern states. Incidentally, Bob McKay was the keynote speaker at that conference, and many of you were there. The next one will be next week in Denver, and the other regional conference will cover the rest of the states. The reason I make this pitch is that we hope when the conferences are in your region, you will definitely make plans to attend; we think they will be most helpful in the area of lawyer competence and also to you. Chief Justice Norman Krivosha, who is the retired Chief Justice of Nebraska and was the Chair of the Conferences of Chief Justices' Committee on Lawyer Competence, will be the keynoter at the Denver conference. Jack Mudd is going to be one of the panelists, and a lot of other fine people will be there. We discuss at those conferences three areas of competence: one, the requirement of legal knowledge and skill; two, administrative management aspect of law practice; and three, the impact of lawyers' personal problems, such as alcoholism, drug addiction, stress, and matters of that nature that have been previously discussed at this meeting.

Sandy posed a very interesting question: Will professional skills assure lawyer competence? That reminds me of a story I told some of you. At church one Sunday, a minister asked all of those in the congregation who were perfect to please stand. And way back in the room, a man stood up. The minister said, "Did you understand what I said? I just wanted those people who were perfect to stand up." Unabashed, the man replied, "Yes, I'm standing up in memory of my wife's first husband."

Now we can't assure that there is going to be lawyer competence, but the

ABA and certainly you, as law professors, are doing the best you can to see that lawyers become competent and maintain their competence. Of course, we think that once you become competent, it's not a badge that lasts forever, but something that you must diligently maintain; otherwise it will slip away.

So we think that what you are doing is so very important. Your role, as Bill said, is to see that competence is obtained by helping the young people before they get into actual practice of law; not only to know the theory, but also know the practical aspects of the law. And as Roberta Ramo said the other day, we hope you find more opportunity to talk about some of the stress problems and financial matters, docket control, and the realization that all of a sudden instead of handling one matter, you end up handling twenty matters at one time.

You asked for reactions on this conference. I personally have thought that there has been an over-emphasis on litigation, and I think that has been recognized here. Not that it's not very important, but when your people come to practice with us from prestigious law schools, I find they may have had some vigorous training in litigation, but some of them are lacking in their writing skills. Writing ability, as all of you know, cuts across every field of the practice of law, whether in litigation, real estate, corporate, business, labor, criminal, or whatever. So even though writing skills courses are not as attractive to teach and not as interesting to take, I hope that there is greater concentration on the writing abilities of the young lawyers-to-be.

Also, as Justin talked about and Bill mentioned, I think we should stress the whole professional aspect of the practice of law.

In conclusion, Sandy, let me say this. I, too, am impressed with the fact that so many of the programs that were started under Bill Pincus and CLEPR apparently are still going along. But, it is my impression that for a period of time, the clinical education and professional skills programs moved along at glacial speed. Since I've been here, I have gathered that in recent years there has been greater movement, and I certainly hope that these programs which are so vital to the future of young people, and certainly to the competence of lawyers, will move ahead with deliberate speed.

SANDY BOYD:

Mr. Tate defines professional skills broadly and much the way the Section of Legal Education has defined skills in various guidelines and standards. Now turning to Dick Nahstoll, a champion of law school autonomy within the university, how do you reconcile academic freedom and law school autonomy with some of the new, specific accreditation standards that have been adopted to direct American law schools how to teach?

R. W. NAHSTOLL, Esquire, Portland, Oregon:

Sandy and I used to have those discussions when he was the University President. I think that the standards that we have now probably don't need very much change, subject to the exception that I'll come to; but I don't think that

they are sufficiently respected within the law schools, to say nothing of the Universities, and I set that aside because that question wasn't really the one that was assigned to me. But I think what has happened is that one of the very most important parts of professional skills is being neglected throughout your entire faculty, and I would like to speak to that for a moment. One of the things most important about developing a competent lawyer, a competent practicing lawyer, is to develop someone who has a self-discipline, a commitment to his responsibilities, and a capacity for self-discipline and organization. Legal Education as a total matter, not limited to your clinics, but as a total matter, is giving a completely antithetical signal to students. You tell them to come to class and they don't come to class, and nothing happens. You tell them to come at 9:00 and they walk in at 9:15 or 9:20 and nothing happens. You are giving them a signal that that kind of irresponsible sloth is acceptable. And it's not going to be acceptable to their clients; it's not going to be acceptable to the courts; and it's a hell of a way to prepare to practice law. And I suggest that this isn't something that you can accomplish solely within your clinic, but it is something that you should get your faculties to begin to meet their responsibilities about. Now there is a standard on that, but it's observed more in the breach than in the observance.

