

Law School Curriculum, Training Law Students, and the Vitality of the Profession: The Judicial Perspective

Saturday, July 28, 2001
Closing Session

Professor Bradley Clary: We're ready for our closing plenary session of this 2001 conference. The final plenary panel is here. At my far right is Justice Elizabeth Lacy of the Virginia Supreme Court; next to her is Judge Paul Michel of the Federal Circuit Court of Appeals; sitting here is Judge John Tunheim of the U.S. District Court in Minneapolis; and presiding as the moderator is Professor Cunyon Gordon. Professor, I'll turn it over to you.

Professor Cunyon Gordon: I love that when you say presiding over the judges. I love it.

In keeping with the theme of erasing lines, the judges preferred to be closer to you so we can have some intimacy here and some candid conversation. [The panelists had moved the dais closer to the audience.] I'm looking forward to this and thank you for inviting me. I am pleased to be here with such esteemed jurists.

Let me make a prefatory remark and say that the legal academy has been under siege, some would say, from the practicing bar and some fairly high-ranking members of the bench, about a perceived failure of the academy to produce the kind of graduates that you want. And I really don't want you to name names, but in hearing from the bench, I mean, you're not just jurists—you are one of the consumers and a constituent group of what the law schools produce. So, I'd like to start out by asking, What do you think of the product? Justice Lacy.

Justice Elizabeth Lacy: Well, I think we see two kinds of products. We see the initial product in terms of the law students or law graduates that we hire as our clerks, and then we see your more long-term product in terms of the attorneys who appear before us. I'd like to say there's a big difference in those two, although I'm not sure there always is.

But let me talk for just a minute about the students who come before us, and there are a lot of different ways we can talk about that. They are very bright eyed and bushy tailed, all of them, and we appreciate that. I

do see very distinct levels of competence, ranging from “highly competent” to “needs a lot of work.” I say that not as a reflection on the academy necessarily, and not as a reflection on the student, but this for many of them is their first real-world experience. My biggest problem is that, as bright as they are talking to me, their ability to communicate through the written word is difficult and often very “iffy.” And with the volume we have in our chambers, and I think I say fairly for all three of us, much of that communication is written these days. Much of what they have to do is read other people’s work and tell me about it, in writing. And it’s not very consistent.

One of the things I do, before I hire a law clerk, is to give a writing test. I cull through, pick five or six applicants, and have them write. They are given a brief and a brief in opposition. I ask them to tell me the facts, the issues, and the positions that each side takes. And, inevitably, the writing exercise is the deciding factor and often not who would have otherwise been my first choice.

Professor Gordon: At the next level you will have them return those briefs to their legal writing professor. Judge Michel.

Judge Paul Michel: I’d have to say that while there are many reasons, the majority of the written work that I see, both from my own law clerks and from lawyers with more experience, is disappointing. I’d say the majority is inadequate to the case at hand, the needs of the client, and the needs of the court. And I think that the shortfall has some serious consequences. The one for the clients is obvious, because there’s sort of an overburden of case loads that almost all appellate courts have now, and trial courts as well I’m sure. It’s very hard to make up for shortcomings in the presentation of one side. So, we pretty much have to deal with what we get. And, therefore, the client’s interests can be jeopardized by inadequate performance.

With respect to law clerks, I now have gotten sufficiently discouraged that I’m hiring very few law clerks right out of law school. I find that if they’ve been trained by a district court judge, like Judge Tunheim, they’re vastly better than they would have been otherwise. And I often try to get people who have been trained by people like Cunyon Gordon in a top law firm. Sometimes I can get both, and that gives me an even greater level of confidence that I’ll get high speed, high accuracy, highly dependable work from the law clerk. And when I don’t, it really severely impacts not only the quality and correctness of what the panels on which I sit can do, but it also ends up being a determinant about whether I have any personal life, whether I get home, you know, before 11:00 p.m. So, I have kind of strong feelings.

I do think that there’s plenty of talent, plenty of brains, plenty of intensity and industry. I think what’s lacking is just sheer experience in

doing the kind of writing that we need. And I'm sure in your hands they're doing a lot of just that and they're better off for your efforts. But I must say that the whole society is in a way making your jobs harder, because as far as I can see, nobody gets enough precise writing experience at home, in primary school, in middle school, in high school, in college, or in law school. So, it's a catch-up game and that's always the hardest battle to win.

Professor Gordon: Judge Michel's comments suggest an analogy to a football game because it's a handoff, where the student from college is handed off to the law school with a certain amount of preparation, and the law school hands off the student to a clerkship or to the profession. These handoffs have to be smooth. He suggests that perhaps the latter handoff could be smoother, and that's what I'm hoping we'll gain some more insight into. Judge Tunheim, you've been identified now as the person on success.

