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Legal Competence Yesterday and Tomorrow

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I. *Introduction*

Attacks have been lodged against the legal profession for many years, indeed, since even before Shakespeare commented in Henry VI, "The first thing we do, let's kill all the lawyers." However, it is only more recently, with the growth of mass education and public awareness and with technological advances, that suspicions of the incompetence of lawyers has arisen again with a vengeance. Some would credit this new trend to the condemnation of alleged incompetence among trial lawyers by Chief Justice Burger of the American Supreme Court. But to limit the attack on lawyers to this Chief Justice is to ignore the fact that problems of lawyers' abilities and performance are the inevitable outgrowth of an increasingly rights-oriented public, which has responded to the democratic system by questioning the utility of the lawyering services they receive in return for their money. The members of an educated community, conscious of the exchange of values in a free enterprise system, will ultimately question the mystique that surrounds the legal profession; they will doubt the lawyers' use of a coveted and impenetrable language, and they will likely decline to accept advice without reason, delay without cause, and inefficiency without excuse.

This paper examines the issue of professional competence, principally from the perspective of a legal educator functioning within a law school setting. The following basic questions are posed. First, what is the meaning of "professional competence" in the legal profession? Second, who determines the parameters of professional competence in law? Third, what forms of legal education are needed in order to provide society with lawyers who best satisfy such standards of professional competence?

II. *The Meaning of Professional Incompetence*

One might well presuppose that incompetence encompasses only an inability to perform. An incompetent lawyer would then be inept; he

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or she would be unsuited to the practice of law, disinterested in his or her responsibilities, and incapable of providing reasonable services for value. In reality, incompetence does encompass such situations, but it also includes a great deal more. To be incompetent, a lawyer might fall below a requisite standard of ability on but a single occasion, with respect to a single legal issue, and in relation to only a single case. Incompetence in law is not the preserve of only the hopelessly substandard practitioner and the obviously dishonest abuser of the public trust. Legal incompetence can be, and is, demonstrated by a multitude of lawyers who are often very good and are the most skilled in their powers of reasoning and the most highly regarded by their fellows. Such incompetence occurs when a usually able lawyer attempts to service a wide and often diverse clientele. It occurs when he or she is tired and overworked, upset or irritable, hasty or careless. Legal incompetence is not peculiar to the "other" lawyer; it is common to all of us in the profession. The parameters of legal incompetence are, therefore, determined not in the abstract, but against the background of actual practice. Incompetence is measured in terms of actual standards of performance, minimum levels of ability, and identifiable performance goals. Any concept of professionalism demands some requisite standard of ethics, some basic level of honesty and decency. Competence in law is a measure both of the capacity to perform and of performance itself. The lawyer must be able to carry out lawyering functions with a requisite degree of knowledge and skill, and he or she must also be willing to perform such functions honestly, completely, and on time. In addition, lawyering requires psycho-sociological abilities, for the law is a human science that addresses public and private concerns alike. A competent lawyer is one who is able not only to recognize social needs, but also to respond to them through recourse to legal institutions, doctrines of law, and specified legal procedures.¹

1. The Code of Professional Conduct of the Canadian Bar Association provides as follows: "Rule (a) The lawyer owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf (b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of legal service at least equal to that which lawyers generally would expect of a lawyer in a like situation." Code of Professional Conduct, C.B.A., ch. 2, pp. 4-6, 1974. The Code of Professional Responsibility, of the American Bar Association, Canon 6, stipulates that: "A Lawyer Should Represent a Client Competently." The Model Rules of Professional Conduct, drafted by the Commission on Evaluation of Professional Standards of the American Bar

Undoubtedly, lawyering demands both the diligent and the ethical execution of legal responsibilities. The lawyer needs to know how to reason in and about the law, and how to fulfill his or her tasks with diligence and deliberateness, efficiency and conscientiousness. An inability or an unwillingness to fulfill any of these legal roles gives rise to the pertinent query: was that conduct competent and was that performance professional?²

The meaning of the term competence should not be over-extended. Competence does not equal omnicompetence. No lawyer can be expected to carry out with perfection all legal functions that might arise, and no lawyer can be expected to know all of the law, considering the complexity of legal rules and the diversity of factual issues. Legal practitioners simply cannot canvass every conceivable legal avenue. Moreover, lawyers differ from one another in sophistication, counselling skills, drafting ability, and capacity to litigate. In short, they are not alike in all matters of competence.³

Association, defines competence as the "specific legal knowledge, skill, efficiency, thoroughness, and preparation employed in acceptable practice by lawyers undertaking similar matters" (Rule 1.1, Discussion Draft, Chicago, Jan. 30, 1980). See, in general, *Professional Competence and The Law* (L. Trakman, ed., 1981).

2. It should be noted that competence in law is usually defined more in relation to "performance" than "capacity". See A.B.A. Code of Professional Responsibility, E.C. 6-1 to 6-6. However, capacity still remains an intrinsic preliminary criterion in determining questions of performance. For example, The Conference on the Quality of Professional Services, C.B.A., postulates that "1. The Conference accepts the definition of "competence" as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken, and it accepts the definition of "incompetence" as the state of lacking the ability or qualities which are requisite or adequate for performing legal services. . . (italics added)." In terms of this definition, the lawyer's ability is envisaged as a prerequisite to his performance. In fact, this need not be so, and often is not so. The lawyer's absence of performance may well arise as a result of overwork or overcommitment, even though he or she is otherwise most able.

