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# Teach the Law Student to Be a Lawyer

William E. Doyle

# TEACH THE LAW STUDENT TO BE A LAWYER

BY THE HONORABLE WILLIAM E. DOYLE*

On the occasion of the dedication of the magnificent new University of Denver Law Center, I, in conjunction with others, have been asked to offer some comments and remarks on the state of legal education. The title assigned to me by the editors was "A Judicial Evaluation of Legal Education." Upon discovering that I had no judicial attitude on the subject, I was forced to limit my remarks to ideas which have come to mind as a result of reading and observations in my capacity as an amateur or, at most, a "semi pro" law teacher.[1]

The law schools of both the University of Denver and the University of Colorado are fortunate in having progressive attitudes. Moreover, there is no strict adherence to a deeply rooted tradition committing them to a particular law teaching system. These schools have adopted many innovations and are continuously evolving more vital curricula. In common with all law schools, however, they continue to follow the Langdell tradition of emphasizing law study in the abstract rather than applied, and my discussion is for the most part addressed to this point.

Heretofore our special western contribution to legal education has been thought to be in the field of natural resource law. Our geographic location does indeed serve to give emphasis to courses such as Water Rights, Oil and Gas, and Mining Law. It seems to me that geographic location, plus western progressivism, also enables the state to pioneer and explore in a search for more effective teaching methods that will result in the development of more competent practitioners. A purely local present circumstance which could prove most helpful is the ideal location of the new University of Denver Law Center in the midst of the courts. This proximity must have been considered by the planners and it would be indeed unfortunate if complete advantage were not taken of the accessibility of the courts for educational programs.

My theme is a familiar one. How can we bring law school teaching closer to practice? One obvious general answer is to make the law school itself a more important, more vital and less cloistered community institution. Improvement of the status of the law school and increased recognition of the law teachers, most of whom are dedicated and highly competent professionals, will help to narrow the gap between theory and practice. But this is not enough. The curriculum itself should be overhauled.[2]

One system shortcoming which I have often noted is the "college" atmosphere present in law schools. The law student is not now admitted to the professional fraternity upon his entrance into law school. He is required to keep his distance, and he never feels

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*Formerly Associate Justice, Supreme Court of Colorado; recently appointed to the Federal District Court bench; instructor at the University of Denver College of Law; former instructor at Colorado University and Westminster Schools of Law.

1 Most of what I say here is not new. The ideas, in somewhat different form, have been expressed by others. The difference is that we are now moving from the talk stage to the action phase, and there is real hope that needed improvements will be brought about.

2 The law schools have done very well in developing good students of the law, and I do not suggest that this phase of law training should be slighted. Any change should continue to recognize the need for developing studiousness and an interest in law theory. I advocate broadening the training.

that he belongs to the legal profession until he has at last passed the bar examination and been admitted. This attitude is not conducive to a truly professional approach to law teaching. If students cannot be treated as mature, responsible men and women they should not be in law school. We ought to receive the law student into the legal fraternity—at least provisionally, and even share some of the "cult secrets" with him. We should teach him appreciation of the profession at the very outset; the part it plays in making and administering laws; its great importance in the scheme of things; what it demands of its members; the advantages and privileges which it provides; and something of manners and mores among lawyers. This orientation would give him needed perspective and would start the development of the responsible professional—the ultimate object of our endeavors.

I. WHAT QUALITIES AND TRAINING ARE DESIRABLE IN THE LAW SCHOOL PRODUCT?

At times it has been suggested, somewhat facetiously, that the only occupations which a law graduate is competent to perform, after having devoted three years to study under the case system, are those of an appellate court justice or a law school instructor. Recognizing that this statement is somewhat exaggerated, we must nevertheless admit that there is some truth in it. Unfortunately, there are insufficient appellate court and law teaching positions to go around. Besides, the lawyer is needed for many other important tasks. It is true that the law graduate's primary training is along the lines of legal research, study and evaluation of legal questions. But does this train him to perform the tremendous variety of lawyer assignments? If it is true that our training is thus limited, I submit that we are not doing an adequate job.

