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# Prefatory Remark

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THE PRACTICE OF LAW IS A DEMANDING DISCIPLINE. It is no simple matter to represent a client competently and responsibly. The twin obligations of undivided loyalty to the client and uncompromising candor to the court impose severe strains upon the lawyer who does not comprehend the linkage between those seemingly conflicting obligations. Resolution of the sometimes clashing responsibilities to client and court are often not knowable intuitively. Careful training is essential for proper performance in a competent and responsible manner. If these observations seem little more than truisms today, it has not always been so. The notion that university training for lawyer competence might be necessary or even desirable is largely a product of the last century. Before that, lawyer training was largely in the hands of the profession in various forms of more or less successful apprenticeship programs. Indeed, for a number of years, beginning with the Jacksonian period of highly individualized democracy, no training of any kind was required of those who asserted willingness to give legal advice.

With the rise of the university law schools, apprenticeship as a substitute for formal legal education all but disappeared, and even the occasional state requirements for apprentice training as a supplement to law school education ultimately were abandoned nearly everywhere. As the law schools became the nearly exclusive arbiters of who could enter the profession, they perfected techniques of imparting analytical skills to their students. The goal came to be epitomized in that mystifying expression, "to think like a lawyer." Law students did indeed become very good at finding the *ratio decidendi* of opinions and distinguishing one appellate result from another.

Despite these highly refined techniques for communicating analytical skills, something was lost in the process. Law schools and law professors, many of whom had little or no practical experience, asserted that the teaching of analytical skills was not only a proper province of the law schools, but the only thing that law schools should attempt. What we would now call skills training was to be provided elsewhere, in apprenticeship programs (mostly unsuccessful), in office instruction, or in actual experience (one suspects sometimes at client expense).

Law schools performed their self-assigned tasks with increasing skill and mounting self-confidence that they had correctly defined the limits of their role. At least until the 1960's, there were surprisingly few complaints from the bar or the students. But, interestingly, as the law students became increasingly well qualified to perform the exacting

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tasks imposed by the analytical methodology, they also become increasingly critical about the absence of skills training as a significant part of legal education. Moreover, law firms, always ready to fault the academic establishment, claimed that their new associates, concededly bright and energetic, were not immediately useful because they did not understand the pragmatic aspects of practice or, in the jargon, "They couldn't find the courthouse door."

However exaggerated the claim of deficiencies in legal education, there was some truth to the complaint. To their credit, the law schools responded, especially when financially attractive grants became available for educational experimentation in skills training—particularly in clinical legal education.

In considering the future, it is initially instructive to look at history and current incentives for change. These include not only a new awareness of student concerns, but also a new perception of the improved prospects for more comprehensive programs of legal education. The principal vehicle for change has been the clinical legal studies program, now an integral part of the education program of most American law schools.

American legal education seems at last to have accepted the proposition that preparation for the practice of law does not consist exclusively of analysis of appellate decisions. As the American Bar Association's Task Force on Lawyer Competency has noted, lawyer competence demands a wide range of lawyering skills, including the ability to: 1) analyze legal problems; 2) perform legal research; 3) collect and sort facts; 4) write effectively—both in general and in a variety of specialized lawyer applications such as pleadings, opinion letters, briefs, contracts, wills, and legislation; 5) communicate orally with effectiveness in a variety of settings; 6) perform important lawyer tasks calling on both communication and interpersonal skills such as interviewing, counseling, and negotiation; and 7) organize and manage legal work.[1]

As to clinical legal education, perhaps the important fact is that it is alive and well, at least for the moment. The vital question is this: How will clinical legal studies survive after the demise of the Council on Legal Education for Professional Responsibility, Inc. (CLEPR) at the end of 1980, likely reduction or elimination of federal grants for clinical legal education, and general budget tightening because of rising costs? In seeking to answer that ultimate question, several preliminary questions arise. First, has clinical legal education proved its educational worth? (My answer is affirmative.) Second, assuming an affirmative answer to the question of worth, is clinical legal education affordable? (Again, my answer is affirmative.)

Before considering these threshold questions, it is appropriate to recall the history of the development of clinical legal education in the

[1] ABA TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF THE LAW SCHOOLS 9-10 (1979).

