

## LEGAL EDUCATION AFTER LAW SCHOOL: LESSONS FROM SCOTLAND AND ENGLAND

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### Introduction

The symposium entitled “Professional Challenges in Large Firm Practices” held at Fordham University School of Law on April 15, 2005 opened up a much-needed dialogue between law schools and law firms about legal education *after* law school. Keynote speaker Michael Greco, President of the American Bar Association, opened the conference by noting that: “[L]awyers are always going to be students, because the learning doesn’t stop in law school. The irony is that when we become lawyers, we not only continue to be students, we simultaneously are teachers.”<sup>1</sup> Greco’s keynote was followed by a panel on “The Role of Law Firms in the Educational Continuum,” which brought together three lawyers from large private firms, a lawyer from a large government law department, and two law professors.<sup>2</sup> As one of the two academics on the panel, I learned a great deal about the extent and sophistication of the legal education that takes place within law firms and legal departments.<sup>3</sup> The

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1. Michael S. Greco, President, Am. Bar Ass’n, Keynote Address at the Fordham University School of Law Symposium: Challenges in Large Firm Practices (Apr. 15, 2005). At the time of the symposium, Greco was president-elect of the American Bar Association; he became president in August 2005, at the Association’s Annual Meeting.

2. The panel members were: Donald E. Bradley, General Counsel, Wilson Sonsini Goodrich & Rosati; Drake Colley, Senior Counsel, New York City Law Department; Clark D. Cunningham, W. Lee Burge Professor of Law and Ethics, Georgia State University College of Law; Vilia Hayes, Partner, Hughes Hubbard & Reed LLP; and Margaret Raymond, Professor of Law, University of Iowa College of Law. A panel transcript is available at <http://law.gsu.edu/ccunningham/Professionalism/FordhamPanel-I.pdf>.

3. Much of my learning came from a series of conference calls with the panelists before the conference and from reviewing materials generously provided by Paul Saunders,

panel's discussions have inspired me now to propose that pilot projects be launched to increase collaboration between legal academics and law firms in the provision of legal education after law school. I suggest that such programs emulate the much closer partnerships that exist between the academy and the legal profession in England and Scotland. Promising areas for such collaboration in the United States include teaching and assessing competency in effective lawyer-client communication and professionalism in identifying and resolving ethical dilemmas.

During the panel, Donald Bradley, general counsel of a large California law firm, explained why the training of lawyers in law firms is now "dramatically different" than when he entered the profession over thirty-five years ago.<sup>4</sup> He described himself as "a product of on-the-job training . . . sitting with a senior partner and a mid-level partner for about five years, [who were] trying to teach me what it meant to be a lawyer and the values I should possess and the skills I should develop."<sup>5</sup> Bradley attributed the demise of this kind of training to "time compression" in the practice of law caused by a variety of factors, including:

- client expectations that legal work be turned around in a very short period of time;
- technology that makes quick turn-around and responses possible;
- pressure on general counsels at corporations to control their budgets by using law firms in highly cost-effective ways; and
- intense competition among law firms to acquire and keep clients.<sup>6</sup>

According to Bradley, the above factors collectively result in "tremendous pressure on law firms with respect to their budgets, their

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the panel moderator, describing the education programs at his firm, Cravath, Swaine & Moore LLP.

4. Donald E. Bradley, Gen. Counsel, Wilson Sonsini Goodrich & Rosati, Remarks at the Fordham University School of Law Symposium: Professional Challenges in Large Firm Practices (Apr. 15, 2005).

5. *Id.* at 20. Another member of the panel, Vilia Hayes, provided a similar account, noting that in the past lawyers learned how to do corporate deals by "drafting [a document], by having somebody mark it up, by sitting there and talking to [the associate]. . . . I remember that in excruciating detail, when somebody would sit with you for two hours and go over the brief. I don't think you have as much time to do that [now]." Vilia Hayes, Partner, Hughes Hubbard & Reed LLP, Remarks at the Fordham University School of Law Symposium: Professional Challenges in Large Firm Practices (Apr. 15, 2005).

6. Bradley, *supra* note 4, at 9.

discounts, lean staffing, capitalizing on expertise, knowledge management—anything to make the process more efficient and take less time.”<sup>7</sup> Bradley then explained that, “[t]he overall result of these factors . . . is clearly less time and more compression for mentoring, for on-the-job training. I think large law firms have recognized that, and that they have said, ‘We have to compensate for insufficient mentoring by really ramping up our training programs.’”<sup>8</sup> In recent years, large firms have devoted considerable resources to in-house training programs. For example, in 2004-05 the Tax Department at Cravath, Swaine & Moore LLP provided a formal fifty-six hour training program covering areas of tax law “that are more easily learned in a classroom setting than by working on a deal,” as well as “issues of practice and ‘lore’ that are often as important as knowledge of the technical provisions of the Internal Revenue Code.”<sup>9</sup> In addition, Cravath’s Tax Department encourages its associates to attend the forty-session training program offered by the Corporate Department.<sup>10</sup> Attendance at the classes in this program is not mandatory for Cravath associates,<sup>11</sup> but participation in a two-day New Associates Weekend, which includes “interactive training” such as a negotiations workshop and a session on Transaction Management, is required.<sup>12</sup> Other large firms seem to follow a similar pattern of mandatory retreats and interactional workshops for first year associates, combined with a series of optional