What then should be the objectives? It is important to train prospective lawyers to be good students of the law but this is only one quality which should be developed. In addition we must, to the extent possible, teach them to be lawyers. To accomplish this it is necessary to demonstrate "how to do it," and this training must be performed in the laboratory and the clinic. During this program we must also impress upon these students their professional obligations.

II. WHAT SPECIFIC CHARACTER TRAITS AND QUALIFICATIONS SHOULD THE LAW SCHOOL ENDEAVOR TO DEVELOP?

The ideal law graduate is a highly disciplined practical idealist who is dedicated to rendering thorough, excellent and loyal service to his clients and to society. He is educated in depth and is articulate in both the spoken and the written word. He has the proper balance between scholarliness and practical application of the law. He grasps the institutional significance of his profession and is devoted to it. He is devoted to principle, is incorruptible, is spiritually and mentally profound, and has a strong sense of justice. He has a grasp of the realities of life in general and of his profession in particular. Finally, he should have had at least an introduction to the fundamentals of law practice.

All readers will not agree that the above are valid or even possible objectives of legal education in the law school, but let's not stop to debate these issues. I do not intend to recommend ways and means of molding such a product. My actual recommendations are less theoretical, are more restricted and are perhaps less controversial and I shall get on with them. First it will be helpful to outline specific areas of training which may be considered desirable.

*A. Advocacy*

The complaint from time immemorial has been that the average law graduate cannot find the lawyer's entrance to the court room and lacks the slightest conception of what is expected of him once he gets inside. It is perhaps an exaggeration to say that few graduates have been inside a court room prior to admission to the bar, but too many of them do lack knowledge of such obvious courtroom fundamentals as the location of court officers and the places where the lawyer should stand or sit. They, of course, are unacquainted with the formalities and customs and no amount of book reading will substitute for actual exposure.

I am not suggesting that the law school attempt to train all law students to be "court room tigers." It is impossible to contemplate a legal community composed wholly of this breed. I merely say that the very large gap between the law school and actual court room practice should be narrowed. Every law student should be exposed to trial work if for no other reason than to afford him an opportunity to discover whether he has talents along this line. An even better reason for such exposure is to stimulate interest in trial work and ultimately to develop a more competent trial lawyer and a higher-level trial bar and bench. This is in contrast to what appears to be the present trend, which is to play down the importance of trial work and to discourage interest in it as an instrument in the practice. A further reason for this suggested shift in emphasis is this—a lawyer can practice competently in his office only if he has knowledge and judgment which allow him to project the problem to litigation. A reliable prognosis as to the outcome of litigation can be made only on the basis of first-hand knowledge of the hazards of litigation.

*B. Counseling Ability*

The counselor is a specialist in his own right. His high calling demands a deep understanding of law, unlimited patience, depth

of character, high integrity, analytical ability, a talent for applied psychology and the personality balance of a philosopher. It may be that good counselors are born and not developed. Nevertheless, the law school should address itself to specific training for office practice because justice is administered to a far greater extent in the law office than in the court room. The court room and the office have much in common and the student should be impressed with their close relationship. He should be taught the fundamentals of law office procedure with the accent on the important relationship between attorney and client.

### *C. Public Responsibility*

I read a great deal these days about the necessity for developing in the lawyer what is called professional responsibility.[3] I am not sure of all its implications, but basically I think that this movement is designed to increase professional knowledge, raise professional standards and encourage the bar association, the law school and the individual lawyer to respond to the needs of society. It seeks to educate attorneys so that they can better discharge their respective missions. The lawyer and the mentioned institutions are not fulfilling their obligations in this free society. They are not fighting for the preservation of the principles which have great value to the citizenry and the community as a whole. The present effort is to educate the lawyer to assume his old place as community leader and policy maker. The law school is said to be failing to orient its students and failing to provide adequate programs to educate lawyers to meet today's complex demands. Law education is criticized for being too narrow. It is recommended that the graduate lawyer have a broader approach so that he can better deal with his clients' problems and better advance the interests of the system under which he operates. These are worthy objectives and although I would hesitate to state how to implement the curriculum