There is another reason in which I want to rain on somebody's parade. I think that the thing I have picked up most definitely out of this conference is that the standards which are, I believe, adequate, are not being sufficiently respected with respect to externships. I'm alarmed by what I've heard around here about how some of these externships are being conducted to the extent that they are, or approach, a program in which a school accepts a student's tuition with its left hand and points with its right hand out to the horizon and tells the student to go get a job and return at the end of the semester, or anything close to that. Those externships are unacceptable. They are not meeting the minimum requirements, the very minimum requirements of the standards, and I think that perhaps in this afternoon's session, which is piggy-backing on this conference, there may be some time for some more discussion of that. In the meantime, I don't want to leave any room for me to be estopped to require something better out of those programs than I have heard has been going on.

SANDY BOYD:

In recent years, the financial resources being placed in traditional legal education have been rapidly increasing. Frank Walwer, if you are the university president, why should you provide the law school with more funds to implement professional skills? Should the law school also reallocate resources from traditional to "skills" education?

FRANK WALWER, Dean of the University of Tulsa School of Law:

Now there's another change in the questions.

SANDY BOYD:

Well, I knew the question didn't make any difference because you had your own answers made up anyway.

FRANK WALWER:

At long last we get to the question of where and how do we find the fiscal resources. And I'm reminded of how ironic it is when we get to money issues that as a Dean (unfortunately I'm the only Dean sitting here) I sit between a rock and a hard place: a University President on my left, and an over-anxious faculty on my right, and that's exactly what I generally face at home. I find it also ironic that when we at long last get to dollar resource questions, a Dean is of course dragged in after the counsel of the practitioners and the aspirations of the faculty are made clear. Neil Gold, Dean of Windsor, told us yesterday an awful lot can be reduced to simple terms. Thus, I simply assert that to get resources for a good thing such as professional skills training requires either, in a constrained condition, a re-allocation of existing resources or the generation of new resources. To get the resources, one first has to identify, at our respective home bases, the parties who control the resources which would be potentially available for particular purposes. And second, having identified the players, next determine what as a matter of persuasion will convince those parties to re-allocate or expand.

I want to put aside the identification of resource opportunities, and talk about the persuasion point. I listened this morning, as we all did, to Bob MacCrate give an eloquent exposition of the history of legal education. I want to introduce into that history the question, for example, of what the historic economic underpinnings for today's meeting are (and I don't mean super-saver flights). I suggest that if you go back to ultimate professional skills training, namely the apprenticeship system, that the evaporation of the apprenticeship system, in part, had an economic basis in terms of a lawyer's self interest. The advent of the typewriter created a different mode in law offices and less need to rely on the apprentice for preparing documents. And while the apprenticeship system began to fade, the introduction of legal education in the university framework was in the self interest of the university in terms of generating tuition revenue.

Why does our profession have these enormous student-faculty ratios? In part, because the deal struck at Columbia and Northwestern, for example, was that the teacher practitioner was going to be paid on the basis of the number of bodies in the classroom. And fortunately—maybe not—Langdell developed a system in which large student-faculty ratios would work. Obviously, I'm being a little crass, but I'm trying to emphasize the economic factors. The years unravel and along comes Bill Pincus and the Ford Foundation with ten million dollars for clinical education which had to, grossly speaking, be rammed down the throats of some American law schools. In part, clinical education was introduced because the bucks were there and it wasn't viewed as a change in the allocation of existing dollars or threatening to anybody's TVRF. Clinical education was an add-on;

the dollars were available. When Bill Pincus traipsed around, higher education was in an expansionist mode. And universities managed to increase tuitions fees far beyond the rate of inflation. Law schools got their research institutes. The ABA was addressing itself to what some called at the time the "rip-off factor." The ABA pressed university presidents to allocate a higher percentage of all tuition money right back into the law schools, thus reducing the student-faculty ratios from very high levels. The ABA was able to reduce the "rip-off" and improve ratios within a heavily resourced context. Now as we sit here in 1987, what is the economic environment? When I go home on Monday, my desk will be cluttered with appeals for research support, computers, several requests from faculty to attend workshops such as these, and other entreaties such as the need to have benches for the students outside the law school—all great and good stuff.