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7. *Id.* Bradley attributed the decline of individualized mentoring to these factors rather than to the “the demand for the billable hour, to the quest for ever-increasing profits per partner.” *Id.* at 8. Other conference speakers placed greater emphasis on the increasing expectation of billable hours for both associates and partners. *See, e.g.*, Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 *FORDHAM URB. L.J.* \_\_\_\_ (2005); Bruce Green, Louis Stein Professor of Law, Fordham University School of Law, Welcome and Introduction, Fordham University School of Law Symposium: Professional Challenges in Large Firm Practices (Apr. 15, 2005).

8. Bradley, *supra* note 4, at 9.

9. Cravath, Swaine & Moore LLP, Tax Training, [http://www.cravath.com/Students/Cravath\\_System/tax\\_training.htm](http://www.cravath.com/Students/Cravath_System/tax_training.htm) (last visited Oct. 17, 2005).

10. *Id.* The training program provided in 2004-05 by the Corporate Department at Cravath, Swaine & Moore LLP consisted of forty different sessions over eight months. Cravath, Swaine & Moore LLP, Corporate Training, [http://www.cravath.com/Students/Cravath\\_System/corporate\\_training.htm](http://www.cravath.com/Students/Cravath_System/corporate_training.htm) (last visited Oct. 17, 2005). Some classes covered basic subjects for new lawyers, while others provided detailed instruction intended for lawyers at all levels. *Id.*

11. E-mail from Paul Saunders, Partner, Cravath, Swaine & Moore LLP, to Clark Cunningham, W. Lee Burge Professor of Law & Ethics, Ga. State Univ. Coll. of Law (Feb. 8, 2005, 06:27:35 EST) (on file with author).

12. Cravath, Swaine & Moore LLP, Cravath System, <http://cravath.com/print.aspx?site=Students&sections=4> (last visited Oct. 17, 2005).

classes for lawyers of all levels.<sup>13</sup>

The next part of this essay compares these American law firm training programs with two examples of post-law school legal education in the United Kingdom: (i) a three-year basic competency program in Scotland that law school graduates must complete to be licensed as lawyers and (ii) an accreditation scheme in England that assures proficiency in criminal defense representation.

### BASIC COMPETENCY TRAINING IN SCOTLAND

Scotland offers a particularly good example of a system of post-law school legal education that is jointly designed and implemented by law schools and the legal profession to achieve basic competence to practice law.<sup>14</sup> The legal profession in Scotland is divided between a specialized trial bar called “advocates” (comparable to barristers in England), and a much larger group of practitioners called “solicitors” who handle transactional work, litigate in lower tribunals, and function as intermediaries between clients and advocates in major litigation.<sup>15</sup>

After graduating with a university degree in law, students who wish to enter the Scottish legal profession must complete a three-year course of professional training and education.<sup>16</sup> This begins with a course called the Diploma in Legal Practice (“Diploma”). The Diploma is a twenty-seven-week program that provides law students with practical skills and knowledge, and equips them for the two-year traineeship that follows the Diploma.<sup>17</sup> The course is provided by university law schools but is taught

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13. See Bradley, *supra* note 4, at 9 (noting that Wilson Sonsini Goodrich & Rosati requires new associates and laterals to attend a weeklong off-site “boot camp” to “learn about the firm, its culture, its style of practice”); see also Hayes, *supra* note 5, at 19 (describing the legal training provided to associates at Hughes Hubbard & Reed LLP). Hughes Hubbard & Reed LLP provides workshops for first and second year associates on trial advocacy, negotiation, summary judgment motion practice, and deposition skills; the first year workshops are mandatory. Telephone Interview with Vilia Hayes, Partner, Hughes Hubbard & Reed LLP (Feb. 28, 2005).

14. I am indebted to Professor Paul Maharg of the Glasgow Graduate School of Law for providing me with a summary of the Scottish legal system. For a more detailed description of the Scottish legal system, see Paul Maharg, *Professional Legal Education in Scotland*, 20 GA. ST. U. L. REV. 947 (2004) [hereinafter Maharg, *Professional Legal Education*]. For more information on legal education in Scotland, see Law Society of Scotland, <http://www.lawscot.org.uk/> (follow “Education & Training” hyperlink) (last visited Oct. 17, 2005).

15. See *id.*

16. *Id.* at 950. Students who plan to become advocates complete essentially the same three year program as would-be solicitors, and then take additional training provided by the professional body that regulates the advocates’ bar. See, e.g., *id.* at 954.