3 The Report on the Arden House Conference recognizes the deficiencies and takes the position that the answer is in continuing legal education. It declares: "The deficiencies in the education of the newly admitted lawyer have been pointed out over and over again by lawyers and judges as well as by laymen. The critics are almost unanimous that college and law school give comparatively little of the practical and technical knowledge without which the advice or representation offered by the young lawyer may very well result disastrously. And the disaster will affect not only the client and the lawyer but the profession as well. Another similar criticism is that the newly admitted lawyer has not had a full and fair opportunity to learn what in the broad sense it means to be an 'Attorney and Counsellor-at-Law.' His knowledge of the standards of conduct of lawyers in accepting cases, in advising clients, and in representing them in court is limited to what he has read or been told about the Canons of Ethics. Furthermore, he has had little chance to find out the possibilities. These then are the deficiencies which it is necessary to overcome by post-admission education, bearing in mind that the cliche' that 'education is not a destination, but a journey' is particularly true of what the lawyer must learn after admission to the bar."

to produce these results, I recognize the need and would favor the inclusion in the law school curriculum of non-legal and comparative material of the type suggested.

### *D. Scholarliness*

One justification for the case method of study has been that it develops good techniques for dealing with legal problems. A by-product of the continuous reading and briefing of appellate court opinions is, of course, the development of an interest in the theory and objectives of law as well as legal history and philosophy. I question whether these objectives are achieved to the greatest possible extent, but assuming that they are, I am not persuaded that scholarliness will decline when practice is taught. Where is the inconsistency between scholarliness and practical know-how? I do not share the fears of those who speak disparagingly of practical law school education by saying that it creates a trade school philosophy. The inference is that practical proficiency is bound to result in a low level of theoretical knowledge and scholarly ability. I see no reason why one cannot be a legal scholar and at the same time a good practicing lawyer.[4]

## III. SHOULD CASE STUDY BE CONTINUED?

Most of the shortcomings of law school education are attributed to the case system of study originated by Professor and later Dean Langdell in 1870.[5] The system as designed has not changed radically since the teaching days of its originator. Nevertheless, notable progress, about which little is said, has been made in modernizing the law school curricula. In the two Colorado law schools, many courses are being offered with a view to teaching students how to perform various professional tasks. There is new emphasis in such fields as legal draftsmanship, writing, court administration and trial practice. For example, at the University of Denver a program has been in effect for several years involving the assignment of students to legal aid service and assignments to defend indigent accused persons in the municipal and justice courts. The College of Law also has courses in legal technique and jurisprudence designed to give the student direct knowledge as to the meaning and objects of law, philosophy of law and legal history. All of this is helpful, but although the trend appears to be away from the case system of study in the junior and senior years, the case book continues to be the basic tool of law teaching.

Most present day criticism centers around the failure to assign actual problems to the student, and usage of appellate court opinions as the bulwark of the law school curriculum. Some criticism is directed to the law professors' lack of practical experience and their revulsion toward anything practical. This is exaggerated. A typical attack is that of Judge Frank.[6] He denounces professors, and particularly the influence of Professor Langdell, in extravagant terms:

4 "Actually, the traditional study of law as a philosophy and as a profession are mutually interdependent and enhance one another in their respective purposes." Landman, *The Curriculum of the Law School*, 47 A.B.A.J. 156, 157 (1961).

5 Landman, *Supra* note 4; Frank, *infra* note 6. See also Forer, *Training the Lawyer*, 47 A.B.A.J. 354 (1961).

6 Frank, Courts on Trial at 227 (1949).

. . . [Y]et it is, I think, still true that at many law schools the majority of the professors have never met and advised a client, negotiated a settlement, drafted a complicated contract, consulted with witnesses, tried a case in a trial court or assisted in such a trial, or even argued a case in an upper court.