To understand the economic environment in which you are working, take your student enrollment, let's say 600 students. Assume each student will be taking 15 hours (somewhat less). The institution has to deliver in this hypothetical 9,000 credit hours to those students in that term. Now your so-called traditional faculty member will teach four courses per year with an average size of fifty students and thus will meet a six-hour teaching load, or with two of the four offerings about 300 instructional credit hours of the 9,000 per term. The clinician, as everybody knows, with let's say two hours of credit for ten students, will provide twenty credit hours per term. Thus, you have a problem because, in a constrained economic situation, faculty are beginning to look over their shoulders a little bit more. Someone has to pick up the instructional slack or devise methods to pick up the slack when you have those differentials. You could reduce the number of credits required for a student to graduate. That's okay if you don't charge students on a credit hour basis. You could increase the number of large classes. We ought to do a better job at differentiation of what could be taught in a larger setting so that in return we can provide the opportunity for smaller, more intimate, more labor-intensive classes. We've expanded the range of opportunities in law school. Health Law is blossoming. Thus, to spread the work load of delivering 9,000 instructional hours, we should also import teachers from some of the other divisions. And let's be more mindful of what adjuncts can competently do—not because using adjuncts is education on the cheap, but because you can engage magnificent adjuncts to do a marvelous job with the same kind of credentials law teachers have when they enter the academic realm.

With respect to the expansion of resources, a Dean can always go hat in hand to the university president who ultimately signs the checks, but central has a lot of pressures. You could increase tuition, but that's getting more difficult. You can generate gifts from the law firms, but it ain't easy to get money out of lawyers. Following the spirit of what Bob MacCrate said this morning, there is that large society outside who needs legal services. There are public agencies, there are pro bono private agencies. Can we develop a resource based at the law schools and provide legal services for local agencies? You as clinicians have to figure the next move in your own shop. I want to be quick to say some agencies are, of course, involved in sacred issues requiring highly competent legal services. If we are going to deliver legal resources, we better do it right.

Finally, I was terribly struck by Justice Wahl's eloquence with respect to the human dimension. Another speaker emphasized as a paramount skill to be in-

culcated in our students "the ability to work with others in a collaborative fashion, the ability to listen, and the ability to develop empathy." We depart this conference with this footnote. The American Bar Association through Standard 405E has been a good friend of the clinicians. I'm sorry there are so few non-professional skills people here to witness your zeal and accomplishments. At the same time, since you are viewed by many as specialists, I suggest by your own mode of behavior you strive to do a better job of integrating back home. Get hold of the Dean, invite the Dean out to lunch, make it clear you're not going to ask for something. Tell the Dean the good you are doing, the context, you goals and values. Do the same with your other colleagues. Figure out how you can help the "traditionalist." What are the ways of combining a skills element in individual, so-called "traditional," courses back home? Remember the self-interest involved. Make the case. Do some fact finding. Analyze overall institutional goals. What balance is necessary? Then, and only then, engage in a predetermined negotiation strategy with the Dean and others to increase the resources you will require.

SANDY BOYD:

Frank Walwer and Peter deL Swords analyzed the costs of clinical education at page 133 of the Clinical Legal Education Guidelines. Justin Stanley represents the profession's concern with professional responsibility and professionalism. I want to ask him to speak on legal education and professionalism and the particular role of clinical real life experiences in developing professional responsibility in law students.

JUSTIN STANLEY, Esquire, Chicago, Illinois. Chair, ABA Commission on Professionalism:

Thank you, Sandy. The questions today and the responses are following an obvious pattern. We are asked questions that are slightly different than the ones we were given, then after we talk for a while and the questions that are asked orally are forgotten, we get back to the questions we were given.

You have been very kind to me, however, Sandy. The only part you left out was whether or not teaching professional responsibility could more effectively be done in a clinical setting than in another. I have thought about the question; the answer is not simple, but I am inclined to think that teaching professionalism in a clinical setting is certainly not enough. It can be done because in any situation in which we as practicing lawyers deal, whether it is litigation or transactions or whatever, questions of professionalism are apt to come upon you with some surprise. In some instances they can be anticipated, in many they cannot; so in my opinion it would be very difficult to structure a clinical approach to the whole subject of professionalism. Specific questions as they come up must be dealt with.

Now that means, I think, that there should be some basic background course offered in professionalism, but that is not the end of it. In any substantive or

procedural course, for example, contracts or taxation or whatever, there are bound to be, and these can be anticipated, basic questions of professionalism. Where they can be anticipated, they should be brought into the course being given and they should be discussed.

