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LAW SCHOOL NEVER STOPS

ROBERT L. CLARE*

EVERY FACET OF AMERICAN SOCIETY has undergone extensive change in the last twenty years. The practice of law has been no exception. Looking back over the past forty years that I have been practicing law, the period from the middle 1960's to the middle 1970's encompassed, more than any other period, basic changes in substantive law and the way it is practiced. Because of these changes, the law school graduate of today who enters private practice embarks on a wholly different journey than those who graduated over twenty years ago.

In the past, law school graduates were molded into lawyers through a long period of training. They gained experience by working at the "knee of the master": carrying his bags, watching him negotiate transactions or argue cases, drafting papers and briefs for his review, and researching ordinary as well as arcane questions of law. Although law schools had long ago replaced clerking as the primary source of one's basic legal education, the training process at law firms had changed very little from its beginning in the late 1800's.

No one seriously disputed that the old training process provided an effective means of both learning the practice of the law and producing good lawyers. As Mr. Justice Oliver Wendell Holmes, Jr. stated: "The life of the law has not been logic: it has been experience."¹ As applied to learning the practice of law, this statement is no less true today than it was in 1880. However, the modern legal community—law firms, law staffs of corporations and government agencies, bar associations, continuing legal education institutes and law schools—has begun to implement a whole new philosophy of legal training predicated upon the direct teaching of legal practice skills rather than the experience-orientated process discussed above.

Why was there this change in approach? The answer lies in the modification of the practice itself which has occurred over the past fifteen years. Learning a lawyer's skill from experience was a slow, time-consuming process, requiring the performance of a large number of transactions, ranging from the simplest to the most complex. Because of economics, the impatience of young lawyers and the demands of a changing practice, law firms can no longer afford the luxury of this process.

Looking back to the 1930's and 1940's, the salaries of young lawyers ranged from twenty to forty-five dollars a week. The cost of training a

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¹ O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

young associate, to the firm and its clients, was relatively little. Even in the ensuing ten years, that same associate at best might expect a salary of seven thousand or ten thousand dollars a year. Therefore, the time spent by such trainee/associate in learning at the knee of the master was an insignificant factor in the overall computation of the firm's legal fees.

It was not uncommon in those times for two or more associates to "carry the bag" of a senior litigator and to learn by watching him for a number of years before getting their first opportunity to try a case. Training in corporate law was the same. Young associates attended conferences and negotiating sessions for years before they were allowed to conduct the affairs of a client on their own.

When responsibility was ultimately transferred to the associate, it was more symbolic than real. Most law firms usually had some insignificant cases for major clients in which it made little difference to the clients whether the cases were won or lost. These cases involved collections, workmen's compensation, enforcement of judgments and the like. In the corporate area, associates drafted corporate minutes and routine contracts, negotiated labor disputes and filed Securities Exchange Commission forms. These problems were ideal training grounds for young lawyers and gave them an opportunity to learn from their mistakes. An associate might handle these minor matters for years, gradually acquiring confidence and a sense of responsibility. There was plenty of time to learn since it was not uncommon for an attorney to remain an associate for fifteen to twenty years.

The law firm's recognition of the associate as its greatest asset did not come until after World War II. In the late forties and early fifties competition among law firms for top associates blossomed. This was evidenced by intensified on-campus interviewing, summer clerkships and, in the sixties, substantially higher starting salaries. By 1980, these starting salaries had risen to as high as thirty-eight thousand dollars.

The increased cost of associate salaries, which had to be passed on to clients, caused corporations to develop their own in-house capability. Corporate counsel began handling all the routine matters which law firms had in the past used for training associates. Firms were left with more difficult problems calling for the expertise of an experienced attorney. The firms realized that they had to find quicker methods to train associates so as to allow them to assume more important and, consequently, more profitable work.

Of necessity, the increased cost of associate salaries required that associates be given more important and unsupervised work. Associates had to mature more quickly with much earlier client contact. This phenomenon reduced the time for partnership consideration from fifteen to seven or eight years, again compressing the training period. Obviously, the firms could not make a litigation partner of someone who

always carried the bag of a senior partner and never tried a serious lawsuit. On the other hand, an associate could not try a serious lawsuit without experience and supervision.