The Langdell spirit choked American legal education. It tended to compel even the experienced practitioner, turned teacher, to belittle his experience at the bar. It tended to force him to place primary emphasis on the library, to regard a collection of books as the heart of the school. A school with such a heart is what one may well

> imagine. The men who teach there, however interested some of them may once have been in the actualities of law offices and court-rooms, feel obliged to pay but subordinate regard to those actualities. The books are the thing. The words, not the deeds. Or only those deeds which become words.
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> Langdell invented, and our leading law-schools still employ, the so-called 'case system.' That is, the students are supposed to study cases. They do not. They study, almost entirely, upper-court opinions. Any such opinion, however, is not a case, but a small fraction of a case, its tail end. The law students are like future horticulturists studying solely cut flowers; or like future architects studying merely pictures of buildings. They resemble prospective dog-breeders who never see anything but stuffed dogs. (Perhaps there is a correlation between such stuffed-dog legal education and the over-production of stuffed shirts in my profession.)

Judge Frank's somewhat extreme comments are offered to show one school of thought on the case method. They have some comparative value in the present assessment.

I am too heavily engaged at present to consider all of the positive and negative evidence on the subject of the case method. In my opinion, it is less deficient than its detractors would have us believe. No better system for first year law study has yet been devised. It furnishes a smooth transition from college to law school by organizing the subject matter and presenting it in comprehensive form for introducing the student to new terminology and new techniques. It demonstrates the mechanics of legal analysis and gives guides to accepted legal writing.

The pattern of a case book is at least comprehensive, (although not so all inclusive as it purports to be). The student using the case system in his first year learns the mechanics of applying legal principles, definitions, legal texts and other legal materials to sets of facts, and the actual briefing provides unconscious indoctrination. He learns the judicial method which is also the lawyers' method for solving legal problems. The case system has a further advantage in securing a maximum student participation in the large class. Often law professors fail to make maximum use of the case book system in that they fail to be selective, tending to emphasize completion of all the materials in the book rather than study of particular principles in depth. The failure of teachers to properly use the materials is not a valid reason for discarding the system. Case materials can be and often are put to use so as to bring the facts to life. Thus the case method need not be merely abstract study. There is no inexorable requirement that the instructor never depart from the text. He can and should freely supplement or substitute any other literature considered helpful. Finally, problems or exercises can be effectively interspersed with case study. Indeed, an instructor could have his students observe a trial in the field of study being taught and conceivably demand a written report. The case method, as such, does not preclude such outside activities. The fault does not lie entirely with the case system but with the failure

to branch out and employ other techniques to supplement the case system. The real issue is whether we are willing to design new courses and new methods to make law theory meaningful.

What facilities could be put to use? Let us explore this possibility.

### IV. THE COURT ROOM AS A LAW LABORATORY

It has long been recognized that the law schools miss a valuable opportunity in failing to make use of courts as teaching aids. Mere observation of an actual criminal trial would quicken interest in a criminal law or criminal procedure course. This would be true of other courses as well. Acceptance of this concept does not bring one home free. Unfortunately, the average trial is not geared to provide maximum pedagogical value. A small amount of observation of jury selection, for example, goes a long way. The reading of exhibits can become tedious. Perhaps too much of the interesting action occurs in chambers. But all of these difficulties are practical ones which could be overcome with a modicum of planning. The legal educator should not, however, be content with mere trial observations. Maximum value can only be realized if there is actual involvement with the trials. The student program to defend indigent persons charged with misdemeanors or ordinance violations in justice and municipal courts has proven to be very helpful, but it should be extended to higher court levels.

In the district courts, for example, lawyers are regularly assigned to defend indigent defendants charged with felonies. A qualified law student could be assigned to some cases to aid the

appointed lawyer. The student, under the lawyer's guidance, could do investigative work, file necessary papers, obtain orders and process, do research and other preparation work, and finally, could serve as a trial assistant.