You know I would love to structure a course in professionalism, and teach it for that matter, if I could get away with it. If I were structuring such a course, I would certainly not have it consist only of a study of the canons or the codes or the rules. They would be part of it, but back of all that there should be some study of the history of the profession, what it stands for, what its objectives are, what its privileges are and what its duties are. There should be large consideration of the duties of lawyers as officers of the system of justice.

I can assure you, and you probably know this as well as I, that without the lawyers, our system of justice simply cannot function. And what and how we are, in a sense, becomes the system of justice.

With that background, I would anticipate dealing with hypothetical cases, I would bring in judges, practitioners, and non-lawyers. I might try to make use of sessions such as Columbia has used in its Law and Society program. I would have that round table and have other people listening, because you could not accommodate everyone at the table and still keep your student-faculty ratio. I would have students as part of that. And I can assure you that that learning process would mean as much to them as any other that I can think of with the possible exception of facing a serious question of professionalism in a case which a student happens to be handling as a part of clinical experience.

It does seem to me that a background such as I described is essential so that professionalism can effectively be brought into other courses and so that the students can intelligently deal with professionalism problems as they come up in the clinic. I have been pleased to be here, and I am excited about the challenges that are being given by all of you to the so-called traditional methods of legal education. I am hopeful that out of all this will come improvements in the system's legal education. But again, with all due respect, may I suggest to you that old ideas and old methods of doing things are not necessarily bad simply because they are old. In addition, new ideas are not necessarily good because they are new.

I come away with the impression that there is just a tremendous amount of knowledge and training and studies that are the life of lawyers, and I am more convinced than ever that we all have to look at the education of lawyers as an ongoing lifetime enterprise. The academics helped start us on our way, and one of the best things that you could do is to turn us loose with an understanding and acceptance of the necessity of continuing our legal education until the last day. I can tell you that I have never undertaken a new chore in practice without learning something, and it is the ability to keep learning and the acceptance of the importance of that which I think you are advancing. Thank you.

SANDY BOYD:

It is impossible to overemphasize Bill Pincus' contribution to legal education in our time. So I want to ask Bill what has been the impact on legal education of twenty years of debate and action on professional skills education?

WILLIAM PINCUS, Esquire, Great Neck, New York. Former President, Council on Legal Education for Professional Responsibility:

Thank you, Mr. Chairman. Friends, my impression from the presentations and discussions of the last day and a half is that law schools now are quite different teaching institutions, compared to what they were twenty years ago. Unlike the situation of two decades ago when clinical programs were a rarity, unknown, and unwelcome, they are now commonplace.

This is not the place, nor is there the time, to evaluate from my perspective all the clinical programs I heard about. Some of them would still not qualify for a CLEPR Grant. Many problems are still with us. But now I have the feeling that the law schools will solve them, or that they will live with them and go on to better things in the clinical area. Accomplishments are now bigger than the problems. And over all as "Mr. Clinical" I was not only pleased; I had a feeling of exhilaration from time to time.

It is not just the presence of clinical programs reported here that is significant. Clinical programs began to proliferate twenty years ago. And the statistics alone would attest to their presence. What makes this conference important is the attention to education on the part of clinical teachers that has come to the forefront. The clinicians and others that I have heard here would easily be seen by anyone as primarily concerned with the education of future lawyers: how their work adds to a lawyer's education in a way that is unique and indispensable; not an alternative, but an enrichment of what the law school has been doing. Legal educators now understand that reaching the heart and soul of the students is as much their task as reaching the intellect.

I got the feeling that these concerns on the part of those who spoke to us are now the basis for an ongoing debate in the law schools. This has drawn an increasing number of other faculty into a discussion about the nature of education. The debate is how to more effectively contribute to the growth and maturity of the law student, this *human* being who is going to be a lawyer, one of the most *human* of man's and woman's undertakings. If this impression of mine is correct, then we who were formerly with CLEPR will really have achieved something. For CLEPR's highest aim was to engender such a concern on the part of legal educators. This was missing twenty years ago compared to what is now the case. But we had faith that a full and honest discussion of education would inevitably make the case for and establish clinical education in its rightful place in the law school curriculum. Obviously this is happening. I believe clinics are here to stay, not just because they survived the worst of it, but because the law schools now know that clinics are bringing the concern for the nature of education to the top of the law school agenda.

