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LEGAL SKILLS AND PROFESSIONAL VALUES

A HANDBOOK

PREPARED BY

PAUL C. SAUNDERS, CHAIR

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The New York State Judicial Institute on Professionalism in the Law was established by an Administrative Order of the Chief Judge of the State of New York on March 3, 1999, for the purpose of promoting awareness of and adherence to professional value and ethical behavior by lawyers in the State of New York, promoting scholarship regarding, and practical attention to, emerging issues in the practice of law that may present issues of professionalism or legal ethics, and facilitating cooperation among practitioners, bar associations, law schools, courts, civic and lay organizations and others in addressing matters of professionalism, ethics and public understanding of the legal profession.

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A MESSAGE FROM NEW YORK STATE CHIEF JUDGE JANET DIFIORE

In December 2015, the New York Court of Appeals adopted new Rule 520.18 of the Court's Rules for the Admission of Attorneys and Counselors at Law, which requires every applicant for admission to practice, with certain exceptions, to demonstrate that the applicant "possesses the skills and values necessary to provide effective, ethical and responsible legal services in this State."

This Rule charges each law school to develop "a plan identifying and incorporating into its curriculum the skills and professional values that, in the school's judgment, are required for graduates' basic competence and ethical participation in the legal profession . . .". Each law school must certify that its graduates have attained these required skills.

In order to assist in implementing this new requirement, the New York State Judicial Institute on Professionalism in the Law has prepared a Handbook for law schools, providers of continuing legal education, law students, law graduates and new lawyers, setting forth descriptions of suggested skills and professional values for practicing lawyers.

Pursuant to its original mandate established by then-Chief Judge Judith S. Kaye, the Institute is charged with fostering cooperation among practitioners, law schools, courts and bar associations. This Handbook is an outgrowth of the Institute's April 2019 program *From Law School to Practice: Instilling Skills, Competencies and Professional Values—A Dialogue with the Academy, Bench and Bar.*

It is my hope that this Handbook will be useful to law school administrators, faculty and providers of continuing legal education as you continue your important work of preparing law students, law graduates and new lawyers to practice law and endowing them with the skills and professional values necessary for the effective, ethical and professional representation and participation in the legal profession that the clients we serve and our communities expect from our honorable profession.

LEGAL SKILLS AND PROFESSIONAL VALUES

A HANDBOOK

Volume 7, No. 1 Fall 2019

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WHY DO WE LEARN PROFESSIONAL SKILLS AND VALUES IN LAW SCHOOLS AND BEYOND?

The purpose of this handbook is to assist law students and lawyers in developing the "professional skills needed for competent and ethical participation as a member of the legal profession" and in understanding the values on which our profession is based. It offers suggestions for the introduction of law students, law graduates and new lawyers to our legal profession, including its history in the United States and the history of legal education in America, as well as examples of topics that might be considered by law schools and continuing legal education providers when they assess their teaching of the necessary legal skills and professional values. The topics listed in this Handbook could be parts of courses on Lawyering or Professionalism, they could be included in the syllabi of other required courses and they could be taught as part of a CLE program. They are listed here not because we believe that all of them should be taught in the academy but rather as a menu from which the academy might choose. The Judicial Institute does not endorse any specific method of teaching skills and values, but we do urge that the inculcation of skills and professional values should be an important part of any law school and CLE curriculum.

* * *

The history of legal education in the United States[1] reflects a long-standing debate between practitioners and academics as to whether law should be taught as a science in which the fundamental and universal doctrinal principles are taught, or as a practice in which lawyers use their skills to advise clients, help them resolve their disputes and comply with the law.

Beginning in the 1970s, a widespread concern about lawyer competence was being raised by judges, lawyers, legal educators and the public. This was accompanied by a large increase in the number of lawyers in the United States, from 431,918 in 1977 to 574,800 in 1980, according to the American Bar Association. This concern led to at least four Reports, the Cramton Report,[2]

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1 Appendix C is a brief history of legal education in America taken largely from ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

2 A.B.A. SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCE (1979) [hereinafter CRAMTON REPORT]. The report is named after the chair of a twelve person task force, Dean Roger Cramton of Cornell Law School.

the MacCrate Report,[3] the Best Practices Report,[4] and the Carnegie Report,[5] each of which suggested a reform in legal education that would make the practice of law a central goal of legal education. Each also encouraged a renewed emphasis on the teaching of skills and professional values in order to prepare students, in the words of the Best Practices Report, to "practice law effectively and responsibly . . .".[6]

Although there was no consensus among legal educators as to which skills should be taught, the MacCrate Report identified ten skills with which every lawyer should be familiar: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternate dispute resolution procedures, (9) organization and management of legal work, and (10) recognizing and resolving ethical dilemmas.[7] The MacCrate Report was careful to point out that those "skills" were not a "standard for a law school curriculum."[8] Nevertheless, as Sam Sue, Director of Career Planning at CUNY School of Law, has written, "given its impact on the law school curriculum, the MacCrate Statement has in effect served as a set of learning objectives for the skills that law students should achieve upon graduation, despite the fact that the Statement's description of skills provides little guidance on the actual level of skill needed to produce competent entry-level attorneys."[9]

The MacCrate Report was not without its critics. Three years after it was issued, Professor Lucia Silecchia, an Assistant Professor at the Columbus School of Law of The Catholic University of America, sent a survey about law school research and writing programs to all of the law schools in the United States and 111 responded. Among other things, she asked about the impact of the MacCrate Report on first-year skills programs. Of the 111 schools

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3 A.B.A SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf.

4 ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007) [hereinafter BEST PRACTICES REPORT], https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf.

5 WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

6 BEST PRACTICES REPORT at 39.

7 MACCRATE REPORT at 116.

8 *Id.*

9 Sam Sue, *Assessing the MacCrate Skills: Developing a Good Survey*, 23 PACE L. REV. 657, 660 (2003), *available at* https://digitalcommons.pace.edu/plr/vol23/iss2/10.

responding, only three said that the MacCrate Report had a "significant impact" on their program design and nearly half said that the Report had "no influence" whatsoever, perhaps because they were already teaching "legal writing" and similar subjects.[10]

Professor Carrie Menkel-Meadow, an expert in negotiation among other things, was more direct in her criticism of the MacCrate Report: "It is . . . too over-determined, too rigid and, at the same time, too incomplete for me. It enacts a particular picture of the lawyer, as principally a litigator, a 'means-ends' thinker who maximizes an abstract client's goals."[11] Menkel-Meadow believes, unlike MacCrate and his colleagues on the Task Force, that law and lawyering combine the "logic of the law is experience" viewpoint of Oliver Wendell Holmes Jr.[12] with the "craft sense" of Karl Llewellyn[13] (an understanding of how variations in the empirical world might create variations in doctrine) to form "an artistic, intuitive sensibility that reminds us that we are humans, not chemical elements or plant sub-species that can be fixed in taxonomic categories. It is in this dimension of the 'art' of lawyering—as well as the values of what lawyering should be done for—that I think the work of the MacCrate Report misses the mark."[14]

One of the continuing debates, even after the MacCrate Report was published, was the continuing importance of legal research and writing. The

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10 Lucia A Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 267-268 (1996), *available at* https://scholarship.law.edu/cgi/viewcontent.cgi?article=1268&context=scholar. In her survey, Silecchia asked questions about first-year skills courses and her conclusion was that "until the law school makes a decision about which philosophy [i.e. a research and writing program or a skills based one], it will be impossible to answer any of those questions or work out the details of a coherent program that will achieve either goal well."

11 Carrie Menkel-Meadow, *Narrowing the Gap By Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASHINGTON L. REV. 593, 594 (1994), *available at* https://digitalcommons.law.uw.edu/wlr/vol69/iss3/8. Professor Menkel-Meadow believed that the MacCrate Report paid "insufficient attention to the human aspects of lawyering—variously called empathic, affective, feeling, altruistic, and service aspects of lawyering, whether the representation is of an individual, an entity or a 'cause' or issue." *Id.* at 595-596. "The education of lawyers should deal with the cognitive, behavioral and experiential, affective, and normative aspects of being and learning as a professional." *Id.* at 596.

12 O. W. HOLMES, JR., THE COMMON LAW 5 (1881), https://books.google.com/books/about/The_Common_Law.html?id=xXouAAAAIAAJ&printsec=frontcover&source=kp_read_button#v=onepage&q&f=false

13 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 209-225 (1960).

14 Menkel-Meadow, *supra* note 11, at 602-603.

MacCrate Report listed as among its ten skills, legal analysis and reasoning and legal research, but not legal writing. However, there were those who believed that research *and writing* were at the heart of what lawyers do in practice.[15] Professor Silecchia has written that "it can be argued, quite persuasively, that research and writing are the two basic 'foundational skills' upon which a great deal of a student's subsequent law school success depends."[16] This, of course, raises the question whether the first year of law school is meant to produce successful lawyers or successful law students.

Even though the MacCrate Report did not end the debate about the teaching of skills and values in law schools, it did result in action from the ABA. In 1996, the ABA changed Standard 302 (one of the ABA's accreditation standards) to require accredited law schools to "offer to all students . . . adequate opportunities for instruction in professional skills." Law schools were also required to offer students "live-client or other real-life practice experiences. This might be accomplished through clinics or externships" but "a law school need not offer this experience to all students."

In 2005, Standard 302 was amended again, stating that "a law school shall require that each student receive substantial instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession." The word "substantial" was not defined until 2010, when the ABA issued a "guidance memorandum" stating that "substantial" equaled one credit.[17] Standard 302-3 also provided that "a school may satisfy this requirement for substantial instruction in professional skills in various ways . . . .To be 'substantial,' instruction in professional skills must engage each student in skills performances that are assessed by the instructor." Interpretation 302-1 provided that "Instruction in professional skills need not be limited to any specific skill or set

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15 Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23, 24 (1985). ("Grades in substantive courses help students obtain starting positions, but it is research and writing skills which make careers.")

16 Silecchia, *supra* note 10, at 275. One of her solutions to the debate between a theory-based legal education and a skills-based one is to create a legal writing course that required students to write as many of the different types of legal documents as possible, although contract drafting might best be taught after the students had completed a doctrinal course in contracts. A second proposed solution was the creation of a first-year skills course based entirely on a hypothetical case, beginning with an initial client interview. *Id.* at 280.

17 Consultant's Memo #3, A.B.A. Section on Legal Educ. and Admissions to the Bar (March 2010).

of skills." In fact, that Interpretation urged law schools to be "creative" and listed ten "skills" that would be within the ambit of Standard 302-1.[18]

In 2007, the Carnegie Report found that law schools "give only casual attention to teaching law students how to use legal thinking in the complexity of actual law practice" and "fail to complement the focus on skills in legal analyses with effective support for developing ethical and social skills."[19] One of the recommendations of its Task Force on Educating Lawyers was that law schools should "join 'lawyering,' professionalism and legal analysis from the start." The report explained that "the existing common core of legal education needs to be expanded to provide students substantial experience with practice as well as opportunities to wrestle with the issues of professionalism."[20]

Two years later, a Legal Education Critical Issues Summit, sponsored by the ABA, the American Law Institute and the Association for Continuing Legal Education recommended that law schools should better integrate "core practice competencies" into their curriculum. In 2013, the Association of the Bar of the City of New York recommended that law schools should offer a "broad range of curricular initiatives in addition to traditional casebook offerings" including "hands-on clinical or other experiential training" and "exposure to well-structured teaching by experienced practitioners, provided in coordination with academics."[21]

ABA Standard 302 was amended again in 2014. It no longer contained a "requirement" that law schools teach skills and values but provided only that they "shall establish learning outcomes that shall, at a minimum, include competency in (a) knowledge and understanding of substantive and procedural law; (b) legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) other professional skills needed for competent and ethical participation as a member of the legal profession." Six credits in experiential courses were now required by the ABA.

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18 Those ten skills are very similar to the MacCrate list of ten.

19 CARNEGIE REPORT at 6.

20 *Id.* at. 9.

21 NY CITY BAR ASSN TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY, 49-50 (2013), https://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf. A similar provision was contained in the ABA Standards for Accreditation, Standard 303. However it has recently been deleted as "unnecessary."

Interpretation 302-1 was also amended. Gone was the encouragement of creativity; it was replaced by the following: "For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency and self-evaluation."

Following the ABA's "learning outcomes" Standard 302, most law schools now publish their desired "learning outcomes" on their websites. For example, Syracuse Law School lists six learning outcomes, each of which is accompanied by "performance criteria." Syracuse's first "learning outcome" is that "graduates will develop knowledge of a broad cross-section of constitutional, statutory, regulatory and common law." The four "performance criteria" include that "graduates will demonstrate competence in the courses that are required for all students." NYU Law School's learning outcomes for first-year courses include that "the first-year curriculum provides a base of analytic, doctrinal, and skills approaches that enable our students in their second and third years to study advanced topics in the law and to take advantage of increasingly complex practical opportunities." Other law schools' learning outcomes are similar.

Many states remained unconvinced that the ABA standards were having the desired effect on the preparation of students for the legal profession. For example, in 2012, California's State Bar Board of Trustees established a task force on admissions regulation reform. Its report recommended that a new set of training requirements focusing on competency and professionalism should be adopted in California in order to better prepare new lawyers for successful transition into law practice . . .".[22]

In 2013, an ABA Committee on Professional Education Continuum, chaired by NYU Law School Vice Dean Randy Hertz, conducted a retrospective of the MacCrate Report after twenty years. Responding to continuing criticisms that law schools fail "to do enough to prepare students for legal practice" the Report of the Committee presented "a more nuanced view of the current state of the professional education continuum and the challenges currently facing the academy, bar, and the judiciary." The Committee called attention to the many curricular reforms that had already been made in law schools, finding that "there is an impressive amount of innovation, re-thinking, and experimentation

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[22] STATE BAR OF CALIFORNIA TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 1 (June 24, 2013), http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf.

occurring at the moment." The Committee urged faculty members and law schools to see "this process through to a positive conclusion."[23]

In December 2015, the New York State Court of Appeals amended the requirements for admission to the bar by requiring applicants to "establish that they have acquired the skills and are familiar with the professional values necessary to competently practice law." Those "skills and professional values" were not further defined in the New York State Court of Appeals rules, in order to encourage the law schools to experiment and to decide for themselves what the necessary "skills and values" were.[24]

In 2018 and 2019, the Educating Tomorrow's Lawyers project of the Denver University-based Institute for the Advancement of the American Legal System ("IAALS") conducted a series of surveys of academics and practitioners in order to find out what practitioners thought were the necessary skills and values required for competent law practice. Among other things, that survey found that whereas 45 percent of law professors believed that new lawyers had sufficient skills to practice law, only 23 percent of practitioners so believed. The survey asked the 24,137 respondents to identify which of 147 "characteristics," "skills" and "competencies" were required for law graduates to possess upon graduation from law school. They identified 77, of which the top three were "keeping confidentiality," "arriving on time" and "honoring commitments." These, of course, are not skills that are necessarily "law-related" although they are important.

THE ROLE OF EXPERIENTIAL COURSES IN THE TEACHING OF SKILLS AND VALUES

ABA Standard 303 requires each accredited law school to offer a curriculum that requires each student satisfactorily to complete at least one or more experiential course(s) totaling at least six credit hours. That standard

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23 A.B.A SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMMITTEE ON THE PROFESSIONAL EDUCATION CONTINUUM, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR AND JUDICIARY (March 20, 2013), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf.

24 N.Y. CT. APP., NOTICE TO THE BAR: NEW SKILLS COMPETENCY REQUIREMENT FOR ADMISSION TO THE BAR (December 16, 2015), https://www.nycourts.gov/ctapps/news/nottobar/nottobar121615.pdf. The requirements are set forth in the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law. 22 NYCRR 520.

provides that "an experiential course must be a simulation course, a law clinic, or a field placement." Today, virtually every accredited law school in the United States offers a wide variety of experiential courses and each school describes that curriculum in some detail on its website. How successful have such experiential courses been in inculcating the necessary skills and values in law students? Are law firms more likely to hire law graduates who have had an experiential course background as opposed to those who have had more traditional course work? Villanova Law School, to take just one example, has claimed that "Villanova prepares graduates to become the kind of lawyer the market demands."[25]

There are at least two statistical surveys that have attempted to answer those questions but they have different conclusions. In the first, a survey conducted by the "Educating Tomorrow's Lawyers" project ("ETL") of IAALS under the leadership of ETL's director Alli Gerkman, asked whether students from the University of New Hampshire Law School's prestigious and skills-based Daniel Webster Scholars program received higher scores on client-interview assessment questionnaires than did students who were not in that program. The ETL conclusion was that they did. IAALS's conclusion was that more skills training resulted in more competent graduates, resulting in a greater willingness to hire those graduates, resulting in happier clients. The second survey, conducted by Associate Professor Jason Webb Yackee of Wisconsin Law School, asked whether students graduating from law schools with greater clinical positions available to students had better employment outcomes. Somewhat surprisingly, his conclusion was that they did not. In fact, Yackee even suggested that his findings might be interpreted as demonstrating that making more clinical positions available to students might actually harm their employment prospects.[26]

Some have offered anecdotal "evidence" that experiential learning does not lead to better outcomes. Writing in the Huffington Post, Professor Brian Leiter of the University of Chicago Law School says that over the years, he has written many letters of recommendation for his students who were applying for clerkships. Typically, he says, the judges who are hiring the students tell the students what courses they should take during their remaining time in law school. "Not once have I heard of a federal judge who demanded that the student should

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25 *Villanova University School of Law: Where Law Meets Business*, ABOVE THE LAW (Oct. 6, 2014), https://abovethelaw.com/?s="where+law+meets+business" (last visited October 22, 2019).

26 Jason Webb Yackee, *Does Experiential Learning Improve JD Employment Outcomes?*, 2015 WISCONSIN L. REV. 601 (2015), *available at* http://wisconsinlawreview.org/wp-content/uploads/2015/11/2-Yackee-Final.pdf.

take more 'experiential learning.'"[27] Others, among them Professor Peter Joy of Washington University Law School, disagree: "Law schools have the means to better prepare graduates for the practice of law through restructuring their curricula, requiring well-structured law clinics and externships, and developing new courses to respond to the demands of a changing legal environment. The time is long overdue for more law schools to become proactive in adopting a true and substantial commitment to experiential education and to a curriculum that prepares graduates for the practice of law today and tomorrow."[28]

Dean Richard Matasar of New York Law School put it thusly: "[E]ven schools exhibiting first-rate educational professionalism and offering faculty who are wonderful role models as educators cannot fulfill their roles unless they also produce individuals who are solid lawyers, who exhibit *legal professionalism*. We therefore must teach the skills and values that will lead our graduates to become effective and 'good' legal practitioners."[29]

HOW LAW SCHOOLS TEACH SKILLS AND PROFESSIONAL VALUES TODAY

Professor Kate Krause of the Mitchell Hamline School of Law has written that one of the largest barriers to the needed reforms in legal education was the "myth" that professional education could meaningfully separate theory from practice. "[The 'myth'] aligns the teaching of doctrine with theory and the teaching of skills with practice . . . ." resulting in a division of responsibility for the curriculum between doctrinal professors who teach theory and adjunct professors, "with less power and authority in faculty governance," who teach lawyering skills.[30] That "myth" seems to have largely disappeared. Today, virtually every law school in the United States teaches some forms of necessary legal skills and professional values and much of those are taught by "doctrinal" professors as well as practitioners and judges.

There is certainly no single method of teaching skills and values nor does the Judicial Institute believe that there should be. However, we believe that

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[27] Brian Leiter, *"Experiential" Education is Not The Solution to the Problems Facing Law Schools*, HUFFINGTON POST (Jan. 5, 2014), https://www.huffpost.com/entry/experiential-education-law-school_b_4542103.

[28] Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 583 (2018), *available at* https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss2/4/.

[29] Richard A. Matasar, *The Two Professionalisms of Legal Education,* 15 NOTRE DAME J. L. ETHICS & PUBLIC POLICY, 99, 102-103 (2012)(emphasis in original), *available at* https://scholarship.law.nd.edu/ndjlepp/vol15/iss1/4/.

[30] Kate Krause, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 9 (2013), *available at* https://open.mitchellhamline.edu/facsch/384/.

three of the most commonly used methods, simulations, legal clinics and legal externships, are valuable and should be encouraged. Some schools have gone to great lengths to identify, with the help of the judiciary and the practicing bar, the most essential legal skills and professional values and have taken measures to assign those skills and values to professors in the required courses in their curricula.

For example, in 1993, Gonzaga University School of Law undertook a two-year long process to incorporate the recommendations of the Cramton, MacCrate, Best Practices and Carnegie Report in the law school's curriculum as much as possible.[31]

A curriculum review committee then conducted a review of the entire curriculum over a two-year period, during which "the faculty agreed on forty-four essential skills, which included case and statutory analysis, legal research, and lawyering skills such as fact investigation, interviewing, counseling, negotiation, drafting, and pretrial and trial advocacy."[32] The faculty also agreed on twelve essential values, including self-motivation, responsibility, a commitment to service and the elimination of bias.

The question then became how to incorporate those skills and values into the curriculum. The answer chosen by the Gonzaga faculty was to allocate each of the skills and values to one or more of the curriculum's required courses. Faculty members teaching those courses were responsible for integrating the skills and values into the courses, often after collaboration with other faculty.

In 2007, Gonzaga undertook another curriculum review, including a review of skills and professional values, in which each faculty member was asked to "articulate the content, skills and values that were critical for Gonzaga students to encounter in law school."[33] Alumni were also asked to weigh in. The result of this review was a revision of the curriculum once again, this time to add two required courses to the first-year curriculum, a "Litigation Skills & Professionalism Lab" and a "Transaction Skills & Professionalism Lab." Gonzaga also added a required clinic or externship to the upper-class curriculum.

In the words of Gonzaga's Dean, "The new curriculum preserves the strength of traditional legal education by allocating nearly two-thirds of its required credits to legal doctrine, theory, and analytical thinking. The curriculum

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[31] Early Martin & Gerald Hess, *Developing A Skills and Professionalism Curriculum—Process and Product*, 41 U. OF TOLEDO L. REV. 327, 334 (2010), *available at* https://www.utoledo.edu/law/studentlife/lawreview/pdf/v41n2/Martin-Hess%20FINAL.pdf.

[32] *Id.* at 336.