Judge John Tunheim: That's a sobering thought.

Professor Gordon: What are you doing?

Judge Tunheim: First on the subject of law clerks. You know, our work is increasingly complex at the federal district court level. There's a lot of work there, and we need to have law clerks who can work quickly. We all know lawyers who are terrific lawyers, but they have to think about a problem for a long time before they can come up with an answer, and we don't really have time for that at the district court level. It's a very intense research and writing experience, in addition to advising the judge.

So, at base, I simply need very smart, young lawyers coming out of law school who have had training in the right kinds of courses. We see difficult issues every day that are wrapped in different ways so that you can't find the answer in a casebook or a *Federal Reporter* or some such place. The new issues that come up every day are surprising to me, even after nearly six years on the bench. They require much intelligence and, I think, creativity to help judges resolve them.

I mean, think about my job. I spend most of every day in the courtroom. I probably hear three or four civil motions a week. The law clerks do a lot of work on the civil motions, research and writing, drafting opinions for me. And I do my homework essentially at night, reading for the next day and reading briefs. And so, I need to have law clerks who are really terrific. I've had wonderful luck thus far, but the research and the writing is what I'm looking for primarily. And, frankly, I look for experiences that I know are more of a guarantee that they're going to be good law clerks. The law review experience is one that is a very good

predictor for me. It's one that I'm familiar with because I was involved in that. The level of sophistication there is very helpful.

I also rely on professors whom I trust to give me good, solid recommendations. I have a lot of externs working in my office during the school year, which I highly recommend for law students. It's a great opportunity to spend several months in the chambers helping out. And, occasionally, I find someone who is terrific and he or she comes back to be a law clerk for me.

In terms of basic writing, which is the other topic we're talking about right now, there's a lot of need for improvement in lawyers' writing skills. It's not necessarily improvement in legal writing as we traditionally know that concept. In many respects, it's simply an improvement in writing. To be able to write more concisely, to be able to write in a fashion that quickly and efficiently communicates an argument or an idea in a nonrepetitive fashion. It's difficult. It's far more difficult to write a very good ten-page brief than it is to write a fifty-page brief. But when I sit down at night at ten o'clock or whatever to read the briefs for the next day, and I usually have much of the record along with me, and I'm facing several hundred pages of reading, that's not going to be very effective or efficient at convincing me what the case is all about.

So, bring in the English teachers and bring in the people who can teach law students how to write and write well, not necessarily the *legal* writing. They will get that through their first-year legal writing courses. They'll get that through writing exams. They'll understand how to frame an issue. But how to write well and quickly and precisely is, I think, a skill that is very hard to find today.

Professor Gordon: It sounds as if you're saying, all of you are saying, that you could have a better set of basic, not even basic, but well-honed skills in analysis and presentation and writing, but you don't expect them to be able to practice law, do you, when they come before you?

Justice Lacy: I don't. I mean, I think that although law firms particularly have changed over the years and maybe don't have the same amount of time to work with young lawyers and to do the mentoring that we've talked about, still these are first-year lawyers and there is going to have to be some level of training.

But I think to some extent, while I agree with Judge Tunheim that just plain English is important, I do question the extent to which students really do know how to engage in some of the legal analysis. Far too often I see "case case case case, answer; case case case case, I'm right, they're wrong" without the real development of reading through those cases and seeing how, especially in our court, we're developing the law and where the next step is and how the facts and the rationale of the prior cases lend themselves to the results a particular advocate wants.

I think that's a problem. I think that the electronic research supports that because it's so easy to find the phrase, the word, the sentence that says exactly what you want. Unfortunately, the students didn't read the case that reversed the court they are quoting. And that perhaps is the extreme, although, I've had two briefs in the last couple of years where that's been precisely what happened.

So, I do want to say that while the English, the actual structure, organization, and all of that are important elements, the analysis still must be there. It seems to me that the lawyers, the young lawyers I get, are still looking for the black-letter law. And when they find that in a case, they apply it. They often fail to provide the analysis and explain the precedent. I see problems with developing that analytical skill through the writing. Now, maybe they have the organizational tools and if you talk to them orally they can do it. But that transition to the written communication is something that should not be overlooked. Whether it's a trial memorandum they're working on or a legal brief, I think that is a weakness.

Professor Gordon: Let me step back a minute and ask, first of all, because I don't know whether this is the first time that you as judges have been asked to talk particularly about law school curricula and about the product that law schools are producing. What role, if any, do you think you ought to have or could have, either as individuals or as the bench in general, with shaping where law schools go and identifying the things that you want out of the law school? I know, "Objection, multiple question."