17. See *id.* at 950.

predominantly by practitioners. The largest Diploma program in Scotland is offered by the Glasgow Graduate School of Law (“GGSL”), a joint endeavor of Glasgow and Strathclyde Universities.<sup>18</sup> GGSL emphasizes “transactional learning,” in which law graduates practice legal transactions in a learning environment that simulates the real world and are assessed on their work in that setting.<sup>19</sup> For example, there are no lectures or examinations in estate planning; instead, students focus on two transactions: winding up the estate of a decedent and drafting a will.<sup>20</sup> GGSL, an internationally recognized leader in the educational use of information technology, has also created a virtual town on an internal website, complete with history, maps, businesses, a host of citizens, and sixty-four different law firms.<sup>21</sup> Each firm consists of four students who use the website to conduct firm transactions, send and receive correspondence, maintain the firm’s case management system, and keep a personal log that is reviewed by assigned faculty.<sup>22</sup>

Either before the Diploma or during it, students are required to obtain a traineeship with a practicing solicitor or a legal service employer in Scotland.<sup>23</sup> After completing the Diploma, students enter into a two-year training contract with this employer.<sup>24</sup> The Law Society of Scotland monitors the traineeship: trainees must submit written reports of their work and quarterly review forms.<sup>25</sup> Together, these materials form part of the “ongoing assessment of the training program, known as the Assessment of Professional Competence.”<sup>26</sup>

Six to eighteen months into their traineeships, trainees are required to take the Professional Competence Course (“PCC”).<sup>27</sup> The Law Society of Scotland designed the PCC “to build upon the knowledge and skills

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18. *See id.* at 951. For more information about GGSL’s Diploma program, see Glasgow Graduate School of Law, Diploma in Legal Practice, <http://www.ggsl.strath.ac.uk/courses/diploma.html#> (last visited Oct. 12, 2005).

19. Paul Maharg, *Transactional Learning Environments and Professional Legal Education in Scotland*, 74 THE B. EXAMINER, Nov. 2005, at 9, 10 [hereinafter Maharg, *Transactional Learning*].

20. *Id.* at 12. Students are assessed at four points during the estate planning transactions: the draft will, court filings, letters, and tax forms. *Id.* at 13.

21. *See, e.g., id.* at 10-11; Maharg, *Professional Legal Education*, *supra* note 14, at 962-63.

22. *See* Maharg, *Transactional Learning*, *supra* note 19, at 10-11; Maharg, *Professional Legal Education*, *supra* note 14, at 962-63.

23. *See* Maharg, *Professional Legal Education*, *supra* note 14, at 952.

24. *Id.*

25. *Id.*

26. *See id.*

27. *See id.* at 953.

developed in the Diploma, and it relies upon the office experience that trainees gain in their traineeship.”<sup>28</sup> Most trainees will then return to one of the universities for the PCC, although some large law firms provide in-house courses for their own trainees.<sup>29</sup> At the start of the second year of training, trainees obtain “a restricted practicing certificate” that authorizes them to litigate under certain conditions.<sup>30</sup> After the trainees complete the two-year training contract, they can apply for “a full practicing certificate and entry to the profession.”<sup>31</sup>

#### PROFICIENCY ACCREDITATION IN ENGLAND

The English legal system provides an example of an unusually ambitious and successful program that increases the proficiency of practicing lawyers: the Criminal Litigation Accreditation Scheme administered by the Law Society of England and Wales (“Law Society”).<sup>32</sup> One commentator described the Criminal Litigation Accreditation Scheme as “likely the most detailed accreditation scheme anywhere run by a representative body of the legal profession regulating the quality of its own members’ criminal work.”<sup>33</sup> It was developed in response to an influential study of the legal services that defendants received after arrest.<sup>34</sup> The law professors who conducted the study published their findings in 1994 in a book entitled *STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENSE LAWYERS IN BRITAIN*.<sup>35</sup> The study was highly critical of the standard of practice among criminal defense lawyers.<sup>36</sup> In response, in 1995 the Law Society created a multi-step program (called the “Police

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28. *Id.*

29. *See id.*

30. *Id.* at 954.

31. *Id.*

32. The Law Society of England is the official body that regulates solicitors. *See generally* The Law Society of England and Wales, <http://www.lawsociety.org.uk/home.law> (last visited Oct. 17, 2005).

33. Roger Smith, *Quality and Criminal Legal Aid in England & Wales*, JUST. INITIATIVES, Feb. 2004, at 42, 44, available at [http://www.justiceinitiative.org/db/resource2?res\\_id=102064](http://www.justiceinitiative.org/db/resource2?res_id=102064).

34. *See, e.g., id.* at 43.

35. *See generally* MICHAEL McCONVILLE ET AL., *STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENSE LAWYERS IN BRITAIN* (1994). The authors conducted their research over a three-year period during which they observed the practices of forty-eight firms of solicitors in England. *Id.* at 15.

36. *See id.* at viii (describing “the failures of defence solicitors and their staff adequately to advise and protect suspects under interrogation at police stations”); *see also* Smith, *supra* note 33, at 43 (“The study was particularly critical of the conduct of solicitors and their representatives in police stations, where it suggested, effectively, that lawyers were doing very little for their clients.”).