United States. Until the late 1950's the only clinical legal studies programs were in those few schools that opened legal clinics, mostly before 1950, for the combined purpose of providing some needed legal service to persons who could not afford to pay conventional lawyer fees, and to offer skills training to law students. Those programs were limited to a few schools, including Duke, Tennessee and New York University, and were not widely copied.

The more general spread of clinical legal studies did not take place until the 1960's and 1970's. The original thrust occurred in 1959 when the Ford Foundation established an experiment in clinical legal education known as the National Council on Legal Clinics (NCLC). Between 1959 and 1965 NCLC funded nineteen experimental programs with over 500,000 dollars. Their success provided the basis for further grants from the Ford Foundation (more than ten million dollars through 1980) that established the viability of the clinical legal studies concept. The ultimate recipient and dispenser of those funds was the Council on Legal Education for Professional Responsibility. During its life, from 1965 to 1980, it provided funds for experimental programs of clinical legal education in most American law schools. The response was overwhelmingly positive. Traditional schools, "elite" schools and practice-minded schools found the programs relevant and useful—at least so long as financial support was available from CLEPR and, more recently, from the federal government.

Training for competence is now recognized as a proper part of legal education, even when defined to include instruction in such lawyer skills as interviewing, counseling, negotiation and trial advocacy. This is the message of the report issued by the Task Force on Lawyer Competency of the ABA Section of Legal Education and Admission to the Bar, which strongly endorsed skills training in law school.[2] Since the most readily accessible route to skills training is through clinical legal studies, the question remains: Can law schools afford clinical legal education?

If such training is a proper and essential ingredient of legal education, the answer must of course be affirmative. But the question remains: What, if anything, must be given up if clinical education is to be continued?

The issue has been put in its most acute form with the termination of CLEPR and its grants program. Moreover, the likelihood of federal grants in support of clinical legal studies appears to be a diminishing possibility. It is therefore unhappily appropriate to assume that neither private nor public funding will be available to most law schools as they reappraise their allocation of budget funds during an inevitably more stressful financial future. In short, does clinical legal education meet the test of necessity?

[2] ABA TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF THE LAW SCHOOLS 8 (1979).

An affirmative answer is here suggested for the following reasons. First, skills training is an important adjunct to analytical training and is nowhere better provided than in appropriately designed clinical programs. Second, neither students nor prospective employers should be satisfied with a legal education that omits reference to the practical world of skills training. Third, contrary to the common belief of earlier generations, skills training can be better accomplished through the systematic training programs of the law schools than through the more haphazard training of law firms and other law offices.

Finally, there are a number of positive signs that clinical legal education has achieved permanent status in the law school world: 1) Nearly all law schools have one or more clinical programs that are typically oversubscribed. The AALS DIRECTORY OF LAW TEACHERS lists more than 700 teachers of clinical subjects;[3] 2) The REPORT OF THE AALS/ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION endorses the clinical concept and suggests various ways of incorporating clinics into the legal education apparatus;[4] 3) The bureaucracy of the legal education apparatus has accepted clinical education. The AALS has approved both a Standing Committee on Clinical Education and a Section of Clinical Education, both of which are active in programming, training and publication. The ABA Section of Legal Education and Admissions to the Bar has more recently reactivated its Clinical Legal Education Committee, also with a promise of continuing financial support; and 4) The California Bar Examiners have experimented with a performance test of advocacy skills.[5] If validated, this could well be the precursor of other certification programs that would demand proficiency in skills training as a precondition for admission to the bar.

It is still too early to predict the exact shape of clinical legal studies in the law school curriculum; but the strong indications are that it will survive, even after the demise of CLEPR, and even without other external funding, simply because it is right.

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[3] ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1980-81, at 959-64 (1979).

[4] *See* AALS/ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, GUIDELINES FOR CLINICAL LEGAL EDUCATION (1979).

[5] *See* Letter from Kenneth McClosky, Director of Examination to Committee of Bar Examiners of the State of California (July 9, 1979) (California Committee of Bar Examiners' Study on the relationship between alternative measures of lawyering competencies).