Judge Tunheim: Well, let me take a quick crack at that question. I think judges can and should have a role in assisting law schools. It's an assistance role more than anything else. We see many of the products of your law schools in court on a daily basis. We see where the needs are, where the problems are. I mean, for one example, I would like to see far more development in law schools of courses on subjects such as professionalism and how to be a civil, in that civil sense of the word, lawyer.

You need to spend time in law schools teaching professionalism and the idea that law is a profession and a calling. Although it is increasingly becoming a business, some of us can rue that occasion; new lawyers need to know that they need to be professional and courteous. The problem is that when they come out of law school without that kind of training, what they're going to do is emulate those whom they are up against, or with, in their practices right away.

Professor Gordon: Justice Lacy, you mentioned when we were talking before about some of the incivility. Is that—

Justice Lacy: Yes. Well, I think you all might be surprised at the number of briefs, this is on the appellate level—it isn't just the random trial court—the number of briefs that have extensive ad hominem attacks. Of course, the motions for rehearing attack the bench. And it's done by everyone, even Attorneys General's offices, which really surprises me. Now to me, that's the kind of brief that you write, you put it in your drawer, and then you write the one you're going to present.

But I agree entirely with Judge Tunheim, because I think that the whole idea of professionalism is one that the people sitting in this room have the opportunity to affect in a way that nobody else does. Kids today are coming into law school with a much better perception of lawyers, or they think, than perhaps we did because of the number of TV shows, everything from "Court TV" to "The Practice." And they have a perception of how lawyers should be trying cases, which I think no one in this room would necessarily agree with. But unless the people in this room talk about professionalism and explain that it is not a street-fighter-way of earning a living, or shouldn't be, I think people are going to think that's the way—the toughest guy wins or the toughest gal wins.

I also think, to build on that, that it isn't just the bench that should have a relationship with the law school. We've got the bench, the bar, and the law school. It's like a three-legged stool and all three parts of the profession should be talking to each other. I would like to see a much greater involvement of all of you in your state bar organizations, in our Inns of Court organization, in other types of activities in which there are opportunities for the profession as a whole and all parts of it. And I say that not just from a policy standpoint, but I think if you could get involved in these types of activities, you could make some connection with the lawyers and judges in your community.

Judge Tunheim mentioned professors leading him to good students. If you have good people who have the skills that you know I need, I would like to hear from you, just like I hear from some constitutional law professor.

Additionally, make contacts with the hiring partners in the law firms. Don't just leave that to your career development office in the law school. Make those bridges, because those bridges will also help, I think, with something that Dean Sullivan said this morning about making the law firms and the lawyers and the judges aware of the strength of those kinds of students—and not just the top five or ten percent. It's important to take the initiative in developing those professional relationships outside of academia.

Professor Gordon: Judge Michel, I know that you do a lot of speaking to law groups and you do—I'm sure all of you do—moot court. Is there something more that you would be willing to do were you brought into the interior of the law school?

Judge Michel: Sure. I think many judges would be quite interested in returning, particularly to their own law school or to one in the town where they now serve as a judge if their own law school is elsewhere, in any number of capacities—to meet with students, to judge moot court competitions, to teach legal writing classes, to be on advisory boards that deans sometimes form. I think practitioners would also be willing to do that—and not only at a showcase event.

For example, I happen to have gone to law school at the University of Virginia, and in several recent years, the legal writing teachers there recruited a very large number of mid- and upper-level practitioners and a considerable number of judges to come back and work with students in a moot court type of exercise that was part of the first-year required legal writing course. They got a tremendous turnout of people who you would think would be too busy, too highly paid, too self-impressed and whatnot, because I think all of us forever remember what it was like to be a law student. We have a tremendous identification with today's students and with today's teachers, and we respond to the invitations.

I think just as we would like to see many of you come out of the academy even more than at present and participate more in state bar activities and American Bar Association activities and local bar activities and Inns of Court and other things that have been mentioned, the street ought to be a two-way street. And we the judges and we the practicing lawyers ought to be spending a lot more time mixing it up with law school faculty, law students, and law student organizations. But we are sufficiently busy and sufficiently desperate to get our work done that if we aren't invited, we're unlikely to come knocking at the door and say, "Please, let us come over to the school and do something."

Professor Gordon: There is a perceived tendency on the part of the academy to insulate itself from the kind of scruff that's out there practicing law, and is that something that more relationships, or better relationships, on the individual level will change? Judge Tunheim.

Judge Tunheim: I think it certainly will, and I encourage it. Like my colleagues up here, I do spend a lot of time over here at this law school in a lot of different functions. I usually always say yes when I'm asked and I rarely, if ever, regret the experience. I do bring civil motions over here to have them argued by lawyers in this very room for first-year civil procedure classes. I've done that for quite a number of years now. And it's a great experience for me, too, because it's interesting to see what the students are picking up on and to hear about the class discussions afterwards, about the lawyers and their styles. It's a real live motion, so it's something very interesting for the students to see.