Station Qualification”) that defense lawyers must complete to be accredited to advise arrestees at police stations.<sup>37</sup> First, the candidate must observe a qualified lawyer giving advice in two cases at a police station and document their observations in a portfolio.<sup>38</sup> Second, the candidate must provide advice in two other cases under the supervision of qualified lawyer and record those cases in the portfolio.<sup>39</sup> Third, after the portfolio has been reviewed and approved, the candidate enters a twelve-month probationary period in which he or she must complete five cases of police station advice without supervision.<sup>40</sup> The Law Society audits these case files using a very detailed list of “transaction criteria,” which are “a series of points and questions that a trained observer checking the file . . . would use to evaluate what was done and the standard to which it was done.”<sup>41</sup> Finally, the candidate must pass a “critical incidents test,” where he or she views a tape of an interrogation and indicates how and why he or she would intervene.<sup>42</sup>

The Law Society has since added a second accreditation scheme for practice in the lower criminal courts: the “Magistrates Court Qualification.”<sup>43</sup> It includes a portfolio of “short notes on 20 cases and more detailed notes on five,” followed by an interview and an assessment based on a courtroom advocacy simulation.<sup>44</sup> The police station advice and courtroom advocacy programs together form the comprehensive “Criminal Litigation Accreditation Scheme.”<sup>45</sup>

The Law Society has also commissioned two books setting out best practices for lawyers handling criminal cases.<sup>46</sup> These books are valuable

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37. Julian Webb et al., Project to Support Implementation of a New Training Framework for Solicitors Qualifying in England and Wales: Review of the Training Contract and Work-Based Learning 33-34 (Nov. 2004), <http://www.lawsociety.org.uk/documents/downloads/becomingtfrwebb.pdf>.

38. *Id.* at 33.

39. *Id.*

40. *See id.* at 34.

41. Smith, *supra* note 33, at 46 (quoting LEGAL AID BD., ANNUAL REPORT 24 (1992)). The Legal Services Commission (formerly known as the Legal Aid Board) created the transaction criteria so that auditors would have a way to inspect solicitors’ files and determine how well the work had been done. *Id.* at 46. For example, the transaction criteria list over twenty items of information that should be obtained from the police when representing an arrested person. *See* LEGAL SERVS. COMM’N, TRANSACTION CRITERIA: CRIME §§ 7.1- 8.2 (May 2002), *available at* [http://www.legalservices.gov.uk/docs/civil\\_contracting/crime.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/crime.pdf).

42. Smith, *supra* note 33, at 44.

43. *Id.*

44. *Id.* at 45.

45. *Id.* at 44.

46. *Id.* The books, both of which are now in their second editions, are entitled ACTIVE DEFENCE and CRIMINAL DEFENCE: A GOOD PRACTICE GUIDE IN THE CRIMINAL COURTS. *Id.*

resources for lawyers seeking these accreditations.

#### POSSIBLE LESSONS FROM SCOTLAND AND ENGLAND

Although the basic competency program in Scotland and the proficiency accreditation scheme in England differ in both methodology and objectives, they share certain features. Both programs have very specific criteria defining the competency that candidates must develop. This in turn enables the programs to use objective pass/fail assessment methods. Additionally, both assess competency not just through tests of the candidates' substantive knowledge, but also through simulation exercises and reviews of real casework.

There are significant bar-academy partnerships in teaching and assessing basic competency in Scotland and England. In contrast, if the programs described at the aforementioned Fordham symposium are typical, it appears that for most law firm training programs in the United States:

- Lawyers are not required to demonstrate that they have acquired specific knowledge or competency upon completion of a training program (and thus are not required to pass any particular training program as a condition of continued employment or promotion);
- Participation in most of the training programs is voluntary;
- Standards, goals, and procedures are specific to each law firm; and
- Each firm primarily uses its own curriculum, materials, and teachers.

The closest American analogy to the bar-academy partnership seen in the United Kingdom is the teaching of trial skills by the National Institute for Trial Advocacy ("NITA"). NITA is a not-for-profit, continuing legal education institution with a professional staff of approximately sixty individuals.<sup>47</sup> NITA is very much a product of the legal profession. The American Bar Association Section of Judicial Administration, the American College of Trial Lawyers, and the Association of Trial Lawyers of America together created NITA in 1971, and NITA's Board of Trustees is comprised primarily of leading lawyers and judges.<sup>48</sup> The collaboration of judges, lawyers, and academics produces a "learning-by-doing"

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47. See National Institute for Trial Advocacy, <http://www.nita.org/about.htm> (last visited Oct. 17, 2005).

48. *Id.*

methodology in which participants conduct realistic courtroom trials and other litigation events such as depositions.<sup>49</sup> These simulations are videotaped and then comprehensively critiqued, first by one faculty member who views the live performance and then by the participant and another faculty member who view the videotape.<sup>50</sup>

Lawyers can receive NITA training by attending regional or national workshops.<sup>51</sup> NITA also provides training at specific law firms through in-house programs.<sup>52</sup> Although NITA was founded to meet post-graduate training needs in trial practice, it has also had a major impact on law schools. The NITA teaching methodology is now the standard for teaching trial practice in law schools, and NITA teaching materials are widely used in law school courses.<sup>53</sup>

Are there areas of legal practice—perhaps more universal than trial practice—where the success of NITA might be emulated? I suggest two, which the following discussion will show may be closely related: (i) effective lawyer-client communication and (ii) identifying and resolving ethical dilemmas.

