

DALHOUSIE CONTINUING LEGAL EDUCATION SERIES, NO. 21

**PROFESSIONAL COMPETENCE
AND
THE LAW**

Sponsored by

Dalhousie Law School
The Law Foundation of Nova Scotia
The CLE Society of Nova Scotia
The Canadian Bar Association

Editor
Leon E. Trakman

Assistant Editor
Douglas Watters

FACULTY OF LAW — DALHOUSIE UNIVERSITY
HALIFAX, NOVA SCOTIA, CANADA

1981

PROFESSOR STEWART MACAULAY
UNIVERSITY OF WISCONSIN-MADISON

I have been asked to speak about "Professional Competence and the law--What's at Stake: The Educator's Perspective." In the interest of truth in advertising and full disclosure, I must make a few things clear at the outset. Much of my knowledge about the topic comes from a study of 106 lawyers in Wisconsin.¹ I am aware that a study of American lawyers does not necessarily tell us anything about the bar in Canada. However, you are invited to take my remarks as reflecting the quaint native customs of a colorful but primitive people which might be suggestive to a Canadian audience. Moreover, while I am paid to meet classes at a law school, I could hardly claim to be representative of American law professors. This talk will be "an" educator's perspective rather than "the" view of all of my colleagues.

Our topic is professional competence. Let me make clear that I am for it, and I do not intend to advocate greater incompetence. However, my view is that the nature of the problem often is poorly defined and the proposed cures--usually some form of educational change--are likely to be far more symbolic than instrumental. I will first explore the idea of professional competence; I will then consider some of the limits of legal education as a solution to those problems we are able to identify; and, finally, I will talk about a few things which can be done inside law schools which might help.

Recalling Pirandello, Are We 70 Conferees in Search of a Problem?

In much of the current writing about professional competence, we can find a long list of sins. The more common include the charge that lawyers do not know the law, particularly the newly developing statutory fields where keeping up with developments can be a real burden. Lawyers are said to handle trials poorly in various ways. Some of the criticisms centre on poor public speaking techniques; others on trial strategy; others on the art of direct and cross examination. Lawyers are found to write poorly and lack skill in drafting legal documents of all kinds. Lawyers are seen as sloppy and careless, juggling the demands of their profession and constantly begging for continuances of proceedings.

Insofar as we find such sinners, what have we found? There are a number of possible alternative explanations: The lawyers in question may be stupid or the victims of an inadequate education, before, during and after law school. On the other hand, we may be looking at people coping with structural problems as best they can. Geoffrey Hazard has written that people go into corporate law practice because they can "give their technical best to the problems they work on." He continues, saying that the "rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, makes good guesses as to the level of malpractice at which they should operate in any given situation."² If competence means Rolls Royce lawyering, then the same people who can afford a Rolls will be able to afford a competent lawyer. A lawyer for a person with limited means may have to "wing it." Such an attorney may not be able to do much legal research, fully investigate his or her case and plan direct and cross exami-

nation so as to meet an idealized model of practice. Given the amount at issue and the client's ability to pay, there are real limits on what can be done. The lawyer may have no practical alternative to filling in blanks on a form will, contract or pleading, whatever its literary quality. S/he may be able to do little more than follow the steps in a "cookbook" published by a continuing legal education program. Perhaps such second class legal service is worse than no legal service at all, but this question does not seem to be captured by labelling conduct as competent or incompetent.

Even a lawyer who could bill a client for more time invested in a case, sometimes will be ill advised to do so. Lawyers may be part of a local legal culture which rewards a "common sense" approach and penalizes "legal technicality." Judges may not be pleased with lawyers who push them into ruling on difficult legal issues such as the outer reaches of the hearsay rule or whether the federal Magnuson Moss Warranty Act authorizes particular Federal Trade Commission regulations which can or must control in a state action brought by an individual against a merchant. One younger Wisconsin lawyer told me of his experience in one of the trial courts in a smaller city in the state. The lawyer was something of an expert on Wisconsin's consumer protection laws. He based his case on several provisions of the Wisconsin Administrative Code. It seemed clear that the retailer defendant had violated the regulations and the consumer was entitled to a remedy under a literal reading of their words. Neither the opposing lawyer nor the judge had ever seen the regulations before the trial. The judge ruled for the retailer, remarking that the Wisconsin Administrative Code lacked a good index; the lawyer for the consumer had not played fairly when he raised a law which the bar in the community and the judge were unaware of.