I encourage you to set up these types of activities, such as an actual court hearing in your law school, which is easy to set up. I know the

Eighth Circuit Court of Appeals makes it a point of hearing arguments in each of the law schools in the circuit on a fairly regular basis. They move around. I don't know how often they get around to each one, but they do that. That's a great experience. Then the Minnesota Supreme Court comes over here and hears arguments, I think, on a regular basis. I've never been asked by the other law schools in Minneapolis and St. Paul to come over, but I certainly would with a motion if asked. I think that's a good idea.

Professor Gordon: It sounds as if what we're getting are some models of some things that might be tried to have more of a relationship so we can erase some of the lines between the academy and the bench. Judge Michel talked about his day as at the University of Virginia. Justice Lacy, has the Virginia Supreme Court done anything that you're particularly proud of that you want to share?

Justice Lacy: Oh, we've done lots of things. "Proud" is the operative word there. I must say we don't travel around. We have seven law schools in the state and it's a little hard—and three of them are public law schools. It's a little difficult to make the circuit. But I would like to mention something that we have found very helpful. We have an actual section of our state bar called "Education of Lawyers." The members are the deans and another representative from each one of the law schools and members of the bench and the bar. We have really utilized this section as a wonderful communication tool. I won't take up your time with a lot of the programs that we've done—but it has really opened up the communication between the deans within our state, and also between the deans and the practicing bar.

Now, as a result of that, second semester of freshmen year we have a group of very well-known judges and lawyers throughout the state who go to the law schools for a half day or full day of mandatory discussions about professionalism, about issues of getting ready to take the bar, about character, about the responsibilities that one undertakes when one becomes a lawyer. There are breakout sessions. At first the deans and the professors were saying, "Okay, here they come again to tell us how to teach lawyers. We know; that's our job; that's not their job. We don't have time. We don't want to do this. And it's a required day. No way, we're too busy." All of that has changed. It has worked really well.

Professor Gordon: Is this kind of mistrust or tension between the academy and the practicing bar and the bench something that is "mendable"? I mean, it sounds like you're saying it can be mended and the conversation can go two ways, in two directions. I think you don't want to design the law school curriculum, right?

Justice Lacy: No, no, no, especially after the last two days.

Professor Gordon: Justice Lacy teaches legal writing. Judge Michel has taught. So, you've been inside, you've been on the bench, and I take it you were all at one point law students.

Judge Michel: Still.

Professor Gordon: What package of things do you think students should be familiar with on the day they cross the stage? Obviously, they can't at that point write you a brief, but what do you think they should be able to do? Judge Michel.

Judge Michel: I think two things are absolutely crucial that don't get enough attention, maybe three. The first is the ability, and Justice Lacy touched on this, to mine the factual content of the case or the record and integrate it with the law. I see so many briefs that are just a long, meandering excursion from one legal rule and doctrine and one case and one statute to another. They never quite marry up the facts of the case. It seems to me that every graduating law student should be able to master and marshal the factual content of a case and use it effectively.

The second thing is that every graduating law student, I think, should be able to properly and accurately and effectively employ authority in an analytic manner—whether it's a memo or trial brief or appellate brief isn't so important. I must say that about three-quarters of most briefs that I read amounts to little more than a kind of necklace of strung-together dicta. And, so, I very much resonate to the comment made by Justice Lacy.

And the third thing is that most of the young lawyers, and even the older lawyers, pay inadequate attention to the intersection of civil procedure, evidence, local court rules, basic rules of litigation like waiver and harmless error, and things like that. And there's way too little appreciation by most young lawyers, it seems to me, of the importance of things like the procedural posture—is this a trial or is this summary judgment or is this a motion to dismiss that got granted? Who had the burden of proof? Who had the burden of going forward? What is the standard of proof? Is this an elevated standard of proof or is this a mere preponderance? All these basic fundamentals of the process seem to be insufficiently grasped by the students.

So, I think there are many kinds of writing—drafting conveyances, drafting very technical contracts, and some other kinds of legal writing—that are quite important, but aren't realistic for graduating students to have more than a passing exposure to. But I think if you get down to sort of the basic legal memo, and I'd even say the basic trial or appellate brief, I think every graduating law student can and should be able to write that

kind of paper at quite a competent level. That's what I mean by the proper handoff. I think the law firms and the judges and the rest can take it from there, but if we don't get somebody who can write a good brief, we have a problem.

Professor Gordon: Judge Michel, what do you do with the people you get as clerks? You can't reeducate the people who appear before you, I think, but you can do something with your clerks. What kinds of things work for you to develop them?