In 1999, I interviewed Robert Creamer, Vice-President of the Attorneys' Liability Assurance Society, Ltd. ("ALAS"). A consortium of law firms founded ALAS in 1979 to provide malpractice insurance as an alternative to the commercial insurance market.<sup>54</sup> I asked Creamer about the attorney behaviors that cause the most serious liability exposure for ALAS. He said the three biggest factors were: (i) lawyer implication in client misconduct,

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49. *Id.*

50. *Id.*

51. *See* National Institute for Trial Advocacy, Program Search by State, <http://www.nita.org/programorder.asp> (last visited Oct. 17, 2005) (providing a list of workshops by geographic location).

52. *See* National Institute for Trial Advocacy, NITA's In-House Training, <http://www.nita.org/inhouse.htm> (last visited Oct. 17, 2005). Large law firms that have used NITA's in-house training programs include Baker & McKenzie, Foley & Lardner LLP, Jones Day, and Paul, Hastings, Janofsky & Walker LLP. *See* National Institute for Trial Advocacy, Here's What Law Firms Say About NITA In-House Programs, <http://www.nita.org/inhouse4.htm> (last visited Oct. 17, 2005).

53. *See* National Institute for Trial Advocacy, NITA Law School Services, <http://www.nita.org/lawschool.htm> (last visited Oct. 17, 2005) (noting that NITA materials have been adopted by over 300 law schools nationwide). My own law school trial practice course in 1980 used NITA case problems and was taught by a full-time faculty member who had experience as a NITA instructor.

54. Interview with Robert A. Creamer, Vice-President, Attorneys' Liab. Assurance Soc'y, Inc., in Chi., Ill. (Apr. 2, 1999) (notes on file with author) [hereinafter Creamer Interview]. For more information on ALAS, see Attorneys' Liability Assurance Society, <http://www.alas.com> (last visited Oct. 17, 2005).

(ii) conflicts of interest, and (iii) “problem partners.”<sup>55</sup> He explained that “problem partners” were liability risks not because they lacked diligence, thoroughness, or competence in terms of substantive legal knowledge, but because they had poor judgment, especially in the area of client relations.<sup>56</sup> We then discussed how the typical path from associate to partner at large firms is not designed either to teach good client relations or to identify lawyers who were at risk of being “problem partners.”<sup>57</sup> Associates rarely have the opportunity to exercise significant ethical responsibility for client matters under close supervision. Instead, partners give associates pieces of a matter to work on—where hard work and technical competence are evaluated—while the client relationship is the province of the partner.<sup>58</sup> Indeed, a personality type that might thrive as an associate—ambitious and hard-working in the extreme—might be at particular risk of becoming a problem partner.

Law Cover, Australia’s largest indemnity insurer for lawyers, has reached conclusions similar to those expressed by Creamer.<sup>59</sup> In 1992, Law Cover commissioned the Risk Management Project to study a representative sample of over two thousand professional liability claims.<sup>60</sup> The researchers interviewed each lawyer in the sample against whom a claim had been filed.<sup>61</sup> These interviews were extensive and confidential.<sup>62</sup> Each interview examined “the nature of the matter and how the solicitor usually approaches such work, the nature and evolution of the client/solicitor relationship, the legal issues involved, the solicitor’s

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55. Creamer Interview, *supra* note 54.

56. *Id.*

57. *Id.*

58. *Id.* At the aforementioned Fordham symposium, Vilia Hayes explained the need for simulation-based training and pro bono work to provide adequate experiences for associates:

[I]f I have a major litigation in the firm that we have fifty or a hundred lawyers working on, and a hundred paralegals, you are not going to get that depth of practice . . . . If you have another case where you are on the privileged team and you are reviewing privileged documents for a year, the firm has had to come up with a different way to make sure you are not going to have just that one limited experience . . . .

Hayes, *supra* note 5, at 18.

59. See RONWYN NORTH & PETER NORTH, *MANAGING CLIENT EXPECTATIONS AND PROFESSIONAL RISK: A UNIQUE INSIGHT INTO PROFESSIONAL NEGLIGENCE EXPOSURE IN THE AUSTRALIAN LEGAL PROFESSION* ix (1994). Law Cover is a mutual indemnity insurance fund operated by the Law Society of New South Wales. *Id.* It provides professional negligence insurance for all solicitors in New South Wales, the Australian Capital Territory, Western Australia, and Tasmania. *Id.*

60. *Id.* at ix, xi.