The student could do very valuable work during the trial. He could organize the flow of witnesses, obtain law books, do emergency research, help prepare instructions and assist in many other ways. These efforts would provide him with invaluable knowledge and training. Thus the mysterious aspect of the trial would disappear and, as the student came to realize that the successful trial is largely a matter of initiative, intensive preparation and common sense, his natural tendency to shun it would disappear. Also, he would see the importance of the trial, and having seen the law in action, his classroom interest would be tremendously stimulated. No longer would he be learning in a vacuum.

Such a program would require much planning and organization. Professors in charge of the program would have to supervise it closely and require periodic reports. The trial lawyer, and perhaps the judge, could grade the performance.

### V. OTHER "LABORATORY" FACILITIES

Denver is fortunate in having trial courts, appellate courts, clerks' offices, legal departments of the state and city, law offices big and small, government offices, administrative offices, corporations with legal departments and many other similar law-oriented offices. The men who occupy these various positions could be enlisted to assist in the practical education process. How would such a program work? Again, the law school would be responsible for the organizational and supervisional tasks. Participation of the agencies on a voluntary basis would have to be obtained. A pool of students capable of filling the assignments would be available. Limitations in time would require that each assignment be for a limited period. But even a short term assignment would have a great educational value.

a. Trial courts could use students as law clerks. This would afford an opportunity to sit through entire trials performing such research and other work as is assigned to them. They could prepare the necessary orders, write actual memo opinions, observe the pre-trial, and at last the entire trial. This would be an unequalled vantage point for observing law in action.

b. Law offices could utilize the services of students in much the same way. The average lawyer constantly needs additional research service. He could assign almost every type of task—duties such as drafting documents and preparing memoranda. The observing of law office procedure, attending conferences, interviewing witnesses, performing other similar office functions, would initiate the student into this most important phase of practice.

c. Public law departments could use student aid in much the same way. Assignments could be made to the offices of the district attorney, the city attorney and the attorney general. These assignments could involve not only performance of office functions but limited trial and appellate participation as well.

d. Special assignments could be made for students hoping to specialize. Taxation hopefuls could work for a time in the office

of the director of revenue, state or federal. The utility aspirant could be assigned to the public utilities commission for work and observation, the oil and gas candidate might find a place in the law or leasing departments of the large oil companies, and the labor specialist in the industrial commission. The trust departments of banks would be the best possible training grounds for individuals desiring to study estate planning and the administration of trusts and estates. The possibilities are without limitation.

The duration of such a training period would have to be worked out on a practical basis, but I would suggest that there be at least a two week assignment (full time) in order for the experience to be of value. There would, of course, have to be reports both from the agency and the student so that the latter's progress could be evaluated. The student report could be made an important part of the program.

The great educational value of a program such as that outlined seems manifest. It would have value to the student, of course, in that it would introduce him to the wonderful world of practice and give him a confidence and a practical interest which he would not otherwise have. It would provide him with more mature judgment with which to solve legal problems. It would also serve to teach teachers. I do not claim that any short time association could produce meaningful work, but it would be beneficial in other ways to the teacher. The law students have much to offer. If given the opportunity, they could bring new ideas and fresh idealism to that which often appears to the practitioner as ordinary and dull.

The organization difficulties could be minimized by a gradual branching out to the practice areas. I can foresee the lengthening of the course of study so as to include this training.

Now I turn to my final point which is the affect the suggested changes might have on the bar examination.

### VI. SHOULD THE BAR EXAMINATION BE CONTINUED?

My basic thesis has been that the law schools should be (and indeed are becoming) more responsible, mature and professional institutions. Once real progress has been made in closing the breach between law training and law practice, there should be some drastic changes in the bar examination. It is possible that it should be supplanted altogether in favor of law school comprehensive examinations.