Judge Michel: Well, I use a very simple, very old-fashioned technique and it seems to work very well. I get a draft and I massively rewrite it all around the margins and in-between the lines and on the backs of the pages and I give it back to the young lawyer. Then it gets redone, and it comes back to me and, like a tennis match, it goes back and forth, and back and forth, and back and forth, until neither of us can make it any better. Then I send it to the other two judges on the panel and they make it better. It's very laborious, but I must say I see huge change from day one to day 365 a year later. We actually have a lot of clerks who stay for two years and we see even more change in them.

So, I use this very simple technique. I haven't been able to invent a better one. It seems to work well, based on what I perceive to be the tremendous growth of the young lawyers. And I think you must use similar techniques and they grow under your tutelage. I just think there needs to be more of it. If I had some magical powers, I would say you're on the right track and even probably a lot of the innovation that's in law school in techniques and curriculum is probably in the right direction, but you just need a lot more of it.

Professor Gordon: Is there something that should underlie all of what they're getting in law school—whether it's theory or doctrine or practical skills? Judge Tunheim.

Judge Tunheim: Well, underlying it all is the ability to communicate effectively whether in writing or orally. And you can learn a lot of substance in law school, and a lot of substance is taught, but there is that translation of that substance into effective advocacy, which is easy for some and very difficult for others.

One thought that I had is, and I'm not sure how many law schools do this and how many legal writing courses have this kind of a flavor, simply bringing in lawyers or judges and talk about what particularly the judges would like to see in a brief. How often is that done? When I remember back, I was told as a first-year law student how to write a legal memorandum and then how to write a brief, and these were based on examples and a student legal writing instructor telling me what to do and

correcting what I did and saying what was wrong. But never was there anything about what judges want or what clients need. That is another way law schools can interact a little bit more with the real world—to take perhaps what theoretically you think is part of a good brief or a good legal memorandum, and turn that into what is practically wanted by the community, the clients, the judges, the readers of the efforts of the students.

Judge Michel: Also, judges agree with one another to an extremely high extent. It doesn't matter whether I'm talking to federal judges, state judges, intermediate appellate judges, trial judges, supreme court judges, judges on my courts, judges on other circuit courts. The degree of unanimity is about ninety percent, maybe higher, on everything we like and everything we hate, and we grouse quite a lot among ourselves. Part of the reason I go around so much and talk to law students or lawyers' groups or anybody who will invite me and listen to me is I think we have an obligation not to just complain privately, but to provide feedback to the people who write briefs for a living or law students who mostly will be writing briefs or other legal papers. But it's not true, as some occasional articles suggest, that it's all highly personal and what one judge likes will be totally useless to another. That idea is wildly overstated when we are so close to unanimity—it's just amazing.

Judge Tunheim: One other point about the practice of law, and I don't recall discussion of this issue ever in law school, not once, not one mention of the issue, and that is: As a practicing lawyer, what is your strategy for winning a case or for obtaining justice or for prevailing in the end? I found that the most fascinating part of practicing law was to take a problem and figure out a strategy, a winning strategy or a strategy that could allow the least harm or some kind of good outcome for the client. And I don't think—well, maybe things have changed in law school, but I've never heard law school discussions about the strategy of how you take a problem and figure out how to resolve it. How do you set it up in court in a way that will enable you to win in the end? That is one of the most important points about lawyering, and to me it was one of the most fascinating parts of it, but I heard nothing about that in law school.

Professor Gordon: Judge Tunheim, what you have done to take that information, that insight, back out into the—

Judge Tunheim: I talked about it a lot.

Professor Gordon: Judge Michel said that the private grouching has to stop so we get the cross pollination.

[To the audience]: The judges did say, invite them in. Invite them in there. Invite them to talk to faculty, to talk to you, to let the academy know what they want. But, again, they're not going to go intruding. You know how academics can feel about intruders. So, they'll have to be invitees.

Justice Lacy: I want to say, too, I think there's a huge challenge to law schools today generally since a good number of your students by the end of their second semester, even first semester second year, know where they're going to work, and certainly by the end of their second summer they know where they're going to work. You don't have students very long. They're students for maybe that first year. So, the challenge to incorporate these kinds of skills when nobody wants to write—people don't like to write—into classes throughout their time in law school is very difficult. It's difficult to keep their attention. I appreciate that thought. I mean, I just think it's totally different than when I was in law school. So, to the extent we can help with that, I hope we do.

Audience Question: How much does unprofessional writing—such as the ad hominem attacks you mentioned earlier—affect the outcome of a case?

Justice Lacy: First of all, I don't think it has much to do with whether they win or lose, unfortunately. I would like it to, but we really don't operate that way. It actually is a topic of discussion I think on many appellate benches. What we don't really want to do is put footnotes in opinions and things like that. That puts us on the same level. But certainly addressing it, we have no problem. A lot of my colleagues address it in forums such as this, but they are also beginning to make comments or reports to the state bar with regard to disciplinary action, to impose sanctions for something that is very bad.