3. The attributes of competence, as defined in both The Code of Professional Conduct of the C.B.A. and The Code of Professional Responsibility of the A.B.A., are distinctly broad in character. Consider, for example, the commentary on competence in the code of the C.B.A.: "1. Competence . . . has to do with the sufficiency of the lawyer's qualifications to deal with the matter in question and includes knowledge and skill and the ability to use these effectively in the interests of the client. 2. As a member of the legal profession, the lawyer holds himself out as knowledgeable, skilled and capable in the practice of law. . . .3. It follows that a lawyer should not undertake a matter unless he honestly believes he is competent to handle it . . . (Ch. 2, pp. 4-5, 1974)." These comments raise questions of both nature and degree. How much "knowledge and skill" should the lawyer possess in practicing law? What are the parameters of his or her capacity to provide legal services? How do we decide when a lawyer is entitled or justified "to believe [that]

Yet it is precisely the popular myth that lawyers are all-able, all-knowing, and all-seeing with respect to the law — the notion of *nemo juris ignoantiam excusat* — which produces the greatest threat to the legal profession, for such a belief induces in society an unrealistic expectation that satisfaction should and can always be provided by the legal profession. Such a misconception produces a deep-seated mistrust of lawyers, especially when that which the public expects is not forthcoming. Whatever professional competence might mean, it should not mean perfection in legal know-how and professional ability. Unjustified social expectations of lawyers give rise to unjustified criticisms of lawyers. A legal profession that perpetuates a myth of infallibility defies growth. We should move in the other direction.⁴

III. *Who is Competent?*

Understanding the meaning of competence in law presupposes an understanding of the meaning of law itself. The competent lawyer is expected to “know” the function of the law and to comprehend its operative mechanisms. Yet lawyers are not uniform in their capacities to perform. They have differing abilities in oral advocacy and in negotiating contracts, drafting wills, and conciliating conflicts. Just as they differ as persons, so do they differ in their ability to assimilate information and articulate arguments. How, then, do we distinguish the competent from the incompetent? Where

he is competent to handle” a legal matter? The Code of Professional Conduct of the C.B.A. does not answer these questions. See, in general, *Professional Competence and The Law*, *supra*, note 1.

4. For critical commentary hereon, see Brunis, *Incompetence of Defense Counsel in Criminal Cases* (1974), 16 Criminal L.Q.; Burger and Barnett, *Rx for Continuing Education: Lawyer, Examine Thyself* (1973), 59 A.B.A. Journal 877; Rosenthal, *Evaluating The Competence of Lawyers* (1976), 11 Law and Soc. 257; Allen, *Causes of Popular Dissatisfaction with Legal Education* (1976), 62 A.B.A.J. 447; Fromson, *Let's be Realistic about Specialization* (1977), 63 A.B.A.J. 74; Morgan, *The Evolving Concept of Professional Responsibility* (1974), 90 Harv. L. Rev. 702; Carrington, *On the Pursuit of Competence* (1976), Trial 35, 12; Reiter, *Discipline as a Means of Assuring Continuing Competence in The Profession* (1978), paper 11, Professional Organizations Committee, Ontario; Kelso and Kelso, *The Future of Legal Education for Practical Skills: Can The Innovation Survive?* (1977), Brigham Young Un. L. Rev. 1016; Frankel, *The Search for Truth: An Umpireal View* (1975), 123 U. Pa. L. Rev. 103; Carrington, *The University Law School and Legal Services* (1978), 53 N.Y. U. L. Rev. 402; Swan, *Continuing Education and Continuing Competence*, Selected Checklist of Materials on Specialization (1979), 34 Record 441.

is the dividing line between professional and unprofessional behaviour?

A single standard of competence, applied to all absolutely, is undoubtedly most convenient, for it is certain in nature and predictable in operation. But fixed standards produce rigid results. Once fixed, they fail to allow for the differing abilities of lawyers. Surely the lawyer who is a specialist should *not* be judged according to exactly the same standard as the non-specialist. Surely a single standard of competence does not promote justice if it regulates both experienced and inexperienced lawyers without differentiation.⁵ By contrast, relative standards of competence offer the advantage of flexibility. Yet relativism raises the crucial question of to whom and to what degree the standards are relative. All lawyers could be required to perform at some minimum level of competence, but what might this minimum level be? Alternatively, standards of competence could be set relative to the qualifications of the practitioner, reflecting his or her training in law, experience in practice, and complexity of function. Yet such relativism introduces not only a lack of clarity as to what constitutes competence, but also a discriminating standard in favour of some practitioners at the expense of others. Most importantly, if relative standards of competence are to apply, the following question arises: who should make such decisions and in accordance with what criteria?⁶

Surely, the relative character of standards of professional competence evolves out of a weighing of interests. These include private and public concerns, social and economic demands, and political and cultural forces. Thus, the performance of lawyers

5. See Kelso, *The Duty to Deliver Competent Counsel*, Panel Discussion, (1976), 30 *Un. Miami L. Rev.*, 847; Puffer, *Specialization—A New Legal Direction: Good for Old Lawyers—Bad for New Ones* (1976), 3 *Barrister* 1:57; Harrison, *What Now for Lawyers* (1975), *New Law J.* 276; Wolkin, *More on a Better Way to Keep Lawyers Competent* (1975), 61 *A.B.A.J.* 1064; Yegge, *Tomorrow: The Future Role of the Lawyers* (1969), 29 *Louisiana L. Rev.* 640; Anderson, "Education, Competence and Quality of Service, Appendix B2", in *The Legal Profession and the Quality of Legal Services* (Ontario, 1978) pp. 85-115; "Report of the Special Committee on Competence, Manitoba, Appendix D3", in *The Legal Profession and the Quality of Legal Services* (Ontario, 1978) pp. 350-5.