From a client's perspective, competence may have to be defined much more broadly than is common in the literature. We, perhaps, should add several items to our list of lawyer sins, although we might debate whether we were talking about competence or ethics--a distinction unlikely to interest a client. For example, there are lawyers who litigate cases which should have been settled. Sometimes these are lawyers who lack the ability to value their case properly so that their bargaining is realistic. Lawyers who have few clients may let hope cloud their judgment or think that a trial will gain them valuable publicity. Some lawyers resemble surgeons who operate in an attempt to cure the common cold. I have been told stories of some who relish combat and disdain non-adversary more-cooperative means of problem solving. Such a litigator, while ostensibly maximizing the interests of his/her clients, may instead maximize only personal satisfaction in participating in courtroom battle.

Interestingly, a number of large corporations are beginning to attempt to control legal costs by supervising the work of elite law firms. Many of these firms long have had a standard approach to any case which features exhaustive legal research, endless pretrial procedures and large teams of expensive lawyers. The work will be a model of professional craftsmanship, but it may serve a client's interest poorly when the case does not warrant the best legal service money can buy. A policy of spending whatever is needed to deal with a law suit allows a large law firm to bill many hours

and so help cover its overhead and produce profits. A policy of quick settlement may not be as advantageous to a corporation's lawyers but it may be a better resolution of the question of costs and benefits for the corporation.

Also there are lawyers who fight to defend their clients' legal rights while doing great damage to valuable relationships. One can produce a technically marvelous estate plan which minimizes the taxes due at the cost of family harmony. One can point out all of the things that might go wrong in a partnership or under a property settlement suggested by divorcing spouses and provoke warfare among the parties. One can insist on precise definitions and terms to cover all imaginable contingencies and thus make it impossible for a buyer and seller to agree to a contract. One can raise endless but perfectly valid objections to testimony during a trial and antagonize jurors who do not appreciate the finer points of legal craft. In short, at least on occasion, the highest levels of technical competence may serve a client's goals so poorly as to be incompetent practice. A client seldom needs technique itself--lawyering is not like competitive figure skating or gymnastics where judges award points for form and may even count off points for routines which impress the audience. Lawyers are hired to produce results.

We must also note the opposite sin: there are lawyers who settle cases which should have been tried or settled more advantageously for the client. These lawyers often are pursuing their own self-interest rather than that of the client--a lawyer who accepts the other side's initial offer or who only goes through the motions of bargaining does not have to invest much in research, investigation or trying the case. If such a lawyer can mass process enough cases, s/he can earn a living or even do better. This lawyer needs few skills other than the ability to persuade clients that a valuable service has been rendered. Blumberg, in a famous article, called this "The Practice of Law as a Confidence Game."³ While we might be tempted to see selling out a client and persuading him/her to accept the settlement by misrepresentation as a problem of ethics, at least some of the time lawyers who practice this way do so because they lack the skills needed to practice differently. If a lawyer does not know how to try a case (or knows that s/he is not very good at it), it is in his/her interest to settle on whatever terms are offered or are prompted by a bluff.

Of course, even lawyers of ability may pursue the average interest of their clients as a group or their own interest rather than the desires of any one client. For example, one executive of a large corporation has complained that

many attorneys' practice ... practice before ... administrative bodies consumes much more of their time than the time spent in litigation before the courts. It has therefore become very important to an attorney to maintain strong and close relationships with these respective agencies so that he can get informal rulings, hints as to the agencies' attitudes and other "favors". These are necessary, he believes, if he is to adequately advise

his many clients. However, if I want to take a position that is very unpopular with the particular agency and which will almost certainly lead to litigation, I will have difficulty in getting my counsel to go along. If I am unaware that such a position can be taken, he may not suggest it to me. He fears that by serving as an aggressive advocate for my position, he may estrange himself to some extent with the members of the agency and thereby reduce his ability to serve his many other clients who also deal with that same agency.⁴

However we define competence, we lack any sense of the dimensions of the problem. How many of what kind of lawyers lack what kinds of competence? It is not easy to get any idea of a rate. A few "atrocious stories" may be vivid and shocking, but they may be very atypical. We can wonder whether judges are in the best position to observe and evaluate the performance of the bar. They can see what is going on before them, but they seldom know much about what is occurring backstage. Indeed, my colleague Marc Galanter suggests that we might need something like the "tissue committee" that evaluates operations in hospitals if we were serious about appraising the performance of the bar. One would have to sample each lawyer's cases from the first to last contact with clients, appraising decisions and non-decisions both from the point of view of the degree of legal skill displayed and the degree of service to the interests of the clients. Of course, just stating the proposal should suggest all of the problems of access, privilege and privacy one would face as well as the difficult judgments about settlement offers made, accepted and rejected, decisions about how much to invest in a case and tactics to pursue.