[33] *Id.* at 338.

addresses one of legal education's weaknesses by allocating over one-third of its required credits to lawyering skills and professionalism."[34]

Other schools have structured their teaching of skills around existing legal reasoning and writing courses. Professor Susan Brody of The John Marshall Law School has written that "there is widespread agreement, it seems, that effective oral and written communication are the two most important skills for lawyers."[35] Teaching research skills today has become more and more difficult, with the dramatic increase in the number of available books, reported cases and statutes and the requirement for expertise in non-legal information gathering.[36] If legal research and writing are indeed the "foundational skills" of the legal profession, can they be fully developed in parallel with the development of other skills or would one have to be sacrificed to the other? Professor Silecchia, a legal skills professor at the Columbia Law School of The Catholic University of America, argues that, at least in the first year, law students should be exposed primarily if not entirely to the development of research and writing only, leaving other skills-development to the later years. "The substantial devotion of the first year to research and writing also poses the classic advantages of pursuing 'depth' rather than 'breadth' in law school curricula."[37]

Still other schools, such as Florida International University School of Law, use required skills courses (called Legal Skills and Values I, II and III) to simulate "real life" legal problems so that students will learn how to recognize and address legal issues from inception to resolution, all the while emphasizing the importance of professionalism. These courses are supplemented by a wide variety of elective courses that expand the lawyering skills of the students.[38]

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34 *Id.* at 347.

35 Susan L. Brody, *Teaching Skills and Values During the Law School Years*, in THE MACCRATE REPORT, BUILDING THE EDUCATIONAL CONTINUUM CONFERENCE PROCEEDINGS, MINNEAPOLIS-ST. PAUL, MINNESOTA, SEPTEBMER 30-OCTOBER 2, 1993 22 (Joan S. Howland & William H. Lindberg eds., 1994).

36 *See, e.g.*, Dan J. Freehling, *Problems and Solutions in Teaching Computer-Assisted Legal Research*, INTEGRATED LEG. RES. (Winter/Spring 1989); Robert C. Berring, *Full-Text Databases and Legal Research: Backing Into the Future*, 1 HIGH TECH L. J. 27 (1986), *available at* https://scholarship.law.berkeley.edu/facpubs/398.

37 Silecchia, *supra* note 10, at 275-276; *See also* Barbara Cox and Mary Barnard Ray, *Getting Dorothy out of Kansas: Importance of an Advanced Component to Legal Writing Programs*, 40 J. LEGAL EDUC. 351, 354 (1990), *available at* https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1179&context=fs.

38 FIU LAW: LEGAL SKILLS AND VALUES, LAW.FIU.EDU, HTTPS://LAW.FIU.EDU/ACADEMICS/JD/LEGAL-SKILLS-AND-VALUES (last visited Oct. 22, 2019).

TOPICS TO BE CONSIDERED IN LEARNING THE SKILLS AND VALUES OF THE LEGAL PROFESSION

1. Law as a profession

- We believe that it is important at the outset of a legal education to acquaint students with the history of the legal profession in the United States and with what lawyers have done and continue to do as members of the legal profession. A brief history of the legal profession in the United States is attached as Appendix B.

- defining the profession of law and its values [39]

- Roscoe Pound, the non-lawyer Dean of the Harvard Law School, once defined a profession as "[A term] that refers to a group of men (?) pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood,"[40] Mary Ann Glendon, another Harvard professor, quoted Karl Llewellyn's criticism of Pound's definition: "The problem with applying Roscoe Pound's high-sounding formulation to the legal profession . . . is not that it's untrue, but that every aspiration it expresses is potentially at war with all the others."[41]

- ethical responsibilities

- confidentiality and conflict-avoidance

- independence and self-regulation[42]

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39 The Statement of Professional Values for the Legal Profession, promulgated by the New York State Judicial Institute for Professionalism in the Law is annexed hereto as Appendix A.

40 ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

41 MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 17 (1994).

42 *See* Louis A. Craco, *The Philip B. Memorial Lecture, "Carpe Diem": An Opportunity to Reclaim Lawyers' Independence*, 27 PACE L. REV. 1 (2006), annexed hereto as Appendix D.

- delivery of legal services and changes brought about by technology
- "zealous advocacy," its history and its limitations
- different types of law practice (law firms, solo practice, in-house corporation lawyers, government lawyers, public service lawyers, "unbundled," others)
- obligations (e.g. pro bono work, access to justice, mentorship, others)
- the role of bar associations, including the unified bar
- law as a social profession
- opportunities to "do good"
- understanding "the centrality of lawyers in the effective functioning of ordered society."[43]
- anticipating the future of the legal profession. In 2011, the President of the New York State Bar Association appointed a task force to study the future of the legal profession. Among many other things, that task force identified social and economic changes that affected the legal profession, including demographic diversity, the availability of technological tools, especially electronic communication, and the changing model of the law firm. Its recommendations included "encouraging a healthy balance of professional and private lives for attorneys," mentorship programs for new lawyers and more robust continuing legal education programs.[44]

2. <u>The practice of law</u>

- Defining the "practice of law" has proved very difficult. The ABA 2002 draft of the definition of the practice of law stated

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[43] Jay Conison, *The Report and Recommendations of the ABA Task Force on the Future of the Legal Profession: Its Significance for Bar Admissions and Regulation of Entry into the Legal Profession* 12, THE BAR EXAMINER (December 2014), https://thebarexaminer.org/wp-content/uploads/PDFs/830414-conison.pdf

[44] N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION (April 2, 2011), https://www.nysba.org/futurereport/.

that "the 'practice of law' is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law." The definition also stated that a person is presumed to be practicing law when that person gives advice and counsel to others about their legal rights, drafts legal documents that affect the legal rights of a person, represents a person before an adjudicative body or negotiates legal rights and responsibilities on behalf of another person. The statement further provided that the unauthorized practice of law should be subject to civil and criminal penalties.[45] However, this definition was withdrawn by the ABA the following year after it concluded that the task of creating an acceptable definition of universal application was impossible.[46]

- Ronald Dworkin has argued that "legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. But law is not a matter of personal or partisan politics . . .".[47]

- what lawyers do (e.g. delivering the rule of law to clients; resolving disputes, offering "wise counsel;" engaging in government service; others)

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45 In December 2002, the US Department of Justice and the Federal Trade Commission objected to this definition as potentially anticompetitive and urged the ABA Task Force to consider less restrictive measures. They concluded that "the boundaries of the practice of law are unclear and have been prone to vary over time and geography." U.S. Dept. of Justice and the F.T.C, Comments on the American Bar Association's Proposed Model Definition of the Practice of Law (December 20, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf. The following year, the ABA abandoned its efforts to define the practice of law and recommended that each state adopt its own definition.

46 *See generally* Soha Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach To Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903 (2004), *available at* https://scholarlycommons.law.wlu.edu/wlulr/vol61/iss4/13. Professor Turfler proposed that "the model definition should understand the benefits and the consequences that the alternative forms of legal service delivery entail and should truly protect the public . . . [T]he correct balance between the public's need for access to legal services and its need for protection must be struck." *Id.* at 1959.

47 RONALD DWORKIN, A MATTER OF PRINCIPLE 146 (1985).

- Lawyers are required to behave with civility. For example, the New York State Bar Association's *Standards of Civility* "set forth principles of behavior to which the bar, the bench and court employees should aspire." Those *Standards* provide, for example, that "lawyers should be courteous and civil in all professional dealings with other persons" and that "in depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect."[48]

- understanding law firm organization and models

- the challenges and rewards of solo practice

- remaining current with the law; understanding how the internet is replacing advance sheets; "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[49]

- billing by the hour and alternate billing methods such as contingency, success fees and sliding scale fees.

- obtaining and retaining clients

- understanding general principles of law practice management

- understanding licensing and bar admission requirements

- understanding the rules relating to court admissions and renewals

- understanding how disciplinary and grievance committees discipline lawyers

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48 N.Y. STATE BAR ASS'N COMM. ON ATTORNEY PROFESSIONALISM, REVISION OF THE N.Y. STANDARDS OF CIVILITY (revised February 8, 2019), https://www.nysba.org/capstandards/.

49 MODEL CODE OF PROF'L CONDUCT r. 1.1 cmt. (Am. Bar Ass'n 1983).

3. Problem - solving[50]

- As used in the MacCrate Report, the term "problem" includes the entire range of situations in which a lawyer's assistance is sought in avoiding or resolving difficulties, realizing opportunities, or accomplishing objectives. A "problem" must take into account a wide range of fact-specific variables as well as the client's goals, attitudes and feelings.[51]

- identifying and diagnosing the problem

- generating alternative solutions and strategies

- developing a plan of action

- implementing the plan

- keeping the planning process open to new information and ideas

- Most law schools teach "critical thinking" as a way of solving problems and "thinking like a lawyer." Although there are many definitions, the Foundation for Critical Thinking has defined it as "the intellectually disciplined process of actively and skillfully conceptualizing, applying, synthesizing and/or evaluating information gathered from, or generated by, observation, experience, reflection, reasoning or communication, as a guide to belief or action."[52]

- The McGeorge School of Law has listed critical thinking, reading and listening as the first three among ten skills that every lawyer must master to be successful.[53] Critical thinking includes deductive and inductive reasoning, reasoning by

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50 This section is taken largely from the MacCrate Report at 141-148.

51 MacCrate Report at 141, n.1.

52 *Critical Thinking,* CRITITICALTHINKING, https://www.criticalthinking.org/pages/defining-critical-thinking/766 (last visited October 22, 2019).

53 COURTNEY LEE & TIM. NACCARATO, *LEGAL SKILLS FOR LAW SCHOOL & LEGAL PRACTICE*, PACIFIC MCGEORGE SKILLS HOUR SERIES, https://www.mcgeorge.edu/documents/week1LegalSkills.pdf.

analogy, finding distinctions and "think[ing] through how the facts and law relate."

4. Advising clients—part 1[54]

- Advising clients is one of the quintessential duties of the practicing lawyer. The Judicial Institute's Chair Emeritus Louis Craco has written that when lawyers advise their clients, they make the rule of law a reality and that "the notion of the lawyer as a public actor delivering the Rule of Law to clients [is] the account that best explains what it means today to be an American lawyer."[55]

- understanding the obligations of the lawyer and the proper nature and bounds of the lawyer's role in a counseling relationship

- obligations of the client

  - understanding when the representation ends

  - understanding attorney-client privilege and duty of confidentiality

  - understanding when a client's confidential information may be disclosed

- preparation of a retention letter

- establishing the scope of the representation

- obligations of diligence and promptness, and thoroughness and preparation

- answering the client's preliminary questions

- interviewing the client, gathering information relevant to the decision to be made (remember, things are almost never what they first appear to be)

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[54] Some of this section is taken from the MacCrate Report at 176-184. Note that these points are not set forth in any particular order.

[55] Appendix D at 109.

  - importance of listening
  - asking clear and precise questions
  - being aware of non-verbal communications
  - cultural differences
  - language barriers
  - gender/personal pronouns

- understanding what the client wants and needs; exploring alternatives
- determining the factual and legal issues
- determining what type of investigation of the facts is appropriate
- determining the substantive area of the law that is involved
- determining whether the lawyer is capable of giving the required legal advice
- determining what is in the client's best interest
- analyzing the decision to be made and counseling the client about it
- ascertaining and implementing the client's decision
- understanding the ethical implications of the decision
- exploring possible conflicts, especially in cases where more than one person is being represented
- understanding and communicating the rules of confidentiality and the circumstances in which a lawyer may reveal a client's confidence
- [if advising an entity] understanding that the entity is the client

- developing a plan of action including preparing for contingencies

- what to do if it appears that your client is (or is planning to) violate the law or ethical principles

- special problems of advising an unpopular client[56]

- understanding that the lawyer is an agent, not a principal and must only act within the scope of the lawyer's authority

- the importance of independence and candor in rendering legal advice: "In representing a client, a lawyer shall exercise independent professional judgment and render candid legal advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to a client's situation."[57]

- Advising clients, in the final analysis, is like a game of chess and perhaps three-dimensional chess. The lawyer must not only understand what the client wants and needs, the lawyer must also give correct legal advice and, most important, anticipate the consequences of that legal advice once it is acted upon.[58]

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[56] In his commencement address to the Yale Law School Class of 2019 on May 20, 2019, Georgetown Law's Professor Neal Katyal spoke of his representation of Salim Hamdan, who was Osama Bin Laden's driver. "In other countries, Mr. Hamdan would have been shot just for bringing his case. More to the point, his lawyer would have been shot. But America is different, special. It says something about America that, after defending the enemy (British soldiers after the Boston Massacre of 1770) John Adams was eventually elected President. It says something special about America that, after defending Gitmo detainees, I could serve at the highest levels of the Justice Department." Neal Kumar Katyal, Saunders Professor, Georgetown University Law Center, Commencement Address at Yale Law School (May 20, 2019), *available at* https://law.yale.edu/sites/default/files/documents/pdf/neal_katyal_2019_commencement_remarks.pdf

[57] Rules of Professional Conduct (22 NYCRR 1200.0) rule 2.1.

[58] *See generally*, Seth Rosner, *The Consigliere*, 9 GEORGETOWN J. LEGAL ETHICS 191 (1995).

5. Advising clients—part 2[59]

- Another important aspect of advising clients is understanding—from their prospective—what they want from the lawyer. Some, such as South Carolina Law School's Dean Burnele Powell, have argued that clients want to "win" and they want their lawyers to tell them that they will "win".[60] Powell says that such desires are "tragic" because the merits limit what even the most excellent lawyer can deliver and he urges lawyers to accept a degree of "martyrdom"—lost cases, irked clients, disappointment and to adopt the alternative role model of the "lawyer of stature." Professor Clark Cunningham, a scholar who has devoted much of his professional career to bettering lawyer-client relations, writes that what most clients want is "effective lawyer-client communication." Survey after survey have shown that what bothers clients the most is the failure of their lawyers effectively to communicate with them. Cunningham reports the following observations from clients who were dissatisfied with their lawyers:

    - "failure to keep client adequately informed"
    - "lack of client focus: failure to listen"
    - "making decisions without client authorization or awareness"
    - "failure to give clear, direct advice"[61]

- Instead, what clients wanted was "responsiveness", "listening to your clients," "putting themselves in our shoes," "anticipating what the client's needs are," "being keenly aware of the goals and objectives of your client" and "paying attention to the overall philosophy and goals of the client."

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59 *See generally*, Clark D. Cunningham, *What Do Clients Want from Their Lawyers?*, 2013 J. DISP. RESOL. 143 (2013), *available at* https://scholarship.law.missouri.edu/jdr/vol2013/iss1/7; Anita Bernstein, *What Clients Want, What Lawyers Need*, 52 EMORY L.J. 1053 (2003), *available at* https://pdfs.semanticscholar.org/3f50/62c511139d7ef82ba923fb9fefd2cb8770b4.pdf..

60 Burnele V. Powell, *What Clients Want and Why They Can't Have It*, 52 EMORY L.J. 1135, 1147 (2003).

61 Cunningham, *supra* note 59, at 144.

- The most common complaints of clients to Grievance or Disciplinary Committees, by a wide margin, are neglect, failure to communicate, failure to represent clients diligently or competently. "In most jurisdictions, these three offenses add up to more than half the total disciplinary volume, [however measured]."[62]

- One senior lawyer who mentored a member of the Judicial Institute taught him that the "cardinal sin" that a lawyer could commit was "not being available to your client." Of course, that was before the days of social media and the internet, which, in the era of 24-hour availability, must be considered in assessing work-life balance.

- In addition to effective communication, clients also want—and the various Codes of Professional Responsibility contemplate giving—advice about what they should do, even if it is not strictly legal advice but is rather moral, social or psychological advice.[63] Lawyers should be prepared to give such advice when asked "what do you think I should do?"

6. <u>Dealing with courts</u>

- how to address the court

- ex parte communications

- understanding the ethical prohibitions against knowingly making false statements of law or fact to a tribunal and the duty to correct such statements

- understanding the requirement to disclose to a tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel

- understanding the prohibition against offering or using evidence that the lawyer knows to be false

- understanding what must be done when a lawyer knows that a person intends to engage in, is engaging in or has engaged in

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62 Bernstein, *supra* note 59, at 1056.

63 *See, e.g.*, Rules of Professional Conduct (22 NYCRR 1200.0) rule 2.1.

criminal or fraudulent conduct related to the proceeding in which the lawyer represents a client before a tribunal

- understanding the importance of courtesy to court personnel and the prohibition against failing to comply with known local customs of courtesy and engaging in undignified or discourteous conduct before a tribunal and intentionally violating established rules of procedure or of evidence

- understanding e-filing, e-courts, e-checks and the technology to utilize e-discovery

- understanding the way in which a court's chambers operates

- making written submissions to courts

- social media issues and limitations on their use

- understanding the disciplinary authority of a court

- how to create a record

- recusal – prior relationship issues

- fraternization and appearance of impropriety

7. Understanding the role of the legal profession in society

- law as a social profession

- lawyers' obligations to society

- promoting access to justice

- pro bono obligations of lawyers including pro bono obligation before admission to the bar

- One of the four professional values articulated in the MacCrate Report is "contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice."[64] The late Robert Witmer, a

[64] MacCrate Report at 213 *et seq.*

member of the Institute and former President of the New York State Bar Association, speaking at the Institute's first Convocation in 2000 and picking up on Dean Anthony Kronman's description of the "lawyer-statesman" [65] said "Lawyers are and have been of service to their community in all sorts of organizations—political, educational, service, religious. And they have been able to use the special blend of analytical, organizational, interpersonal and communication skills in which lawyers are trained and have experience. This community service has defined our profession in many ways . . . . The soul of our profession depends very much on the commitment of its members to service and to the community in which they reside . . . . We should never forget that responsibility."[66]

8. Understanding limitations on lawyers

- limitations imposed by the Code of Professional Responsibility, such as confidentiality, avoidance of conflict, prohibiting clients from violating the law and others

- limitations imposed by other regulations, such as prohibiting the unauthorized practice of law

9. Conducting basic and advanced legal research[67]

- knowledge of the nature of legal rules and institutions

- knowledge and ability to use the most fundamental tools of legal research

- understanding of the process of devising and implementing a coherent and effective research design

- basic computer-assisted legal research

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[65] ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 354 (1993).

[66] 1 J.N.Y.S. JUD. INST. PROF. LAW, CONVOCATION ON THE FACE OF THE PROFESSION, ALBANY, NEW YORK, NOVEMBER 13-14, 2000, RECORD OF PROCEEDINGS, 87, 89 (2001), https://www.nycourts.gov/LegacyPDFS/IP/jipl/pdf/NYSProfJournal_p1.pdf .

[67] This section is taken in part from the MacCrate Report at 157-161.

- understanding precedent and especially understanding when precedent is controlling
- "Shepardizing™" and its importance

10. Acquiring basic professional attributes

- timeliness, especially in responding to courts and clients
- rectitude
- preparation
- avoiding over-confidence
- clarity of speech and thought
- empathy

11. Preparing and delivering a coherent legal argument or client position

- The purpose of all legal argument is persuasion.
- The delivery of legal advice even in the non-litigation context requires coherence and clarity.
- emphasizing strengths and acknowledging weaknesses
- the importance of precedent
- the importance of policy

12. Deciding whether to litigate or settle

- how to analyze the strengths and weaknesses of a case
- how to assess the risks of litigation
- understanding what the client wants and what is best for the client
- settlement issues, including fairness and finality

- potential cost savings to the client

13. Organization and management of legal work[68]

- formulating goals and principles for effective practice management
- developing systems and procedures to ensure that time, effort and resources are allocated efficiently
- developing systems and procedures to ensure that work is performed and completed at the appropriate time
- developing systems and procedures for effectively working with other people
- developing systems and procedures for efficiently administering a law office

14. Law office management[69]

- retainer agreements
  - New York State (and perhaps others) requires a written retainer letter at the beginning of an engagement for a new client.[70] Among other things, the Rule requires that the letter describe the scope of the representation, the fee to be charged and fee dispute resolutions.
  - In New York, retainer agreements are not required if the fee is expected to be less than $3000 or with respect

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68 Some of this section is taken from the MacCrate Report at 199-202.

69 This section is addressed primarily at those students and new lawyers who will become solo practitioners or work in firms of five or fewer lawyers. In New York State, it has been estimated that approximately 85 percent of the practicing lawyers are solo practitioners or work in firms of five or fewer lawyers. The New York State Bar Association has a number of practice aids aimed at such lawyers, including its Solo and Small Firm Resource Center.

70 22 NYCRR 1215 governs written retainer or engagement letters. In general, it requires the lawyer to give the client a written letter of engagement before commencing the representation or within a reasonable time thereafter. The letter must include descriptions of the scope of legal services to be provided, the fees to be charged and the applicable fee dispute resolution mechanism (arbitration under Part 137). Note that each Department has slightly different requirements.

to representations in domestic relations matters subject to 22 NYCRR 1400.

- They are also not required if the lawyer will charge a regularly represented client the same basic fee rate and perform services that are of the same general kind as previously rendered to and paid for by the client.
- If the client is an organization, the letter must explain that the lawyer is the lawyer for the organization, not for any of its constituents.
- The letter may contain the client's obligations to the lawyer, such as cooperation, response to requests for documents and information, preservation of data and the like.
- The instructor might wish to provide samples of retainer agreements.
- Why are retainer agreements used?
- A worthwhile simulation in class might have the students draft retainer agreements based on hypothetical scenarios drawn from real-life experiences.

- Escrow Accounts and IOLA[71]
  - prohibition against commingling client's funds; the lawyer as a fiduciary
  - the requirement to hold client's funds in an attorney escrow account in a banking institution
  - the requirement to notify a client of the receipt of funds in which the client has an interest
  - The bookkeeping requirement is a detailed set of rules and involves far more than merely maintaining a check register for the escrow account.

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[71] *See generally*, Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.15.

- There are disciplinary proceedings for violation of the Rule.

- understanding IOLA ("Interest on Lawyer Account"): Under the Judiciary Law and the Rules of Professional Conduct, lawyers have discretion whether to deposit client funds in an interest or non-interest bearing account; if the funds are deemed "qualified funds" (i.e. too small or reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a separate account) they may be deposited into an IOLA account from which the bank will, at least quarterly, deposit interest earned less service charges or fees to the state IOLA fund. IOLA funds are used to help low-income people obtain help with their civil legal problems. There is no requirement that funds be placed in an IOLA account and no disciplinary action or action for damages may be maintained for a lawyer's failure to do so.[72]

- Practicing law efficiently

  - understanding how to minimize clients' costs while at the same time providing the necessary legal advice and services

  - discussing expenses and fees with clients early and often

  - advising clients on inexpensive means of resolving disputes and refraining from unnecessary discovery and other activities whose costs cannot be justified by the anticipated results. Recent studies are showing that early conferences between parties and among parties and the court in which the merits of a dispute and means of resolution are discussed more often lead to early, efficient and satisfactory resolutions than protracted litigation.