6. On the relative dimensions of professional competence in law, see, in particular, Allen, *New Anti-Intellectualism in American Legal Education* (1976); 28 *Mercer L. Rev.* 447; Clare, *Incompetence and the Responsibility of Courts and Law Schools* (1976), 50 *St. Johns L. Rev.* 463 (1976); Esau, *Specialization and The Legal Profession* (1979), 9 *Man. L.J.* 255; Cramton, *The Hired Gun or the Social Engineer* (1977), 4 *Learning and L.* 18, n.3. See further, *supra*, note 5.

should be judged, in part, in light of the background and experience of individual practitioners and, in part, in accordance with community standards reflecting social need, financial exigency, and political expectations.⁷ Ultimately, absolute standards of competence must be weighed against relative standards. To impose a rigid and unchanging standard of competence upon lawyers, to the exclusion of all other criteria, would be to reduce professional standards to their lowest common denominator. To require from lawyers only a minimum standard of competence would also be to shelter — indeed, to cloister — the legal profession from public responsibility, notwithstanding social demands for more exacting standards of professionalism. Again, the solution must lie in a balance being struck between social needs and professional capabilities.

IV. *Who Determines Competence?*

A key problem in determining the parameters of professional competence lies in identifying the interdependence that exists, or should exist, between the personal, social, and legal expectations of lawyers. Society at large, the law society, the bar, and the individual lawyer all influence the character of legal competence. Yet which force should predominate? Who is the primary determinant of professional competence and what are the parameters of such decision-making power?

Lawyers are functionaries charged with public responsibilities. Their service to the public should accord with the existing social need for such service, and their competence should advance with the advances of society.⁸ Thus, competence in law presupposes knowledge of man in society and of the control that law imposes upon man in society. Each increase in socio-cultural complexity produces to a legal reaction to such complexity. Each development of mankind should be counterbalanced by an equivalent development in the ordering of mankind. Variations in social attitudes should be displayed in the legal regulation of such attitudes, and developments in technology should be reflected in the legal control

7. See, *supra*, note 5.

8. See further, Duncan, *Public Access to Law in the 1980s* (1980), 44 Sask. L. Rev.; Fraser, *Recent Developments in Legal Education: The Victoria Experience* (1979), 13 U.B.C. Law Rev. 224; Carrington, *The University Law School and Legal Services*, *supra*, note 5.

exerted over such technology. Just as lawyers need to monitor cultural and economic development, so they also need to evaluate the lawyering process in terms of such developments.⁹

Community attitudes cannot be ignored in evaluating what constitutes a “worthy” legal fee, a useful piece of legal advice, or the most justifiable conclusion to a legal confrontation. Yet community assessments of legal competence have inherent limitations. Perceived legal abilities, as evaluated by lay members of society, may well differ from real legal abilities, and apparent legal sophistication may disguise very real legal deficiencies. A client who *feels* that he or she is receiving value may assume the existence of competence which may not exist in fact. So long as such public misconceptions prevail, community determinations of competence in the practice of law will be inadequate as a measure of ability and performance in law.¹⁰

Can the lawyer be directed to regulate his or her own performance through education and restraint, caution and precaution? Certainly, competence in law is maintained in part by voluntary means. Lawyers attend continuing legal education conferences, junior members of the bar consult with senior colleagues, and law libraries facilitate learning in the law. But self-motivation has its limits; it takes time to learn, it costs money to attend conferences, and the general practice of law makes it difficult to follow complex developments in multiple legal areas. To rely entirely upon personal motivation in the search for competence in law is to disregard human frailty. Growth in legal knowledge and skill presupposes that individual lawyers aspire towards such growth. Such may be the case, but it need not necessarily be so.

What can be said of the legal profession as a regulator of performance? Should and can the profession, as a whole, create and implement standards of professional competence, and if so, how should such standards be determined and how are they to be

9. Detailed discussions hereon are contained in Arthurs and Verge, *The Future of Legal Services* (1973), 51 Can. Bar Rev. 15; S. Colvin, D. Stater, L. Taman, J. Yale and F. Zemans, *The Market for Legal Services: Paraprofessionals and Specialists* (1978); B.F. Christenson, *Lawyers for People of Moderate Means* (1970); B.A. Curran and F.O. Spalding, *The Legal Needs of the Public* (1974), A.B.A. - A.B.F. p. 63; Thomason, *What the Public Thinks of Lawyers* (1974), 46 N.Y.S.B.J. 151; R.L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law* (1976), 28 Stan. L. Rev. 207; Bauer, *On Producing Intellectual Giants and Moral Midgets* (1975), Learning and L. 12, no. 2.

