

Breach of Trust: Legal Education's Failure to Prepare Students for the Practice of Law

**A Comment on
"Is 'Thinking Like a Lawyer' Really What We Want to Teach?"**

Molly Warner Lien¹

I loved Harvard law school. It was a great education in how to think creatively. Of course, it did little to prepare me for the private practice of law. — Ted Yi, Partner, Piper, Marbury, Rudnick & Wolfe.

I agree with Dean Rapoport that the legal academy is deluding itself if it thinks a legal education consisting of abstract and theoretical sessions on “thinking like a lawyer” prepares students for the practice of law. I also agree with her that the majority of law professors, and particularly the majority of younger law professors, begin teaching with little or no law practice experience and that they are poorly equipped and often unable to teach others to do what they have never done themselves.² Finally, I agree with her that we need to teach students more about what they will be doing as practitioners.

Concomitant with this agreement, however, is a very real sense of frustration with the lack of solutions in Dean Rapoport's paper. I believe that while the solutions may not be easy, they are obvious. Law students need to spend more time *doing* what they will do as lawyers. They need courses in which they will develop the skills and the qualities that will make them good lawyers.

1. © Molly Warner Lien 2002. All rights reserved. Molly Warner Lien is a Visiting Consultant at the National University of Singapore and is a former Assistant Professor and Director of the Legal Research and Writing Program at Chicago-Kent College of Law.

2. The majority of academics fled practice at the earliest opportunity (after three years at most during which they did primarily research) and many were probably not very good at what they did. Many other academics never really practiced at all in the sense of advising and representing clients. In the academic world, all sorts of things pass as substitutes for practice, including clerkships, advanced degrees in law or other disciplines, service as a political staffer, or work with a non-governmental organization. Having some people like this on the faculty provides intellectual interest and diversity. Having an entire faculty of them means that law students are being taught by non-lawyers.

As deans have probably heard from their alumni, lawyers find it both frustrating and insulting that the lack of congruence between legal education and law practice bothers the legal academy so little. While the question of whether legal education prepares students for the practice of law is dutifully discussed by commentators in amply footnoted articles every few years, this is not a problem that keeps the average legal academic awake at night. The academy's rationale, as Dean Rapoport noted, is that we need only teach students to "think" like lawyers and that the profession must assume some responsibility for training young attorneys in the actual process of lawyering. The danger for law schools is that law firms *are* assuming some responsibility and their assumption of the educative role is beginning to marginalize the importance of law schools.

Law schools today have one of two options. The first is to admit that law schools will have a diminishing influence on the practice of law. True, law schools may continue to influence intellectual discourse, but that discourse will often be only marginally more relevant to the practice of law than academic discourse in the fields of sociology, business, or economics.

Alternatively, law schools can and should think hard about the competencies that lawyers must have. If law faculties do not know (and they may not, given that many faculty members have not practiced law), they should ask their alumni and other lawyers. Many law firms are devoting substantial resources to exactly this question. Once these skills and qualities are identified, law schools should devote the energy, time, and resources necessary to develop them in students.

Most law schools, of course, do nothing of the sort. Most schools think that the introduction of clinical courses, usually not even available to all students, coupled with one or two semesters of legal writing, will suffice. It will not, particularly since most schools delegate the teaching of these courses, which of necessity involve labor intensive on-on-one instruction, to the lowest paid teachers in the academy.

Most law schools are naive enough to think they are getting away with business as usual. They are not. The profession has understood this about the legal academy for years. Within days of entering law practice, most young attorneys quickly realized that their ability to think creatively about a selected group of novel cases had little to do with their work. This pique of the profession has generally manifested itself unobtrusively: an occasional editorial or article in a bar journal; a pithy letter to the editor in a law school alumni publication; the inevitable "bridging the gap" symposia dutifully presented each year by local bar associations; or, a quadrennial forum discussion at the Annual Meeting of the American Bar Association.

What is changing is that the profession is beginning to calculate in very tangible ways how deficits in legal education harm law firms and damage client relationships. To compensate, many legal employers dedicate substantial hours by both partners and associates to internal development programs. Many hire full-time associate development coordinators or outside consultants

to work with associates. Other firms pay substantial costs in tuition and associate hours by sending young attorneys to programs such as those sponsored by the National Institute for Trial Advocacy (NITA). They incur these costs even on top of the very high salaries paid to young associates.

Law firms are, of course, both professional service organizations and businesses. When law firms expend financial and human resources, they ask the same questions any business would ask. Why are we spending so much on associate development? What does the firm need to do and what skills can we reasonably expect a young attorney with excellent credentials to know? Are we losing money on particular attorneys because they are inefficient and we write off much of their time? Many are hiring expert consultants to help them.

These questions lead to the one major question that firms ask, especially when confronting recruiting and retention issues. It is the same question law schools should be asking: What are the basic competencies of a lawyer? What should we look for as we decide which young attorneys to hire? Which criteria should we use in retention and partnership decisions? Which attorneys should go into which practice groups?³

Today's legal employer wants competency, respect, trust, judgment, flexibility, communications skills, resilience, management skills, an ability to work with others, leadership, a strong work ethic, and a commitment to client service. When firms interview, they are looking for these qualities. Many large firms are even undergoing a lengthy process of self-evaluation to see exactly what sorts of qualities will help most in individual practice groups.⁴

How does legal education measure up in terms of these qualities? Much depends on the school, but I would suggest that most schools merit at best a C+ in preparing law students for practice. On the positive side, turning first to competency, most law schools, coupled with the bar review course (and the more theoretical the school, the more necessary the bar review course), turn out lawyers who are competent to analyze legal problems, identify issues, and apply legal rules. The question of which student is supposedly "better" at this is determined in what is usually a 100-person horse race during a four-hour period at the end of a course. Nevertheless, most lawyers, given the time and information, are generally competent to engage in abstract thinking and both inductive and deductive reasoning.