I mentioned Attorneys General's offices because they, at least in our court, appear all the time. We have begun making comments without identifying people, but to the chief deputies, we ask them to please review those briefs. We think they are inappropriate. We think it's very bad for their senior associates and senior members to allow that kind of work to go in. And we speak to those privately at the law firms about it because it is a very distressing thing.

But if you have a bad case, using bad or good words isn't going to help you. It doesn't affect the outcome.

Professor Gordon: I've heard that referred to as the unwritten tradition, teaching values and trust and respect. I think the judges are willing to mention it and talk about it and hopefully something will be done.

Judge Tunheim: Just a couple of comments on that. I do tell lawyers when I think they've gone overboard in their briefs—with the idea that if I don't say something, then it's going to just get worse next time. I will tell you that it doesn't do them any good. It doesn't raise the stakes or raise my level of interest in what they're writing about. And usually for the case itself, it just has no impact one way or the other. I typically will ignore that part of the writing if it gets too extreme.

But I do make it a practice of saying to counsel in the courtroom that I don't appreciate those types of charges being made in a brief, or even an argument, unless they really are clearly well founded, and they rarely are. They're usually done from a tactical standpoint to try to get some edge on some particular issue and it's really inappropriate in most instances. Sometimes it's proper, unfortunately, because something wrong has been done.

Judge Michel: There's another similar problem, which I'm going to call distortion, that I think plays out very differently. If there is distortion in the use of authority or description of the facts or description of the rulings by the tribunal below, I think that is an even more serious problem. That isn't just irritating and irrelevant, it can contaminate the whole discourse between the court and the advocate. And I think that it can affect outcome, and I think it always is adverse to the distorter and that person's client. I think we start to lose confidence in individual lawyers, and if they're "repeat appearers," they're in really big trouble the next time they come back.

And I have found that if I discover halfway through somebody's brief some serious distortions, plural, I read the rest of the brief, but basically I'm so scared of these people at this point that I don't trust much of what I read. So, I think in the distortion category, as opposed to the ad hominem attacks, the stakes are higher, the consequences are worse, and the effects on the lawyer and the client are very adverse. It's amazing that it's as common as it is, because it's so counterproductive.

Judge Tunheim: Lawyers can lose the trust of judges quite quickly. The bar is small enough here in Minnesota that in most courts you see the same lawyers time and time again. If they engage in that type of activity on a regular basis, you lose trust in them. You question in your mind what else they have to say. I don't understand why they do it. Or why some of them give my staff a rough time—like my calendar clerk, who is trying very hard to schedule a lot of different things and working on a number of other things. Even the mere fact of not calling her back for a week, or being very difficult with her, or being angry with her, who do you think she tells about that first? It's me. And, you know, I hear about that all the time. So, that's a very common problem that lawyers have.

Justice Lacy: I think, too, it goes the other way. I know that there are lawyers who appear before us on some kind of periodic basis who are very good, and they write very good briefs. I see their name on the brief and I think, great, I don't have to do the extra work. So, there is a real value that attaches, both negative and positive.

Professor Gordon: I think on those briefs they should have to identify all of their faculty, everyone who taught them so that you know exactly who they are.

Audience Question: What do you think about a course on judicial clerking?

Judge Tunheim: I think it could be worthwhile. I don't know that any of my clerks have ever taken a course like that. I don't think any of them have or I would have heard about it. But I think it's worth experimenting with classes that teach that—maybe in a seminar format. It's for law clerk preparation, but also preparation for law students to become judges, mediators, arbitrators. I mean, if you look at students coming out of law school today, some of them will become judges, and not any of them will become judges with any kind of training for being a judge. Most of them will be mediators in some sense. Some might be qualified mediators and go through training for that. More and more lawyers are doing that today and more and more will in the future, because that's really a way in which law is evolving. Many of them will be law clerks, particularly on the state court bench. There are a lot of law clerk openings.

A course on resolving disputes could focus on a judge's job and what judges look at, on what arbitrators look at, and what mediators look at, and, frankly, on what lawyers look at when they have to take a case and decide how to be persuasive in front of a judge. You can help replicate the experience that some law students get when they're law clerks—when they do have that one-on-one relationship with a judge, which I think is very helpful for their later practice. But you can do it for a larger group of people in the context of a class and I think that should be done—or at least tried.

Justice Lacy: I don't know. I never had someone who came through a seminar like that. And I don't want to be in any way raining on creativity, but on the appellate level, the way clerks are used varies so dramatically between judges and between courts that other than some of the very basic things that we've been talking about in terms of writing and analysis, getting the people just to generally know about those types of things, I'm not so sure that there would be a way in which you could train someone to come into my chambers unless you've got one of my old clerks to say this is how she does it, only to find out this year I decided to do it differently. Again, I don't want to say that's not a good idea, but I think

that clerks do know a year ahead of time, along with a lot of other people. Well, federal clerks know about a month after they've been accepted to law school.