I'm impressed with, and full of admiration for, the clinicians I have heard speak and also for those I met informally as participants. Their ability, their talent, their dedication, their passion, and their charisma, is there for all of us to see. For my part I cherish all of it, and I love them. In these twenty years the law schools have paid attention, it is now obvious, to the caliber of those recruited to teach in clinics. This was not the case twenty years ago, when, at the beginning, law schools would hire almost anyone for this area. And this alone testifies almost more than anything else to the value that law schools place on clinics and clinical education.

This is a confident generation of clinicians that the law schools now have. They range from the talented and able to the brilliant. They are articulate and persuasive. This is true of the survivors of the early wars—the founding fathers and mothers. We can even call them the depression children who have now grown up. And this is true of the second generation which has now joined them. They all have a vision. They have dreams. They are sometimes brash. But they should be—on behalf of what all of us as human beings hold so high: education. They want to humanize legal education as much as possible because they're responsible for human beings.

Finally, what's happened in the clinics and the law schools in the last twenty years seems to me at last to provide the means to bring bench and bar closer together with law schools. Clinics are law offices; and their operations easily provide the stuff which interests the bench and the bar. It struck me for the first time at this conference that this is where the common language of teachers, practitioners and judges is being forged and developed. The presence of ABA leaders here makes it clear and testifies to this reality.

In the last two days along these lines, we've seen in the clinic law office of our host school some of the shape of the future. The practicing lawyers as well as the teachers who have been here have been very interested not only in how cases were handled; they also saw how imaginative use of computers, for example, contributes to case handling and to law office management. It is quite probable that, as the discussion yesterday suggested, the bench and the bar will look to the law schools, because of the clinics, for the models of how to practice law in the grandest manner and in the best interests of justice.

To conclude, it's a different world in the law schools because of the twenty years of debate and action about professional-skills management, which is a term I really don't like. It is a much better world. I have no doubt that it will be even better in the future as clinicians continue to join with their colleagues in the law schools to enrich legal education, and live more closely and more fully as a result with their brethren in the bench and the bar.

Sandy Boyd said I'm here to give the benediction. So, because Bob MacCrate talked about the historical role of the priesthood; because one of my ancestors was a high priest and figures in the Bible's story about the struggle for freedom and morality which is what law is all about; and just because I feel like it, I'll leave you with one of the priestly benedictions—just the first one of the three: May the Lord bless you and keep you. Thank you.

SANDY BOYD:

Thank you all for an outstanding panel discussion. We turn now to Bob McKay, who will summarize the conference.

## Concluding Remarks.

ROBERT B. McKAY, Professor at the New York University School of Law. Chair, AALS-ABA Committee on Guidelines for Clinical Education (1980 re-

port). Chair, Long Range Planning Committee, ABA Section of Legal Education and Admissions to the Bar. Member, Board of Governors, American Bar Association:

This conference began on a high note with Justice Rosalie Wahl's elegant and inspirational statement, and it concluded, except for this brief postscript, on another elegant statement by our founding father, Bill Pincus. Bill may not have realized that at the end we were applauding him. When he joined in the applause, he apparently thought it was for the whole conference, but we were really applauding you, Bill; that's what it was all about.

When a conference in two and a half days is as rich as this has been, it's not possible to say anything that hasn't already been said, and said better than I can say it. There is no conceivable way I can summarize the richness of text that has been presented for our consideration. But I am undeterred. I was given the opportunity of a platform, and here I am.

When I was asked to speak, I thought what a nice thing—to go to a conference with no obligation to prepare anything in advance. Now I realize that I, too, had an obligation, not shared by some of you, to attend all the sessions and to do what you clinicians advise lawyers and law students to do, to listen. And so I have listened. In the process of diligent attendance at all sessions, I may have missed some of the corridor conversation, which I am sure was very rich indeed; but I want you to know that I have benefitted enormously by being here. So I want to count the ways in which it seems to me that this has been a quite remarkable event. First, a rough count suggests that probably half the American law schools have been represented in the conference. Jim White can tell you how difficult it is to get across-the-board representation of American legal education for any purpose, let alone a specialized conference such as this. Second, at least a third of the participants are women. I don't know that any of us have been at a legal education conference before in which that has been the case. The female representation substantially exceeds the proportion of women on law faculties at the present time, and even approaches the percentage of women among American law students. That is, I believe, a salutary development. The prime movers and shakers of the skills training movement are here, both the women and the men who are the active participants and those who support the clinical effort, although not active clinicians.