The firms had a serious economic interest in rapidly developing the ability of their associates to perform as fully developed lawyers. They found that it was necessary to bring the law school graduates to a stage of expertise where they would be recognized and trusted as persons of ability, *i.e.*, worthy of partnership, in a mere seven years.

Making a new partner is not merely an announcement of a fact, with an accompanying change of status and income for that person; it is much more meaningful to the existing partners. By their decision, they are certifying to the public that those selected for partnership have proven by their experience and work that they can perform in accordance with the high standards of the firm. New partners are entrusted with the firm's reputation and the existing partners stake their personal assets on the ability of the new partners to perform competently. Further, the new partners ensure the continuation of the firm.

As the pressures of time and money made the need for instant expertise more evident, the firms first appealed to the law schools to give students more practical training. There was academic opposition to this change. However, in the last five years there has been a growth of law school course offerings in trial advocacy and an increase in the number of practical clinical courses. Despite these efforts, a 1978 study showed that the vast majority of new lawyers felt deficient in basic skills such as drafting and negotiating settlements.² This conclusion was confirmed in a recent study prepared for the American Bar Foundation.³

Obviously, law schools cannot do the whole job. Law schools rightfully claim that some of the deficiencies found in young lawyers stem from improper training in elementary and secondary school and colleges. Law schools have neither the time nor inclination to correct these deficiencies.

Since law schools could not remedy these problems, the firms realized that they had to tackle them. Increased use of the National Institute for Trial Advocacy (NITA) and other bar courses only partially answered the problem. Large firms could not send everyone to the courses because attendance by large groups was costly both in direct expense and in time away from the firm. It became increasingly evident that in-house training was the most practical answer for it provided maximal exposure with minimal cost and afforded great flexibility to meet the individual needs of the firms. Thus, many firms developed curricula to

² Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978).

³ Zemans and Rosenblum, *Preparation for the Practice of Law—the Views of the Practicing Bar*, 1980 A.B.F. RESEARCH J. 1.

meet their individual needs. These firms now conduct general courses for all associates and specialty courses for department members.

As a matter of organization, some firms may find it necessary to centralize the planning of in-house training and not leave it solely to the discretion of each department head. To avoid conflict, orientation and department programs require coordination and planning. Obviously, the new associate cannot attend a firm program on ethics held at the same time as a demonstration by the corporate department on negotiating techniques. Consideration may be given to the hiring of a director of continuing legal education (CLE); however, the partners' desire to maintain direct supervision and control over the associates' training might outweigh the efficiency gained by the retention of an outside professional.

Training sessions must be scheduled so as to not interfere with the associates' practice of law, or to be so burdensome as to be self-defeating. Many firms use non-office hours in whole or part for the training. Programs requiring several hours, such as mock trials, contract negotiations or the analysis of financial statements, may be scheduled for Saturdays or semi-holidays such as Election Day. Some firms hold weekend retreats, out of the office, where there is an opportunity for a concentrated study program for selected associates.

Generally, training programs start with an office orientation which consists mostly of lecture presentations supplemented by written material or audio or video tapes. These initial orientation lectures customarily cover the makeup and policies of the firm, ethics, conflicts and privilege, and the techniques of negotiating and settlement. In addition, in some firm orientation programs, the personnel manager will explain to the associates how they can obtain assistance in their work. For example, the librarian will demonstrate the firm's information retrieval devices and associates will be given training on the use of Lexis, word processing and other mechanical aids. Also, firms may issue manuals to their associates which usually include:

- 1) pertinent local court rules and decisions relating to evidence and pre-trial discovery;
- 2) checklists for a corporate check or preparation of wills, mergers, acquisitions, antitrust searches, etc.;
- 3) index of pleadings and other litigation forms;
- 4) index of firm opinions;
- 5) index of legal memoranda.