61. See *id.* at xi.

62. *Id.*

relevant skills and experience, and the specific events before and after the allegation was made.”<sup>63</sup> The researchers in most cases also interviewed the lawyer retained by Law Cover to defend the claim.<sup>64</sup>

The results of this unusually in-depth study were “clearly disturbing.”<sup>65</sup> They demonstrate “how easy it is for the average solicitor—even the solicitor other solicitors would choose and trust—to become entangled in the events that often lead inexorably to a claim.”<sup>66</sup> The lawyers did not seem to understand the dynamics of the claims.<sup>67</sup> The researchers concluded that most lawyers need help to see the patterns that lead to client dissatisfaction and to understand how they should act differently to reduce their inherent exposure to malpractice claims.<sup>68</sup> By far the most significant cause of professional negligence claims was *not* dissatisfaction with outcome, but instead was related to the handling of the client relationship.<sup>69</sup> The most frequent problems were failure to listen to the client, to ask appropriate questions, and to explain relevant aspects of the matter.<sup>70</sup>

A different empirical study in Australia, an evaluation of specialist accreditation that included client focus groups and surveys, found that practitioners and their clients selected “divergent indicators of performance with which to assess satisfaction with service.”<sup>71</sup> Although clients were satisfied with the specialists’ legal knowledge and skills, the evaluators found “consistent evidence of client dissatisfaction with the provision of services, and the quality of the service-delivery process.”<sup>72</sup> According to this study:

Practitioners are concentrating on developing their knowledge and skills to deliver better outcomes; but their clients, expecting both technical competence and results, are being disappointed by the process of getting there. Clients complained about the quality of their lawyers’ services in terms of inaccessibility, lack of communication, lack of empathy and

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63. *Id.*

64. *See id.*

65. *Id.* at xii.

66. *Id.*

67. *See id.*

68. *Id.*

69. *See id.* at 21.

70. *Id.* at 11, 21-26. LawCover was so impressed by these findings that it began to offer premium reductions to lawyers who participate in a series of workshops on lawyer-client communication. *See* Robin Handley & Damien Considine, *Introducing a Client-Centred Focus into the Law School Curriculum*, 7 *LEGAL EDUC. REV.* 193, 197-98 (1996).

71. Livingston Armytage, *Client Satisfaction with Specialists’ Services: Lessons for Legal Educators*, AUSTRALASIAN PROF’L LEGAL EDUC. COUNCIL 355, 365 (1996).

72. *Id.* at 357.

understanding, and lack of respect . . . .<sup>73</sup>

The evaluators concluded that:

consideration should be given by the profession to introducing additional training to redress identified performance deficits in the related areas of *inter-personal skills* and *client management techniques*. This training should be client focused, rather than transaction focused; it should train practitioners to recognise that client needs are not confined to attaining objective outcomes; and it should help lawyers to listen to clients more attentively, diagnose their various levels of needs and demonstrate empathy.<sup>74</sup>

These recommendations are remarkably consistent with the landmark 1992 report of the American Bar Association Task Force on Law Schools and the Profession (generally known as the “MacCrate Report” after Task Force Chair Robert MacCrate).<sup>75</sup> The MacCrate Report concluded that the process of licensing lawyers in the United States “has not played a significant role in either encouraging or measuring the acquisition of” critical professional values.<sup>76</sup> More recently, the Conference of Chief Justices expressed similar concerns:

Most lawyers get their first introduction to the basic concepts of legal ethics and professionalism during law school, but few students fully appreciate their importance or receive a sufficient grounding in practical legal skills for competent legal practice before being admitted to profession . . . .

. . . .

State bar examinations traditionally test bar applicants’ knowledge of substantive legal principles, but rarely require more than a superficial demonstration of the applicants’ understanding of legal ethics, professionalism, or basic practical skills. Thus, they fail to provide an effective measure of basic competence of new lawyers.<sup>77</sup>

The MacCrate Report concluded that “it is unrealistic to expect even the most committed law schools, without help from the Bar, to produce

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73. *Id.* at 365.

74. *Id.* at 366.

75. See generally *Legal Education and Professional Development, An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR 1 [hereinafter MACCRATE REPORT].

76. *Id.* at 283.

77. *Regulatory Authority over the Legal Profession and the Judiciary: The Responsibility of State Supreme Courts*, A Report on the Conference Proceedings of the Conference of Chief Justices 31-32 (1997).

graduates who are fully prepared to represent clients without supervision.”<sup>78</sup> Therefore, the Report urged the creation of an “American Institute for the Practice of Law”<sup>79</sup> that would work with licensing authorities, law schools, and the organized bar “to share information and to coordinate their efforts to improve the transition education for lawyers as they enter the profession.”<sup>80</sup> Effective transition education must include skills and values instruction, not just instruction in substantive law.<sup>81</sup> Moreover, such instruction “should include participatory exercises, trained instructors and concurrent feedback and evaluation.”<sup>82</sup>

Since the issuance of the MacCrate Report, more than a dozen years ago, no significant steps have been taken to establish the proposed American Institute for the Practice of Law. Moreover, state-sponsored transition-to-practice programs have not expanded as the Report encouraged. Yet the same period has seen impressive resources and imagination go into the development of in-house training programs. Therefore, perhaps less ambitious goals may be achievable by focusing on discrete elements of competency, such as lawyer-client communication and ethical judgment, and addressing them in the context of law firm training.

#### THE EFFECTIVE LAWYER-CLIENT COMMUNICATION PROJECT

The Effective Lawyer-Client Communication (“ELCC”) Project, based at the Georgia State University College of Law, aims “to determine whether international and interdisciplinary collaboration on the issue of lawyer-client communication can actually change basic institutional practices and beliefs in the legal profession.”<sup>83</sup> It was initiated in 1998 by Washington University and the Centre for Legal Education in Australia and has at various times included participants from Australia, England, India,

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78. MACCRATE REPORT, *supra* note 75, at 285.