10. See in general, *supra*, n. 9.

enforced? Undoubtedly, the regulation of the legal profession must emanate, to a large degree, from lawyers themselves, acting as a collectivity. Lawyers are better able than the lay public to evaluate the competence of other lawyers, for they are better informed about the nature and significance of law and are less readily misled in the assessment of legal competence.¹¹ Yet how do we limit the risk of the role that self-interest might play in a legal profession charged with the responsibility to evaluate itself, and how do we ensure that the competence of lawyers advances as technology, knowledge, and innovation advance? The answer must lie, to some degree, in the institutionalization of professional competence within an ordered framework which would reflect a predetermined structure and content. Complex questions of methodology must be resolved, including: how is professional competence to be institutionalized in legal form, and, most importantly, how is this to be achieved? The answers, it is suggested, lie primarily in the hands of the bar *and* the law school. Competence training is their shared duty; incompetence is their joint responsibility.

V. *Competence and the Bar*

Standards of professional competence can be created at various levels. They are often devised in law school programs, through courses on legal ethics and professional responsibility, and in seminars devoted to legal education and jurisprudence. Yet can we teach aspirant lawyers to be moral? Can we show them, in a classroom setting and in the absence of prior professional

11. The regulation of the legal profession by the profession itself has been the subject of numerous studies to date. See, inter alia, Reiter, *Discipline as a Means of Assuring Competence in the Profession*, *supra*, note 4; Anonymous, *Professional Discipline of Solicitors in England* (1979), 75 Mich. L. Rev. 1732; Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere* (1977), 10 Creighton L. Rev. 613; Miller, *Justice Report on Complaints against Lawyers* (1970), 33 Mod. L. Rev. 542; Steele and Nimmer, *Lawyers, Clients and Professional Regulations* (1976), 3 A.B.F. Research J. 917; Wolkin, *On Improving the Quality of Lawyering* (1976), 50 St. John's L. Rev. 523; Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence* (1974), Utah L. Rev. 463; Brickman, "The Education and Licensing of Lawyers: Current Proposals to Improve the Competence of Lawyers", in *Conference on Education and Licensing of Lawyers* (Florida, 1976); Redlich, "Lawyer Education and Certification: Flawed Premises and Uncertain Results", in *Conference on Education and Licensing of Lawyers*, *supra*, in note; Gilbreath, *Maintaining Competence Among Lawyers: How Far Have We Come* (1979), 24 Catholic Law 162.

experience and training, what is responsible and competent behaviour? The answer is surely a qualified “no”: we cannot teach aspirant lawyers to be honest and trustworthy, but we can inform them of the moral and legal consequences that flow from dishonest and untrustworthy conduct. We cannot show students how to be professional in their legal practices before they even have such practices, but we can instruct them in the conduct of simulated or clinical legal practice.

The bar has a vital role in the professional and competent training of its membership. Various reasons give rise to this responsibility. Of necessity, training in legal competence is an ongoing function; it does not cease on graduation from law school, nor does it end upon the award of a law degree. There is a need for the boundaries of education to be extended as new legal procedures, novel problems of law, and more complex issues of fact arise in the societal sphere. No lawyer can hope to graduate from law school with an ability to weather all legal storms, for his competence reflects his experience, and so long as his pre-existing experience is primarily academic or simulated in nature, his competence in practice is likely to be limited. We cannot set unrealistic training goals for law schools, yet how is such an education in law to be provided? Do we mandate programs in continuing legal education and compel all lawyers to participate in such exercises?¹² Or should continuing education programs be voluntary, dependent upon the willingness of lawyers to undertake training in specialist or generalist, and practical or academic, areas of law? Surely the answer is both. Voluntary and mandatory education in law are complementary means of attaining professional competence in law; they are not mutually exclusive.

How, too, can we train lawyers effectively after they have

12. Mandatory legal education has been given particular stress over the course of the last decade. See, in particular, Byron, *Mandatory Continuing Legal Education in Minnesota* (1975), 54 Mich. State Bar J. 361; Byron, *Mandatory Continuing Legal Education in Minnesota: The First Year* (1975), 50 St. John's L. Rev. 512; Clark, *Report of the Task Force on Mandatory Continuing Legal Education in Ohio* (1976), 3 Ohio Northern Un. L. Rev. 915; Hardy, *Continuing Legal Education in Kentucky: A Mandatory Plan* (1976), 40 Kentucky Bench and Bar 10; Leet and Loeb, *Continuing Legal Education: Should it be Compulsory?* (1975), 27 J. Legal Ed. 110; O'Donnell, *Compulsory Continuing Legal Education: Periodic Recertification of Lawyers* (1976), 62 Women Law J. 20; Sheran and Harman, *Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licencing* (1976), 44 Fordham L. Rev. 1081.

completed law school, but before they are admitted to the bar? For some decades, lawyers in British Commonwealth jurisdictions have been exposed to articling programs and bar admission courses. Each form of legal training has distinctive characteristics. Articling periods provide the law school graduate, who at that stage is a trainee lawyer, with an exposure to the practice of law while under the supervision of qualified members of the bar.¹³ Periods of articling are followed by bar admission courses, which give aspirant lawyers an opportunity to study law in organized programs of instruction which are created and conducted by the bar itself.¹⁴ Both of these post-law school activities have particular virtues and pitfalls in relation to professional competence; each will be examined below.