Following the general orientation are departmental programs. A variety of approaches are used here. Some departments have a training supervisor, while others assign each associate to two senior members, usually a partner and an associate. The supervisor or the seniors have the responsibility of reviewing the associate's work and determining his training needs. For example, if an associate has indicated an interest in

a foreign office of the firm, the supervisor will schedule him to rotate through the appropriate departments of the home office and enroll him in the needed language courses.

One firm has each department conduct weekly or monthly group meetings in which associates or partners discuss new developments, decisions or problems encountered. A department needing a standard legal form may assign the drafting responsibilities for various paragraphs of that form to associates, who may then explain and discuss their work at a weekly luncheon.

Other firms conduct workshops in which associates discuss and analyze drafting problems which they have received in advance. An approach used in antitrust groups is to assign new associates to opposite sides of antitrust cases pending in the United States Supreme Court. The associates then argue the case before the rest of the antitrust department sitting en banc.

The litigation departments of large firms have, of necessity, developed the most extensive and formalized programs. These departments have the greatest number of training aids available to them, as well as a large number of outside CLE courses. They have at their disposal a library of audio and video tapes which associates may borrow and use at their leisure. In addition, many firms use the local courts as their classrooms. Led by team captains, groups of associates observe actual trials and later critique them.

A normal litigation-training program covers everything from drafting complaints to appellate arguments. A typical program might begin with a workshop for drafting complaints, answers and interrogatories with discussion centering on distributed fact sheets. This may be followed by a tape on motion practice and mock arguments of motions. Some firms show video tapes which compare associates and partners taking depositions of witnesses. There may also be an exercise illustrating direct and cross examination of an expert. In this regard, some firms retain outside experts to serve as witnesses. The associates are given fact sheets and are video taped while examining the expert witness. Partners act as judges and members of the audience may raise specific evidence objections, provided they are prepared to argue the validity of their objection. The critique of the examination includes discussion of objections not made, as well as those previously raised.

Most large firms are beginning to conduct mock trials on weekends with visiting judges. Approximately one month prior to the trial, teams for plaintiffs and defendants are given a record, including pleadings, deposition testimony, documents and stipulation of facts. Associates act as witnesses and receive witness statements which usually are not shown to the attorneys. The teams are given one evening in which to interview and prepare each of their witnesses. Each team member may be asked to prepare the entire case for his side and only on the date of the trial are members of the teams assigned specific tasks. A jury may

be chosen from the paralegal staff, thereby adding a realistic touch to the mock trial and making the opening and closing statements all the more important. The proceedings are video taped and an audio tape may be made of the jury deliberations. After the jury verdict, these tapes are utilized for group and individual critiques. The record of the jury deliberations is especially instructive as to the cause for the failure of the participants to bring a point across to the jury. After the all-day mock trials, for comparison some litigation departments conduct mini-segments of the same trial led by an experienced senior litigator.

The major time-consuming problem in mock trials is preparing or obtaining an evenly balanced record for trial, containing all phases of a typical litigation problem. There are several sources from which such records may be obtained. NITA will not only sell problem material, but will also send a group leader to help in setting up a firm's program. In addition, selected associates can be sent to NITA or similarly conducted bar association courses. The associates attending these sessions may subsequently serve as team leaders for the in-house mock trials.

Video and audio tapes are in vogue as teaching aids. Firms are developing libraries of these materials and some firms have reciprocal arrangements with others to share purchased tapes, as well as tapes developed in-house. Cassettes are available on a wide variety of subjects, and are used in conjunction with or as a substitute for lectures, or as a prerequisite for the lecture. A major advantage in the use of tapes is that they are conveniently available to associates. However, the exclusive use of tapes, not in conjunction with a lecture, deprives the associate of the benefits of an oral critique and the helpful question-answer discussion which can follow taped programs.

In-house video recording has proved very effective. Most frequently, it is used to tape mock trials or moot court arguments which are played back to the participants, accompanied by an appropriate critique. Of course, no oral critique is as effective as seeing one's own mistakes on video tape, for viewing one's own idiosyncrasy of presentation brings home the need for improvement. The ability to play back the tapes permits uninterrupted demonstration and individual critiques.

