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FROM SINK OR SWIM TO THE APPRENTICESHIP: CHOICES FOR LAWYER TRAINING

Lucy Isaki*

Our symposium today asks the question: Is there a gap in lawyer training to be narrowed? My answer is: Probably. Is it any greater than the gap that existed twenty or thirty years ago? I think not.

Law schools are graduating women and men well prepared *to begin* the practice of law. True, there is much that new law school graduates do not yet know. But in a short time—two to three years—most new law graduates gain the skills and substantive knowledge needed to be successful.

If this is true, how can we explain one judge's recent remark to the Washington State Bar Association Task Force Investigating Professional Qualifications of New Admittees that most of the lawyers who appear before her are not competent to try cases? There must be some basis for this harsh criticism of lawyers from a respected jurist. The MacCrate subcommittee that heard testimony from the legal profession concluded that there was "a fair amount of support for the proposition that law school graduates are not adequately prepared for their first jobs in law practice and that the gulf is widening as the practice becomes more complex and the range of skills more diverse."[1] The MacCrate Commission's Subcommittee recognized, however, that the historic role of law schools has been to bring students to the point where they are prepared *to become* competent practitioners under the supervision of experienced lawyers. Thus, we should not be asking a newly minted lawyer to try, without supervision, a complex 10(b)(5) case, or draft a software licensing agreement in uncharted legal waters. We should not be surprised if in trying a simple tort case, a new lawyer asks an awkward voir dire question, or in drafting a simple contract a new lawyer

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1. Section on Legal Educ. and Admissions to the Bar, American Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum* 386 (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter *MacCrate Report*]. What the judge and the subcommittee may have in common is that they both appear to draw their conclusions from a relatively limited set of observations. Before I would choose to describe lawyers as inadequately trained, I would want to know a great deal more about both the training and about the tasks that the lawyers are undertaking.

includes too much (or too little) contractual boiler plate. A few lawyers hit the ground running. Most do not. Once upon a time, when a judge observed the awkward voir dire or wild cross-examination, or a more experienced lawyer saw out of place contract boiler plate, the experienced judge or lawyer guided the newer lawyer and thus narrowed the gap.

It certainly is no great failure of our law schools or judges if this no longer takes place. New lawyers are prepared to begin the practice of law, with supervision. Many, however, are simply not receiving any meaningful supervision. What seems clear is that there is a growing clamor to take action to more quickly narrow the gap that has long existed, and for someone to provide more meaningful supervision to new lawyers.

To answer the question "what can we do about narrowing the gap," we need to look at some of the reasons that account for the growing recognition of the gap and a lack of on-the-job learning. First, there simply are more lawyers today. Judges no longer see the same lawyer two, three or four times a month. Once a year is the more likely frequency of appearance before the court by lawyers in civil practice. As a result, a judge may be less likely to form the kind of bond that previously might have permitted a relationship to develop in which constructive criticism was appropriate. Second, with increased court filings, judges themselves are very busy and they have less time for molding young talent. Third, as the legal community has expanded, lawyers simply have formed fewer collegial relationships with other lawyers. More and more an interaction with a lawyer in King County, Washington is a one shot deal. In short, we're becoming more like New York City or Los Angeles. The friendly advice from an opposing counsel that once might have taken place just does not take place with any regularity today. Another reason for a lack of collegiality is the increasing competitiveness among lawyers—a direct result of our growing numbers. One may choose not to counsel a lawyer whom one views as a competitor.

And then, of course, there are the economics of law practice. At salaries of forty to fifty thousand dollars a year, new lawyers are expected to produce large numbers of billable (and collectible) hours at an early stage. And, their supervisors also are expected to generate large numbers of billable and collectible hours. Supervisory lawyers may thus provide new lawyers with less guidance. The new lawyer is often expected to "just do it."

Should any of this dictate a radical change in law schools? No. Our law schools are doing a good job. This is not to say that law school curriculum should not be examined and modified on a regular basis. The law schools still have an obligation to train people to think rationally (like lawyers) and to prepare people to the point where, with supervision, they can *become* competent practitioners.[2] But it is the practicing bar that needs to recognize its obligation to assist new lawyers to become competent practitioners.

At a minimum, the practicing bar ought to ask every lawyer in a big or a small firm to closely examine how new lawyers are supervised. The sole practitioner who hires recent law grads to brief cases for the court, or to prepare motions and interrogatories, but who does not closely review the work or provide meaningful feedback to the new lawyer, should ask herself or himself if this practice makes sense. The medium or large size firm that refuses to reimburse new lawyers for training programs or allow training time to be "counted" towards a billable hour quota, similarly ought to ask whether this policy makes sense. And all lawyers need to look at whether, within today's economic reality, more mentored training could be provided. If law is to remain a learned profession, mentors need to step up and assist new lawyers.