  - More and more courts are requiring the parties to engage in alternate dispute resolution ("ADR") and even where that does not occur, it is often

[72] *See generally*, N.Y. Judiciary Law § 497 (McKinney).

advantageous for the parties and their counsel to consider ADR.

- understanding how long a lawyer should maintain files after matters are concluded

- Solo practitioners should have back-up lawyers who can help in the event of illness or disability. In New York State, there exists a "cottage industry" of per-diem lawyers who only practice in state courts and can cover such things as calendar calls.

- Understanding billing and alternate fee arrangements

  - Most lawyers bill by the hour and keep time sheets (often in 6-10-or-15-minute increments) to record their work.

  - If the retention is on an hourly billing basis, billing to the client is typically on a monthly basis and certainly at least on a quarterly basis.

  - If the retention involves a retainer payment, the retainer payment must be held in the lawyer's escrow account and not in a regular operating account.

  - Where the retention is on a contingency fee basis, the percentage recovery is typically no higher than 30 percent.[73]

  - In criminal cases where the fee is a "flat" non-refundable fee, there are limits on "non-refundability."

  - per diem lawyers, "low bono" and "unbundling"

  - In New York State, "fee splitting" is permissible subject to certain conditions. Generally, the academic literature encourages "fee splitting" on the theory that it promotes getting the client the "right" lawyer for a particular matter.

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[73] A contingency fee of 40 percent or greater will raise red flags in certain Attorney Grievance Committees.

- Sometimes, alternative billing arrangements are agreed upon in which, for example, the lawyer and client will agree on a single lump-sum fee or a percentage of the recovery. Such agreements are typically in writing.

- In all cases, under the applicable ethical rules, the client is responsible for all out-of-pocket expenses, unless the engagement is a pro bono engagement.

15. Understanding conflicts and other ethical dilemmas and how to deal with them

- understanding the nature and sources of ethical standards

- Most codes of professional responsibility and the ABA Model Code discuss lawyer conflicts, when they occur and when they must be acted upon. New York's Rules 1.7 and 1.8 in the Rules of Professional Conduct are but two examples of rules dealing with lawyer conflicts.

- Lawyers must always be aware of conflicts and other potential ethical issues.

- Conflicts can arise at any time and must be disclosed as soon as they arise.

16. The basics of drafting (including contracts)

- Clear writing requires clear thinking.

- Contracts are written expressions of agreements reached by two or more parties.

- Contracts are typically drafted by lawyers.

- differences between term-sheets, memoranda of understanding and contracts.

- Some contracts are form contracts with respect to which there is no opportunity to negotiate (contracts of adhesion).

- Contracts must be clear and unambiguous.

- introductory parts, preamble, recitals and words of agreement
- definitions and defined terms
- discretionary authority and declarations
- "must, will and shall"
- amendments, consents and waivers
- Contracts should state the governing law and the method of resolving disputes.
- Most contracts have end-terms.
- representations and warranties; narrow or broad; should relate to past facts not future facts
- covenants; what obligations should be created
- conditions to an obligation
- Most states interpret ambiguities against the drafter (a doctrine known as *contra proferentem*).
- making sure that the client fully understands and agrees with everything in the contract
- special problems of drafting legislation

17. Negotiations

- What is negotiation? understanding different types of negotiation, including negotiations to form or terminate a relationship
- preparation for effective negotiation
    - determining settlement point (the "bottom line")
    - predicting the opponent's settlement point
    - determining with clarity the issue(s) to be negotiated

  - determining the desired goal
  - evaluating the strength and weaknesses of the client's case
  - planning for the actual conduct of the negotiation, including points to be conceded and anticipating things that may happen during the negotiation
  - identifying and ranking a roster of outcomes that are preferable to the "settlement point" and that should be obtained if possible

- recognizing a negotiation situation
- how to deal with a strong counter-party
- determining alternatives to negotiation
- cost-benefit analyses
- how to establish credibility
- deciding among various negotiation strategies
- ethics in negotiations, including honesty, settlement authority and keeping the client informed
- impasses and how to break them
- from negotiation to mediation

18. <u>The basics of litigation</u>[74]

- understanding the fundamentals of litigation at the trial-court level
- understanding federal vs. state considerations

[74] Some of this section is taken from the MacCrate Report at 191-198.

- understanding the skills and processes required for preparing a case for trial
- understanding the skills and processes required for effectively conducting a trial
- motion practice, including motions to dismiss the complaint and for summary judgment
- document preservation obligations before and during litigation
- drafting the complaint
- temporary restraining orders and preliminary injunctions
- drafting the answer
- drafting the counterclaim
- discovery, both formal and informal
    - depositions, including taking and defending depositions
    - document discovery including e-discovery
    - interrogatories
    - requests to admit
- jury vs. judge-only considerations
- trials, including mock trials
- jury selection
- social media issues, including what is permissible and what is not
- preparing witnesses to testify
- opening statements

- direct examination
- cross-examination
- motions for judgment as a matter of law
- jury instructions
- jury verdict forms
- preparing and delivering the closing argument
- post-trial motions
- knowledge of the fundamentals of litigation at the appellate level

19. Brief-writing

- The goal of brief writing is persuasion.
- understanding court rules on format, length and other requirements
- establishing credibility with the court
- the importance of candor
- finding the best argument and making it
- articulating legal theories and arguments clearly and effectively with logic and economy
- dealing with anticipated responses
- Clear writing requires clear thinking.
- Short and succinct is better than long and verbose. Why?
- the art and necessity of revising and re-writing
- spell-checking

- examples of good briefs
- writing an amicus brief[75]
- writing a reply brief or rejoinder

20. Oral arguments

- The goal of oral argument is persuasion.
- how to prepare
- common mistakes and how to avoid them[76]
- how to address the court
- how to present a persuasive argument
    - Moot court preparation is essential.
    - the "rule of three"[77]
    - avoiding jargon and jokes
    - avoiding ad hominem attacks
    - telling the court what you want it to do

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[75] On April 25, 2018, the New York Court of Appeals changed its rules for amicus briefs to require the brief to state whether any party, counsel or other individual contributed to the preparation or funding of the brief and to provide that reply briefs are not permitted by amici.

[76] THE CLERK OF THE COURT, U.S. SUPREME COURT'S GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES (Oct. 3, 2019), https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf, is a useful guide to Supreme Court oral advocacy and oral arguments in general.

[77] Cicero's "ethos" (speaker's credibility), "logos" (logic, narration, division, proof, refutation) and "pathos" (appeal to the emotions of the audience). The "rule of three" also refers to the fact that audiences respond best when only three points are made in a writing or speech. Examples abound in effective writing and oratory. "Life, liberty and the pursuit of happiness," "veni, vidi, vici," "faster, higher, stronger."

  - arguing the facts
  - arguing the law
  - arguing from precedent
- how to engage the court
- how to listen to and respond to questions
- anticipating your adversary's argument
- when to concede a point
- nonverbal communication skills
- style and demeanor
- how to close
- examples of good oral arguments and some that could have been better[78]

21. Understanding the differences among litigation, arbitration and mediation and how to choose the most appropriate strategy

- Litigation takes place before a judge and sometimes a jury.
- Arbitration and mediation are creatures of agreement.
- In arbitration and mediation, the parties can generally (but not always) select the arbitrators and mediators; that is not the case in litigation.
- There is an appeal from a court decision in litigation; appeals from arbitration awards are rare and although the results of a mediation cannot be appealed, they can be challenged in some circumstances.

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[78] Transcripts and recordings of more recent arguments in the US Supreme Court are generally available and a useful source of material.

- Arbitration, especially before three arbitrators, can take longer than litigation and can be more expensive.

- Arbitration awards are enforceable as if they were judgments in a litigation.

- Mediation generally succeeds only if both parties agree to the result.

- Mediation is the least expensive of the three alternatives but it generally requires agreement by both sides.

- understanding the factors that will lead to the selection of one method over the others

22. How to read a balance sheet and other fundamental financial documents

- Why do lawyers need to understand balance sheets and fundamental financial documents, such as income statements and cash flow statements?

- What is a balance sheet? (Statement of Financial Position; a snapshot) (a statement of assets, liabilities and equity)

- assets=liabilities plus shareholders' equity (i.e. a balance)

- Companies use assets to operate their businesses; liabilities and equity are sources of those assets.

- "Current assets" include cash and cash equivalents, accounts receivable, inventory and raw materials.

- "Non-current assets" include items that are not easily turned into cash; tangible assets are such things as buildings while intangible assets includes such things as goodwill and intellectual property.

- "Depreciation" is usually subtracted from the value of assets.

- "Current liabilities" are liabilities that will come due within a year; long-term liabilities are debts that come due in a year or longer.

- "Shareholder equity" represents the amount invested in the business.
- using ratios and other techniques to analyze a balance sheet
- understanding software tools

23. Drafting wills

- In New York State, testator must be at least 18 years old and of sound mind and memory.
- Wills must be signed at the end by the testator in the presence of at least two attesting witnesses (three witnesses are common), who sign their names and addresses at the end of the will.
- Oral wills are generally valid only if made by a member of the military on active service during a war or armed combat or if made by a person who accompanies an armed force engaged in such activity, or a mariner at sea.
- Wills typically name an executor and a guardian for minor children.
- There is a movement toward permitting "e-signatures" on wills. Nevada and Indiana permit them. There is a similar movement toward digital wills. That movement will continue.[79]

24. Representing entities (e.g. corporations)

- understanding who the client is
- public vs private corporations
- understanding what can go wrong and how to deal with it when it does

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[79] Paul Sullivan, *Drawing Up a Will Your Heirs Can Download*, N.Y. TIMES (Oct. 19, 2019, https://www.nytimes.com/2019/10/18/your-money/electronic-wills-online.html.

- understanding the basic structure of the federal securities laws and Delaware Corporation Law or other relevant state law
- understanding basic corporate structure: articles (or certificate) of incorporation; by-laws; corporate officers; shareholders; derivative litigation; shareholder litigation
- understanding how the federal securities laws and rules regulate lawyers who "appear and practice before the Securities and Exchange Commission"
- understanding "up the ladder" reporting obligations of lawyers
- advising the board of directors or other governing body

25. Criminal Law and Practice[80]

- Prosecutor
  - understanding the functions and duties of the prosecutor
  - Who is the client of the prosecutor?
  - understanding the prosecutor's heightened duty of candor
  - preserving the record
  - understanding the prohibition of improper bias
  - conflicts of interest
  - appropriate workload

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[80] This section draws heavily from A.B.A., *Criminal Justice Standards for the Prosecution Function*, AMERICANBAR (4th. ed., Nov. 12, 2018), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; A.B.A., *Criminal Justice Standards for the Defense Functions,* AMERICANBAR (4th ed.), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

- the importance of diligence, promptness and punctuality
- relations with the media
- understanding the duty to report and respond to prosecutorial misconduct
- the use of investigative resources and experts
- the relationship with law enforcement
- the relationship with courts and defense counsel
- the relationship with victims and witnesses, including experts
- dealing with physical evidence, including evidence disclosed by the defense
- decisions to charge, including minimum requirements and discretion
- relationship with a grand jury
- understanding the decision to recommend release or detention
- preservation of evidence
- understanding negotiated dispositions
- selection of and relationship with jurors
- understanding special trial skills for the prosecutor, including ethical obligations.

- Defense
  - understanding the "tempered" duty of candor
  - preserving the record
  - understanding the prohibition of improper bias

- understanding conflicts of interest
- the importance of diligence, promptness and punctuality
- relationship with the media
- communicating with detained persons
- maintaining an effective lawyer-client relationship
- seeking release from custody
- interviewing the client
- fees, including the special challenges in representing indigent defendants
- engagement letter
- dealing with a client who might engage in unlawful conduct, including the defense counsel's obligations
- the importance of keeping the client informed
- what to do with the client's file
- relationships with witnesses, the court and the prosecutor
- understanding discovery issues and compliance obligations
- special trial skills necessary for defense counsel
- understanding pleas, plea offers and negotiations
- "Queen for a Day" issues
- special trial issues, including whether the defendant should testify
- negotiated dispositions
- selection of and relationships with jurors

- understanding sentencing issues
- how to prepare and present an appeal

- Special immigration issues
  - access to the client
  - making a record
  - presenting a claim for asylum
  - dealing with conditions of detention

26. Practicing Administrative and Regulatory Law

- understanding what administrative law is (Generally, it is "the body of laws and legal principles governing the creation, administration and regulation of government agencies at the federal, state and local levels."[81] It includes "the powers granted to administrative agencies, the substantive rules that such agencies make, and the legal relationship between such agencies agencies, other government bodies, and the public at large."[82]

- Why do we regulate?
  - to apply a binding set of rules to certain activities, such as health and safety
  - to influence business or social behavior
  - to prevent certain undesirable activities
  - to allow markets to operate efficiently

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[81] Isabel Salovaara & Adam Augusiak-Boro, A Guide to Careers in Administrative Law 3 (Catherine Pattanayak, ed., 2011), https://hls.harvard.edu/content/uploads/2011/08/adminlawguide.pdf. .

[82] *Administrative Law,* CORNELL LAW, https://www.law.cornell.edu/wex/administrative_law (last visited Oct. 22, 2019)..

  - to promote and enforce human rights
  - other reasons
- understanding who regulates
  - federal, state and local administrative agencies
  - corporations
  - self-regulated organizations such as the American bar
  - professional organizations
  - trade organizations
  - voluntary organizations
- understanding what constitutes "good" regulation[83]
  - Is the regulatory action supported by legislative authority?
  - Is there an appropriate scheme of accountability?
  - Are procedures fair, accessible and open?
  - Is the regulator acting with sufficient expertise?
  - Is the action or regime efficient?
- Although administrative law is often thought of as federal administrative law, there is also a large body of local (i.e. city and state) administrative law. "As with local government writ large, there is a great variety to local agencies' form and function. . . . The local level . . . yields quite a menagerie of departments, boards, bureaus, commissions and other institutions. . . . In that domain, we see a wide array of governmental structures, agencies that often operate with relatively little procedural formality, a blending of public and

[83] This is taken largely from ROBERT BALDWIN ET AL, UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE (2d. ed., 2012).

private and agency expertise that can be grounded less in technical knowledge and more in local expertise."[84] Local administrative law should not be overlooked when learning administrative law.

- Federal administrative law is governed largely by the Administrative Procedure Act.

- What are some of the current legal issues in administrative law? They include judicial deference to administrative agencies and its limitations, including, at the federal level, *Chevron* and other types of deference[85] including *City of Arlington* deference.[86]

    - other issues with respect to judicial review of agency decisions, including debarment and suspension

    - the nondelegation doctrine (executive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so)[87]

    - top-down vs. bottom-up regulation, including cooperation between regulatory agencies and businesses and non-profit organizations

    - statutory interpretation issues, including "appropriate and necessary" and "plain meaning" (e.g. does "document or other tangible object' include live fish?[88])

- What do practitioners of administrative law do?[89]

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[84] Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L. J. 564, 593, 634 (2017), *available at* https://www.yalelawjournal.org/article/localist-administrative-law.

[85] *Chevron, U.S.A., Inc. v. Nat'l. Res. Def. Council*, 467 U.S. 837 (1984); *See generally* Anthony Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511 (1989)*, available at* https://scholarship.law.duke.edu/dlj/vol38/iss3/1 (note that this article is in part out of date).

[86] *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

[87] *See, e.g.*, Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181(2018) *available at* https://www.gwlr.org/wp-content/uploads/2018/10/86-Geo.-Wash.-L.-Rev.-1181.pdf.

[88] It does not. *Yates v. United States*, 135 S. Ct. 1074 (2015).

[89] *Administrative Law,* PSJD, https://www.psjd.org/Administrative_Law (last visited Oct. 22, 2019).

- write regulations
- counsel administrative agencies and their staffs
- write comments on regulations
- serve as administrative law judges
- organize and participate in regulatory hearings
- analyze public comments after they have been submitted
- investigate
- advocate for changes in or defend administrative regulations
- represent corporations and other organizations and persons who have claims with respect to regulations or who have been charged with violating such regulations

- The Harvard Law School Office of Public Interest Advising publication, *A Guide to Careers in Administrative Law*[90] is an excellent resource for finding administrative law jobs and learning how to apply for them.

- What substantive areas of law are involved in administrative law practice? Because of the breadth of jurisdictions of federal, state and local administrative agencies, the substantive areas of law are virtually limitless. They include
  - agriculture
  - antitrust
  - financial regulation
  - health and safety

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[90] Salovaara & Augusiak-Boro, *supra* note 81.

- welfare and disability programs
- immigration
- transportation
- zoning
- housing
- trade regulation
- election law
- foreign affairs policy
- environmental regulations, and
- employment issues, including discrimination

- Skills required for lawyers practicing administrative law include those required for the practice of law generally; good writing skills are critical as are good inter-personal skills.

27. Professional self-development[91]

- Lawyers should take advantage of opportunities to improve their knowledge and skills.

- Lawyers should also learn how to evaluate their performance, including preparation and planning processes.

- In order to provide the required "competent representation," lawyers must remain current with developments in the law and other relevant fields of discipline.

28. Dealing with Discrimination, Implicit Bias and Sexual Harassment

- recognizing discrimination, bias and harassment by courts, clients and other lawyers and disrupting such conduct to eliminate inequity in how people are treated

[91] Some of this section is taken from the MacCrate Report at 218-219.

- understanding when and how to report instances of such discrimination, bias and harassment

- "debiasing"[92]

- understanding the obligation to report knowledge that another lawyer has committed a violation of the Rules of Professional Conduct (see NYS Rule 8.3) that raises substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer

- "[I]mplicit racial biases can influence the behaviors and judgments of even the most consciously egalitarian individuals in ways of which they are unaware and thus unable to control. Additionally, the effects of implicit biases may not be open and obvious. . . . Yet, the absence of overtly racist practices does not make the problem of racial bias any less concerning."[93] The same is also true of other types of implicit bias.

- The American Bar Association has several initiatives dealing with Implicit Bias, Women in the Profession, the Unique Experiences of Women Lawyers of Color and other relevant subjects and its reports are available at its website.

29. Challenges for today's lawyers and those of the next generation

- privacy issues

- work-life balance issues, including parenting and other family issues, caring for the elderly, needy and ill, and personal health issues.[94]

- dealing with debt

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92 *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007), *available at* http://scholarship.law.cornell.edu/facpub/917.

93 L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L. J. 862, 865 (2017), *available at* https://www.yalelawjournal.org/article/systemic-triage-implicit-racial-bias-in-the-criminal-courtroom.

94 *See* N.Y. STATE BAR ASS'N, SPECIAL COMMITTEE ON BALANCED LIVES IN THE LAW, FINAL REPORT (Mar. 7, 2008), https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26859.

- data protection issues
- artificial intelligence issues
- cryptocurrency
- cyber issues
- "fake news" and market manipulation
- alternate forms of the delivery of legal services
- maintaining lawyer independence[95]
- on-line legal advice
- access to justice issues, especially with respect to vulnerable populations including indigents and clients with limited economic resources
- too many unrepresented litigants
- backlog of immigration cases
- high costs of certain types of litigation
- e-discovery challenges
- project management issues
- explosion of data
- virtual reality issues
- blockchain

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95 Rules of Professional Conduct (22 NYCRR 1200.0) rule 2.1.

APPENDIX A

PROFESSIONAL VALUES IN THE LEGAL PROFESSION

INSTITUTIONAL VALUES

Because law is a profession, institutional values must insure its integrity, honor and independence. Because it is a profession, there must be a common acceptance of its core mission: the provision of competent, candid, independent legal advice to clients. Those in the legal profession share a belief that lawyers must set aside their own interests and seek to maximize those of their clients, within the permissible bounds of the law. Doing so permits zealous advocacy of our clients' causes and requires strict confidentiality save for the most extreme and exigent cases that threaten the system of justice. Institutional values must also seek to preserve and strengthen the rule of law and the system of justice. Lawyers who are selected to become members of the judiciary have a heightened obligation to perform their work with rigorous independence, honesty, fairness and strict adherence to the rule of law. As members of a learned profession, lawyers have the obligation to remain abreast of changes in the law, enabling the provision of competent legal advice. When supervising other lawyers, a lawyer must insure that they are aware of and comply with applicable codes of conduct. Lawyers also have an obligation to advance justice and the system of justice and to promote diversity in the profession. They should advance the cause of representing the unrepresented and be aware that the law and the practice of law have a broad impact on people's lives and on society itself.

CLIENT-RELATED VALUES

Providing legal advice and services is at the core of the legal profession. When lawyers do so, they are in effect delivering the rule of law and thereby performing a public service. They must do so competently and with candor and independence. Preserving confidentiality is not only an obligation, it is essential for the proper functioning of the system of justice. The so-called principle of partisanship requires that lawyers put their clients' interests ahead of their own in all but the most extraordinary cases and requires that lawyers must always be available for their clients. Clients must be fully informed about their matters and because lawyers may be fiduciaries for their clients, their property must be scrupulously segregated and preserved. The principle of partisanship also means that lawyers must assiduously avoid conflicts of interest that might jeopardize their ability to provide candid and independent legal advice.

PERSONAL VALUES

Lawyers must behave with personal integrity and civility and in their relations with courts, clients and adversaries and at all other times they must be scrupulously honest. Being honest does not mean betraying client confidences or interests but it does prohibit prevarication. Because lawyers are common members of a shared honorable profession, they must treat each other courteously and with respect. "Zealous advocacy" does not countenance deception, disrespect or incivility and it is not inconsistent with common notions of fair play. Lawyers must also be diligent and prompt in their work..

LAWYERS AS MEMBERS OF A LARGER COMMUNITY

As members of a profession whose hallmark is the delivery of the rule of law to their clients and who thereby provide a public service, lawyers also have a responsibility, from their unique perspective, to become active and productive members of their community and to educate others about the law. They should support and promote the rule of law, mentor other lawyers in appropriate situations and provide or contribute to the provision of free legal services to those who cannot afford them, participate in government whenever appropriate and speak out against injustice whenever it is perceived.

APPENDIX B

A BRIEF HISTORY OF THE LEGAL PROFESSION IN AMERICA

1. Cicero

- Although one could select an earlier starting point, we believe that it is appropriate to begin this short history of the legal profession with Marcus Tullius Cicero (106-43 BC), a Roman who some have called the greatest lawyer of all time. He was born in a small town south of Rome to a wealthy family, educated in Greece and Rome where he studied philosophy and rhetoric and after brief military service, studied Roman law under Scaevola. His first case was a successful defense of a man charged with killing one of his parents.