79. *Id.* at 337-38.

80. *Id.* at 285.

81. *Id.*

82. *Id.* at 335. The MacCrate Report specifically encouraged sponsors of American transition education to study programs in Commonwealth countries. *Id.* It noted that “[t]he inadequacy of the existing programs of transition education in this country becomes apparent when they are compared with comparable programs in Commonwealth jurisdictions.” *Id.* at 295.

83. See Clark D. Cunningham, *The Client’s Perspective on the Initial Interview: A Social Science Approach* 3 (June 2001), <http://law.gsu.edu/Communication/HARTART2.pdf> [hereinafter Cunningham, *The Client’s Perspective*] (providing a thorough description of the pilot project). For more information about the ELCC Project, see *Effective Lawyer-Client Communication: An International Project to Move from Research to Reform*, <http://law.gsu.edu/Communication/> (last visited Oct. 17, 2005) [hereinafter *Effective Lawyer-Client Communication*].

Israel, Scotland, South Africa, and the United States, and from a wide variety of disciplines.<sup>84</sup> The ELCC Project is significantly influenced by the example of the medical profession, “where a greatly increased emphasis on patient satisfaction is both a cause and an effect of extensive social science research on doctor-patient communication.”<sup>85</sup> The analogous experience in the health care field indicates that the critical first step is to develop “a practical and cost-effective method to assess the effectiveness of lawyer-client communication that correlates that assessment with the degree of client satisfaction.”<sup>86</sup>

Over the past thirty years, medical education has increasingly emphasized the use of standardized patients for both teaching and licensure.<sup>87</sup> This methodology was developed in response to two concerns about its predecessor, the “oral examination.”<sup>88</sup> In the oral examination, a medical student interviews and examines a real patient in front of a faculty physician.<sup>89</sup> Afterwards, the faculty physician asks the student why he or she asked the patient certain questions and then asks the student to provide a diagnosis.<sup>90</sup> This testing method has two major shortcomings: “variability in both the patient case and in the faculty examination.”<sup>91</sup> The use of standardized patients, individuals trained to perform a scripted role in an initial clinical examination, overcomes these shortcomings.<sup>92</sup> Standardized patients describe the same physical complaints, provide identical responses to similar questions, and exhibit the same body

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84. See Cunningham, *The Client’s Perspective*, *supra* note 83, at 3. When the author was appointed to an endowed professorship at Georgia State University School of Law (“GSU”), GSU took the place of Washington University as the primary sponsor of the Effective Lawyer-Client Communication Project. The Centre for Legal Education in Australia has changed location and leadership and is no longer actively involved in the project. See, e.g., The University of Newcastle, Centre for Legal Education, <http://www.newcastle.edu.au/research/centres/cle.html> (last visited Oct. 14, 2005) (noting that the Centre for Legal Education was founded by the Law Foundation of New South Wales in 1992 and then was transferred to the University of Newcastle in 2000).

85. See Cunningham, *The Client’s Perspective*, *supra* note 83, at 3; see also *Effective Lawyer-Client Communication*, *supra* note 83 (noting that the ELCC’s “forms and procedures are modeled on the standard procedure used by health care providers”).

86. See Cunningham, *The Client’s Perspective*, *supra* note 83, at 3.

87. See David Stern, *Outside the Classroom: Teaching and Evaluating Future Physicians*, 20 GA. ST. U. L. REV. 877, 893 (2004) (noting that “[p]ractice sessions for ‘real-world’ experiences that use ‘standardized patients’ are becoming increasingly more common”). Most medical schools now have standardized patient teaching programs for students. *Id.* at 894.

88. *Id.* at 893-94.

89. *Id.* at 893.

90. *Id.* at 893-94.

91. *Id.* at 894.

92. *Id.*

language in every interview.<sup>93</sup> They are also trained to complete a written evaluation after the simulated examination.<sup>94</sup>

The GGSL has agreed to collaborate with the ELCC Project to run a pilot program in Scotland.<sup>95</sup> The pilot program will use standardized clients to assess solicitor candidates.<sup>96</sup> The College of Law of England and Wales, the largest provider of post-graduate legal training in Europe,<sup>97</sup> is also supporting this project. Moreover, the United Kingdom Centre for Legal Education likely will be an additional partner, as will a major commercial law firm in Glasgow that is interested in the potential use of this methodology for its in-house training programs.

The ELCC project has already conducted small-scale pilot projects in the United States, using law school clinics as research sites.<sup>98</sup> The expansion of the project to post-graduate training in Scotland lays the groundwork for similar applications to legal education after law school in the United States.