3. The studies yield some fascinating information. One report I saw looked at the legal profession as a whole. The author stated that successful lawyers tend to be much higher than the general population in terms of skepticism, autonomy, abstract reasoning, and a sense of urgency. Lawyers tended to be much lower than the general population in terms of resilience (Why do we choose a profession where we will inevitably lose some of the time?) and in terms of sociability. (The latter does not mean that lawyers cannot talk at cocktail parties, it just means that they do not really care most of the time about the person they are talking to.)

4. Is the practice group one that requires a very fast turn-around time? Lawyers in a commercial leasing practice, for example, need to be not only competent but able to work under the very tight time constraint of having to get a document to a client in twenty-four hours or less.

As to communications skills, the Socratic dialogue used in most classrooms does help develop oral communications skills. One of the most inspiring things about teaching first-year courses is the privilege of watching students who are highly intelligent develop the self-assurance they need to be effective speakers. Requiring all students to participate in moot court and clinical programs also helps students develop their oral skills.

The success of law schools at teaching written communication varies from school to school. Students arrive in law school with a challenging disparity in their abilities and experience. It is basic that the better the legal writing program, the more likely a student will develop excellent writing skills. This is particularly true of students who have not had a lot of writing experience. One must ask, however, why the teaching of such a core skill is usually denigrated by law school administration and faculties. And it is denigrated. It is denigrated because most writing courses are not given adequate time to do the job in terms of the number of credit hours and class time. It is denigrated because it is something that is done only during the first year, when in truth it should be done in every course throughout law school. It is denigrated because writing faculty are underpaid and denied the job security they need to develop as teachers. The courses are labor intensive and to pay writing faculty equivalent salaries to those of tenure track and clinical faculty would be expensive. Deans think it better to keep a hierarchical structure where the scholar-prince and -princess contingent is expected only to lecture and to write, and the labor-intensive work of turning inexperienced writers into masters of clear expression is done by the poorly paid.

Yet what could be more logical than having a contracts professor who has completed the materials on offer, acceptance, and consideration assigning a contract drafting assignment? This does not happen because tenured contracts professors too often do not want to take the time to grade the papers. Indeed, most students get no practice at all in drafting documents. If schools care about developing the core skills of writing and drafting, schools must offer excellent programs, which I would define as programs that give students the experience of writing and drafting many types of documents. These courses should be taught by an excellent (and appropriately paid) faculty of writing professors who have significant practice experience doing what they teach. Writing should also be taught across the curriculum. If doctrinal faculty need help in fashioning these assignments they could seek help from practitioners or the legal writing faculty. Writing faculty should not be expected to do this, however, on top of an already crushing workload and should be paid an appropriate fee for the service they give.

There are, however, other skills and qualities that firms value, but that the law school curriculum largely ignores. One is efficiency. I spoke about the reality of attorney realization rates in 2000 at the Legal Writing Institute Conference. Particularly during retention and partnership determinations, firms look at how profitable an attorney is. Every billing software program gives an attorney's realization rate and, to be candid, most often firms do not

even need to look. If an attorney is inefficient, many sophisticated clients will ask after two or three months that the attorney be taken off the case. Yet nothing is done in law school to help students understand this reality. Neither doctrinal courses that test once at the end of the semester nor writing courses that give students weeks to write briefs are effective. All professors (doctrinal, clinical, and legal writing) should assign projects that involve generating written work product quickly. This can work very well in drafting courses and even the first-year writing course should include short-term assignments such as client letters.

Finally, lawyers need the ability to work with others, leadership skills, resiliency, and a strong work ethic and client orientation. Can we teach these skills? Probably not, especially since many academics do not have them and get little chance to develop them. But we can give students an opportunity to teach themselves. As an example, in writing programs, do you require students to work in isolation, talking only with the professor? A lot of programs do this on the theory that the professor is like the partner.

The trouble is that this is not how firms work. One associate at the firm told me that she recognized after her summer associate program that her legal education at Duke Law School was doing little to prepare her for practice. Her solution was to get an MBA as well so that she could develop team-building skills, since that was how her IP practice group worked. Can students develop these skills in law school? They do to some extent in clinical courses, moot court teams, and law reviews, but most law students do not have the chance to participate in these programs. Ironically, students who participate in study groups to help prepare for exams may be doing the best job of teaching themselves a skill that law professors have failed to teach.

In conclusion, I would like to inject a cynical note and, at the risk of impertinence, ask a question of Dean Rapoport. Your paper indicates that you recognize the problem and, I suspect, most deans recognize the problem. Why don't deans address it? I think that the answer is based on money and a completely healthy instinct for self-preservation.

With respect to money, legal education in the current format of one professor in a Socratic or lecture course is inexpensive to deliver and is somewhat effective at conveying basic information. Skills courses, by contrast, require individual one-on-one effort, and administrators find the best way to balance the budget is to shunt them to lower-paid faculty.

With respect to self-preservation, deans have to keep faculty at the top happy. Deans think that the reputation of a school is dependent on the scholarly productivity of a faculty. Faculty, who do not have to work intensively with individual students because the skills faculty do "that," are happy because they are free to pursue scholarship. Am I right or am I wrong, and how can we end the cycle of not preparing our students for their profession?