- Cicero became a consul in 63 and among other things foiled an attempted conspiracy to overthrow the Republic. He allowed the execution of the key conspirator but since that was against Roman law, Cicero was sent into exile. In exile, he rejected Caesar's attempts to repatriate him and as a result he was away during the civil war between Caesar and Pompey. Cicero backed the unsuccessful Pompey but was pardoned by Caesar when he returned to Rome. Although not involved in the conspiracy to kill Caesar, Cicero's support for the conspirators was ambiguous. He defended and then denounced Mark Anthony, for example. When the Second Triumvirate was formed in 43, Cicero was killed by Mark Anthony's soldiers.

- Cicero was best known for his rhetoric and his writing. Nearly one thousand of his letters still survive. Some have said that Petrarch's discovery of Cicero's letters in 1345 marked the beginning of the Renaissance. Because of his Greek education, especially from the proponents of Stoicism, Cicero valued service and virtue.

- In Cicero's time, the Roman legal system, which can trace its origin to about 500 BC, was one of the most sophisticated in the western world. Cicero's principal contribution to that system was to infuse the Greek Stoics' natural law philosophy into the Roman system.

- In Cicero's view, "natural law" meant that there was a set of universal laws that were a part of nature itself and that were immutable. "Law is not a product of man's thought nor is it any enactment of the peoples, but rather something eternal that rules the whole universe by its wisdom in command and prohibition."[96]

- Out of that natural law came Cicero's principle that all human beings are equal: "However one may define man, a single definition will apply to all. That is sufficient proof that there is no difference in kind within the species . . . reason, which raises us above the level of the beasts . . . is common to all of us . . . . There is no one from any people whatever who, if he finds a guide, cannot attain virtue."[97]

- Also out of that philosophy came Cicero's view that a government must have the consent of the people. "A commonwealth is the property of the people . . . many people united by agreement on justice and a partnership for the common good." Further, "whenever a tyrant rules . . . we have no republic at all . . . there can be nothing more horrible than that monster that falsely assumes the name and appearance of a people."

- In addition, Cicero believed that the best type of government was a republic that was governed by a deliberative body that could be one of three possibilities, a kingdom, an aristocracy (in which selected citizens hold power) or a popular government in which power is in the hands of the people. But for Cicero, there was also a fourth possibility in which all three forms were merged in order to prevent a devolution of any of the three forms into government by despot, a faction or a mob.

- As a lawyer, Cicero was at his best as an advocate for the defense, and especially in murder cases. His defenses were sometimes not based on the facts (for example claiming that his

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96 2 MARCUS TULLIUS CICERO, THE POLITICAL WORKS OF MARCUS TULLIUS CICERO: COMPRISING HIS TREATISE ON THE COMMONWEALTH; AND HIS TREATIES ON THE LAWS WITH DISSERTATIONS AND NOTES 2.4.8 (Francis Barham trans., Edmund Spettigue, 67, Chancery Lane, 1842).

97 *Id.* at 1.10.28-43; *See generally Sources of Law, 2: Cicero's Philosophy*, UNIV. OF WISCONSIN, CENTER FOR LAW, SOCIETY AND JUSTICE, LEGAL STUDIES PROGRAM, https://www.ssc.wisc.edu/~rkeyser/?page_id=543 (last visited Oct. 22, 2019, *quoting* 2 CICERO, *supra* note 96, at 1.10.28-30, 43.

clients were not near the scene of the crime, without any evidence[98]) but rather were often based on motive or lack of it. He was very successful. After he became worn out, he left Rome for Greece and Asia Minor, where he studied philosophy. After he regained his strength ("the excessive strain on my voice had gone, my style had simmered down, my lungs were stronger and I was not so thin"[99]) Cicero returned to Rome.

- Cicero's rhetoric and philosophy influenced many, including Edmund Burke, Gladstone, Winston Churchill and Frederick Douglass. His views of natural law, good government and equality of all people influenced John Locke, David Hume, Montesquieu and Thomas Jefferson, among many others.

- Timberlake has written that the early Roman lawyers of Cicero's time were "in no wise inferior to their modern successors in the profession. They were learned in the law, powerful in oratory and debate, zealous in upholding the law of the land, devoted to the interests of their clients, and true to the finest ethics of their profession."[100] Tacitus wrote that "Marcus Tullius Cicero was, by far, the greatest legal luminary of the Republic and the magnitude of his labors as orator, advocate, consul, author, teacher, philosopher, and commutator, was so prestigious that he stands without a rival, and, in spite of his vacillations and conceits, even after two thousand years the profession must bow in awe and reverence to this great name, which heads the list of Roman lawyers, the most eloquent of the sons of Romulus!"[101]

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98 Jim Powell, *Marcus Tullius Cicero, Who Gave Natural Law to the Modern World*, FOUNDATION FOR ECONOMIC EDUCATION, (Jan. 1, 1997), https://fee.org/articles/marcus-tullius-cicero-who-gave-natural-law-to-the-modern-world/ (last visited Oct 22, 2019).

99 *Id.* at 5.

100 E. W. Timberlake, Jr., *Origin and Development of Advocacy as a Profession*, 9 VA. L. REV. 25 (1922), *available at* https://www.jstor.org/stable/1065786?seq=16#metadata_info_tab_contents.

101 *Quoted in* Edward. J. White, *Lawyers in Ancient Rome,* 92 CENTRAL L. J. 407, 416 (1921), *available at* https://play.google.com/books/reader?id=n71CAQAAMAAJ&pg=GBS.PP8; Timberlake.

2. The Roman Foundation of the American Legal Profession

- Even before Cicero's time, the legal profession appears to have had its beginning during the last two centuries of the Roman Republic.[102] In the early days of the Republic, knowledge of the laws was confined to a "select group of aristocratic priests" who made up the college of pontiffs. The pontiffs kept archives not open to outsiders that contained records of many kinds."[103]

- Because the actions of the college of pontiffs disadvantaged ordinary citizens, the Roman Senate convened a Commission to put the laws into a written form. The Commission published a written statement of the Roman laws, which was then put onto ten bronze tablets. After another year of study, the Commission created two additional bronze tablets containing laws. These became known as the Twelve Tablets. But because the Twelve Tablets were brief and enigmatic, the college of pontiffs retained its monopoly power over the furnishing of legal advice for many generations.[104]

- Thus, the early Roman Republic had three groups that were offering legal advice: the college of pontiffs, lay jurists who were not members of the college, and jurists who believed they had a sacred calling.

- Under *legis actionis*, parties in litigation had to conduct their cases in person. But under the formulary and *cognition* procedures that came into existence in the second century BC, litigants could choose to be represented in court by a third party. These third parties were variously called *cognitor, procurator*, or *defensor*. This may have been the beginning of the advocacy role of the legal profession even though most of these third parties were not legally trained.

- The training of advocates probably began in the second century AD. Prospective advocates first studied rhetoric and persuasion before they studied law. They also had the experience of actual courtroom practice while in school. By the middle of the third century, advocates in Rome were studying statutes, edicts and

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102 JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS (2008).

103 *Id.* at 10-11.

104 *Id.* at 13.

resolutions of the Senate and legal opinions of judges that had acquired the force of law.[105]

- By the end of the fifth century, advocates in Rome had to complete a four-year course of study. They also had to pass an oral examination. At this time, there were two branches of the Roman legal profession: advocates or forensic orators, who appeared in court, and jurists, who did not but who gave expert legal advice to their clients. Advocates were paid in *honoraria*, which meant that the payments were voluntary and that advocates could not sue for non-payment.

- Lawyers had to obey strict behavioral standards and clients could sue them for damages if the lawyers violated them. The so-called "calumny oath" was an oath that lawyers were required to take at the beginning of a trial and that required the advocate to swear to faithfully strive to present the client's case justly and truthfully, that the advocate would not present any case considered to be "desperate" or groundless and that the advocate would resign from the case if it was later considered to be baseless. "The terms of the calumny oath thus cast the advocate in the role of gatekeeper for the court."[106] It was the predecessor for today's codes of professional responsibility for lawyers.

- In the early fourth century, imperial power in Rome passed to the Christians and under Constantine, Christianity became the official religion of the Roman Empire in the late fourth century. In the fifth century, the Church prohibited clergy from practicing law as advocates.[107]

- At the same time, the Church, which since the early second century had been developing rules (or "canons") for worship, the administration of property and relations among its members, began to merge some of its procedures with those of Roman law. For example, Constantine obligated the Roman civil courts to recognize judgments of episcopal courts and ecclesiastical courts were obligated to follow the same procedures as those in civil courts.

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105 *Id.* at 20.
106 *Id.* at 28.
107 *Id.* at 39.

- Toward the end of the sixth century, Emperor Justinian codified the governing law for the Eastern Empire, which, beginning with Justinian's rule became known as the Byzantine Empire. The Justinian Code was not applicable in the Western Empire but it served as an influence. With the fall of the Western Roman Empire, law schools largely disappeared.[108]

- In the sixth century, the Western Roman Empire essentially "fell" and with it the Roman legal profession.[109] However, the Church stepped in and attempted to preserve much of the "Roman administrative style." [110] Similarly, the barbarian kingdoms that replaced the Western Roman Empire desired to preserve much of the Roman regimes in part because the territory they controlled was still populated largely by Romans. Slowly, however, Germanic legal procedures replaced Roman procedures. Legally-trained judges were either members of the community or government officials.

3. The Early Middle Ages

- The early Middle Ages (e.g. from the ninth century to the eleventh century) was a period of what Brundage called "law without lawyers."[111] There were few if any lawyers and the Church was deeply involved in all legal structures. Canon law continued to grow as a comprehensive body of written law. Non-lawyers, called *advocati,* acted like lawyers, gave legal advice and spoke in courts on behalf of their clients. "The clergy . . . constituted the principal reservoir of legal learning throughout the early Middle Ages."[112]

- The twelfth century represented a legal revival. Specialized law schools grew up, first in Bologna and then in other cities. Roman law merged with canon law into what became *ius commune*, which became more influential with respect to continental law than it did with respect to the common law.

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108 An exception to this occurred in the Celtic kingdoms of Ireland and Wales. Another exception was Iceland which, like the Celtic kingdoms, never came under Roman rule.

109 *Id.* at 46.

110 *Id.* at 47.

111 BRUNDAGE, *supra* note 102, at 75.

112 *Id.* at 63.

- A reform movement began in order to separate the Church from the kind of governmental control exercised by leaders such as Constantine. The volume of litigation in church courts grew substantially.[113] Canon law expanded and was taught all over Europe. Brundage writes that "Practitioners of the two learned laws, Roman and canon, gradually commenced to become aware of their collective identity as an advantaged social group during the latter part of the twelfth century and began to attach themselves to the elite classes that ruled Western society."[114]

- As a result, by 1200, "trained lawyers had begun to form an essential part of church governance. . . . Throughout Western Christendom, trained lawyers had also begun to rise to prominent positions in civil government and society. . . . Law became a much sought-after occupation during the long twelfth century as it became increasingly obvious that legal training often led to positions of power in the church and in royal government."[115]

- In the middle of the twelfth century, a canonist named Gratian published what Brundage called "the most important turning point in the maturation of canon law." His *Concordia discordantium canonum*, often referred to simply as Gratian's decretum, was a 4,000 chapter compendium of papal letters and proclamations, administrative regulations of Germanic rulers and proceedings of church councils. It was "an amazingly successful tool for teaching and intending clergymen continued to study it in preparation for ordination for more than seven hundred years."[116] Before Gratian, canon law was a branch of theology; afterward, it emerged as a separate and independent discipline. By the end of the twelfth century, legal procedures had become technical and complex, making "the services of trained lawyers indispensable."[117]

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113 *Id.* at 80.
114 *Id.* at 125.
115 *Id.* at 166.
116 *Id.* at 96-97, 105.
117 *Id.* at 125.

- In the absence of law schools, untrained *advocati*, some of whom were clerics who knew a little about canon law, began giving legal advice.

- Canon law began to develop and episcopal courts exercised expansive jurisdiction, even though clerics were discouraged from giving legal advice and were prohibited from representing parties in litigation. There were, however, exceptions to this prohibition.

4. The Origins of the Jury Trial

- After Constantine became emperor and Christianity became the state religion of the Roman Empire, Christians and their clergy assumed the role of judges. One of the problems they faced was the custom of trial by ordeal and blood punishments.

- For example, a person charged with a crime might be tried by an ordeal in which that person would plunge an arm into boiling water. The judges would then observe the healing of the wound. The theory was that "God would intervene to repair any damage to the innocent and would refuse to heal the guilty."[118]

- Christians were taught by the Church and believed that if those sitting in judgment convicted a person who was innocent, they would suffer eternal damnation in Hell. This belief came from the passage in the Gospel of Matthew, "Judge not, lest ye be judged." As a result, convictions were rare. To assuage the concerns of the judges, Augustine, among others addressed the problem thusly: "*Cum homo juste occiditur, lex eum occidit, non tu.*" (When a person is killed justly, it is the law that kills that person, not you.") Similarly, St. Raymond of Penafort wrote that "the judge does not sin if the criminal is justly convicted."[119] These maxims were designed to assure those sitting in judgment that in convicting someone, even if wrongly, they would not sin so

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[118] *Id.* at 54.

[119] Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHICAGO L. REV. 941 (2009)(reviewing JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008)), *available at* http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/76_2_Gallanis.pdf.

long as they believed that the alleged criminal was guilty beyond a reasonable doubt.

- Nevertheless, the Church was concerned about eternal punishments for those sitting in judgment and in 1215 the Fourth Lateran Council promulgated Canon 18, a rule that prohibited clergy from participating in blood ordeals, lest they become polluted by judgments of blood against innocent persons. In time, Canon 18 brought about the end of the ordeal and, according to Whitman, brought about the beginning of the jury trial.

- The inquisition existed in France (and in other countries as well) and was used in England by the Normans after the conquest of 1066. In England, "assizes" (from the French "asseoir" meaning to sit down) existed from the time of Henry II. The word "assize" meant, among other things, a court session. The Assize of Clarendon in 1166 established a "jury of presentment" that formally stated criminal charges against an accused. It also created inquiries by an assize of twelve "of the more lawful men" of the township. These twelve were not meant to be judges but rather witnesses. There were no jury trials, as all (or at least most) trials were still trials by ordeal.

- Trials by ordeal, sometimes called "judgments of God," existed all over Europe. They were proceedings of last resort and were used only if no witnesses would come forward, if the accused refused to confess or if the matter could not be resolved by the oath of an honorable person.[120] The most common trial by ordeal was trial by battle, in which two disputants would fight and the winner would be the victor in the dispute.

- By the thirteenth century, most of the trials by ordeal, including blood ordeals, were replaced by trials in which the assizes of twelve from the vicinity of the offense were brought to court to speak on oath (they were called *juratores* or persons who have been sworn, i.e. "jurors") but they did not render a judgment about the accused's guilt or innocence. The proceedings were called "jury trials" even though the rendering of a judgment by the *juratores* was still far in the future.[121] In those days, it was

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120 JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 60-61 (2008).

121 Gallanis, *supra* note 119, at 944.

not easy to be a juror and because of the fear of eternal punishment, witnesses refused to testify. Why were the witnesses silent? Whitman answers that "it was inevitable that witnesses would resist testifying. Partly this was because of the norms of the vengeance culture. . . .[Moreover, witnesses] did not wish to undergo the spiritually perilous business of taking an oath." As a result, during the twelfth and thirteenth centuries in England, witnesses were compelled to testify and accusers were compelled to make accusations. In continental Europe, blood ordeals were replaced by inquisitions (authorized by the Fourth Lateran Council) to determine guilt or innocence.

- As noted above, in 1215, Canon 18, promulgated by the Fourth Lateran Council of the Church, condemned trial by ordeal and forbade clergy from participating in judgments of blood. Almost immediately, Henry III instructed English justices to find some new means of adjudicating disputes "since the Church has forbidden the judgments of fire and water."[122] Within a year, the justices settled on a jury trial. In this "jury trial," witnesses, who had been compelled to give testimony even if they did not wish to, were now being asked to render a general verdict as well. The *juratores* became not only witnesses but also jurors with the obligation to render a verdict. Judges were relieved of the obligation to extract a confession from the accused (judicial torture, which existed under Continental law, did not exist in England) and they were spared the moral responsibility for rendering judgment against a potentially innocent person. Whereas the ordeal represented the judgment of God, the jury trial placed the burden of judgment on the jurors.

- By the middle of the thirteenth century, the English jury had matured. The role of the English judge had also matured by that time. Judges were prohibited from using their own private knowledge about the facts or from acting with passion. Because juries were deciding guilt or innocence, English judges were spared "the agony of decision."[123] To avoid the perils of rendering a general verdict convicting an accused who was innocent, English criminal juries, as early as 1329, sought and

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122 WHITMAN, *supra* note 120, at 126-127.

123 *Id.* at 148, *quoting* JOHN BAKER, 6 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 47 (2003).

received permission to render special verdicts rather than general verdicts, in order to ease their moral pressures. A special verdict would merely find the facts, without deciding guilt or innocence; that was left to the judge.

5. The Origin of the Common Law

- In his *Commentaries*, Blackstone wrote that "general immemorial custom, of common law" was the "first ground and chief cornerstone of the laws of England" and was made by the decisions of the courts of justice, not legislatures. The beginnings of the common law came from the reign of Henry II in the middle to the end of the twelfth century. Among other things, Henry II required courts to keep detailed records, made "official visits" to the counties of England and were integrated into a single legal structure. Henry II also redefined the relationship between the church and the state, taking power away from the church and increasing the power of the monarchy.[124]

- The first compendium of the common law, the fourteen volume *Tractatus de legibus et consuetudinibus regni Anglie* (Treatise on the Laws and Customs of the Kingdom of England) was written by Ranulph de Glanville in around 1188. It begins "Here begins the treatise on the laws and customs of the kingdom of England composed in the time of Henry the Second, when justice was under the direction of the illustrious Ranulph de Glanville, the most learned of that time in the law and ancient customs of the kingdom; and it contains only those laws and customs which are followed in the kings court at the Exchequer and before the justices wherever they are."[125]

- The common law was called "common" because unlike feudal justice, it was "common to all men in all regions of the country."[126]

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124 Henry II quarreled with the archbishop of Canterbury Thomas Becket, who was assassinated at Canterbury Cathedral after Henry II allegedly said "Who will rid me of this troublesome priest?" *Id.* at 85.

125 RANULF DE GLANVILLE, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur* [Treatise on the Laws and Customs of the Kingdom of England] (George Derek Gordon, ed., 1965).

126 HUNT JANIN, MEDIEVAL JUSTICE: CASES AND LAWS IN FRANCE, ENGLAND AND GERMANY 74 (2004).

- In 1215, at Runnymede, King John capitulated to rebellious barons, who were complaining about extortionate taxes and his heavy-handed administration of justice, and signed and sealed a document that became known as Magna Carta. The two chapters that, in the words of Lord Tom Bingham, "have the power to make the blood race," were Chapters 39 and 40.[127] Chapter 39 provided that "No free man shall be seized or imprisoned or stripped of his rights and possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." Chapter 40 provided "To no one will we sell, to no one deny or delay right or justice."[128]

- Magna Carta changed the constitutional landscape in England and eventually the world. Even though it was quickly annulled by the Pope and had no status as a law adopted by Parliament, it became enormously influential.[129]

- Magna Carta was "one of the historic milestones in the rise of the common law."[130]

- One of the enduring mysteries of the development of the common law in England was why the common law did not rely more than it did on Roman or canon law. Why did the English common law develop in a way that was very different from Continental law, whose *ius commune* tradition relied on those laws? One explanation favored by many historians is that the English monarchs were so powerful that they did not need to rely on Roman or canon law. "They were capable of imposing a relatively uniform law on their compact realm without drawing on the putatively universal authority of either ancient Rome or the church. Moreover, they had already taken major steps toward the development of a royal common law before

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127 TOM BINGHAM, THE RULE OF LAW 10 (2010).

128 *Id.* Bingham was "the most eminent of our judges" and was the Master of the Rolls, Lord Chief Justice and Senior Law Lord of the United Kingdom, "the only person ever to hold all three offices." *Id.* at 1. The London-based Bingham Centre for the Rule of Law was created in his honor.

129 Lord Bingham noted that Magna Carta has been cited by more than 900 American courts. *Id.* at 15.

130 JANIN, *supra* note 126, at 74.

university learning had produced its developed romano-canonical law."[131]

6. The Medieval Origins of the Legal Profession

- The legal profession as we know it today probably had its origins in the church courts of the thirteenth and fourteenth centuries. When professional canonists appeared in church courts, they were regularly required to take oaths promising to obey certain ethical rules. These oaths had their origins in the "calumny oath" of Roman antiquity. Their forms varied; some had as many as ten provisions; others as few as two. The *Properandum* of the Second Council of Lyons in 1274, for example, required advocates in ecclesiastical courts to swear to "use their strength and resources to secure for their clients what they consider right and just, sparing no effort they can muster for that purpose. Should they discover at any point in the proceedings, moreover, that the case they had accepted in good faith is unjust, they will no longer participate in it . . .".[132]

- These standards of professional conduct were not limited only to ecclesiastical courts. In England, for example, the Statute of Westminster I adopted in 1275 required "serjeants" or "sergeants-at-law" (the predecessors of King's or Queen's Counsel) to swear not to perpetrate any deceit or fraud upon the courts or their clients as a condition for admission to practice.[133]

- Formal legal education re-appeared around the turn of the thirteenth century. Universities had formal courses of instruction in Roman and canon law. Students were not only required to spend substantial time studying *ius commune* but they also had to demonstrate "skill in using that knowledge in public disputations" and pass examinations proving that they could "argue points of law successfully."[134]

- Although, as Brundage points out, there was no legal profession in a strict sense prior to the mid-twelfth century, "By the mid-thirteenth century . . . a legal profession had once more emerged

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131 WHITMAN, *supra* note 120, at 130.
132 BRUNDAGE, *supra* note 102, at 301.
133 *Id.* at 304-305.
134 *Id.* at 489.

in western Europe . . . . The legal professions, together with the universities, the papacy, the corporation and constitutional government, are institutions that must rank among the most influential and enduring creations of the thousand years that constituted the European Middle Ages."[135]

7. The Early Bar in England

- In early England, (i.e. feudal times) English justice was crudely administered. "The village moots, the shire courts and, in feudal times, the barons' courts, administered justice without much formality. A lawyer was not a necessity."[136] Instead, litigants brought their friends into court and took "counsel" with them.[137]

- Because they were largely the only ones who were literate, the study of law, such as it was, was taken up primarily by priests and monks[138] who became the professional class of those who could plead cases (for a fee) and who formed what some have called an "ecclesiastical bar."[139]

- In his *Commentaries*, Blackstone complained about this "ecclesiastical bar," most of whom he said were foreigners who studied only canon and civil law and, to the consternation of the nobility and the laity, ignored the common law.[140] As a result, the laity began to perform the duties of advocacy.