We have been favored with the presence of Bill Pincus, the father of the skills training program. (I shall suggest in a moment that he should now be denominated the grandfather of the movement.) He is one of the very few people I know in legal education who has been memorialized in a plaque at any law school; and many of us have seen the tribute to him at the University of New Mexico Law School. Whether memorialized in concrete or metal, he has left a deep imprint on American legal education, certainly including my own school. We are all grateful for his contribution because it has shaped and changed legal education in important ways.

Justin Stanley, former ABA President, is the embodiment of the professionalism movement which relates very closely and directly to skills training and professional responsibility, on which he has spoken today. Shepherd Tate, another former ABA President, is the prime mover of the effort to secure lawyer com-

petence, also closely related to skills training, as he has made clear in his remarks today. Bob MacCrate, current ABA President, is already a proven friend of legal education; in his absolutely extraordinary statement today, he gave the best defense I have ever heard of the case method as it then was, and the reasons why it is no longer sufficient by itself. In these three we see a reaffirmation of support of skills training by the leadership of the American Bar Association. In addition, we have in the room still, I believe, five present or former chairs of the ABA Section of the Council of Legal Education and Admissions to the Bar, all of whom are strong supporters of what we are talking about here today. Jim White, the ABA Consultant on Legal Education, is also here. As the guardian of the accreditation process, he has consistently supported and enlarged the opportunities for skills training in American legal education.

One thing you would not have known, the only thing perhaps I can offer that is fresh, is that the entire proceedings were bracketed by two Kansans. Rosalie Wahl is from Kansas, and am I, so I want you to know that in former Kansans the spirit of clinical legal education and skills training burns brightly.

Now I want to say flat out that this is the best planned, the best organized conference I have ever attended. I may have forgotten some very good ones, but I think I have some qualifications to speak on the subject of conference quality. I have organized some myself, and I think none of them were as well done as this has been. We owe a particular debt of gratitude to Roy Stuckey, to Kathy Grove, Susan Bryant, and all others involved in the planning and implementation of this remarkable conference. In my judgment the Albuquerque Conference will go down in the history of legal education, and certainly in the skills training movement, as a kind of a watershed, or perhaps I should say in terms of local locale, a march out of the desert into the promised land. That I think is where we are now prepared to go.

Let me review, as others have done, but in perhaps a slightly different perspective, the last twenty years of the skills training movement. It began as we have been reminded several times, with the CLEPR program, whose full title is the Council on Legal Education for Professional Responsibility. I emphasize the two last words because, while it is not uncommon to talk about professional responsibility and professionalism, I think that aspect of skills training deserves repeated emphasis, for that is what skills training is all about. Bob MacCrate said it today, emphasizing the concern for service to the public. The objective is more than quality legal education; we seek the best means for legal education to accomplish the ultimate goals of service to the public.

I think back with pleasant nostalgia to the days when the Council met at Boca Raton, the fifth year anniversary at Buckhill Falls, later conferences at Key Biscayne, at New York University, at Sacramento, not all exclusively on this subject but featuring it heavily, San Antonio recently, Vanderbilt a while back, and others that some of you attended that I did not.

During the early years, in the youthful exuberance of the movement, hope was all, and ambition perhaps outran achievement from time to time. Then came the middle years when enough had been accomplished to prove a threat to the legal education establishment, with talk from time to time of circling the wagons in the fight for survival. Now, in full maturity, survival is assured. The issue now is quality, how best to accomplish the agreed-upon tasks. I pronounce the

skills training movement an adult. One full generation has passed, Bill Pincus is now the grandfather of the movement. We congratulate you, Bill, on your new grandchild.

Consider the accomplishments of the skills training movement. The AALS/ABA Guidelines, mentioned earlier today, have held up surprisingly well. More important is the fact that the Guidelines and the work of people here led to the accreditation standards on which the entire movement heavily depends. And I emphasize again what a good friend to skills training has been the American Bar Association, as demonstrated again today. Every law school now has a skills training program of one dimension or another. We have had a rich a diverse testimony of the variety of those programs. Universities in Montana, New Mexico, Los Angeles, New York and many others are doing different things; and one of the important lessons is that there is no single path to follow. Skills training is unlike legal education in general, which has sought to standardize everything that is done in terms of what we sometimes call the follow-the-leader syndrome. Skills training, on the other hand, has developed a variety of modes from which each of us can learn, just as each of us has learned in the last two and a half days about things that will benefit us as we return to our respective schools. But there is no suggestion that there should be a strait jacket prescribing a single preferred way of doing it. We recognize now, as I think legal education has insufficiently recognized in the past, that different schools have different missions, and so a variety of techniques are appropriate for legal education within individual schools.