The articling system has a number of distinctive attributes. Properly supervised, the trainee lawyer is introduced to the practical day-to-day activities of a law office. Court-rooms, clients, and administrative tribunals also represent areas of learning. While articling, the student lawyer is exposed to the law as it operates, not merely as it appears in a case-book, in a simulated problem, or in a lecture. Yet legal articling, as a system, does not necessarily ensure competence; it is only a possible means towards the realization of competence. Articling programs give rise to their own peculiar pitfalls; indeed, they grow increasingly suspect with the passing of time. Attention must be paid to the costs of the articling system, the problems of supervising articling students in diverse legal areas, and the need to train such students and yet operate a viable legal practice. Articling programs also need to be structured. One may well ask how long the articling period should be — six months, a year, or perhaps two years — and who should be responsible for such programs — the bar, parts of the bar, the legal profession as a whole, or some other body? Articling programs also require coordination. Program organizers must decide upon the role of law

13. On a critical evaluation of the articling system as a post-law school experience, see, *infra*, note 15.

14. On the bar examination and subsequent assessment of legal competence, see Brickman, "The Education and Licensing of Lawyers: Current Proposals to Improve the Competence of Lawyers" (1976), C.L.E.P.R., Florida, cited, *supra*, note 11; Redlich, "Lawyer Education and Certification: Flawed Premises and Uncertain Results" (1976), C.L.E.P.R., Florida, cited, *supra*, note 11; Covington, "The Multistate Bar Examination" (1976), C.L.E.P.R., Florida; Pincus, *Clinical Training in the Law School — A Challenge and a Primer for the Bar and Bar Admission Authorities* (1976), 50 St. John's Law J. 479.

firms who participate in such programs: should these employers be required to supervise and examine articling students according to prescribed standards in order to ensure a minimum quality and breadth of training? Moreover, should they be required to report on the quality of student performance after or during such articling periods?

To date, few of the above-mentioned controls have been comprehensively introduced into the articling system within commonwealth jurisdictions. Supervision of articling students is usually carried out on an ad hoc basis, and it varies in quality and intensity from law firm to law firm and from supervisor to supervisor. Seldom are articling systems monitored by the bar, seldom are supervising lawyers required to provide specific forms of training, and seldom are reporting responsibilities imposed on either the employers or the student lawyers. Regretfully, the utility of such articling programs depends more upon chance than design. The indictment of the articling program is indeed severe.¹⁵

The value of the articling period will inevitably hinge upon the manner in which the system is implemented and the method by which it operates in practice. Minimum criteria for the functioning of articling programs should include: the development of a supervised and coordinated activity, the implementation of

15. The articling system as it relates to professional competence has been extensively criticized in recent years. The criticism has assumed two dissimilar directions. First, there is the view that the articling system requires increased supervision, direction, and control. Second, and somewhat more vehement, is the suggestion that the articling system should be abolished in toto. As to the first alternative, The Special Committee on Competence of The Law Society of Manitoba, recommended in 1977 that "7. [c]lose liaison be maintained between the administration of the bar admission course and the principals [that is, the supervising lawyers] to ensure that students are obtaining the best possible practical experience. 8. Lawyers in whose offices students articulated should be encouraged to take an active role in teaching their students. 9. The bar admission course be used to reinforce a student's office training where his experience in his office does not meet the minimum criteria for practical legal training (s.C. 7-9, Articling)." Regarding the second criticism, namely, abandonment of articles, Professor Anderson writes that "even the one year of post-graduate apprenticeship now commonly required is of a length and cost disproportionate to its benefit, that experiences in articling vary widely in range and quality, that a growing number of articling positions are seriously deficient in the breadth and order of experience and the quality of instruction and supervision they provide, and that in some instances the students see mediocre or even poor practices that in turn they may adopt and perpetuate." See D. T. Anderson, "Abolishing Service under Articles of Clerkship", in *Conference on the Quality of Legal Services* (1978), Part 2, VI 2.

standards of performance to be complied with by supervising lawyers, and the monitoring of articling activities through reports on the articling students, to be submitted by the supervising lawyers to the coordinators of the articling programs. In the absence of such controls, the operation of the articling system is likely to remain as questionable in nature as its current procedures, and as doubtful in its effect as its present record.

The other post-law school activity of interest here, bar admission courses, can be useful in training lawyers for professional practice. Introduced after the completion of an articling period, the courses provide a useful link between theoretical and practical legal education. The bar admission student who possesses both a law school background *and* articling experience is then exposed to practical legal subjects, both procedural and substantive, which are taught primarily by members of the bar. The bar course, which is usually followed by an examination, also constitutes that final introduction of the student to the legal world before he actually enters the ranks of the qualified profession.¹⁶ But to what extent are bar admission courses necessary to the development of professional competence, and if deficiencies in such courses are revealed, how are they to be remedied? The answers are varied. Bar admission courses should encompass not simply the learning of substantive rules of law, but also an exposure to legal analysis and to the practical problems that are encountered in the performance of lawyering functions. In addition, the aspirant lawyer needs to appreciate those circumstances in which questions of professional competence are most likely to arise in practice and, most importantly, the ways in which lawyers can either avoid the occurrence of such incompetence or remedy its effect through countervailing action. Thus, the bar admission course represents that last stage at which the still unlicensed lawyer can be forewarned of the pitfalls that most frequently arise in professional life.