Moreover, we cannot assume that lawyers who do not seem very competent in one area are not serving their clients well in others. A second or third class trial lawyer may handle divorces with sympathy and understanding while the model technician may lack such qualities. One whose legal research and analysis leaves something to be desired may be just the person a client should see to help arrange a zoning variance because of the lawyer's excellent contacts at City Hall. On the other hand, an elite law firm may be almost totally incompetent when faced with an ordinary criminal case--the competent response of such a firm may well be to subcontract the job to a lawyer who knows who to see and how to plea bargain.

In at least some of the writing about competence, there is both an attack on university legal education and a proposal for new kinds of courses or teaching to cure the problems of the profession. Unaccustomed as I am to play the role of an apologist for legal education,⁵ let me raise a number of quarrelsome points related to the limits of the effectiveness of this remedy. Much of this literature seems to be symbolic rhetoric rather than careful diagnosis and prescription of a remedy. Often it seems as if we law teachers are being asked to produce 25 year old superlawyers with but a wave of a magic wand. Unfortunately, the magical powers of the law schools are not very great.

A law teacher is likely to notice that proposals to change legal education in law schools avoids inconveniencing those now in the profession.

These proposals contain tacit "grandfather clauses", exempting those now in practice. Yet those now in practice are those ones who have so displeased the distinguished judges and lawyers who write about competence. Moreover, lawyers and judges do not pay for training the newcomers eager to join the profession. At least some of these proposals are pleas for a larger subsidy from taxpayers and private donors who fund law schools.

We must recognize that almost all of the lawyer-competence proposals which have been suggested or which might plausibly serve to meet any of the problems identified would be expensive. Classical legal education, for better or for worse, involves one professor facing 100 or more students in a large classroom. The professor leads the class through a casebook produced at an elite university and promoted by an eager publisher. There are no teaching assistants. There is little individual contact, and there is no need for computers, chemistry laboratories, a hospital or the other costly stage props of most graduate education. Compared to a medical school, or even a graduate department of linguistics, legal education may be flawed but it is cheap--it may even make money for the university.

Trial tactics, estate planning, contract drafting, negotiation and client counselling are not going to be taught very well in a large class with little individual attention. To do these things, we must come a good way toward the graduate or medical school model. Yet university administrators have reason to like schools as they are. Great lawyers have gone through a classical legal education, it is cheap, and so why change? In 1981, American universities are looking for programs to eliminate. Indeed, the Chancellor of the University of Wisconsin-Madison recently held a press conference. He discounted suggestions of some legislators that he could simply eliminate "low priority programs." He said,

Assume we decided to close the Law School--God knows we wouldn't do it--we have students in the pipeline; we have faculty; we have internal planning and regent planning; and we'd have to declare a fiscal emergency. ...

Despite his disclaimer, some of my colleagues were unhappy with what first came to his mind as an example of a "low priority program". One wonders about his eagerness to revamp the law school budget so that it would approximate that of the medical school or the eagerness of the legislature to support such a proposal.

Occasionally it is suggested that law schools could offer truly practical education if they would only cut out the frills such as jurisprudence, legal history, sociology of law, comparative law and some of the more exotic seminars. You will not be surprised to discover that I think little of the platform of the Know-Nothing Party. I might be willing to consider it if lawyers could find a way to promise me (subject to a right to a decree of specific performance) that they would limit themselves to technical roles of the sort often given today to a legal secretary or a paraprofessional and would never serve in policy-making positions affecting society--former students of mine can or could be found in legislatures, school boards, city

councils and all kinds of administrative positions. However, even if this unlikely promise could be extracted and enforced, it is doubtful that law schools would be able to shift enough resources to do many of the things implicitly proposed.

Ending on a Positive Note: Thinking Small about Legal Education and the Competence of the Profession.

Keeping in mind all of these considerations, there are some undramatic changes that individual professors of law could make which might contribute something toward increased professional competence. Interestingly, I think that many of these changes would at the same time help us do a better job of carrying out the intellectual analysis of law which law schools have long defined as their mission.⁶ My suggestions are minor and certainly not revolutionary; they will not transform the level of practice noticeably. Yet revolutions are far easier to talk about than to carry out. Here I want to consider what we are doing now at Wisconsin rather than what might be done if only the world were different. I use Wisconsin examples primarily because I am familiar with them, recognizing that others undoubtedly are doing important things as well.

Wisconsin, as is true at many law schools, offers practice skills courses taught by lawyers, it has several clinical programs where students offer legal service to various groups, and it makes efforts to improve writing skills. Moreover, our school has an important hidden curriculum. We are located at the state capital. Units of local and state government and the private bar hire many of our students for paralegal work. Of course, the polite fiction is that all of this work is done under the supervision of a lawyer. However, there are days when it seems that the state of Wisconsin is being run by second and third year law students, and legal research in our town seems to consist of law students telephoning professors who teach in certain areas, with pleas for help. Obviously, important practical skills are being mastered. Our students are dealing with real rather than hypothetical problems.