There seems to be one universal complaint about today's law students. There is no question that a writing deficiency exists among law school graduates. Law firms, of course, cannot put forward as partners those who lack the ability to express their thoughts in writing. Thus, it is a worthwhile investment to salvage otherwise brilliant lawyers by teaching them to express themselves. To illustrate, a large firm expends about 10,000 dollars in hiring expenses to bring each law student to the front door of its office, and pays that associate between 150,000 and 175,000 dollars during the first four years of training. Thus, the firm has a substantial investment in each such associate. If the firm can salvage one associate it will easily justify the expenditure of additional funds necessary to correct this deficiency.

The basic writing problem may be dealt with directly. Some firms assign partners to assist associates and use workshops to improve or create forceful writing. Others hire outside professionals to teach young associates how to express themselves. Professional assistance can also be sought in other areas as "writing" is not the only collateral subject which lends itself to being taught by non-legal experts. Firms hire accountants and financial experts to teach young lawyers how to read and interpret financial statements. One firm having a large workmen's compensation practice has three doctors regularly lecture the associates on medical terms and problems they will meet in their practice.

During the first years of practice, formal programs of required instruction require from fifty to two hundred hours of actual instruction, including preparation time. This is expensive time and the costs are large, but, in the judgment of the growing number of firms using training programs, the rewards are great. It is probably the best method for providing quality control within the firm. Besides honing the associate's skills, it allows mistakes to be corrected in moot proceedings rather than at the client's expense. Associates who have taken these courses demonstrate more proficiency at an earlier stage in their career. Thus, clients will receive better services from younger lawyers at lower rates. The firm benefits because it is able to bring young associates to partner status in a shorter time. In the end the dollars spent for training are recaptured, and the client ultimately benefits.

APPENDIX

SAMPLE TRAINING PROGRAM

Set forth below is a litigation training program consisting of a composite of the various programs examined in the preparation of this paper.

Litigation Training
(Required of all Litigation Associates
during first 18 months)

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|----|--|----------|
| 1. | Introduction to the Art of Advocacy
Lecture—the purpose and aims of the course
Appointment of Team Leaders and distribution of factual problems. | 1 hour |
| 2. | Pleadings—Lecture
Problems—sources of information—Suggested forms. | 1 hour |
| 3. | Pleadings—Workshop
Team groups—critique of draft of complaint and answers. | 2½ hours |
| 4. | Interrogatories—Discovery
Lecture—purpose—aims—forms. | 1 hour |
| 5. | Discovery Workshop | 2½ hours |
| 6. | Depositions
Prerequisite video tape—demonstration—critique. | 1 hour |
| 7. | Depositions
Video tape—associates taking deposition—critique. | 2 hours |
| 8. | Expert Witness
Demonstration Participation—video tape. | 1½ hours |
| 9. | Motion Practice
Prerequisite—must view tape of “Effective Law and Motion Argument”
Argument of motion and critique—video tape. | 2½ hours |

10. Evidence (8 sessions) 16 hours
Viewing of eight Younger tapes. After each session discussion and comment.
11. Court Room Observation 4 hours
There will be two such sessions—Team Leaders will select trial in Federal Court to observe and critique—Pleadings will be distributed prior to observation.
12. Demonstration Evidence 1½ hours
Use of demonstrative Evidence—all associates—video tape-NITA problems #35 and 36
Followed by small group breakup sessions for video tape critique and work on introduction of exhibits—NITA problems #15 and 18.
13. Trial—Lecture 1 hour
All teams—Distribution of Facts—Assignment of sides—Witness sheets.
14. Deposition of Witness for Trial 2 hours
Plaintiffs and Defendants each have 2 hrs. to examine witness 2 weeks prior to trial.
15. Trial 16 hours
Saturday and Sunday—video tapes—Associates assigned trial tasks:
Selection of Jury
Opening Statements
Plaintiff's case in brief
Motions
Defense Case
Rebuttal
Preparation of Charge to Jury
Motions
Closing Arguments
Jury Deliberations