The models for lawyer training range from what I have called the sink or swim model, to a true apprenticeship, the model that I have heard that our State Bar leadership has discussed as a possibility for Washington State. Sink or swim, the practice of turning over a matter or case to a new lawyer and letting the new lawyer "run with it," seemed to be in vogue 15 years ago, when there were accessible senior lawyers to respond to questions and a smaller community of lawyers. Law firms were proud to announce that the "cream rose to the top." One problem with this model was the cream was white—and most always male. The cream, however, did not rise to the top on its own accord. The cream had the help of more senior lawyers, persons who acted as mentors for up and coming young talent in our legal community. In the sink or swim model, a young lawyer grabbed a case or deal, dug in, found an accessible source of knowledge concerning the practical and the more complex legal aspects of the matter, and sought access to the client in order to win the client's confidence. This model works for a very small group of

2. It is my belief we ought not place upon our law schools the burden of totally revamping their curriculum to suit the practicing bar's idea of legal education. We are not in the business of legal education, we think about law school curriculum only on occasion, and while we should share our thoughts with the law schools, we should not dabble in that business.

people. As our legal community expanded, and a more diverse group of people entered the practice, too many potentially good lawyers were "sinking."

The response of the legal community was to organize more practical training programs. Programs that walked new lawyers through the mechanics of filing a lawsuit, drafting a contract or negotiating a deal. Yet, new lawyers still seemed to be ill-prepared to try a "real" case or negotiate a "real" deal. This model of training was a bit haphazard and still lacked the kind of friendly, mentored supervision that could make the difference. What next? More formal, in-house training programs were organized in larger firms; and the Washington State Bar set out to organize structured week-long or two week-long programs. All these programs were aimed at imparting a high level of practical skills to new lawyers. Indeed, the Washington State Bar Skills Training Program was recognized as a model program by the MacCrate Commission. It was discarded largely due to expense. In Washington, as elsewhere, lawyers were left once again to seek whatever on-the-job training they could find from a decreasing pool of mentors.

The leadership of our State Bar reacted to the perceived gap in lawyer training by suggesting that Washington State consider adoption of a Canadian/English style clerkship: a period of time prior to receipt of a full license, during which one must practice under supervision. This is a true apprenticeship model. Only two states have such a program. The apprenticeship model is not free of problems. Many states that used an apprenticeship model for lawyer training in the past have abandoned it. As the MacCrate Report notes, there are questions about the qualifications of mentors and about whether the mentors actually have the time to do the job. Further, new law graduates typically graduate with student loan debts in excess of twenty thousand dollars. They can ill afford low paying clerkships. If other states offer salaries above the clerkship salaries being offered in Washington State, our best graduates will go elsewhere and the best graduates of out-of-state schools will not come to Washington.

If we mandate clerkships, clerkships may go only to the cream of the crop. The movement we've made to encourage the employment of a broad range of law graduates—from the top of the class as well as the middle of the class and beyond—will be slowed. Further, and most importantly, we will be putting one more road block in the path of persons who are underrepresented in the Bar Association and in law firms: people of color, gay and lesbian lawyers, and physically

challenged lawyers. All this, because practicing lawyers are not taking the time to lend guidance to young lawyers.

The practicing bar needs to heed the wake-up call. Lawyers need to get back to basics: mentoring new lawyers. If it can't be done on the job, then we ought to be willing to fund a quality skills training program like the Washington State Skills Training Program.[3]

We need to encourage more lawyers to provide individual guidance to new lawyers. Without requiring a year long apprenticeship for new lawyers, could we not require lawyers practicing more than six years to provide guidance to one new lawyer every three years? The practicing lawyer could certify his or her work to the Bar and perhaps receive CLE credit for the supervisory work. In addition, no new lawyer should be permitted to appear in court—the first time—without a more experienced lawyer. This small requirement would put a minimal burden on a small or large law firm and would provide great benefit to the new lawyer. The new sole practitioner could be supervised by selecting a lawyer from a roster of more experienced attorneys who agree to accompany the new lawyer to court. It is not a perfect solution, but it goes a little way towards connecting the new lawyer with a more experienced lawyer.

The MacCrate Report's call for *shared* responsibility for lawyer training is, to me, recognition of importance of learning from mentors. Lawyers who refuse to recognize the continuum of legal education, who say economics won't permit continued tutoring are doing a disservice to the profession. Practicing lawyers need to accept the challenge to share responsibility for legal education.

3. The sink or swim model is not acceptable. The addition of some formal in-house training will help new lawyers, but it isn't the whole answer. Law firms are about the business of practicing law, training done in-house is valuable, but a formal, high quality skills training program provided by a law school or by the Bar will be of more value.