Judge Tunheim: It's actually before they get accepted to law school now.

Justice Lacy: So, let me put a plug in for state clerks, please. But I do think that there would be some advantage and some helpfulness to make that last semester perhaps interesting if you could do a little bit along that line, but as a full seminar—I don't know, because we use the clerks so differently.

Judge Michel: One thing I would like to see is more recommendations from faculty members who really know a young lawyer well. The vast majority of the letters that I get are form letters. I mean, a professor who barely knows the young man or woman will say the stock things about how they were well prepared in class and they were very bright and so on and so on. And I'm very skeptical in this fourteenth year on the bench of those kinds of letters. By contrast, if somebody, a legal writing director or whomever, anywhere on the faculty, has a really close-up, detailed knowledge of how somebody can write and think, that has a huge and increased credibility with me.

I think that you may have more power when you consider the full set of opportunities in state trial courts, state intermediate, and federal courts. Forget about the federal courts of appeals and Supreme Court; that's a little bit of a different world. But there are lots of opportunities that are just as good for the young lawyers. And I think you have a lot of credibility, all of you in this room, especially where you start to develop relationships with particular judges, as obviously many of you have done, and I would encourage you to do that more.

If Amy Sloan calls me up and says, "This kid is the best kid I ever had here," then I'm going to hire that kid because I know her, I trust her, and I can rely on her recommendation. Most of the recommendations I get I really can't rely on. It's scary.

Professor Gordon: It certainly would not hurt the currency of legal writing directors and legal writing professors to be in the clerk-making business. I mean, that is certainly one of the notches that certain professors like to have in their belts, how many people they've placed. You can do it. These judges are telling you that you can do it.

Justice Lacy: Yes, please contact us. Pick up the phone. I mean, why wouldn't you if you had a good student whom you knew was applying to Judge Michel, why wouldn't you call him and say I saw you at the ALWD

Conference and I have a recommendation? But you should call other judges, too.

Judge Tunheim: It's the writing and research skills that we're really very interested in, and that's why you should be contacting us. I get letters from professors and they talk about how this student was always the best-prepared in class and received one of the best grades in class. Well, fine, that's okay. But those are really just standard letters with standard recommendations.

The professors whose letters I look at most closely are the ones who are writing on behalf of a research assistant. Someone the professor worked with over a period of time, observing the student's research and writing skills. And I've gotten to the point where I can tell what is an excellent recommendation and what is one of those more formulaic ones. But when you think about it, I get over a thousand applications each year for one position. And, so, I rely on letters and the more personal approaches from law professors.

Justice Lacy: A student's odds are better in state court.

Judge Tunheim: That's right.

Justice Lacy: We only have one clerk each. That's the down side.

Judge Michel: I get three.

Professor Gordon: Judge Michel gets three.

Judge Tunheim: I only get two.

Justice Lacy: Have we given you a sense of how desperate we are for people who can really write and analyze?

Audience Speaker: Yes.

Justice Lacy: I believe Judge Michel said, or maybe Judge Tunheim said, that ninety percent of the judges we talk to share that desperation. You might get one of those ten percent. But, I think I can say without hesitation that no one is going to say: "Just who do you think you are?"

Professor Gordon: Justice Lacy did say earlier, though, that it's better if you make phone calls over time and build some relationships, so a recommendation isn't just coming out of the blue.

Justice Lacy: Whenever that's possible. In your own geographical area, I think you should build up those relationships. But if you have a student who is applying someplace else, you should still contact the judge and explain that you teach at such and such law school, and that you have a recommendation.

Professor Gordon: One more question.

Audience Question: Do you speak with deans about the skills you are seeing—or not seeing—from their students?

Judge Michel: We aren't shy with deans when we get a chance to talk, but we don't always get the chances that we might like to have. And, again, I feel, at least myself, reluctant just to barge in on Dean X and say, "Let me tell you four or five things that are on the top of my mind." But on the other hand, given a slight opening at a conference or being on a panel discussion together or at state bar activity together, then we do provide feedback and we tell the truth. We tell what we really think. And I think most deans are fairly receptive to it. Maybe it varies a little from circumstance to circumstance. But a lot of it—a lot of the problem I think comes from the artificial separation between skills courses, or clinical courses, and doctrinal courses, and between the academy, and the bar and the practice. I think that anything we can do to start bridging over those walls, the better off we're all going to be down the road.