The existence of bar admission courses still gives rise to specific questions of structure and content: who should administer such programs, what courses should be included, and, most significantly, what should their orientation be? Ideally, the bar itself should be the primary administrator of these courses, since it is best equipped to identify the needs of legal practitioners and the qualifications and practical skills they are required to have. Yet

16. See, *supra*, note 14.

difficult decisions must still be made. Bar admission courses, especially those in areas of substantive law, should not be totally theoretical in content; legal theory is most usefully taught within academic confines, by law professors, and over a more extensive, three-year period. Nevertheless, bar admission courses do need a theoretical superstructure that can integrate disparate legal concepts and doctrines, and rules of law, into a homogeneous mold. Compromise is inevitable; a balance must be struck between formal instruction *in* and knowledge *about* the law. We cannot expect less from aspirant lawyers, nor should we.

Competence in law still cannot materialize out of a static mold. The teaching of lawyers to be professionally competent within practice-oriented programs should be systematized in accordance with social need, and the learning of the law should be adaptable in nature if the legal profession is to respect, and thereby be respected by, society. Such is ultimately a necessary goal of both articling and bar admission systems if public interests are to be revered.

VI. *Competence and the Law School*

The development of professional competence in law is also very closely related to the law school environment, in which legal training is initially provided. Law schools can be exclusively academic centres for theoretical training in law, or they can also provide practice-oriented training in legal technique. This dichotomy has plagued legal educators for decades.¹⁷ Law schools can indeed serve as clinical centres in which legal skills are acquired in simulated and real-world settings. But, if this is so, there is still a need for an intellectual environment in which an education in legal theory is offered. Theoretical knowledge is the backdrop against which practical skills are subsequently displayed. Moreover, it may well be asked whether law schools have the facilities to serve as practical centres, given the role of the articling system and the bar admission courses in the acquisition of legal skills.

17. Cf. notes 4 and 7, *supra*. In particular, see *A Dialogue: Theoretical versus Practical Legal Education* (1977), 2 U. Dayton L. Rev. 1; Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies* (1979), 30 J. Leg. Ed. 253; Carrington, *The University Law School and Legal Services*, *supra*, n. 4; Frankel, *The Search for Truth: An Umpireal View*, *supra*, n. 4; Kelso, *The Duty to Deliver Competent Counsel*, *supra*, n. 5; Clare, *Incompetence and the Responsibility of Courts and Law Schools*, *supra*, note 6; Allen, *Prospects of University Law Training* (1977), 63 A.B.A.J. 346; Bridge, *Academic Lawyer: Mere Working Mason or Architect?* (1975), 91 L.Q.R. 488.

Even if the function of the law school is defined in academic terms, the structure of educational programs must still be established. There is a need for educational direction. There is a demand for planned action in determining the nature of law courses. Law school syllabi should be rationalized in terms of the community of interests which lawyers are pledged to serve. What is required are methods of instruction which foster those legal skills that legal practitioners need in order to fulfill their professional responsibilities.¹⁸ It is true that no single form of instruction in law can satisfy all community wants, and no one method of learning can respond to the heterogeneous backgrounds and interests of each and every aspirant lawyer. Yet, no matter how relative the educational needs in law are, they still warrant a coordinated base, a cohesive foundation, and a sound and well-reasoned superstructure.

At present, there is evidence that an unstructured educational system has evolved. An over-abundance of unsystematized courses is being offered in North American law schools. A study of law school catalogues demonstrates that the number of law courses has multiplied significantly over the last two decades. In addition, courses sometimes lack design, they frequently overlap with one another in content, and it is often difficult to differentiate between their theoretical orientations. Frequently, their creation can only be rationalized in terms of the personal and research interests of particular teachers.¹⁹ Within this educational process, emphasis may well be placed on the "academic freedom" of both professor and student. The teacher decides what to include in his or her syllabus and how to teach the subject. The second and third year law student, in turn, is largely free to choose his or her own courses and to determine what to study and what to avoid studying. This apparent freedom of choice is based on a fiction. It presupposes that

18. See in general, *supra*, note 17.

19. On these complex questions, see Boyer and Cramton, *American Legal Education: An Agenda for Research and Reform* (1975), 59 Cornell L. Rev. 221; Keeton, *Tell Me, Show Me, Involve Me — Establishing a Framework for Learning* (1976), 2 Learning and L. 16; Vernon, *The Expanding Law School Curriculum Committee: The Move by Courts and the Organized Bar to Control Legal Education* (1976), 1 J. Leg. Prof. 7; Auerbach, *As Lawyers Multiply, Civilization Decays* (1977), Learning and L. 10, no. 2; Benthall-Nietzel, *Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education* (1974-75), 63 Ky. L. J. 373; Rohan, *Legal Education and Training for the Profession: An Overview* (1976), 50 St. Johns L. Rev. 494; Trakman, *Canadian Law Schools: In Search of Excellence* (1980), 6 Dal. L.J.