Let me discuss a bit the problems that I have seen in legal education and why what you all are doing is making some progress in the direction of improvement and correction. Legal education is a conservative discipline. Although we legal educators are liberal in general and are quick to tell others what to do with their lives or their policies, when it comes to the legal education structure itself, we tend to say if it hasn't been done before, perhaps we should not be embarking on new methods. Consider the fact that it took about a hundred years to come to the case method and another sixty to seventy years to come to the problem method. Skills training has made its mark in only twenty years. So perhaps we are still learning that innovation in legal education is possible after all. Alternative dispute resolution, a still newer entry into the legal education curriculum, is less than ten years old. But if you think about the relationship between ADR and skills training, you will see that there is a great deal of parallelism and something to be learned from our youthful colleague about how to insert new ideas into the curriculum. When we talk about interviewing, counseling and negotiation as part of the skills training program, it is equally part of the alternative dispute resolution regime. There is much to be learned by a crossover between these two disciplines.

The very idea of diversity among the law schools is a benefit to legal education, one that has been slow in coming but which I think now, with your help, is being increasingly realized among the schools. Indeed, innovations in skills training and in ADR instruction provide an opportunity for law schools and legal education generally to rethink goals, both individually in each school and collectively among the 175 ABA-accredited law schools. Legal education has been deficient in a number of respects for which your work suggests cures. For

example, legal education still tends to be bound to the appellate opinion in large part. There is little fact-finding in the traditional curriculum. There is little analysis of choices and strategies other than within the traditional doctrinal framework. In short, legal education tends to be deficient in problem solving which is of course what skills training is all about and what legal education itself should be all about. Despite the generally high quality of legal education today (within its somewhat limited premises), the legal education program is not very closely related to the legal practice which it purports to serve. We have had a number of demonstrations of that here. Whether it's a large law firm with concentration on narrower and narrower bits of practice, the single practitioner, the two- or three-person firm, or public service, the training that prospective lawyers get in law school does not equip them to deal with the problems they will encounter in practice. The assumption of legal education that the law firms will provide that kind of training, and therefore we should not do it because they can do it better is proven false by the facts. The falseness of the premise is demonstrated here at the University of New Mexico Law School. I had the distinct pleasure and opportunity of sitting in on one of the two presentations by Mike Norwood and his colleagues and learning what extraordinary things can be done through the computer process in organizing an office management system and a trial notebook. It is my firm conviction that most law firms are not doing as well on those skills that are now being developed in the law schools. As the graduates of this law school—and I hope many other law schools—go out into practice, they will be able to advise their new associate and partner colleagues about improvements in the practice of law which they learned in law school. That is an opportunity and an obligation, it seems to me, of legal education. If the goal of legal education is to teach students to think like lawyers (that dreadful cliche), I would recast that statement into something more meaningful. I would say the goal of legal education should be to train students to think like lawyers *should* think, but often do not.

We have emphasized here a number of times, and it comes across to me as a powerful message, the opportunity for law schools and for law teachers to inculcate in students a conceptual way of thinking, fact finding, analysis, choice of strategies—in other words to think as lawyers should think, but as I say often, do not. I am reminded in this context of a story about a lawyer who, like myself and perhaps many other lawyers, was not mechanically gifted. Nevertheless, he bought a lawnmower, disassembled, brought it home, and found he could not put it together despite the rather elaborate instructions; so he put it aside. He came home a day or two later to find that his illiterate gardener had assembled the machine and it was performing to its assigned function. Lawyer to gardener, "How is it that you, who cannot read or write, could assemble this complicated piece of machinery that I with all my skills could not put together?" Gardener to lawyer, "Those of us who cannot read have to think." I suggest to you that we have not been teaching law students to think. Lawyers do not think conceptually in terms of the problem-solving objective which I believe is the correct way for all of us. We must think toward creative solutions, a formula that Roberta Ramo among others suggested. Perhaps I have over-stressed the past, but I believe that it does hold the seeds for a future that has been beautifully outlined at this conference. You may recall the old aphorism that the past is never so

clear as the future. In short, we must understand the past better than we usually do in order to predict the future, which we freely do from time to time.