Judge Tunheim: One thing that our bench does, the federal district court bench in Minnesota—which is seven active judges and then several senior judges who are still quite active—we meet every year, once a year, for an afternoon meeting with the three local law school deans and then we have dinner afterwards. So, we're together for maybe five or six hours. We always talk about law school, law clerks. We always talk about curriculum. We always talk about ideas. And I tell you, the judges are not lacking for ideas that are thrown out to the deans. And usually the deans are very—they're appreciative. They're not saying, "No, that's a horrible idea," even though they might be thinking that. I have found it to be a very effective meeting. And we really truly do not miss the event. We do it once a year and we get together for a good long period of time.

Professor Gordon: Where did the impetus for that come from? Did it come from the chief judge or did it come from the schools?

Judge Tunheim: I think it probably came from a meeting, a chance meeting at one point between the chief judge and one of the law school deans suggesting this would be a good idea, and it stuck. It's been going on for

quite some time through a number of different deans who have come in. It's a very good meeting. I enjoy it a lot.

Professor Gordon: We're not going to take anymore questions. I'm going to give the panel one chance to answer my question of the year, and it came from Judge Sheldon. I'm going to start with Judge Michel. If you were the Czar of the World of Law, what would you like to see us implement first?

Judge Michel: I would like to see writing permeate the three-year law school experience. And you would know better how to do it. I don't know the exact technique or the exact method or schedule, but I know that it's needed. Not a little more writing, tons more writing from the beginning of law school until the end. That's what I would do if I had powers that I don't.

Professor Gordon: Justice Lacy, you have all the powers you want.

Justice Lacy: Well, certainly I don't disagree with Judge Michel, but I would like to add something else, and I guess I alluded to it earlier. I would like to let law students be law students longer than they are and let them have the opportunity to be open to more of the aspects of the law school experience and the legal profession than they have right now. It's such a frantic existence. In doing that, I would like to instill or recapture, reinstill, in them the real privilege and responsibility that they are entering by being a law student and eventually a practicing lawyer. They need to appreciate the oath that they take and how important they are, not just to their clients, but to the way we live in this country, our form of government. And it's more than earning a living; it's a wonderful, serving profession. We need to provide a way to have *that* be a greater part of the law school experience than there's time for right now.

Professor Gordon: Wow. Judge Tunheim.

Judge Tunheim: Well, I guess several points. One is that—and I think this is true for lawyers many years after they leave law school—they should never stop learning how to be better writers. You can always do better. You can always learn more about writing. So, I think I agree with Judge Michel with respect to writing throughout law school. I think that's a good idea, but I'd like to see more just plain writing instruction as opposed to just the legal writing. The legal writing is important. Obviously, that's what we will see, but an interesting brief is a wonder to behold. I don't see too many of them, I will tell you that, and oftentimes, given my time in the courtroom, I'm reading briefs at night. I like to have a good solid brief that tells me what to do.

I would like to focus more on professionalism: the idea that law is a calling, a profession, and not a business. Obviously, there are business aspects of it. Anyone who has been practicing law is engaged in a business, but approaching it more from the standpoint that it is a calling. Lawyers have an incredible privilege—essentially exclusive access to one of the branches of government. And that requires them, I think, to be very professional, very civil, to reach out and help those who need help, to provide much more pro bono activity, and to focus on what needs to be done in the community.

Finally, I think there can be and should be more of a focus on oral skills development as well, because the art of trying a case depends so much on one's ability to communicate well verbally. I would like to see law schools spend more time on effective oral advocacy.

Professor Gordon: Thank you, Judges. It has been my privilege to moderate this panel.

Professor Clary: Thank you, Judges. I've been charged with closing the conference, subject to everyone going to the closing banquet, which I hope you will all do, but the hour is late. I'm going to keep my closing remarks to only two points.

First of all, thank you everyone: people who came to present, people who came to attend the dialogue, my colleagues at Minnesota who helped out, people at West and ALWD who helped prepare the conference.

Second, a closing substantive thought. I think this whole dialogue sums up perhaps in the following way. I've heard a lot of talk over the years about the mission of law schools being to teach people how to think like lawyers. Assuming that's true, the integration of ethics, writing, and clinical skills with the doctrinal curriculum will help all law schools achieve that mission. The mere act of having to practice those skills, of having to think about the law out loud, and of having to think about the law on paper helps a student think about the law better.

I would also argue that's not actually the full mission of the law schools. I would argue that the mission of the law schools is not just to help law students think like lawyers, but to learn how to solve problems. Judges have problems they have to resolve. Clients have problems they have to resolve. Legislatures have problems they have to resolve. And you need more than just doctrine to be able to do that. You have to have people skills, management skills, and practical skills. You have to be able to write. You have to be able to talk. You have to be able to communicate—and that's really what this conference has been all about.

So, I hope all of us got something that we can take back to our respective schools, no matter what mission statement we think we have, and we'll see you all at the banquet.