- By the beginning of the fourteenth century, the Inns of Court were formed and were given the power to "call" persons to the bar and to determine the qualifications for advocates. These

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135 *Id.* at 492.

136 ALEXANDER H. ROBBINS, A TREATISE ON AMERICAN ADVOCACY 4 (1904) *quoted in* Timberlake, *supra* note 100, at 28.

137 *See* FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 95, 176 (James F. Colby, ed., 1915). ("It would seem that under the Saxon Kings and certainly for some time under the Norman rule, every litigant spoke for himself, or, in some cases, if laboring under a disability, by his representative.")

138 The so-called "benefit of clergy" rule exempting defendants from capital punishment was based on the ability to read and speak Latin, on the assumption that only clergymen could do so.

139 Timberlake, *supra* note 100, at 29.

140 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK III OF PRIVATE WRONGS 23 (1975).

Inns of Court, Lincoln's Inn, the Middle Temple, the Inner Temple and Gray's Inn, mark the beginning of the history of the legal profession England.[141]

- In his book *A Philadelphia Lawyer in the London Courts,* Thomas Leaming wrote that "All lawyers were once men in holy orders and the judges were bishops, abbots, and other church dignitaries, but in the thirteenth century the clergy were forbidden to act in the courts, and thereupon the students of the law gathered together and formed the Inns. Much concerning their origin is obscure, but the nucleus of each was doubtless the gravitation of scholars in some ancient hostelry there to profit by the teachings of a master lawyer of the day . . .".[142]

- The division of English lawyers into barristers, who appeared in court, and solicitors, who did not, appears to have resulted from the ecclesiastical courts in which those who pleaded on behalf of clients were known as "advocates" and those who attended to the client's cause but did not plead, known as "procurators".[143] As a result, in the King's courts, "we see the attorney (who answers to the ecclesiastical proctor) and the 'pleader', 'narrator' or 'counter' (who answers to the ecclesiastical advocate)."[144]

- In time, under Edward I, those who were ordained to the ministry of law held a monopoly and the legal profession, known as "temporal lawyers" had come into existence in two forms, "pleaders" and "attorneys." Timberlake tells us that the barristers were the successors of the former ecclesiastical advocates or "pleaders," "narrators" or "counters" and the solicitors were the successors of the "procurators" or "attorneys."[145]

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141 Timberlake, *supra* note 100, at 30. It is not entirely clear how these "Inns", which were buildings, came to be formed. "The exact origin of these Inns of Court is unknown, but they probably existed in their present form in the reign of Edward III in 1327." CHARLES WARREN, HISTORY OF THE AMERICAN BAR 28 (1911).

142 THOMAS LEAMING, A PHILADELPHIA LAWYER IN LONDON COURTS (1912).

143 MAITLAND & MONTAGUE, *supra* note 137, at 93-96; BLACKSTONE, *supra* note 140, at 25.

144 MAITLAND & MONTAGUE, *supra* note 137, at 93.

145 Timberlake, *supra* note 100, at 33.

- The first licensed advocates in England were known as "sergeants-at-law" (full Latin title, *Servientes Domini Regis ad legem*) which was the highest position that an English advocate could attain. "It made the lawyer a member of the great gild which administered the law; and it placed him almost on an equality with the bench. The sergeants and the judges were brothers of the Order of the Coif. To that end, they addressed each other as such and lodged together at the Sergeant's Inn."[146] In time, sergeants-at-law became King's or Queen's Counsel.

- In England, King's or Queen's Counsel were "appointed by royal patent, were admitted only upon taking an oath and had a monopoly of all practice. [They were] directly amenable to the king as parts of his judicial system."[147]

8. <u>The Origin of "Zealous Advocacy" in England</u>

- In 1785, Prince George, the Prince of Wales, secretly married a woman with whom he was having an affair, Maria Fitzherbert. Because she was a Catholic, news of the marriage was suppressed. He was so deeply in debt that he was later forced to marry the very ugly and repulsive Caroline of Brunswick in order to produce an heir and to eliminate his debts and increase his allowance. Caroline was so repulsive that the Prince stayed drunk for three days before their wedding and then he refused to live with her. She moved away and in 1814 and was seen dancing "not dressed further than the waist" at a party in Geneva.[148]

- King George died in 1820 and Caroline thus became Queen Caroline. Caroline was in Europe at the time. George considered divorce, but capitulated and agreed to an annual payment to Caroline if she would agree to stay in Continental Europe. When she came back to England nevertheless, the House of Lords asked her to appear before it so the Lords could dissolve the new King's marriage on the ground of adultery. (She was said to have had an affair with an Italian "of

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146 W.S. HOLDSWORTH, 2 A *HISTORY OF ENGLISH LAW* 413 (1936), *quoted in* Timberlake, *supra* note 100, at 33 n. 23.

147 GEO W. WAREVILLE, ESSAYS IN LEGAL ETHICS 29 (1902), *quoted in* Timberlake, *supra* note 100, at 34.

148 JANE. ROBBINS, THE TRIAL OF QUEEN CAROLINE: THE SCANDAL THAT NEARLY ENDED A MONARCHY 58 (2006).

low station.") The Lords passed the divorce law but, following a brilliant oratory by Lord Henry Brougham, Caroline's counsel, decided not to enforce it.

- Brougham claimed to have facts at his disposal that would permit him to make a charge of recrimination against King George, adding that he would produce the material only if the case began to go against him.[149] "The highest duty of an advocate," he told the Lords, is to promote his client "at all hazards." "I must not regard the alarm, or the suffering, the torment, or even the destruction I may bring upon another—nay, separating the duties of a patriot from those of an advocate. I must go on, reckless of the consequences, though my fate should be to involve his country in confusion and conflict."[150] Brougham was not required to reveal his secret, however, because Caroline was acquitted. She was then denied entry to George's coronation in July, 1821, and within a month, she was dead.

- Lord Brougham's oration is often cited as the most forceful example we have today of "zealous advocacy." If necessary to save his client's marriage, Brougham threatened to reveal that the new King had been married to a Catholic, even if doing so brought down the monarchy.

- Much has been written of Brougham's speech. Professor Munroe Freedman, an expert on legal ethics, quoting two other experts, Geoffrey Hazard and William Hodes, pointed out that inspired by Brougham's speech, "the traditional aspiration of 'zealous advocacy' remains 'the fundamental principle of the law of lawyering' and the dominant standard of lawyering excellence among lawyers today."[151]

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149 Apparently, the information in Brougham's possession concerned George's marriage to Ms. Fitzherbert. Because the King was forbidden by law from marrying a Catholic, he could be removed from the throne if his marriage to her was valid.

150 ROBBINS, *supra* note 148, at 247-248; *See also* Paul Saunders, *Whatever Happened to Zealous Advocacy?* N.Y.L.J. (Mar. 11, 2011), https://www.cravath.com/files/Uploads/Documents/Publications/3272850_1.pdf.

151 Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319 (1985) *available at* http://scholarlycommons.law.hofstra.edu/hlr/vol34/iss4/1. Others disagree. Illinois Circuit Judge Richard Curry has written that "'Zealous

- The principle of "zealous advocacy" became one of the central principles of the American structure of Canons of Ethics for lawyers. For example, for almost forty years, the New York Code of Professional Responsibility urged lawyers to practice "zealous advocacy." Canon 7 said that "A Lawyer Should Represent a Client Zealously Within the Bounds of Law." The ABA Model Code of Professional Responsibility was identical.

- Lately, however, those words have been removed from the Codes. In 1983, the words were removed from the ABA Rules and placed in the Comments section. In 2008, the words disappeared entirely from the New York Rules of Professional Responsibility. In fact, only two jurisdictions, Massachusetts and the District of Columbia, today include "zeal" in their Disciplinary Rules and only the District of Columbia affirmatively requires "zeal."[152] The reasons for those deletions are not entirely clear and some have called for their resurrection.[153]

9. <u>The Legal Profession in Colonial America</u>

- According to Professors Lisa Lerman and Philip Schrag, the first female lawyer in America, Margaret Brent, practiced law in the 1630s and 1640s. She apparently had a thriving law practice and was involved in more than 100 court cases. However, after Brent, "not a single female attorney was permitted to practice law in America for more than 200 years."[154]

- In the early colonies, there were no independent courts. Instead, the legislatures and the governors constituted the courts. By the middle of the seventeenth century, independent courts, composed in the main by laymen, were established and

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advocacy' is the buzz-word which serves to legitimize the most outrageous conduct, conduct which debases the profession as well as the perpetrator." Richard L. Curry, *Lawyers of Conscience Enforce the Unenforceable*, ILL. B. J. (November 1985).

152 *See generally*, Saunders *supra* note 150.

153 *See generally*, Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1167 (2006) *available at* http://scholarlycommons.law.hofstra.edu/hlr/vol34/iss3/17, *quoting* GEOFRREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.2, 6-5 (3d ed. Supp., 2003).

154 LISA G. LERMAN & PHILLIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 836 (Vicki Been et al. eds., 2d ed., 2016).

were under the control of the Royal Governors. There was no such thing as the profession of law.[155]

- Timberlake writes that in the early colonies, "attorneys" were held in ill repute and were prohibited from charging fees. Those "attorneys" were not in fact lawyers but "were very largely traders, factors, land speculators and laymen of clever penmanship and easy volubility, whom parties employed to appear and talk for them in the courts . . .".[156]

- Litigation was not permitted by the Quakers and in New England, the clergy controlled the courts. For that reason, religion was more important to the colonists than was the common law. Lawyers were considered unnecessary.

- Also, in the early colonies the state of the law itself was unsettled. It was an open question whether English common law was accepted as the law of the land. Although common law was accepted in some of the colonies, it was not generally accepted until the eighteenth century.[157] Even in those colonies where it was accepted, it was not well understood and was considered to be largely irrelevant to the people. It was thought to be "feudal and tyrannical."[158]

- However, by the eighteenth century, the colonies had grown to such an extent that lawyers became a necessity to serve the growing commerce and trade. "Commerce was being extended and business transactions that required the services of real lawyers were multiplying rapidly."[159]

- In addition, colonists were beginning to assert their rights under common law against the activities of the Royal Governors and the English Parliament. Trained lawyers became necessary. Some of those came from England, and especially the Inns of Court, and they would exclude from the practice of law those who were sharp practitioners or of low morals. Others would go to England for training in the Inns of Court before returning to the colonies. The result was that by the middle of the

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155 Timberlake, *supra* note 100, at 35.
156 WARREN, *supra* note 141, at 5, *quoted in* Timberlake, *supra* note 100, at 35.
157 Timberlake, *supra* note 100, at 36.
158 *Id.*
159 *Id.* at 37.

eighteenth century, the profession of law in the colonies "rose to a position of dignity and importance in every community."[160]

- Authors Hoffer and Hoffer (father and son) have argued that the American Revolution did not begin with crowds burning effigies and the "rising of oppressed masses" but that it began in a courtroom, "where a jury heard and determined the prosecution of a printer."[161]

- In August 1735, a New York City printer, John Peter Zenger, went on trial for seditious libel, after spending nearly half a year in jail. His offense was writing that the New York colonial governor, William Cosby, was "a threat to the liberties of the people." [162] He was represented by two lawyers, James Alexander and Andrew Hamilton. One of the obstacles they faced was the fact that under English law, truth was not a defense to a charge of seditious libel. Hamilton's winning argument was that the expression of a political opinion was neither true nor false; it was a necessary part of the political process. His summation "demonstrated the safety with which lawyers in court could argue about the limits of imperial power and the legal context in which those limits were defined." Zenger "left the court a free man."[163]

- From a legal standpoint the Zenger verdict was unremarkable. But "it signaled a different kind of precedent. It was a precedent for the intertwining of law and politics. . . . The linchpin of this legal theory was that government must be accountable to the people. The exercise of power must represent the will of the people."[164] The Hoffers write that the

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160 *Id.* It was estimated that from 1750 to 1775, nearly one hundred and fifty colonial lawyers had been trained in the Inner and Middle Temples. It should be noted that the Inns of Court were not really law schools in the modern sense. Their members read law on their own and learned the practice of law through apprenticeships.

161 PETER CHARLES HOFFER & WILLIAM JAMES HULL HOFFER, THE CLAMOR OF LAWYERS: THE AMERICAN REVOLUTION AND CRISIS IN THE LEGAL PROFESSION 16 (2018).

162 *Id.*

163 *Id.* at 21. In the pretrial proceedings, Alexander went too far in his arguments and was banned from participating in the trial. Hamilton was careful not to repeat the offense during his summation. The Hoffers argue that the Zenger case stood for the principle of "free speech of counsel in court." *Id.* at 23.

164 *Id.* at 22.

Zenger trial stood for the principle that "rights need not be explicit in writing as law if they were sanctioned by 'immemorial usage.' This was an argument favored by the Revolutionary lawyers, because it rested on Americans' experience rather than Parliamentary grants."[165]

- According to the historian Charles Warren, "when the War of the Revolution broke out, the lawyer . . . had become the leading man in every town in the country, taking rank with the parish clergyman and the family doctor."[166]

- Perhaps no better example of the lawyer-statesman in eighteenth century America can be found than John Adams. A graduate of Harvard College in 1755, Adams at first considered but quickly rejected a career in the law, calling the lawyer one who is "fumbling and raking amidst the rubbish of Writs . . . [and] who inriches (sic) himself at the expense of impoverishing others more honest and deserving than himself." [167] Nevertheless, Adams soon apprenticed himself to a prominent lawyer in Worcester, Massachusetts and after two years he returned to Boston and was admitted to the bar.

- In 1770, Adams witnessed what was later called the "Boston Massacre" in which five townspeople had been killed by British soldiers. Because of disputes over the housing of soldiers in 1768, the Governor of Massachusetts had sent regular British troops to Boston. After rumors of atrocities, a mob congregated in front of a British sentry box and British troops tried to rescue the sentry. One of the British troops was knocked down and rose, firing his musket. Others then opened fire. Captain Thomas Preston, who led the soldiers, was charged with giving the order to shoot and he and his eight soldiers were charged with murder although the Boston mob wanted them hanged immediately. Preston and the soldiers wanted Adams to defend them. Adams agreed and said: "The bar ought in my opinion to be independent and impartial at all times and in every circumstance . . . Every lawyer must hold himself responsible not only to his country but to the highest and most infallible of all Tribunals for the part he should act. [Preston] should expect from me no art nor address, no

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165 *Id.* at 23.

166 WARREN, *supra* note 141, at 18.

167 JOHN ADAMS, 1 PAPERS OF JOHN ADAMS 12-13 (Robert J. Taylor et al. eds. 1977).

sophistry or prevarication in such a cause, nor anything more than fact, evidence and law would justify." Adams was retained for one guinea and after two trials, seven of the soldiers, including Preston, were acquitted and two were convicted of manslaughter. In his summation to the Preston jury, Adams argued that "The law, in all vicissitudes of government, fluctuations of passions or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men . . . . Rules of law should be universally known, what ever effect they may have on politics; they are rules of common law, the law of the land."[168] Adams's biographer James Grant has written that "few American public figures have ever been more devoted to doing the right thing, or more contemptuous of doing the merely popular thing."[169]

- On July 29, 1775, the Second Continental Congress created the Judge Advocate General's Corps in the US Army, 26 days after George Washington assumed command. It was the new country's first law firm.

- The impact of the colonial lawyers on the creation of what became the government of the United States, and especially its Constitution, cannot be gainsaid. William L. Marbury (a descendant of the Marbury of *Marbury v. Madison* fame) told the Maryland Bar Association in 1911 that "but for the persuasive logic, the powerful reasoning of the great lawyers of the *Federalist*, it might well be doubted whether the Constitution of 1787 would ever have become the law of the land."[170]

- The Hoffers have written: "Whether loyal or in opposition, the lawyers' contribution to the debates and the events that followed was, in a word, lawyerly—disputatious, result driven, source-mined adversarial advocacy . . . And thus is should come as no surprise that such a style of political discourse came to characterize American self-governance whenever the lawyers were involved."[171]

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168 HOFFER & HOFFER, *supra* note 161, at 78.

169 JAMES GRANT, JOHN ADAMS: PARTY OF ONE (2005).

170 *Quoted in* Timberlake, *supra* note 100, at 39. Nearly half of the signers of the Declaration of Independence were lawyers; more than half of the members of the Constitutional Convention were lawyers.

171 HOFFER & W. HOFFER, *supra* note 161, at 155.

10. The Legal Profession in Nineteenth Century America

- As described in more detail in the accompanying Appendix C, *A Brief History of Legal Education in America*, training for lawyers in the early nineteenth century took place in the offices of practicing lawyers. America's first law school, the Litchfield Law School, was founded in 1773 but most law schools in the early nineteenth century were small businesses that were not affiliated with universities but were run as businesses by lawyers. Harvard Law School was an exception, founded as a part of Harvard University in 1817. Over time, that changed and more private law schools were absorbed by universities.

- As the United States grew largely by westward expansion, systems of law were either non-existent or were under increased pressure. There were few trained lawyers in the territories and "vigilante justice" became commonplace. Civil rights, as understood today, did not exist and mistreatment of Indians and others was also commonplace.

- In the middle of the nineteenth century, during the Jacksonian period, the legal profession came under attack as being elitist. As a result, at least four states completely eliminated any preconditions for admission to the bar.

- The number of lawyers in America grew dramatically in the nineteenth century. By 1850, there were slightly more than 20,000 lawyers in the country. Lawyers worked as solo practitioners and often held other jobs as well. The practice of law was unregulated.

- Abraham Lincoln was largely a self-made lawyer who neither attended law school nor apprenticed. He was admitted to the Illinois bar after an oral exam lasting a half an hour. His education consisted almost entirely of reading Blackstone.[172]

- After the Civil War, the American economy grew dramatically and with it, the number of lawyers. By 1900, there were nearly 115,000 lawyers in America. During that period, the legal profession was evolving and was under pressure from competitors. For example, a staple of the lawyer's practice, title searching, was replaced by title and trust companies. The legal

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172 WILLIAM W.. FREEHLING, BECOMING LINCOLN 66 (2018).

profession met the challenge and, unlike the professions in England and Japan, for example, which were and remained insular, the legal profession in America found new kinds of work to do and lawyers prospered.

- Bar associations, which were originally social clubs, became increasingly more involved in politics and policy issues. The Association of the Bar of the City of New York was formed in 1870 to combat the corruption of the "Boss Tweed" administration.

- In the late nineteenth century, large law firms emerged, the so-called "white shoe" law firms whose male lawyers (they were all male at the time) wore white buckskin shoes, and were led by Paul Cravath, who professionalized the law firm and who recruited only or at least primarily from the few "leading" law schools of the time. The practice of law also changed during this period; lawyers spent less time in court and more time in their offices and the "corporate lawyer" was created.[173]

- Alexis de Tocqueville (1805-1859) was a French diplomat and historian who travelled through the United States in the early nineteenth century and recorded his observations in *Democracy in America* published in 1835. Of particular interest to him was the justice system in America and the legal profession. He particularly liked the jury system in America: "The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions . . . it invests each citizen with a kind of magistry (sic)."

- Of lawyers and the legal profession, de Tocqueville said: "In visiting the Americans and studying their laws, we perceive that the authority that they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy."

- "Men who have made a special study of the laws derive from [that] occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of

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173 ROBERT T. SWAINE, 2 THE CRAVATH FIRM AND ITS PREDECESSORS 4 (1946-48) .

ideas, which naturally render them very hostile to revolutionary spirit and the unreflecting passions of the multitude. The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary but not very generally known . . .".

- de Tocqueville added: "In America there are no nobles or literary men and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society . . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar."[174]

- de Tocqueville was a strong believer in judicial review but he distrusted majority rule and his belief that lawyers were "hostile to the revolutionary spirit and the unreflecting passions of the multitude" has been criticized by Neal, who wrote that de Tocqueville failed to mention the nineteenth century lawyer's "skepticism, independence of outlook, insistence upon knowing the facts, an accumulation of experience with all the manifold practical problems of human organization, a taste for rigorous analysis and respect for theories."[175]

- The American Bar Association was founded in 1878 and one of its principal purposes was to bring some standardization to legal education. During this period, the legal profession cemented its reputation for self-regulation.

- In the nineteenth century and well into the twentieth, the legal profession discriminated against women and people of color. As noted above, except for Margaret Brent, there was not a

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174 *See generally*, KERMIT L. HALL, ET AL., *Bench, Bar and Legal Reform in the Nineteenth Century*, *in* AMERICAN LEGAL HISTORY (1991); Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society,* 50 MARQ. L. REV. 607 (1967), *available at* http://scholarship.law.marquette.edu/mulr/vol50/iss4/7.

175 *Id.* at 615.

single woman lawyer in America until the mid-nineteenth century.

- In 1868, Myra Bradwell applied for a licence to practice law but the Illinois court denied her application. The court held that although Illinois state law did not explicitly exclude women from becoming lawyers, the legislatures could not have contemplated that women would be admitted to the bar. "God designed the sexes to occupy different spheres of action, and it belonged to men to make, apply, and execute the laws." The US Supreme Court affirmed, and the concurring judges wrote that "Man is, or should be, woman's protector and defender . . . .The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother."[176]

- Until the late nineteenth century, law schools were similarly closed to people of color. There were a few law schools set up to serve the black community before 1900, and only Howard University survived.[177] As late as 1960, there were only three black lawyers practicing in Mississippi.[178]

11. <u>The Legal Profession in Early Twentieth Century America</u>

- Notwithstanding de Tocqueville's description of America's bar as a part of the aristocracy in America, by the early twentieth century, the legal profession came into additional disrepute, largely because of its representation of large, monopolistic corporations (the Sherman Antitrust Act was enacted in 1890). Speaking in 1914, Louis D. Brandeis said "It is true that at the present time the lawyer does not hold as high a position with the people as [the lawyer] held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, lawyers have, to a large extent, allowed themselves to become the adjuncts of great corporations and have neglected the

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176 LERMAN & SCHRAG, *supra* note 154, at 837; *Bradwell v. State*, 83 U.S. 130 (1873).

177 *See* A.B.A, TASK FORCE REPORT ON MINORITIES IN THE LEGAL PROFESSION (Jan. 1986).