Several of us on the law faculty have been trying to draw on these experiences in aid of our educational efforts. In several seminars and courses we ask students who have these jobs to draw on their experiences at work as a source of data and to analyze their experiences in light of the theories current in various fields. As is true of most jobs, students seldom find the time or inclination to reflect on what they are doing. We hope they will learn something from the papers they write. At the same time, they are able to teach those of us on the faculty about practices which would be hard to discover in any other way, short of a major research project. In turn, what we learn about some of these practices influences our teaching in the classic traditional curriculum.

A group of us teach the contracts course together, and we have worked to develop our own materials. Based on research and experience, we have

tried to emphasize alive and important problems rather than the usual offer, acceptance and consideration. We have attempted to place those problems we select in context. We try to discover why the matter was litigated in the first place in light of all of the pressures to avoid problems, settle disputes harmoniously and minimize costs. We look at the facts as disclosed by the record on appeal, noting how they were transformed in appellate opinions. We look at how cases were argued, both stressing questions of advocacy and plausible contentions ignored or downplayed by counsel and the court. We try to discover, where we can, what happened after the appellate opinion. Often we find that the actual outcome is not what might have been expected--orders for a new trial usually lead to settlements rather than trials; affirmances of judgments for money damages yield discharges in bankruptcy or partial settlements because of a lack of assets; court orders are evaded, particularly when it would cost a great deal to attempt enforcement. Moreover, we try to see whether particular cases are part of a larger pattern. Often the same situation yields opinions resting on different doctrines or prompts movement from a common law to a statutory or administrative solution.

We think that these moves at least set the stage for acquiring professional skills. Expanding the context brings into focus the interactions between the total legal process and people and groups seeking their ends. Obviously, there is far more to law than just appellate opinions and doctrines; lawyers are hired to produce results and this task requires legal rules to be viewed as tools. We stress bargaining and settlements which, after all, are what most lawyers do. Our approach stresses costs. Too much legal scholarship and reform proceeds as if law were free. Getting the perfect result is stressed rather than the best result which real people might be able to afford. Finally, our approach raises problems of inequality. Some people can make better use of the legal system as it actually operates than others. If one must pay to enforce his/her rights, then some will be able to buy more justice than others. Some will be able to use legal process, vague standards, the need for expert testimony and the like to run up the costs their opponents must pay to litigate; large law firms often win a war of attrition rather than prevail in a rational search for truth. Of course, we both honor and teach technical skill, but we also try to teach something about when it is worth investing in research, investigation and trial planning. Moreover, our approach offers the beginnings of an answer to a question which bothers many law students. Again and again law teachers demonstrate that a case could be argued either way--whatever a student says, the professor will leap to the other side and challenge the student. Yet if almost any case could go either way, how does a lawyer counsel a client? Once we move from the perspective of the Olympian appellate judge to that of the lawyer and begin to talk of predicting the likelihood, as well as the outcome, of possible litigation as a factor in settlement negotiations or decisions about whether to take action, we begin to deal with one of the most important elements of professional competence--good judgment.

Conclusion

In thinking about professional competence, we must define the problem more precisely. We can offer all kinds of atrocity stories, and we can agree that they should never happen. Nonetheless, we need some sense of how often what kind of lawyer can be said to be incompetent. We need to broaden our view of competence. Most of the practice of law takes place outside court, and we need to worry about mistakes in counselling and settling cases as well as flaws in trial techniques. We must be concerned with the economics of practice as well. What appears as less competent practice may be all that can be done in light of what a client can pay. Blaming the lawyers may be little more than a way of avoiding the costs of changing the way legal services are provided.

At least in the short run, legal education is unlikely to solve such an ill-defined problem as professional competence. Unfortunately, the time for grand experimental programs seems to have passed. Law schools, as all university departments, probably will have to fight to hold as much ground as possible. Individuals acting alone or in small groups seldom can foment revolutionary change. Yet individual law professors could take small steps which might have some impact. Most simply they could give equal time to both a judge's and a lawyer's perspective. They could take seriously the old claim of legal education that it teaches about the legal process or the legal system. If this were done, students would see a picture taken with a wide-angle lense rather than the small part of the total scene now highlighted by the telephoto lense aimed at the analysis of legal doctrine. Perhaps the first step toward professional competence which a law school could offer its students would be a more accurate picture of what it is lawyers do.