The bar examination has an unfavorable effect on the law school curriculum. A self-respecting law school would refuse to admit that its course of study is influenced by the bar examination, but it would have to admit, if pressed, that the examination imposes some pressures. Its mere presence makes it necessary to include courses which the school might otherwise omit. All courses have to be more inclusive and hence more shallow than would otherwise be necessary. Both the school and the student are unconsciously aware of its ominous presence at all times.

No doubt the bar examination at one time served to screen out candidates who lacked either moral or legal competency. In the days of law office apprenticeship and the "fly-by night" law schools it was the only method for testing the applicant's proficiency. But why, in the face of the requirement of a bachelor's degree, of law school entrance examinations and finally a law degree, should there be still another hurdle, the bar examination?

Is the examination intended to force the law schools to keep the course of study at a practical level so that the candidates can at last pass a test prepared by practicing lawyers? If this is its purpose, it is only partially successful because most law graduates feel the need for a refresher course designed to gear their thinking to bar examination standards.

Is it given in the spirit of the closed shop with the idea of holding down the number of lawyers? It does not serve that purpose because fewer than twenty percent (20%) customarily fail, and most of these eventually pass by taking repeater examinations. With few exceptions, graduates of both Colorado law schools eventually pass the bar examination.

Does the bar examination have any educational value? That it does is highly questionable. The student prepares for the examination by organizing a great quantity of legal material into convenient places in his memory. During the examination he disgorges this crammed knowledge into the examination answer books. Then, after he learns that he has passed, he promptly purges his mind of all that was so conveniently tucked into compartments. He does learn a new examination technique whereby he can answer questions in limited space and with a minimum of trimmings, but this has little, if any, permanent educational value.

What then does it accomplish? It subjects the candidate to one final trial by ordeal before he is admitted to the legal fraternity.

By suffering on this final occasion he comes to realize the value of his accomplishment. He learns that admission to the lodge does not come easily. It finally feels good to be relieved of the pain and anxiety. This may have some value, but could we not use other more intelligent and humane means to provide him this anxiety experience? I would favor making the course of training more difficult and raising the qualifying standards in any way which would improve him for the work that lies ahead.

A further objection goes to having a single examination, which is given under trying conditions and which does not necessarily reflect the law school training, to determine proficiency to practice law. A particular candidate may be ill or otherwise below par during the brief examination period; nevertheless, he finds himself gambling his entire educational training, including seven years of special training and a large investment in effort and money, on this three day mental binge.

Would it not be better for the supreme court, in conjunction with its examining committee, to prescribe standards for the giving of comprehensive examinations and character tests within the law schools? Such comprehensive examinations might be given at the conclusion of each school year and be followed by a final examination touching the entire law school training which would be given before graduation. Law teachers are more expert at testing than are bar examiners and the results of law school testing should be more accurate and less subject to the recurrent charge that the examination is unjust

One possible criticism of the law school comprehensive method is that it would discriminate in favor of the local law schools and would thus discourage out of state law school study. This is because of the difficulty in prescribing standards for out of state law schools, at least directly. It is conceivable that these out of state law schools would be willing to observe our examination requirements and, if so, their certificates of proficiency could be accepted. The only exceptions would be the courses which are indigenous to this area such as Water Rights, Oil and Gas and Mining Law. Either there would have to be a requirement that such courses be taken here or at out of state law schools, or that an examination covering these courses be given.

The above are merely germs of ideas and I fully realize that careful planning would have to precede any such drastic changes. I submit, therefore, that the planning stage is now with us and that we should be prepared for the day when the law schools will be conducting the examination.

## CONCLUSION

Having spoken my piece, there only remains to communicate best wishes to the University of Denver Law Center. Completion of this magnificent institution certainly marks a new era in legal education. It will give Denver and Colorado a great new center of legal study and research, and a center for continuing legal education. I am confident that this institution, under the leadership of its very competent administration and faculty, will develop new improved methods of legal education.