178 LERMAN & SCHRAG, *supra* note 154, at 842.

obligation to use their powers for the protection of the people."[179]

- A few years later, Woodrow Wilson addressed the American Bar Association and said "You cannot but have marked the recent changes in the relation of lawyers to affairs in this country; and, if you feel as I do about the great profession to which we belong, you cannot but have been made uneasy by the change. Lawyers constructed the fabric of our state governments and the government of the United States . . . [but today] lawyers have been sucked into the maelstrom of the new business system of the country . . . [they] do not handle the general, miscellaneous interests of society. They are not general counsellors of right and obligation . . . they do not concern themselves with the universal aspects of society . . . the lawyer has lost his old function."[180]

- What had happened to the legal profession? Robert Gordon, a prominent historian of the legal profession, has ascribed the change to a decline in lawyer independence when viewed from the Brandeis-Wilson perception of the lawyer, like the lawyer of the Federalist period, as "fashioning clear-sighted public policy and long-term interest-regarding advice to clients" made possible only by "independence of position in the political economy."[181] The ideology of professional independence, reflected in the de Tocqueville perception of lawyers as a part of the American aristocracy, in which the legal elite would play the role of the "few" was being replaced by a middle class that was "searching for a source of prestige other than landed wealth or success in business."[182] These lawyers were choosing not to be influential but rather to "provide technical advice and lay out the options while leaving the decisions and methods of implementing them to their clients . . .".[183]

- The solution, according to Gordon, was one that was also, but slowly, recognized by the bar in the early to middle part of the twentieth century. The bar recognized that lawyers were

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179 LOUIS D. BRANDEIS, THE OPPORTUNITY IN THE LAW (1914).

180 WOODROW WILSON, 21 THE PAPERS OF WOODROW WILSON: THE LAWYER AND THE COMMUNITY 66-67 (Arthur S. Link ed. 1976).

181 Robert W. Gordon, *The Independence of Lawyers*, 68 B. U. L. REV. 1, 16-17 (1988), *available at* https://digitalcommons.law.yale.edu/fss_papers/1361.

182 *Id.* at 16.

183 *Id.* at 30.

influential, whether they intended to be or not, because "clients will process their advice differently depending on the form and manner and setting in which they give it."[184] This recognition led to the model of "purposeful lawyering" in which lawyers "reflect and deliberate about the nature and results of their influence, as well as to act prudently, either within or without the context of representation, to change whatever results of that influence they think are bad ones."[185]

- Brandeis, born in Kentucky and educated at Harvard Law School, became a living example of "purposeful lawyering" in the early twentieth century. He was a progressive who believed that the law should be used to bring about social change. The landmark Supreme Court case *Muller v. Oregon,*[186] raised the question whether Oregon's law prohibiting women from working more than ten hours a day was constitutional. Brandeis represented the State of Oregon. In his 113-page brief, Brandeis ignored the rule in *Plessy v. Ferguson*,[187] the separate-but-equal decision that eschewed consideration of the actual facts of racial inequality, and filed a brief that merged social science evidence and law in order to show the deleterious effect of overwork on women. The Supreme Court agreed and upheld Oregon's ten-hour limit law for working women. The "Brandeis Brief" was born and it became a staple of Supreme Court jurisprudence. For example, *Brown v. Board of Education of Topeka*,[188] decided in 1954, relied heavily on sociological evidence to show the deleterious effects of racial segregation. Today such "Brandeis briefs" are commonplace.

- The Depression was a bad time for the legal profession. Salaries for lawyers plummeted and it became far more difficult than it had been to be admitted to the bar. More than 70 law schools went out of business between 1930 and 1950; attendance at law schools declined and the number of lawyers fell.[189]

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184 *Id.*
185 *Id.*
186 208 U.S. 412 (1908).
187 163 U.S. 537 (1896).
188 347 U.S. 483 (1954).
189 BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 30-31 (2015)

- Racial and gender discrimination continued to exist in the American legal profession. For example, Thurgood Marshall, who became a noted Supreme Court advocate and Associate Justice, was barred from attending the University of Maryland Law School because of racial segregation.

- In the early twentieth century, the American Bar Association discriminated against black lawyers and it was not until 1943 that the Association declared that membership did not depend on race or sex. Law schools and law firms as well discriminated on the basis of race. As late as 2000, one study found that at law firms of more than 100 lawyers, black associates were "one-fourth as likely as comparable whites in the same cohort of associates to become partners at large law firms."[190]

- The legal profession rebounded from the Great Depression in the post-World War II period. Between 1960 and 2011, the number of lawyers in America increased 320 percent.[191] Lawyers' incomes increased and the so-called "big law" firms thrived. Gender and racial discrimination dramatically subsided. For example, in 2018, 38 percent of practicing lawyers were women and more than half of the law students in America were women. Unfortunately, the relevant numbers for lawyers of color were not nearly as good.

- In 1994, Mary Ann Glendon, a former practicing lawyer turned law school professor, wrote a pessimistic account of the state of the legal profession. "The history of the legal profession, no less than the course of the law itself, has been a ceaseless process of discord and discovery, of gathering order here and deepening commotion there, of patterns emerging and dissolving as new ideas and practices nibble at the edges of old arrangements. . . . What is anomalous about the United States, beginning in the 1960s, is the remarkable rise in the influence of legal innovators and iconoclasts with shallow roots in legal traditions and poor grounding in normal legal science." But even Glendon held out hope that the resilience of the dynamic legal traditions of craft professionalism, constitutionalism and practical reasoning might win out in the end: "The task will not

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190 Richard H. Sandler, *What Do We Know About Lawyers' Lives? The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1806 (2006), *available at* https://scholarship.law.unc.edu/nclr/vol84/iss5/15.

191 BARTON, *supra* note 189, at 33.

be accomplished by the sort of traditionalist who wishes to live in a world that no longer exists or by the sort of innovator who begins with a clean slate and an empty head. What will count are sufficient numbers of lawyers who are knowledgeable enough to be at home in the law's normal science, imaginative enough to grasp the possibilities in the current situation, bold enough to explore them and painstaking enough to work out the transitions a step at a time."[192]

- Challenges remain. The recession of 2008 had a dramatic negative effect on the legal profession and the creation of alternatives for clients to receive information about the law fundamentally changed the profession. With websites such as *Legal Zoom*, clients and prospective clients can have access to the very same information that lawyers have, at far less cost. Many believe that today there are too many lawyers chasing too few clients.[193]

- In addition, such movements as tort reform and judicial hostility to litigation, have negatively affected the legal profession. Nevertheless, scholars such as Professor Benjamin Barton from the University of Tennessee College of Law, predict that "it will get better." Law students are better prepared, and the legal profession will rise to the challenge and change for the better. "America and its legal profession will . . . find a new purchase in these changed times. They have before. They will again."[194]

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192 MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 285, 291 (1994).

193 *Id.* at 121.

194 BARTON, *supra* note 189, at 242.

APPENDIX C

A BRIEF HISTORY OF LEGAL EDUCATION IN AMERICA[195]

1. The Revolutionary Period

- All but one of the original thirteen colonies had some requirements for training before lawyers could be considered "barristers" or "counselors." As a result, most lawyers served a period of apprenticeship.

- The first private law school was the Litchfield Law School in Connecticut, founded in 1773. Courses were based on Blackstone. Law was taught as a "science" not just as a mechanical business.

- The first "law professor" was George Wythe, "Professor of Law and Police" at the College of William and Mary in 1779. Law was taught as a part of the undergraduate curriculum in colleges as well as in private law schools. At Yale, for example, law was taught because "it is scarcely possible to enslave a Republic . . . where Civilians are instructed in their Laws, Rights and Liberties."[196] At the University of Virginia, law was also part of the undergraduate curriculum. This may have been the beginning of the dichotomy between the teaching of law as a liberal arts study and the teaching of law as a technical study.

2. The Early 19th Century

- By the 1820s, private law schools sought to become affiliated with universities not only because of the prestige that such an affiliation would bring, but because universities could grant degrees. In 1824, for example, Yale acquired a private law school and in 1829, Harvard, which established a law school in 1817, brought in Joseph Story from a private law school. One result of this amalgamation was that lawyers became socially and politically prominent. de Tocqueville wrote in 1832 that

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195 With thanks to ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

196 ANTON-HERMANN CHROUST, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA 189 (1965).

the "aristocracy of America occupies the judicial bench and bar."[197] This was not an unmixed blessing for the legal profession during the populist movement of Jacksonian Democracy.

- In addition, during this period, most states abolished their apprenticeship requirements.

- The affiliation of private law schools with universities was not an unbridled success. For example, although in 1835 Princeton established a law school in which students were taught by judges and practitioners, the school had only six graduates and closed in 1852. The University of Alabama established a law school separate from the rest of the university in 1845 but because there were no students, the school closed in a year.

- The practice of law in this period remained one of prestige and was fairly undemocratic. Although some states, such as New Hampshire, allowed any citizen to be admitted to practice, untrained persons were still denied admission. The need for lawyers during this period of economic activity continued, leading to a decline in what Stevens called "formal standards for legal education and the dissolution of bar associations . . .".[198] However, the pendulum began to swing back in the 1850s with the movement toward institutionalism and the urge to professionalize.

3. The Mid-19th Century

- By 1860, there were 21 law schools in America. The study of law became not only a necessity for those who wanted to become practitioners, it became an honorable study for those training to become "gentlemen"(there were apparently no women lawyers at the time) and who anticipated inheriting large estates. New York University claimed to have established a law department "in response to the imperious demand of the Public for greater facilities for acquiring a knowledge of the *science* of legislation and the *theory* and *practice* of the law."[199]

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197 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (1832)

198 STEVENS, *supra* note 195, at 10.

199 N.Y. UNIV., LAW DEP'T., ANNUAL ANNOUNCEMENT OF LECTURES 9-10 (1858-59).

- However, it appeared that one of the real purposes of the law schools was to remedy what some had called the "very imperfect method" of studying law in law offices. New York University claimed that in office training, students "generally pursued their studies unaided by any real instruction, or examination, or explanation."[200]

- The legal profession grew dramatically during this period. In 1850 there were about 24,000 lawyers; by 1880 there were about 65,000. Also during this period, some of the more prominent law firms were established. The predecessor of the Cravath firm was established in 1819 and Sullivan & Cromwell was established in 1879.

- Columbia University, which did not teach law between 1826 and 1847, resumed its teaching in earnest with the creation of the School of Jurisprudence in 1857. Theodore Dwight, a Hamilton College law professor who later taught at Columbia, continued the disparagement of legal training in law offices: "Principles before practice" was his motto.[201] Nevertheless, as late as the turn of the century, most lawyers received their training in law offices, not law schools. The debate was between the academics, who were contending that "the science of law was the science of mankind" and the practitioners, who argued against "too academic a training." One of them claimed that moots were of no more value to a law student than a counterfeit sickness would be to a medical student.[202]

- Although in 1850, New York had no required period of law study for admission to the bar, by 1870 New York had a written bar examination. Other states abolished all requirements for the practice of law. In the 1840s, Maine, New Hampshire and Wisconsin abolished all educational requirements for the practice of law and in Indiana, any person "of good moral character" had the right to practice law.[203]

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200 STEVENS, *supra* note 195, at 22.

201 A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 35 (Julius Geobel, ed., 1955).

202 *Law Apprenticeships*, 5 ALBANY L. J. 97 (1872), *available at* *https://play.google.com/books/reader?id=Ds1GAQAAMAAJ&hl=en*.

203 POUND, *supra* note 40, *quoted in* Joy, *supra* note 28, at 558..

- In the mid-1850s, law schools were able to grant academic degrees. These diplomas brought with them automatic admission to the bar, leading to a debate between the academy and the bar. Lewis Delafield stated that "lawyers are public officers and upon principle no private body should appoint to public office."[204] Curiously, Delafield argued that the easy admission to the bar brought about by the diploma privilege led to the perception that law was a trade rather than a public calling.[205]

- One result of Delafield's criticism was the creation of the American Bar Association in 1878. One of its purposes was to raise the standards of the legal profession.

4. The Langdell Contribution

- Christopher Columbus Langdell became dean of Harvard Law School in 1870. At that time, law schools were considered to be alternatives to colleges. Together with the President of Harvard, Charles Elliot, Langdell created the reforms to legal education that led to the widespread acceptance that the study of law was an appropriate undertaking for universities.

- At the time, Harvard's law school curriculum was a two-year program. Langdell's principle contribution was the case method of study.[206] Some have said that the case study method led to the phrase "thinking like a lawyer."[207]

- Langdell also envisioned and ultimately brought about a three-year program of instruction in a post-baccalaureate school. Even though Harvard adopted that regime in 1899, it did not catch on. By 1914, only two schools, Harvard and Pennsylvania, had law programs that were graduate rather than undergraduate programs. Law schools were more like technical schools with easy admission standards unlike the other parts of the universities with which they were associated. In the early

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204 Lewis Delafield, *The Conditions of Admissions to the Bar*, 7 PA. MONTHLY MAGAZINE, 1876, at 960.

205 STEVENS, *supra* note 195, at 27.

206 Langdell did not invent the case study method; John Pomeroy did at New York University. Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. OF LEGAL HIST. 329 (1979).

207 STEVENS, *supra* note 195, at 41.

twentieth century, Georgetown Law School did not even require a high school diploma for admission. Not surprisingly, many Georgetown athletes were enrolled in the law school.

- Harvard continued to innovate in legal education. In 1873, Harvard hired James Ames as an assistant professor in the law school. He was a recent law graduate who had not practiced law. He became one of the first "academic lawyers." Langdell wrote that "what qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law."[208] As a professor, Ames perfected the case method of study. His appointment exacerbated the debate between academics and practitioners, leading to the creation of the Association of American Law Schools in 1900.

- It also led to a debate among academics themselves. Some, like Ames, wanted nothing taught in a law school other than law itself; others, like Ernst Freund, a political scientist at the University of Chicago, wanted to include comparative law, legal history and Roman law. Other schools wanted to emphasize the law of their particular jurisdiction.

5. <u>The Case Study Method</u>

- Langdell and Dwight claimed that law was a "science." "If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices."[209]

- The case study method was based on the assumption that there were relatively few principles and doctrines in law and that they were best found in appellate court opinions. It was also based on the idea that these principles were of universal application, obviating the need to study the laws of the individual states. Unlike laboratories for the study of physics and chemistry, the laboratory of the law was the library. To Langdell, "it was indispensable to establish at least two things—that law is a

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208 STEVENS, *supra* note 195, at 38.

209 C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS WITH REFERENCES AND CITATIONS vii. (1871).

science and that all the available materials of that science are contained in printed books."[210]

- One of the ironies of the case study method was that it emphasized litigation, even though many practicing lawyers were becoming "office" lawyers rather than "courtroom" lawyers.[211] That method also tended to emphasize process rather than doctrine, even though academics favored the latter.

- Practitioners were not unanimous in their praise of the case study method. In 1876, the *Central Law Journal* condemned the system "which we understand to involve a wide and somewhat indiscriminate reading of cases . . .". One of the other criticisms of the case study method was that it required a "fairly moderate amount of intelligence."[212]

- At its second annual meeting in 1879, the ABA recommended mandatory instruction in thirteen subjects and three years of study for applicants to qualify for a bar examination for admission. Among those subjects were Lex Mercatoria, Admiralty and Maritime Law, Feudal Law and Roman Law.[213] There was no mention of "skills" in any of the ABA recommendations.

- In 1880, the ABA considered but ultimately tabled a recommendation that lawyers who had practiced anywhere for three years would qualify for reciprocal admission to the bar and that a law school diploma be required for law practice. The next year, those resolutions were adopted unanimously.

- In 1891, the ABA's Committee on Legal Education criticized the case study method as "unscientific." Its principle criticism was that it emphasized litigation rather than "the ideal work of a lawyer," which was knowing the rules and keeping clients out of court."[214]

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210 STEVENS, *supra* note 195, at 53.

211 *Id.* at 57.

212 John Chipman Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 758 (1888).

213 A.B.A., REPORT OF THE SECOND ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION: HELD AT SARATOGA SPRINGS, NEW YORK, AUGUST 20TH AND 21ST, 1879 235-236 (1879).

214 STEVENS, *supra* note 195, at 58.

- The 1892 meeting of the American Bar Association similarly criticized the case study method. Cases, it was said, were not the source of law. The studying of disputes, rather than the settled doctrines and principles, led graduates to believe that they were nothing more than "hired gladiators."[215]

- Nevertheless, the case study method grew in acceptance. At Columbia, the case study method replaced the "Dwight method." At the beginning of the twentieth century, it was widely acknowledged that the case study method was the most prominent, if not the only, innovation in legal education.

- The use of the case study method, when combined with the Socratic method of questions and answers, also led to larger classes, which in turn led to more profitable and self-supporting law schools.

- By 1907, more than one third of America's law schools used the case study method. In 1912, Yale essentially abandoned its "lecture and recitation" method and gave its professors permission to substitute the case study method. The next year, almost all courses were taught using that method.

- The case study method in fact became less a method for transferring information about rules than it was a means of teaching legal methodology.

- Law as a science became more widely accepted. In 1890, the new dean of the Catholic University law school wrote that "law as a science is a body of fundamental principles and of deductions drawn therefrom in reference to the right ordering of social conduct."[216]

- A fundamental change in the case study method occurred in 1879 when West Publishing Company decided to create a National Reporter System that would publish most judicial decisions, rather than a select subset. As a result, the nature of

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215 A.B.A., REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT SARATOGA SPRINGS, N.Y., AUGUST 24, 25 AND 26, 1892: COMMITTEE ON LEGAL EDUCATION 317, 323 (1892).

216 WILLIAM C. ROBINSON, A STUDY OF LEGAL EDUCATION 15 (1885).

legal education changed from a search for principles to a search for precedents.

- Perhaps in reaction, a move began to create uniform state laws and the American Law Institute began a series of "restatements." Alfred Reed's 1928 Report for the Carnegie Foundation continued his attack on the case study method, which he found "wasted time, excluded coverage of many important area of law and deemphasized the amount of immediately available information."[217]

6. The Expansion of Legal Education in the Early 20th Century

- By the early twentieth century, "some in the ABA were clearly having doubts about whether a law school education without any experiential or practical experience requirements should be the principal pathway to becoming a lawyer."[218] For example, in 1917, William Rowe, a proponent of clinical education, wrote that law schools "lagged behind all other professions . . . in this matter of providing systematic and experienced clinical and practical education."[219] Others in the academy belittled the proposal, one dean remarking that "more practice work can be taught in a law school in one winter than can be picked up by the ordinary law student in a law office in two or three years."[220]

- At the turn of the century, the legal profession, and with it legal education, expanded dramatically. In 1890, there were six full-time law schools with three or four year programs, one mixed day and night law school, nine night schools and fifty-five part-time or short-course schools. Ten years later, there were twenty-four full course law schools and seventy-four other law schools. Rather than becoming more uniform, law schools became more differentiated. Some stressed academic excellence while others did little more than prepare their students to pass bar examinations. Many were part-time

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217 ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES (1928).

218 Joy, *supra* note 28, at 559.

219 William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591, 596 (1917).

220 Lucien Hugh-Alexander, *Standards for Admission to the Bar*, 3 AM. L. SCH. REV. 462, 477 (1914), *available at* https://play.google.com/books/reader?id=pBlCAQAAMAAJ&hl=en&pg=GBS.PP1.

schools. Georgetown, for example, began as a night school. There were university-related law schools and proprietary law schools such as the Boston YMCA Law School.

- Some schools of this period included experiential education in their programs. Some schools created "legal dispensaries," essentially legal aid bureaus, where students could gain actual practical experience.[221] In 1929, the University of Southern California law school had legal clinics and in 1933, Jerome Frank called for something he called a "clinical-lawyer school."[222]

- Even though there were some women lawyers, the first woman to be permitted to join the bar was admitted in Iowa in 1869. But when the Illinois bar refused to admit a woman, the US Supreme Court upheld the exclusion, writing that "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Because so many law schools refused to admit women— Harvard did not admit women until 1950—many women-only law schools were created. The Portia Law School in Boston was only one of many.[223] Law students of color were similarly rare. Although a few schools served the black community before 1900, only one, Howard University, survived.

- The ABA continued its push for higher standards for law schools. However, most of its proposals concerned the period of law study not its content.[224]

- As the number of lawyers increased, a hierarchy developed among law schools. In response, the ABA believed that there

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221 Joy, *supra* note 28, at 562.

222 Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81. U. PA. L. REV. 907 (1933), *available at* https://digitalcommons.law.yale.edu/fss_papers/4109.

223 By contrast, by 2018, there were more than 400,000 women lawyers in the United States (about 38 percent of all lawyers) and according to 2017 data, 51.2 percent of all law students in the United States were women. Jennifer Cheeseman Day, *More than 1 in 3 Lawyers are Women*, U.S. CENSUS BUREAU (May 8, 2018), https://www.census.gov/library/stories/2018/05/women-lawyers.html; Staci Zarotsky, *There Are Now More Women in Law School Than Ever Before.* ABOVE THE LAW (Mar. 7, 2018), https://abovethelaw.com/2018/03/there-are-now-more-women-in-law-school-than-ever-before/. .

224 Joy, *supra* note 28, at 561.

should be more uniformity in law schools. The ABA Committee on Legal Education and Admissions to the Bar urged standardization. The Committee urged that law schools have well-paid and efficient teachers, written examinations, a degree before practice and three-year programs of instruction.[225] The full ABA did not support the proposal, but did "recommend" that law schools require three years of attendance.

- Nevertheless, a small minority of lawyers actually attended any law school. In 1891, only one fifth of lawyers admitted to practice each year had attended law school. According to Robert Stevens, "the typical lawyer . . . in almost any state, might begin practice on his own without any institutional training, perhaps without even a high school diploma, and often with no or only minimal office training."[226] As a result, in 1896, the ABA required a high school diploma and two years of law study for bar admission. The following year, the period of study was increased to three years. However, there was no requirement for any pre-requisite other than a high school diploma, which remained the pre-requisite until 1921.

- By contrast, in 1905, the Association of American Law Schools required that member schools have three-year programs of study and in 1912, it would no longer admit members whose day and night sessions were of equal length. The AALS believed that night schools would lower the educational standards.

- In the 1920s, the "diploma privilege" (automatic admission to the bar of anyone with a diploma) largely disappeared. However, as late as 1917, not a single state required attendance at a law school before admission to the bar.

- Electives were introduced into law school curriculums in the 1920s. This led to the realization that subject matter could be greatly expanded, especially as the law became more complex.