a student is able to make an intelligent course selection even before he or she is able to appreciate the significance of that choice. It is founded upon the further misconception that a law teacher who orients courses around his or her own idiosyncracies is necessarily exercising academic freedom.²⁰

Specific deficiencies in the educational system are also evident in the very structure of our law school programs. First, objections can be made to the classification systems that are currently used to determine the nature of law school syllabi. For instance, are contracts and torts truly serviceable subject areas or should they be reclassified? An alternative classification, linking both contracts and torts together in a single subject, might well be more realistic. Another choice might be to reclassify the "rights" arising in contract and tort law and to distinguish these from the "remedies" associated with contracts and torts. This would encourage an intermeshing of related principles of law and, at the same time, would distinguish between legal rights and remedies. Nevertheless, the key issue is not whether these proposed classifications are suitable; rather, the issue is whether or not current course classifications are acceptable in the light of a dynamic and ever-growing range of competing alternatives.

Second, advocacy skills are often overstressed in law schools at the expense of other methods of teaching and learning.²¹ Law schools concentrate upon the appellate process: the students study appellate cases and the moot in simulated appellate courtrooms. But what attention is given to the pre-appellate activities of lawyers? Surely, skill in these areas as well is within the needs of the competent practitioner. Surely the aspirant lawyer should *not* be

20. See Stevens, *Democracy and The Legal Profession* (1976), 3 Learning and L. 12, no. 3; Carrington and Conley, *Alienation of Law Students* (1977), 75 Mich. L. Rev. 887; Weinstein, *Economic Scarcity as a Threat to Academic Freedom* (1977), 3 Learning and L. 29, no. 4; Botein, *Reflections on The New Humanism in Law* (1976), 22 Wayne L. Rev. 1295; Frankel, *Humanist Law: The Need for Change in Legal Education* (1976), Utah L. Rev. 39; Katz and Denbeaux, *Trust, Cynicism and Machiavellianism Among First Year Law Students* (1976), 53 J. Urb. L. 397; Mindes, *Forcing an Identity Crisis on Law Students* (1975), 2 Learning and L. 44., no. 3; Trakman, *Law Student Teachers: An Untapped Resource* (1979), 30 J. Leg. Ed.

21. But cf. Seymour, *Current Trends in Legal Education and The Legal Profession — An Advocate's View* (1976), 50 St. John's L. Rev. 434; C.L.E.P.R., *Law School Teaching Clinic: Plans and Pictures* (N.Y., 1977); Gould, *Law Schools Can Teach Courtroom Skills* (1976), N.Y.L.J. 1; Oleck, *Adversary Method of Law Teaching, Summarized* (1975), 27 J. Leg. Ed. 86.

trained almost exclusively in an appellate role when there are a multitude of non-appellate functions which the competent lawyer may be expected to perform.

Lawyers require far more than an ability to argue cases. They should know how to negotiate agreements, what strategies to employ in reaching consensus, and what instruments to use in resolving disputes in the absence of such consensus. They need to understand how to draft and interpret documents, and how to avoid ambiguities in the construction of such documents. Teaching appellate advocacy skills should *not* displace these very necessary components of the educational process. However, the greatest need of all is for an integrated approach towards professional competence. There is a call for cohesion in teaching and learning, for structure in law school programs, and for direction in the orientation of legal studies. Courses in law cannot evolve simply by osmosis, by mere chance, or by a teacher's whim. Methods of instruction cannot develop along isolated lines, ill-attuned to the dynamics of law practice and deficient as a means of advancing professional standards in law. Courses in law need a rationalized foundation. In practice, law courses are often poorly structured, they overlap with one another in substance and in content, and they frequently lack a systematized base. One solution is to teach fewer courses in our law schools, thereby reducing the overlap between them and eradicating those subjects which are deemed to be least significant or most repetitive. This systematization can be achieved in various ways: through the analysis of course content on a piecemeal basis, by means of course clustering, and by streaming courses in accordance with their educational relevance.

The piecemeal examination of law courses requires a close study of individual courses, their nature and content, and, in particular, their relevance vis-à-vis other courses and the educational design of the law school as a whole. Relevant questions include: what issues or topics does each course address? Are such topics or issues dealt with in other courses? How important are such issues and topics in and of themselves, and how important are they in relation to the educational design of the overall curriculum? For instance, a so-called advanced course in property law may be deemed to add little to the educational framework of the school if that course displaces or otherwise overlaps with other advanced and introductory courses in property.

Course clustering is the next stage in the process of curricular

examination. At this stage of reform, courses are grouped within various categories, such as substantive law categories (which would include family law), special skills categories (which would include negotiating and drafting clusters), or practice-oriented categories (which would include clinical law). The goal of this procedure is to determine the relevance of each course grouping, or cluster, in relation to the curriculum at large, and thereafter, the value of the members of each category. Thus, in a commercial law cluster, the absence of a commercial drafting component might lead either to the creation of a commercial drafting course or to the integration of drafting exercises within the existing cluster of commercial or, alternatively, drafting courses. So too, the absence, within existing law clusters, of students' experience in the interpretation of documents may give rise to a new cluster of courses devoted to interpretation itself, or an interpretation component may be added to existing clusters. Clustering, therefore, has this advantage: it creates a hierarchy of needs within law school programs. In so doing, the present haphazard and piecemeal evolution of law courses would be replaced by a process of logical assessment.