With that caution in mind, let me summarize the goals and objectives of skills training as I understand them to have been presented at this conference. I begin of course with Rosalie Wahl's plea for a joinder of mind and heart. That theme, which was a constant throughout the conference, bears repetition and thinking about for its vast implications. Bari Burke translated the goals of skills training into knowledge, skill, perception and character. To be sure, those qualities are not self-defining; but in terms of what can be done through programs of legal education and skills training, I believe all of them can be accomplished at least better than we have in the past. Opportunities for skills training to introduce students to frontier areas of the social agenda include at least some of the following topics that Dean Rivkin and others have commented on during this conference: homelessness, AIDS, securities regulation, insider trading, and many others. I would emphasize also the importance of the more routine cases, the more typical cases as something on which the teaching and learning of law students should be based. There is an opportunity for pedagogy that extends beyond the individual to teamwork, as of course is realistic in the practice of law. The bringing to bear of more minds than one upon problem solving and upon collective strategizing is an important ingredient of skills training, which provides opportunities for rigorous and extensive analysis through fact-finding, issues analysis, and strategy determination.

More explicit attention can and should be given to personal involvement and the development of concerns for social issues, for justice if you will, dealing with racism, sexism and other problems that remain. But most of all I think there is a special opportunity which can and should be taken advantage of for training in professional responsibility. I join Justin Stanley in saying it should not be narrow instruction in the provisions of Code and Rules although they are an essential part. The larger obligations of professionalism are the obligations to students, to colleagues, to society as a whole. The techniques for accomplishing these results have been outlined in various ways. I will not attempt to define which are preferable or in what combination in various schools; but as you all know, they include simulation, lawyering (a term we use at New York University to include interviewing, counseling, negotiation, writing skills), the live-client clinic, and even externships when they are more carefully protected against exploitation than is sometimes the case.

Problems, of course, remain. We should not seek a trouble-free world. In some places questions still remain of full acceptance of skills training by the non-clinicians in a particular law faculty. In this conference we have talked of integration, or even the more violent term "take-over." I suggest we beat them at their own game and talk in terms of the doctrinal analysis of mergers and acquisitions. Merge the two kinds of legal education if they are different and demonstrate that they are one and the same or, failing that, engage in a practice of acquisition, but I suggest not a hostile acquisition against your own colleagues. It has been demonstrated here that skills training offers an intellectual contribution to legal education. Some of your and my colleagues have doubted that from time to time. But certainly the kind of skills training that we have been talking about here contributes as much analytical structure as does case study. Indeed, it is

deeper and wider because facts are not ready-made but must be found. Choices must be determined on the basis of issues not labeled conveniently as tort, contract, property or evidence. Problem solving begins with the introduction of the clients or the simulations as the case may be and ends only with the determination that the best of various possible solutions has been offered to the client.

Finally, we cannot avoid the issue of resources. Frank Walwer has spoken about the practical difficulties. Suggestions have been made about various outside resources that may be available, such as attorney fees in some instances, IOLTA funds in other instances, LSAC possibly in the future, the Title IX funds that Jack Kramer told us about, the grants for special programs; none of these deals squarely with the central problem. What is really required is a persuasion within each law school that additional resources should be made available from the university, from external sources, or re-allocation within the law school. Various justifications have been advanced in support of the necessary additional funding. Some argue that an effective skills training program attracts students, and we know it does. I cite the attractive Washington University brochure as an example. I know at my own school that students say they have come to us rather than another equally good school because of the kind of legal education they can get with us. Another thing we have been told is that alumni like it, and I suspect that is true indeed as well. Alumni have long told us, the bar has told us that we must be more practice-oriented, and now we can go back to them and tell them that we are doing it.

Even those reasons, valid though they may be, are insufficient. The real reason why skills training should be made an integral part of every law school curriculum in this nation is that it is the right thing to do.

KATHLEEN GROVE, Esquire. Assistant Consultant on Legal Education to the ABA.

I'd like to close this conference with just a few thanks. First, I'd like to thank the officers on the Section of Legal Education and Admissions to the Bar for six months ago determining that this was a worthy conference to have and allocating the resources for it. Second, I'd like to thank Claudia Fisher who was my right arm during this conference. I think most of you saw her sitting at the registration desk, or running for something that was needed. Third, I'd like to thank my co-chair, Roy Stuckey, who really conceptualized this conference and deserves much appreciation for his efforts of the last six months which took him away from many of the other obligations he had. I'd like to thank the forty to fifty panelists and speakers we had, who assured a very rich and diverse conference. And finally I'd like to thank all of you for coming and sharing with us your hopes for the future. Thank you.