- In 1920, the ABA Section of Legal Education and Admissions to the Bar received a report from Elihu Root that argued that "only in law school could an adequate legal education be obtained" and that two years of college should be required

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225 STEVENS, *supra* note 195, at 93.

226 *Id.* at 96.

before law school. This Report was approved by the 1921 convention of the ABA. Alfred Reed's 1921 report, *Training for the Public Profession of the Law*, prepared for the Carnegie Foundation, proposed the creation of a stratified legal profession, making a distinction among attorneys, counsellors and advocates. By contrast, the ABA recommended raising the standards of legal education generally.

- Reed also wrote that "[T]he failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly."[227] Reed proposed that students gain practical clinical experience by working in legal aid jobs rather than doing other office work. Several schools, including Harvard and Northwestern, took up that proposal. Frank even proposed a "clinical" law school, although most academics disagreed with that proposal. Frank also called for law schools with faculties composed of professors with extensive experience in practice.[228]

7. <u>The Realism Movement</u>

- By the early part of the twentieth century, social sciences had begun to affect legal education. Roscoe Pound, the non-lawyer botanist who had become dean of the Harvard Law School, argued that law students should be trained in sociology, economics and politics. Yale proposed to change its Law School to the Yale School of Law and Jurisprudence in order to emphasize the historical evolution of the law. Once again, the debate was whether law school was essentially a professional school or an academic part of a university. Thomas Swan, Yale's Dean in 1916, believed that it should be both.

- In 1926, Columbia created a Curriculum Committee chaired by an outsider, a political economy professor from the University of Chicago. Its report issued in 1928 began by saying that "the time has come for at least one school to become a 'community of scholars' devoting itself to the nonprofessional study of law . . . . [This means] an entirely different approach to the law. It

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227 ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 281 (1921), https://archive.org/details/trainingforpubl00goog/page/n5.

228 STEVENS, *supra* note 195, at 162.

involves critical, constructive, creative work by both faculty and students rather than a regime devoted primarily to the acquisition of information." [229] However, most of the recommendations of this Committee were never implemented even though the report was lauded as an "elegant idea."[230]

- Stephens writes that there were two reasons for the failure of the Columbia proposal. One was the conflict about the purpose of legal education and the second was that the proposal assumed that traditional categories of law were irrelevant and that law could only be taught as a part of the social sciences.[231] The consequence would be that Columbia would no longer be a "training" school but a "research" school. The dean, Y. B. Smith, was not willing to abandon Columbia's reputation as a first-grade professional school in New York and as a result, several faculty members, including William O Douglas, who later served on the Supreme Court, resigned.

- Some of the disappointed former Columbia faculty members then founded the Johns Hopkins Institute for the Study of Law and others, including Douglas, went to Yale. They discovered that the social sciences did not fit well with the study of law. In 1934, Robert Hutchins, the dean at Yale in the late 1920s, wrote that "what we actually discovered was that psychology had dealt with very few of the points raised by the law of evidence . . .".

- The Realist Movement in the 1930s, led by thinkers such as Jerome Frank, challenged the Langdellian notion of the law as a science. The predictive value of doctrine was questioned and legal scholarship was viewed as a process rather than substance. As Stephens puts it, under Realism, "all legal logic came under suspicion." [232] Frank argued forcefully for "lawyer schools" where "the law student should learn, while in school, the art of legal practice . . . . [law schools] must repudiate the absurd notion that the heart of a law school is in its library." [233]

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229 Herman Oliphant, SUMMARY OF THE STUDIES ON LEGAL EDUCATION BY THE FACULTY OF LAW OF COLUMBIA UNIVERSITY 20-21 (1928).

230 STEVENS, *supra* note 195, at 138.

231 *Id.* at 139.

232 *Id.* at 156.

233 Jerome Frank, General Counsel, Agricultural Adjustment Administration, *What Constitutes a Good Legal Education?,* Address at the Section of Legal Education (Aug. 29, 1933, *in* 19 A.B.A. J. 723 (1933), *cited in* Edward Thomas Lee, THE STUDY OF LAW AND PROPER PREPARATION 29 (1935).

Stephens argues that Frank's call for a return of the lawyer-school led to the clinical education movement of the 1960s. However, by the early 1950s, there were only 28 clinics run by law schools, independent legal societies or public defender offices.[234]

- Some consideration was given to a four-year program of study but the idea was abandoned in 1935. But "law and . . ." programs continued to be pursued. Business law courses were created, primarily in the so-called elite schools.

- The New Deal brought with it an increase in law courses related to the federal government, such as courses in administrative law. Law professors gravitated toward public service and New York University created, in 1938, a Graduate Division of Training in Public Service.

- Some schools, especially Harvard, had open admission policies pursuant to which any applicant who could pay was admitted. By contrast, some schools, such as Columbia, used aptitude tests to decide which applicants to admit.

- Innovations in legal education during the 1930s were limited to a few dozen upper-tier schools. For most schools, preparation for the bar exam did not require curriculum changes, innovative offerings or faculty research.

8. <u>The ABA's Attempts to Raise Standards</u>

- As noted above, beginning in the 1920s, the ABA attempted to raise educational standards in law schools. One of its first proposals was to require at least two years of college work for all prospective law students. The ABA could not enforce that requirement, but the AALS could. In 1913, the AALS required two years of pre-legal education and in 1926 the AALS rescinded its permission for law students to receive their college work concurrently with their law studies.

- In 1928, the ABA and the AALS required at least three full-time instructors in law schools and 7,500 volumes in law school libraries. In that year there were 173 law schools, of which only about 65 were approved by the ABA. Of the forty-nine states

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[234] Quintin Johnson, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535 (1951).

(including the District of Columbia), thirty-two had no requirements for any pre-law studies and eleven required only high school graduation. None required attendance at a law school. However, every state but Indiana had a compulsory bar examination.

- In 1928, Reed issued his second report for the Carnegie Foundation in which he complained about what he called the "homogenization" of law schools. He was concerned about the ABA-AALS attempts to force smaller law schools to behave like the more elite law schools and the efforts to make evening law schools follow the more orthodox model. He called for two types of law schools, one to train barristers and one to train solicitors.

- At the ABA's Section of Legal Education meeting in 1929, the debate between university-related law schools and smaller, private law schools came to the surface. The dean of the Suffolk Law School, Gleason Archer, delivered an address with the title "*Facts and Implications of College Monopoly of Legal Education*." Henry Drinker of Philadelphia responded, calling for increased educational standards such as mandatory pre-legal college, stating that most of the complaints before the Philadelphia grievance committee concerned "Russian Jew Boys" who would benefit by "absorbing American ideals" by having a pre-legal college education.[235] The ABA's 1930 meeting was similarly tense. The ABA passed a resolution to eliminate commercially operated law schools and Archer responded by proposing that at least half of each law school's faculty be composed of practicing lawyers. That resolution was defeated and replaced by one that encouraged personal contact between law students and established practitioners.

- Further attempts to raise standards took place in the 1930s. The AALS required school libraries to have at least 10,000 volumes and at least four full-time instructors. Nevertheless,

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[235] A.B.A., REPORT OF THE FIFTY SECOND ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT MEMPHIS TENNESSEE, OCTOBER 23, 24 AND 25, 1929: SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR 622-624 (1929). Drinker continued: "I have found these fellows, that came up out of the gutter and were catapulted into the law, have done the worst things and did not know they were doing wrong. They were merely following the methods their fathers had been using in selling shoe strings and other merchandise, that is the competitive methods they use in business down in the slums." *Id.*

in 1928, part-time and mixed schools had about 60 percent of the 46,000 law students in the country.

- By 1932, seventeen states required two years of pre-legal college training and thirty-three states required three years of law study. By 1935, there were 195 law schools and the number of unaccredited law schools declined. The legal profession was becoming overcrowded and the perception was that the proprietary law schools were responsible for the increase. As a result, the Philadelphia Bar Association voted to limit the number of practicing lawyers in Philadelphia. By 1938, there were 101 ABA-approved law schools and only eight states did not require at least two years of college before law school. The number of law students declined in 1939 although it is not clear whether that was because of the Great Depression.

- The ABA continued its efforts to "put unworthy law schools out of business and to induce "worthy" schools to raise their standards.[236] In the unaccredited schools, the case study method was rarely used. The instruction method was thought to be more amenable to passing the bar examination.

- When more states began to require a high school diploma for admission to law school, some of the proprietary schools, such as the Portia Law School, created their own high school equivalency program. When certain law schools, such as University of Mississippi and Vanderbilt, refused to require at least two years of college, they were expelled from the AALS. Other schools experienced a dramatic decline in their student bodies when the requirement of at least two years of college was implemented. At Catholic University, the student body fell from ninety-seven students to sixteen when the two-year college requirement came into effect. However, when George Washington University began to require an undergraduate degree for admission to its law school, its *Alumni Bulletin* declared that the requirement put George Washington "in the first rank."

- In 1940, the ABA observed that in addition to their regular courses in their curriculum, some schools "make a definite

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[236] John Kirkland Clark, *Qualifications for Bar Admission: A Sketch of Progress in Raising Standards*, 8 AM. L. SCH. REV. 3 (1934).

effort to bring their students into contact with practicing lawyers during the period of their law school course."[237]

9. Law Schools from 1945 to 1980

- The end of World War II brought a dramatic increase in the number of students in law schools, at least temporarily. In 1947, there were more than 50,000 law students, of whom almost 40,000 were in full-time accredited law schools. Only 7000 were in unapproved law schools. In the District of Columbia, the YMCA law school closed, after its board rejected the move to become an accredited school because it would lose control of (and profit from) the school as it was then.

- The influx of students to law schools encouraged the ABA and the AALS to continue their efforts to increase the quality of law school education. In 1948, the AALS required a full-time dean in all schools and the ABA recommended increasing the two-year college requirement to three years. In 1952, the AALS required a faculty-student ratio of one to seventy five. By 1958, of the 42,000 law students, only 3500 were in the thirty remaining unapproved schools.

- In addition, unapproved schools were being absorbed into approved schools. For example, the Columbus Law School (formerly the Knights of Columbus Law School) was absorbed by Catholic University and the Washington College of Law was absorbed George Washington Law School.

- By 1950, three years of pre-legal college was the norm; by 1960 the norm was four years of college. The speed of the move to those requirements cannot be overstated: it was not until 1950 that the number of lawyers who had been to college exceeded the number who had not.[238]

- The ABA's *Survey of the Legal Profession* reported that after a survey of nearly all of the country's law schools in the late 1940s, "The curricula are fairly well standardized. The vast majority of schools are either local or regional and the curricula

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237 A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR LEGAL EDUCATION: FACTORS BEARING ON THE APPROVAL OF LAW SCHOOLS (1969) *quoted in* Joy, *supra* note 28, at 565.

238 STEVENS, *supra* note 195, at 209.

have been fashioned largely around the subjects in which the graduates of the schools must be examined for admission to practice."

- In many schools, the case method was being replaced with seminars and, increasingly, clinics. Schools were incorporating introductory law courses, legal skills courses and, in some, the "problem method." There was an increased analysis of legal skills, with a recognition that the case method did not inculcate all of the important skills. Curriculum change focused on skills such as negotiation, drafting and counseling. One professor at Virginia Law School said that "the core program—that is, the program which the students are not obligated to take but that they will take—is pure, old fashioned Hessian-training . . .".[239]

- Some schools tried to teach skills through the "adversary method" in which as cases came up in class, students were called on randomly to argue one side or the other. Others resorted to clinic programs.

- In 1944, the report of the AALS Curriculum Committee, written largely by Karl Llwellyn, attempted to isolate skills and to articulate the rationale for legal education: "current case-instruction is somehow failing to do the job of producing reliable professional competence on the by-product side in half or more of our end-product, our graduates." But there was little agreement as to what legal skills were.[240]

- Ohio State tried to create a curriculum around legal skills in 1950 but it failed. In the 1960s, the University of Southern California and the University of North Carolina law schools also tried to implement a functional or skills curriculum to no avail. Notre Dame University law school tried to create a curriculum around the "problem method" without success. Of all of the skills-based approaches, clinical programs seemed to have the most promise. Many of them began as legal aid clinics.

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239 Thomas E. Bergin, *The Law Teacher: A Man Divided Against Himself*, VA L. REV. 637, 643 (1968). According to Professor Bergin, a "Hessian-trainer" is someone who pretends to be a legal scholar but who in fact is "training Hessians" solely for admission to the bar.

240 STEVENS, *supra* note 195, at 214.

By 1951, twenty eight schools had clinics, most of which did not come with academic credit.

10. Law Schools in the Modern Era

- In the 1970s and 1980s, there was internecine warfare between "practitioners" and scholars or, as some have said, between the "schoolmen" and the "Hessian-trainers." One of the catalysts was whether clinics should qualify for academic credit and whether clinical professors should be placed on the tenure track. As Stevens puts it, "Although some might sneer at law schools as high-grade schools of rhetoric, teaching by methods other than the casebook was probably not congenial to most law professors whose chief and sometimes only skill was the analytic one associated with the parsing of cases."[241]

- Professor Thomas Bergin of Virginia, who coined the phrase "Hessian-trainers" for practitioners who teach in law schools, described the dilemma as follows: "There is no fact more visible in our law schools than that teachers with extraordinary scholarly skills are being made to 'pay for their keep' by rule preaching and case parsing. The time they must give over to preparation for the Hessian-trainer roles makes it literally impossible to produce serious works of scholarship. . . . Almost as serious is the effect of this compulsion on the solid non-scholar Hessian-trainers . . . . Since they are in a university environment . . . it is not surprising that the non-scholars are as diluted by their painful attempts to produce works of scholarship as the scholars are by their attempts to teach their students how to be lawyers."[242]

- By the late 1960s, "concern with skills training was evident among an increasing number of schools."[243] In 1973, Chief Justice Warren Burger, in a speech to the ABA, said "from one-third to one-half of the lawyers who appear in serious cases are not really qualified to render fully adequate representation. . . . The medical profession does not try to teach surgery simply

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241 STEVENS, *supra* note 195, at 278.
242 *Id.* at 279, n.1, *quoting* Bergin, *supra* note 238, at 645-46.
243 STEVENS, *supra* note 195, at 213.

with books . . . . The law school . . . is where the groundwork must be laid."[244]

- In 1975, the Second Circuit Court of Appeals Advisory Committee recommended that law schools teach trial skills.[245]

- By 1969, there were twenty factors set forth by the ABA for approval of a law school, but none of those dealt with experiential education.[246] But by 1973, the ABA for the first time explicitly mentioned "professional skills." ABA Standard 302 (a)(iii) was revised and explicitly stated that "the law school shall offer . . . (iii) training in professional skills, such as counselling, the drafting of legal documents and materials, and trial and appellate advocacy."

- In 1978, the ABA interpreted that standard and said that a law student seeking to be admitted to an advocacy course need not be guaranteed enrollment and that the standard merely required the schools to offer training in the professional skills.[247] In 1980, the ABA said that a law school's failure to offer adequate training in professional skills violated Standard 302(a)(iii) and in 1980, the ABA urged law schools to be "creative" in developing programs of instruction in skills.[248]

- According to an ABA survey in 1974-1975, 109 law schools reported offering 834 experiential courses; by 1990, 119 law schools offered 1763 experiential courses.[249] But according to the same survey, professional skills training occupied only nine percent of the total instructional time available.

- A 1989 Task Force appointed by the ABA, known colloquially after its chair Robert MacCrate, a partner in the New York law

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244 Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227, 233 (1973), *available at* http://ir.lawnet.fordham.edu/flr/vol42/iss2/1.

245 Qualifications For Practice Before the United States Courts in the Second Circuit, 67 F.R.D. 161, 164 (2d. Cir. 1975).

246 A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR LEGAL EDUCATION: FACTORS BEARING ON THE APPROVAL OF LAW SCHOOLS (1969), *quoted in* Joy, *supra* note 28, at 565.

247 Memorandum from ABA Consultant on Legal Education to the Deans of ABA Approved Law Schools (Feb. 1, 1978).

248 Joy, *supra* note 28, at 568.

249 *Id.* at 569.

firm Sullivan & Cromwell, wrote a report ("The MacCrate Report") that concluded that there was a "gap between the teaching and practice segments of the profession" and the Task Force Report, issued in 1992, suggested many ways to "narrow the gap."[250]

- Among other things, the MacCrate Report recommended that ABA Standard be revised to require that "a law school's program of legal education would not only prepare graduates for admission to the bar but also prepare them to participate effectively in the legal profession."[251] Specifically, the Task Force recommended that "the interpretation of Standard 302(a)(iii) should expressly recognize that students who expect to enter practice in a relatively unsupervised practice setting have a special need for opportunities to obtain skills instruction." MacCrate later wrote that changing the Standards was "affirming that education in lawyering skills and professional values is central to the mission of law schools and recognizing the current stature of skills and values instruction."[252]

- In 1996, Standard 302 was changed by the ABA to require that law schools "shall offer to all students . . . adequate opportunities for instruction and professional skills." This expanded the proposed offerings so that they would be available to all students. Law schools were also required to offer "at least one rigorous writing experience."

- In 2005, Standard 302 was changed again. Instead of requiring that law schools "offer" instruction in professional skills, the Standard now stated that "a law school shall require that each student receive substantial instruction in . . . other professional skills generally regarded as necessary for effective and responsible participation in the legal profession." This change turned out to be ambiguous since there was no definition in the Standard of the word "substantial." Accordingly, in 2010, the ABA Consultant on Legal Education clarified that the word

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250 MacCrate Report.

251 Joy, *supra* note 28, at 571.

252 Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805, 819 (2004), *available at* http://ssrn.com/abstract=444601.

"substantial" meant "one credit" or about 1.2 percent of law school available instruction time.

- As a result of this interpretation of the Standard, criticisms that law schools were not teaching "the practical skills needed to practice law in today's economy" persisted.[253]

- In March 2014, the ABA adopted an amended Standard 303(a)(3) that now required that law schools require students to take at least six credit hours in experiential courses.[254] The ABA still left it to the law schools to decide what professional skills would be taught in those courses, but Standard 302 still specified three of them that must be taught: "(1) knowledge and understanding of substantive and procedural law; (2) legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; and (3) exercise of proper professional and ethical responsibilities to clients and the legal system." Standard 304 provided that those requirements could be met by simulation courses and legal clinics. However, that Standard required only "substantial opportunities" for such participation by students and in 2017, at least one law school provided such opportunities for only ten percent of its students.[255] On the other hand, many law schools now require their students to participate in at least one legal clinic or externship as a prerequisite for graduation.[256]

- In January 2014, the Report of the ABA Task Force on the Future of Legal Education contained nine "guiding themes":

    - The financing of law-related education should be reengineered;

    - There should be greater heterogeneity in law schools;

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253 Some of that criticism is collected in Joy, *supra* note 28, at 574.

254 In addition, the memorandum of the Managing Director for the Section of Legal Education and Admissions to the Bar was clarified in 2015 to state that the word "substantial" now meant at least six credit hours. A.B.A SECTION OF THE LEGAL EDUC. AND ADMISSIONS TO THE BAR, MANAGING DIRECTOR'S GUIDANCE MEMO, STANDARDS 303(A)(3), 303(B), AND 304 (MAR. 2015).

255 Robert R. Kuehn, *Universal Clinic Legal Education: Necessary and Feasible*, 53 WASH. U. J. L. & POL'Y 89, 90 (2017), *available at* https://openscholarship.wustl.edu/law_journal_law_policy/vol53/iss1/13.

256 Joy, *supra* note 28, at 581.

- There should greater heterogeneity in programs that deliver legal education;
- Delivery of value to students in law schools and in programs of legal education should be emphasized;
- There should be clear recognition that law schools exist to develop competencies relating to the delivery of legal and related services;
- There should be greater innovation in law schools and in programs that deliver legal education;
- There should be constructive change in faculty culture and faculty work;
- The regulation and licensing should support mobility and diversity of legal and related services; and
- The process of change and improvement initiated by the Task Force should be institutionalized.

- The Task Force also took note of the changed in legal education: "Years of pressure on law schools have begun to shift the educational model. There is greater recognition that the ultimate purpose of law schools is to prepare individuals to do things, rather than just to know things and this has led to an increased emphasis on law schools delivering practice-related competencies."[257]

[257] Jay Conison, *The Report and Recommendations of the ABA Task Force on the Future of the Legal Profession: Its Significance for Bar Admissions and Regulation of Entry into the Legal Profession*, THE BAR EXAMINER (December 2014). https://thebarexaminer.org/wp-content/uploads/PDFs/830414-conison.pdf

APPENDIX D

"CARPE DIEM":

AN OPPORTUNITY TO RECLAIM

LAWYERS' INDEPENDENCE

Louis A. Craco

THE PHILIP B. BLANK MEMORIAL LECTURE

February 28, 2006

Pace Law School

White Plains, NY

At the end of January, long after I had accepted the welcome invitation to give this lecture and had sent a synopsis of its content to the Dean's office, Alan Abelson opened one of his usually provocative weekend columns in Barrons with the question, "An epidemic of integrity?" And the answer, "Something seems to have suddenly evoked an urgent awareness of ethics, and in the strangest of places" of which he named the halls of Congress and Corporate America as two. Abelson's point is mine, too. There has ripened over the last few years, as a result of several forces combining in a fortuitous way, one of those intermittent moments in American public life when a chance to seize and hold the ethical high ground becomes not only morally required, but actually convenient. And in this moment, an opportunity presents itself for lawyers to reinforce and, where necessary, reestablish—against all the stresses that in the last decades been have imposed upon it—an attitude of genuine independence as a central ingredient of their conduct as well as their aspirations.

That attitude, in my view, is indispensable if lawyers, as a group, are to realize fully what it means today to be an American lawyer; and indispensable, too, if lawyers individually are to serve their clients effectively. Seizing this moment and the opportunity it presents, is, I think, crucial to sustaining the legitimate autonomy of our profession over time, and to performing well the individual and collective roles assigned to private practitioners in the peculiarly American experiment.

Allow me to develop some of these thoughts for a few minutes today. First, I shall offer some observations on how the notion of lawyer independence fits into what I believe to be the profession's unique and critical role in American

life; then I would like to explore a bit how the long-maintained understanding of lawyer independence came to be under such stress; and finally, I will suggest what it is about this moment that creates the conditions in which we can reclaim that understanding and encourage its practical application in day-to-day practice.

As I do so, I invite you to keep in mind what the stakes of this inquiry are. It is a crucial part of the continuing search for a contemporary sense of purpose and worth in the modern legal profession. And the stakes of *that* enterprise have been well captured by Professor David Wilkens of Harvard, who put the challenge thus: "One does not need to invoke much hyperbole to put forth a credible argument that the legal profession's survival as an independent profession depends on its ability to articulate a persuasive and public-regarding justification for its privileged place in society."