#### **THE NATIONAL INSTITUTE FOR TEACHING ETHICS AND PROFESSIONALISM**

The National Institute for Teaching Ethics and Professionalism (“NIFTEP”) is a recently formed consortium of five nationally recognized university-based centers on ethics and professionalism sponsored by the American Bar Association Standing Committee on Professionalism.<sup>99</sup>

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93. *Id.*

94. *See, e.g.*, Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 842 (2004) (noting that standardized patients “provide written evaluations of the students’ interaction with the patient”). The medical profession has concluded that this methodology has made the assessment of clinical skills much more reliable. *See Stern, supra* note 87, at 894. Moreover, it provides “an excellent opportunity for students to practice communication and examination skills in a controlled setting prior to examining real patients with real conditions.” *Id.* As of 2004, all medical students must pass a multiple-station examination in which they interview and examine a series of standardized patients. *Id.* at 888.

95. *See* Karen Barton et al., *Do We Value What Clients Think About Their Lawyers? If So, Why Don’t We Measure It?* 8 (October 2005), [http://law.gsu.edu/Communication/WhatClientsThink-UCLA2005\(Final-Bold\).pdf](http://law.gsu.edu/Communication/WhatClientsThink-UCLA2005(Final-Bold).pdf). An important component of the Diploma Course at the GGSL is client interviewing. *Id.* at 10-11.

96. *Id.*

97. *See* The College of Law of England and Wales, *Welcome to The College of Law*, <http://www.college-of-law.co.uk/20001.html> (last visited Oct. 17, 2005).

98. *See, e.g.*, Cunningham, *The Client’s Perspective*, *supra* note 83, at 3-4.

99. *See* The National Institute for Teaching Ethics and Professionalism, <http://law.gsu.edu/ccunningham/Professionalism/NIFTEP> (last visited Oct. 17, 2005). The five centers are The Louis Stein Center for Law & Ethics at Fordham University; The Mercer University School of Law Center for Legal Ethics & Professionalism; The Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South

More than twenty-five practicing attorneys applied to NIFTEP's first annual workshop (held in September 2005).<sup>100</sup> This indicates that practitioners have a strong interest in learning more about the challenge of teaching ethics and professionalism effectively. As the MacCrate Report noted, however, the teaching of professional values should include the opportunity "to perform lawyering tasks with appropriate feedback and self-evaluation; [and] reflective evaluation of the students' performance by a qualified assessor."<sup>101</sup> Standardized clients can be trained to present situations that require both effective communication skills and nuanced ethical judgment. Such exercises can teach professionalism in identifying and resolving ethical dilemmas in a safe and controlled environment. They can also be used to assess whether trainees are prepared to handle real client situations.

Scotland may soon use standardized clients to assess the skills of experienced attorneys. The Society of Writers to Her Majesty's Signet ("WS Society") is an independent association of lawyers based in Edinburgh, Scotland.<sup>102</sup> The WS Society dates back to 1594, making it one of the oldest surviving legal institutions in the world.<sup>103</sup> It is currently evaluating a proposal for the accreditation of Scottish solicitors in specialist areas of legal practice.<sup>104</sup> Unlike specialist accreditation programs in the United States,<sup>105</sup> the WS Society program now under consideration "is conceived as a qualification milestone in the career of younger lawyers and a benchmark of expertise for clients as well as other lawyers."<sup>106</sup> It would emphasize the development not only of substantive legal knowledge and advocacy skills, but also of client-focused skills like communication.

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Carolina; the Stanford Center on Ethics; and The W. Lee Burge Endowment for Law & Ethics at Georgia State University. *Id.*

100. *Id.* For the program agenda and list of participants, see Inaugural Workshop of the National Institute for Teaching Ethics and Professionalism, <http://law.gsu.edu/ccunningham/Professionalism/NIFTEP/Workshop-Fall05.htm> (last visited Oct. 17, 2005).

101. MACCRATE REPORT, *supra* note 75, at 331.

102. Letter from Robert Pirrie, Chief Executive, The Soc'y of Writers to Her Majesty's Signet, to Clark D. Cunningham, W. Lee Burge Professor of Law & Ethics, Ga. State Univ. Coll. of Law (Sept. 19, 2005) (on file with author) [hereinafter Letter from Pirrie]. The WS Society "promote[s] high standards of competency and integrity in the provision of legal services in Scotland." *Id.*

103. *Id.*

104. *Id.*

105. See Adrian Evans & Clark D. Cunningham, *Specialty Certification as an Incentive for Increased Professionalism: Lessons from Other Disciplines and Countries*, 54 S.C. L. REV. 987, 990-91 (2003) (noting that specialist certification programs are not very common in the United States).

106. Letter from Pirrie, *supra* note 102.

2005      *LEGAL EDUCATION AFTER LAW SCHOOL*      117

According to the Chief Executive of the WS Society, Robert Pirrie, “[a]ccreditation under the scheme is intended to represent, therefore, not just mastery of substantive law and practice, but also the ability to deliver advice clearly, proportionately, efficiently and cost-effectively.”<sup>107</sup> To assess qualified solicitors who desire specialist accreditation, the WS Society may adopt the standardized client model being tested through the GGSL’s ELCC Project.<sup>108</sup> This potential partnership between a leading law school and a venerable bar organization in Scotland is a promising model for similar bar-academy collaboration in the United States.

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107. *Id.*

108. Interview with Robert Pirrie, Chief Executive, The Soc’y of Writers to Her Majesty’s Signet, in Edinburgh, Scot. (Sept. 10, 2005) (notes on file with author).