Nevertheless, the clustering and refinement of syllabi does introduce its own distinctive pitfalls and raises the following questions: how is clustering to take place? What clusters are to be chosen? How are law courses to be integrated within such clusters? Even more problematic is the question of what educational goals should underlie this clustering methodology.

The development of course clusters does require guidelines. Clusters can be devised on numerous bases — for example, within substantive or adjectival courses, as theoretical or practical subjects, or with an emphasis on descriptive or analytical content — and with diverse social-economic and political ends in mind. Thus, a cluster can have a multiple design: to train aspirant lawyers in a particular legal area, such as contract law; to provide information about contract law; to teach the rules and principles of contract law; to train students in the techniques of negotiating, drafting, and interpreting contracts; and to teach aspirant lawyers how to analyze the law of contracts and how to apply that law within theoretical and practical contexts. The cluster itself may consist of several or many courses in contract law, depending upon the nature, qualifications, and interests of the faculty and students, the number of existing courses within the cluster, the needs of competing clusters, and the overriding educational design of the law school. For instance,

courses on drafting or interpreting contracts may be omitted from the contracts cluster, due to the existence of alternative clusters which are devoted specifically to drafting or interpreting. The nature and content of each cluster, therefore, varies in accordance with the form of other clusters. No one cluster is immutable and no one cluster subsists for all time; rather, all are interdependent and all require periodic review.

Legal education presupposes a rationalized basis. The educational design mentioned above is one alternative; there are others. Yet course cohesion is necessary if educational viability is to be achieved. To deplete this cohesion in the interest of alleged academic freedom is to overstress the freedom of the teacher at the expense of the collective design. To do so is to institutionalize choices of individuals and to disregard our communal responsibilities as educational facilities.

VII. *Competence Today and Tomorrow*

The path towards professionally competent education lies, to some extent, in appreciating the multiple roles of lawyers today. The stereotypical all-knowing, all-seeing, and all-hearing legal practitioner, who can deal with all legal matters, no matter how complex or diverse their nature, is a myth. To perpetuate the myth is to ignore the realities of modern practice. It is to forget that lawyers are engaged in diplomatic and civil functions, in commerce and industry, and in public and private legal practice. To train lawyers to fulfill multiple functions without making distinctions as to skill and interest is to disregard the diversity of legal talent and the demand for a versatile legal profession. To unify our educational system within a confining mold is to stress superficiality at the expense of an in-depth training in law.²²

Inevitably, the development of professional competence in law

22. In general, see *Legal Education in a Changing World* (N.Y.: Int'l. Law Center, 1975); A. Reed, *Present Day Law Schools in the United States and Canada* (N.Y., 1976); *Symposium: Law in the Future: What are the Choices?* (1976), 51 Calif. St. B.J. 276; J.S. Auerbach, *Unequal Justice: Lawyers and Social Change in America* (N.Y., 1976); D. L. Horowitz, *The Jurocracy: Government Lawyers, Agency Programs, and Judicial Decisions* (Mass., 1977); C. Meyers, *Education of Present and Future Lawyers in Law and The American Future* (1976), 179 N.J.; Whitmore, *Are the Needs of the Community for Legal Services being met by our Universities?* (1975), 49 Aust. L.J. 315; Galinson, *Interviewing, Negotiating and Counseling* (1975), 27 J. Leg. Ed. 352.

will be determined by those who teach, practice, and adjudicate within the profession. How proficiently and ethically individuals conduct their legal affairs will depend on individual and collective moral concerns, social values, and self-respect itself. We cannot train the flagrantly unethical to be ethical, nor can we mold the inherently immoral into the indisputably moral. Certain evils that exist in society and in man cannot be resolved through legal education, professional example, or even the threat of punishment. Yet individual malfeasance is a collective responsibility. It is a duty which is borne by the educational and professional institutions that train individuals, scrutinize their conduct, and regulate their conformity with or deviation from acceptable behaviour. The duty to provide society with competent lawyers rests, to a noticeable degree, with law schools. They serve as chronological and institutional fathers; the professional is the product of their diligence and their involvement in the furtherance of legal knowledge. However, the duty to train is an ongoing and mutual function; it rests with the bar and the bench, and is never-ending.

The training of lawyers cannot evolve without reflection upon the evolution of society itself. Methods of legal education should embody, not gainsay, social interests. Educational programs should maximize, not minimize, community concern. To fulfill educational goals, a synthesis is needed to link social behaviour to a legal understanding of that behaviour. A scientific approach is required that fosters not only legal advance, but the educational embodiment of that advance.

VIII. *Reflections*

The search for professional competence in legal education is a journey down a long and winding road, filled with intersections and overpasses, detours and distractions. Yet, it is a route that should be followed if our educational system is to respond to public demands for a competent legal profession. To make any progress along the pathway is a formidable task, but the risk of inertia is damning. No branch of the legal profession is excluded from this journey; our responsibility to promote professional competence is interdependent. Together, we, as a profession, travel along the same pathway. Together we attain our communal ends, or fail.