One of the many satisfactions of the job that Chief Judge Kaye assigned me as Chair of the Institute on Professionalism in the Law has been the chance, and the duty, to think hard about what it means to be an American Lawyer at the dawn of the Twenty-first Century, to begin to formulate an answer to David Wilkens' challenge. That has led me to appreciate, in a way I had not before—and that lawyers in the tumult of daily practice rarely do—how crucial the Rule of Law is to the distinctive American social contract and how indispensable the daily work of lawyers in private practice is to making the Rule of Law a reality. I have been known to hold forth on this core notion for hours, but let me sketch the idea for just a few minutes now, because it is the context that gives meaning to everything else I have to say.

The premise that The Rule of Law is central to the American design of things ought to be axiomatic, but it actually takes a moment's reflection to appreciate it fully. When I speak if the Rule of Law I am not talking about the network of positive laws and the profusion of regulations about which reasonable people can differ and often do. I am talking about something much more fundamental: the necessity in our culture that people, in general, respect and obey the law. It is a value that, like gravity, we usually ignore, but that conditions everything we do and how we do it.

Think of it a minute. The American enterprise is full of deliberately designed tensions. We are a nation built from scratch on proudly proclaimed oxymorons:

We pledge allegiance to a land with "liberty and justice for all." With this pledge, we embrace a scheme of ordered liberty in which justice is conceived of, as Roscoe Pound put it 100 years ago, as "the ideal compromise between the activities of each and the activities of all in a crowded world."

We declare ourselves, both on our Great Seal and in our daily lives, to be "E pluribus unum"—one from many. And this in turn commits us—across all the divides of race and religion and national origin and culture and moral perspective and economic status and ideology and customs and manners and ambitions— to making a coherent nation—one of the very few genuine polyglot democracies in the history of the world.

We affirm that "all persons are created equal" though in nature and nurture they manifestly are not; only in the eye of our law is this so.

We assert that here there is "equal opportunity for all" and we are thus obliged to reconcile this promise with our embrace of free-market capitalism.

There are others, creatures, for example, of our federal system and our government of divided authority; but the point is sufficiently made for present purposes. The one organizing ideal that can reconcile the tensions inherent in this web of self-competing aspirations is the Rule of Law. Lest you doubt this, look at the headlines of your newspaper, and observe these tensions on daily parade. Conflicts like the fraught issues over the authority to detain prisoners without legal process or to intercept domestic communications without warrant are classic clashes of the claims of order and liberty.

The Senate's recent reconnaissance of the border between presidential power and judicial authority is fundamentally about whether such vivid clashes, and others less dramatic, will be resolved by law or prerogative. You see it too in the "hot button" skirmishes of the so-called "culture wars" like abortion, gay rights, affirmative action and a host of others; all representing "conflicting ideas of justice" among "diverse groups and classes and interests understanding each other none too well", to borrow again from Pound. The hegemony of the Rule of Law is evident from the accounts of these struggles you will read, in the fact that all of them are being fought out in the halls of legislatures and the courts. However hard it seems to be, our society has remitted these issues to the law for resolution.

The Rule of Law is, then, the indispensable instrument by which we manage the tensions inherent in our grand national experiment; by which— across all that divides us— we make the adjustments needed to live as one; by which we create the conditions in which a free economy can operate efficiently and fairly, where private plans can be reliably laid and carried out, where disputes can be resolved peacefully and order kept with a reasonable approach to justice. In our world of oxymorons, the law is both the glue and the lubricant of our society.

What the law is *not*, however, as Oliver Wendell Holmes once observed, is "a brooding omnipresence in the sky ." It is the composite of thousands of cases and matters, laws made and used, advice given and received, day in and day out. If the Rule of Law is crucial to American society, it is equally true that lawyers are crucial to the Rule of Law since they *deliver* it every day in every case or transaction in which they act on a client's behalf. It is not an exhortation, but a description, to say that lawyers in private practice are always engaged in a *public* calling. "They are", as my colleague in the Institute, Paul Saunders, has put it, "where the rubber meets the road."

The public character of private practice is, of course, most obvious in the courtroom, where lawyers play their socially assigned part by advocating their clients' rights and interests in a public peacekeeping system dedicated to resolving conflicts without strife and as fairly as possible.

The very fact that there is so conspicuous a public character to this aspect of private practice, producing the cliché that lawyers are "officers of the court", has led to the tendency identified by Professor Wilkens to think of the lawyer's public role as *only* the advocate's role. "The larger problem," Wilkens went on to point out while giving the Keynote Address at our Institute's inaugural convocation in 2000, "is that most of what goes on in our legal system takes place outside of court. Most lawyering is transactional, advising in the office, structuring. Increasingly what lawyers are doing is working with others to structure complex economic relationships that have a deep effect on what our political and social life is going to be like. And the lawyers who do this work often do not see that they are connected to this public tradition."

But, of course, they inescapably are. Lawyers write instruments that, as Mary Ann Glendon has observed, "aid citizens to live together with a minimum of friction, make reliable plans for the future, and avoid unnecessary disputes." This gives them "extraordinary opportunities to affect for better or worse the quality of everyday life in our large commercial republic." These are all *public* goods, I submit, delivered every day by private lawyers in private practice papering private arrangements for private clients. And the private ordering of their clients' affairs is effective precisely because they conscript what the Supreme Court in Shelley v. Kramer called "the full coercive power of government" to back and enforce what they write.

And even the most private advice lawyers give, shrouded in the privilege bestowed upon the exchange by a society that sees a public good in enhancing the capacity of lawyers to give wise advice, possesses an intrinsic public character. A few years ago, at a symposium in Minnesota ambitiously entitled, "The Future of Callings— An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium," Stephen Carter of Yale

offered an insight into the inherently public aspect of the lawyer as adviser: "The principal lawgivers in America," he said, "are neither the courts nor legislatures, nor administrative agencies, but rather lawyers. This," he continued, "is because most people's principal experience with understanding their legal obligations, and their legal rights, is working with a lawyer. Whether it is a matter of buying a house, defending a lawsuit, or establishing a business, the lawyer becomes, in the life of that person, the lawgiver. It is the lawyer who comes forward to say these are the possibilities of what you may do or not do." So, in the daily counseling practice of lawyers, the adjustments of interests made by the Rule of Law are *delivered* by the lawyer to the client and become, for that client, the law.

It is only because we have the fundamental role I have attempted to sketch thus far that we have a legitimate claim to independence. Independence in both senses that we lawyers use the term: our collective autonomy from supervision by others, and our ability to give disinterested advice to our clients. We are allowed to be independent in the first sense because it is necessary for our independence in the second sense. Thus, we are called on by the professional self-conception I have outlined this afternoon, to be able and willing to speak truth to power, whether the power is held by the President of the United States, or the CEO of Enron, or by a valued and valuable client. It is truly a case of use it or lose it: our profession's claim to collective autonomy, and the willingness of the society to allow it, depends, over time, on our individual willingness to use that freedom from outside interference to provide to our clients the advice we know they need to hear, whether we think they want to hear it or not. The whole notion of the lawyer as a public actor *delivering* the Rule of Law to clients in private practice—the account that best explains what it means today to be an American lawyer—is forfeit if we fail to deliver the goods in the exchanges we have with our clients.

One of the other satisfactions I have enjoyed in the Institute's work is the encouraging discovery of how often and how well lawyers around this state and elsewhere take for granted and act on this duty. But they and we all realize it has become harder to act this way, and for discernable reasons.

A quarter century ago, as a friend of mine (who is not exactly an ideological soulmate) recently wrote, the Supreme Court, in one of its latter-day epiphanies discovered that two centuries of prohibitions against lawyer advertising were unconstitutional.

In *Bates v. State Bar*, the Supreme Court struck down as unconstitutional Arizona's ethical ban on truthful price advertising by lawyers. Justice Blackmun's opinion dismissed the bar's argument "that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth…[and] tarnish the dignified public image of the profession." "At its

core," Blackmun wrote, "the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that they earn their livelihood at the bar. We expect that few attorneys engage in such self-deception."

Well. The English bar had long done something very like that. English barristers still wear gowns with a vestigial pouch on the outside of their rear skirt. In bygone days, this allowed a client to tuck his fee in, without the barrister knowing it and dealing in tawdry trade. But in America, the lawyer's world had forever changed.

There began first a trickle, then a flow, and finally a flood of information about the business of law and its practitioners that has threatened to reshape lawyers' understandings of themselves and their calling.

The vast amount of this information spans virtually every conceivable medium. There has grown up a whole journalistic industry reporting in a "trade press" (both print and television) the news, gossip and trends of the law business locally, nationally and internationally. Lawyers have become media celebrities, starred in their own television commercials, fastened their images to billboards and bumpers, conducted "beauty contests," seminars, created brochures and homepages and found second careers as talking heads.

The kinds of information available in this deluge are as various as the media by which they are delivered. Who is representing whom, and why, and for how much; who one, who lost, and how; who has moved, who has stayed, who is up, who down; where are the young lawyers going, where are they avoiding, how do they feel; what firm, city, practice area, law school is hot, or cold, or heating up, or cooling down; and always, always, who makes how much money. All these data are sliced and diced an put back together again, made into soundbites and graphs and graphics, then turned into the "buzz" of conference room, corridor, email and bar association chatter from which the next trendy tidbits will emerge.

Where information exists in such volume and variety, comparisons become possible as never before and competition inevitably erupts. It is nonsense, of course, to pretend that competition—sometimes fierce—was absent from the law practice of yesteryear. However the prevalence and openness of the contemporary marketplace for clients and talent is something so different in degree as to be different in kind. While long-term, broad-scale representation of a client by a lawyer or firm has hardly disappeared from the practice, it is no longer—as it once wads—the rule rather than the exception.

The rise of client sophistication, fed by readily available banks of comparative knowledge, has led to the rise of transactional practice in which lawyers are hired for a particular task rather than retained for a continuing relationship. Clients can now discriminate more acutely about quality and price in legal services; the fact that they *can* do so means, in the real world, that they *must* do so. This dissolution of long-term ties between client and lawyer puts not only the lawyer but also the client in play. More lawyerly competition for now available clientele ensues. None of this, I am convinced is solely an artifact of big-firm, big-business practice. It is echoed in small cities and towns across the country where it is often perceived as the loss of the "collegiality" of the bar of former days.

Whether this is good or bad is beside the point, not so much because the Supreme Court decided as it did, but because that outcome, in one form or another, was inevitable.

A professional code substantially based upon keeping abundant knowledge about law practice from the public to whose service the profession is dedicated and at whose sufferance it enjoys its monopoly and self-regulatory authority, could simply not be sustained as legitimate over the long term—especially not in the face of the rise of the information age.

It has always been true that some moral courage was required to do the job of being a wise and candid counselor to a client on whom a lawyer depended to any great extent. It has always been true that all sorts of pressures—from partners, family expectations, and the urge to prosper, for example—have insinuated themselves into the mix of considerations that lawyers weigh in deciding whether to do that job in particular instances. And to be sure, the moral courage and self-respect needed to give tough advice to a tough client has become greater as the pressures of modern commercialism in law practice have become more intense.

I think, however, that the time has arrived when the very market-driven psychology that has produced those intense pressures can be co-opted by skillful and dedicated lawyers to support them in their task of rendering truly independent advice. The risks to clients of bad behavior have become so high, the risks to lawyers of collaboration in client lawlessness have become so high, the possibilities of concerted action among lawyers within practice units and among them with the end and aim of reinforcing professional independence and personal self-respect have become so inviting, that cost-benefit analyses by both parties to the lawyer-client exchange should recognize the value of giving and receiving the full benefit of a lawyer's discerning and wise judgment.

To put it in a crass form I admit I abhor, the nub of the idea is this: circumstances have conspired to make it possible to identify such independent judgment as a *product* that adds value to any transaction on which it is brought to bear, to make it possible, also, to persuade clients that total loyalty to them consists in providing them such advice, not suppressing it, and possible, finally, for a lawyer or firm to achieve a competitive advantage by being recognized as marginally better than others in consistently making that product available to clients.

Cognitive psychologists speak of the "salience effect" by which they mean the tendency of humans to perceive in a disproportionately powerful way phenomena that stand out from their surroundings. When advertisers try to create an appetite in consumers for a product or brand those consumers might not need or especially want, they routinely use salience in their efforts to make their wares attract us and stick in our minds. The whole business of endorsements by celebrities or stars of one kind or another is built on this theory—their prominence and supposed appeal will raise their product above the general clutter of commercials and help us remember our Wheaties, or L'Oreal, or Nike shoe. Prosecutors instinctively know about this method too. The "perp walk" of shame is meant not only to further humiliate its subject but to display vividly the disgrace that can be expected to follow crime. We speak of "making an example" of someone—the process of elevating the punishment of a particular offender to a degree of salience from the run of sentences, in order to caution all the rest of us not to offend in like manner.

And in 1917, beset by mutinies and desertions in the horrific trenches around Verdun, the French Army infamously brought the idea to a grisly nadir by summarily executing randomly selected troops (guilty or innocent) "pour encourager les autres"—"to encourage the others."

Corporate America, according to Abelson's article, has been a pacesetter in discovering honesty. "It did so, alas, under some duress," he goes on, "in the wake of a series of scandals, involving some of its most envied (that is, most lavishly compensated) executives, a number of whom have wound up enjoying extended vacations at Club Fed ." Enron, WorldCom, Global Crossing, Adelphia, Health South, Tyco, Marsh & McLennan, AIG, General Re, Arthur Andersen the somber list rolls on….The sheer size and audacity of the corporate wrongdoing in just the interval since the peak of the bull market in March 2000 is astounding and riveting. And its consequences for the perpetrators do stand out. Sunday's Times carried a front-page story on the utter financial ruin—spelled out in lurid detail--of Kenneth Lay on the heels of the collapse of Enron, with detours into the similar fates of Bernard Ebbers at WorldCom and John Rigas at Adelphia. If, as I believe, Abelson is right in seeing a revived appetite for corporate rectitude—real and perceived— in reaction to these and other

spectacular object lessons, it is the salience effect working to good effect. Not the least of these effects, I submit, is to create a market among businessmen for good, independent, morally discerning legal advice.

The point was made in a somewhat back-handed way in the criticism leveled last year by John Coffee of Columbia, who suggested that the failures of professional "gatekeepers" like lawyers and accountants to do their jobs with independence and fidelity had as much or more to do with corporate governance failures in recent years than did compliant directors. The inverse may be equally if not more true: lawyers doing their jobs with independence and fidelity to their client's authentic interests may have much to do with preventing such troubles in the years ahead.

And, even more to my point, their clients may more fully appreciate that this is so, and be more ready to recognize such service as being of significant corporate and individual value to them. If advertisers can make people buy products they don't need by making people want them anyway, lawyers ought to be able to sell their clients a product they do need and are, it seems, again beginning to want.

They have every reason to try. Last year, at the annual luncheon honoring the Life Members of the American Law Institute, Bevis Longstreth, formerly of Debevoise & Plimpton, and more recently a Commissioner of the SEC, gave a scorching speech on the topic I am rather more delicately addressing today. He reminded us of the now unhappily familiar story of the opinions rendered by key Justice Department lawyers that provided crucial, if totally unsound, support for the abuse of prisoners taken in the war on terror. The Bybee opinion, as it has come to be known, represented for him an abject abandonment of the duty of lawyer independence in favor of producing a flawed analysis that was "most plausibly explained as necessary to achieve a certain result ." And he went on to draw a parallel to our subject today: "The issue," he said, "is one of defining the lawyer's role, be it as government lawyer counseling the President or corporate lawyer counseling the CEO ." In both cases, the lawyer will be asked from time to time, "Can we do this?" The client wants to be told "Yes" but needs to be told "No."

If Longstreth can draw a chastening comparison between the Bybee opinion and his perceptions of lawyer failure as seen from his vantage point as an SEC Commissioner, some more recent tales from Washington can offer more hopeful examples. Bybee, it turns out, was not unopposed in his view on torture. A profile in the current issue of The New Yorker recounts the strenuous, continuous, thoroughly conscientious and eventually successful efforts of Alberto Mora, General Counsel of the Navy, first to prevent and then to reverse

the "legalization" of prisoner abuse. It is a fascinating narrative of true lawyerly independence in action.

And it must be of special satisfaction to the sponsors of this lecture series to have learned of Deputy Attorney General James Comey's refusal, in the face of enormous pressure, to authorize continued warrantless intercepts of domestic communications under the National Security Administration's secret program. The accounts of that episode in the New York Times and Newsweek are edifying, not only because Mr. Comey delivered this lecture a couple of years ago, but because of the salience effect his example can have. There is, I believe, ample reason to think that the examples afforded by Jim Comey and Alberto Mora are so distinctively attractive that they can help to produce counterpart behavior in the private practice of law with private clients, just as surely—I would contend even more surely—than examples of toadying advice in the government have had their counterpart in dereliction of independence in private practice.

I base this optimistic assessment in on two beliefs. First, it seems to me apparent that practicing lawyers understand the threat to the autonomy of the profession that would be created by allowing an impression to become widespread that large numbers of lawyers are shirking their duty to perform as conscientious and independent "lawgivers" to their clients. Lest they are in doubt of this threat, the SEC, armed under the Sarbanes Oxley law with new authority to regulate the ethics of lawyers involved in advising public companies, will clarify it for them. Longstreth, reminding his audience last year of the experience of the accounting profession at the hands of SEC regulators, said that the implications for the corporate bar of falling short on the delivery of professional service "can be heard in the giant sucking sound" at the SEC, "as the last vestiges of private ordering within an already hollowed out [accounting] profession are taken away." But it will not come to that, I think, because of the second reason for my optimism. That lies in the fact—not the opinion, I think, but the fact—that lawyers, despite the stresses I outlined earlier, are much more faithful to their duty, day in and day out, than our critics give us credit for. That is true as a matter of personal observation over many years of practice. It is true from what I have learned from practitioners in the work of the Institute. It is especially true in the smaller firms and among the sole practitioners who make up the greatest number of practicing lawyers, and whose personal connection to professional values is the more acute for being less bureaucratic in the form of their practices. The fact that this fidelity is routine, privileged, and avoids noisy problems makes it the antithesis of salient; but it is there all the same, and the outbreaks of honor that the Comey and Mora stories exemplify lend such behavior the prominence that it otherwise lacks.

The task of seizing this moment to reassert with vigor the independence of lawyers and the autonomy of the bar does not belong to the practicing bar alone.

Longstreth proposed a joint venture between the American Law Institute and the Business Round Table to develop a set of best practices that would strengthen the ability of corporate lawyers—outside lawyers and in-house lawyers both—to provide unencumbered, independent advice. Harvard's David Wilkens has been engaged for a number of years in collaborative research with law firms exploring the structures inside firms that reinforce the ethical performance of lawyers at all levels within them. And the Institute that I have the pleasure of chairing will shortly take up a proposal to develop joint ventures with the law schools and bar associations in New York State to explore still further ways to encourage and nurture the instincts toward independence that, I believe, are native to the breed of lawyers. That is an endeavor in which we are likely to come knocking on your door.

Forgive me, please, for talking in these remarks of legal advice as a product; for talking out loud about ways and means of selling that product. It is more, much more, than that. As I have had occasion to insist in other venues, the qualitative relationship between the advisor/advocate on the one hand and the client on the other is fundamentally different from the nexus that exists between the buyer and seller of goods, and it is a transcendently important function in the American design of things, as I tried to convey this afternoon. But the language of the market can, I think, at this time in our profession's history, be useful to describe and understand the nature of the opportunity before us. And, I hope, provide us with the tools to seize it.

Your invitation to give this lecture has been an honor for me that I greatly appreciate, and I am happy to have had the chance to explore some of these ideas with you this afternoon.

APPENDIX E

THE NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW AND ITS CONVOCATIONS

DEDICATED TO PROMOTING PROFESSIONALISM
IN THE LEGAL PROFESSION

The Judicial Institute on Professionalism in the Law was created by an Administrative Order of the Chief Judge dated March 3, 1999, following the issuance of the 1995 Report of the Committee on the Profession and the Courts, to "promote awareness and adherence to professional values and ethical behavior by lawyers in New York State."

As members of the bar, lawyers must remain true to the enduring values that have made the legal profession a positive force for public good throughout our nation's history. The broad mandate of the Institute requires examination and studied consideration of the challenges to lawyer independence and professionalism, both in practice and in legal education.

The Institute has pursued its mandate by studying the influences, pressures and challenges to professionalism in different practice contexts and in legal education. In 2015, the Institute launched a continuing legal education (CLE) initiative. Over the years, the Institute has convened focus groups around the State to identify speakers and themes for its Convocations. Building on the success and enthusiasm for the focus groups, the Institute piloted small group CLE programs with lawyers in law firms and court-based law departments to discuss issues of professionalism raised in scholarly articles in legal journals.

Convocations of the Judicial Institute [258]

Professionalism & Legal Education: 2019

FROM LAW SCHOOL TO PRACTICE: SKILLS, COMPETENCIES AND PROFESSIONAL VALUES

Professionalism & Legal Education: 2014

THE COMING CHANGES TO LEGAL EDUCATION: ENSURING PROFESSIONAL VALUES

Lawyer Independence Convocations: 2009 - 2013

THE RISE AND ROLE OF GENERAL/IN-HOUSE COUNSEL TO LAW FIRMS

INDEPENDENCE AND THE GOVERNMENT LAWYER

CHALLENGES AND BEST PRACTICES FOR SOLO AND SMALL FIRM PRACTITIONERS

INDEPENDENCE AND IN-HOUSE CORPORATE COUNSEL

A PRINCIPLED DISCUSSION OF PROFESSIONALISM: LAWYER INDEPENDENCE IN PRACTICE

Legal Profession Convocations: 2000-2007

CONVOCATION ON THE FACE OF THE PROFESSION

SUMMIT ON THE INTERNET AND THE PRACTICE OF LAW: CHARTING A COURSE FOR THE TWENTY-FIRST CENTURY

CONVOCATION ON THE FACE OF THE PROFESSION: THE FIRST SEVEN YEARS OF PRACTICE

CONVOCATION ON THE FACE OF THE PROFESSION: DEVELOPING PROFESSIONAL VALUES IN LAW SCHOOL

CONVOCATION ON THE FACE OF THE PROFESSION: LEADERSHIP OF THE BAR

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[258] The transcripts of most of these Convocations are available on the Judicial Institute's website: http://ww2.nycourts.gov/ip/jipl/convocations.shtml