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THE MACCRATE REPORT AND THE TEACHING OF LEGAL RESEARCH: A JUSTIFIED SCENARIO FOR EDUCATIONAL MALPRACTICE†

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If there were ever a justified scenario for the tort of educational malpractice, legal research education in Texas law schools today is it. The MacCrate Report[1] stated:

> [The Task Force][2] came to realize that it was not possible to consider how to "bridge" or "narrow" the alleged "gap" between law schools and the practicing bar without first identifying the fundamental skills and values that every lawyer should acquire before assuming responsibility for the handling of a legal matter. [The Task Force identified legal research as one of five essential skills.]
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> . . . .
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> In order to conduct legal research effectively, a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design . . . .[3]

Professor Alton in his article titled Mandatory Prelicensure Legal Internship: A Renewed Plea for Its Implementation in Light of the MacCrate Report states, "[w]ith respect to the individual skills and values [themselves], . . . the [MacCrate Report] recognizes that . . . . [law] schools . . . seem to be doing a good job of teaching legal research."[4]

In reality, there is a gross disparity between the recognition given legal research in the MacCrate Report and the message sent by the law schools:

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1. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Robert MacCrate ed., student ed. 1992) [hereinafter MACCRATE REPORT].

2. The Task Force, an ABA section, was comprised of members of the judiciary, legal educators, practitioners, and the American Bar Association.

3. MACCRATE REPORT, *supra* note 1, at v, 145.

4. Stephen R. Alton, *Mandatory Prelicensure Legal Internship: A Renewed Plea for Its Implementation in Light of the MacCrate Report*, 2 TEX. WESLEYAN L. REV. __ __ (this issue) (1995).

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> The apparent problems with the basic course have been frequently stated. The first problem is one of status: generally, the course does not have any. It is the "neglected orphan" of the curriculum, usually taught by low-status or no-status instructors—other students, adjuncts, and librarians. "Real" law professors, as has been said, generally want no part of it.
> A second problem is one of credit. Not merely is the course usually undercredited, often it is pass/fail as well. In the law school environment, where competition for grades is intense, ungraded low-credit courses will always get the shortest shrift. Students quickly realize that the immediate rewards of long hours spent on legal research are minimal. Most of them understandably concentrate their efforts on the substantive courses.
> Third, legal research courses are largely irrelevant to the rest of the student's legal education. There are precious few opportunities to use research skills after the first year. Almost all upperclass electives, like the first-year substantive courses, are taught and tested without students needing to perform much, if any, library research. Once the first-year program is finished, the research skills—such as they are—of the vast majority of students (except those who participate in such extracurricular activities as the law review or moot court) are left to atrophy until the new lawyers begin professional practice.
> Low status, few credits, no continuing research needs: all are valid complaints, but they are symptoms, not causes. The real problem is more than the low status of a course taught by a librarian or too few credits for too much work. The real problem with legal research courses goes to the foundations of American legal education. It goes to the case method [which Christopher Columbus Langdell created, and which gave rise to the casebook].
> . . . .
> It is the casebook itself that has kept many students ignorant of the laboratory; it is the casebook that has obviated the need for library research for most law students. The casebook, by gathering all cases and materials necessary for a course into one volume, has become a substitute for the library. It has condensed and recompiled sources that are scattered throughout dozens of reporters, codes, periodicals, and secondary literature into a portable law library and has freed the student from the need to master even the most basic research skills.[5]

So, why would a student, enrolled in an ungraded, low-credit (often low-quality) research course in a Texas law school, invest the time and effort to learn about the legal institutions, the documents they produce and the containers that house them? Why would a student expend the even greater effort necessary to acquire a mastery of Texas legal information resources when "[o]ur legislature, our system of procedure, the very organization and functions of our courts, [and the

5. Thomas A. Woxland, *Why Can't Johnny Research? or It All Started with Christopher Columbus Langdell*, 81 LAW LIBR. J. 451, 454-55, 457 (1989).

https://scholarship.law.tamu.edu/txwes-lr/vol2/iss1/7
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legal information resources that contain their work product], are all peculiar."[6]

There are several reasons. Predicated on the Harvard model, a model in which the law school is a "national" school, legal research instruction is currently taught with an emphasis on federal research with some smattering of state materials. Texas law schools use the nationally-recognized legal research books, which by their very nature, are not Texas-law specific. However, more than ninety percent of Texas law school graduates remain in Texas to practice.[7] A Texas practitioner's caseload pivots on Texas statutes, Texas case law, Texas court rules and Texas regulations.

Moreover, the courts in many jurisdictions recognize that the attorney-client relationship imposes upon an attorney a duty "to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based on an intelligent assessment of the problem."[8] It is reasonable to assume that a Texas court would find that the licensed Texas attorney has a duty to diligently perform legal research. A breach of this duty could result in a malpractice suit, or perhaps a disciplinary proceeding. At a minimum, how could a Texas court award attorney fees to an attorney for research efforts resulting from other than a time-efficient, cost-effective legal research strategy?

More immediately, a law student is evaluated on research skills when he or she first clerks for a firm. His or her knowledge of substantive law is put to use in making the judgment call on selecting one case and rejecting another, or determining the applicable jurisdiction in which to search (state v. federal or perhaps searching in both to determine the more favorable forum for the client). Whether the student is invited back as a permanent associate hinges, in part, on his or her legal research performance. Research performance, in turn, hinges on the research skills honed in law school and the quality of the education provided.

Perhaps one explanation for educational deficiency is that Texas legal information retrieval is far more complex and dynamic than ever before. Computer searching skills, citation skills, education in strategies for time-efficient and cost effective retrieval, combined with the peculiarities of Texas law and the information containers that hold it are only some of the new areas that the Texas law student has a need to know—areas that were non-existent when today's legal educators

6. JOHN SAYLES, *Preface to the First Edition*, THE RULES OF PRACTICE IN THE CIVIL COURTS OF RECORD OF THE STATE OF TEXAS (1896).

7. Letter from Kris Coronado, Research Associate, The State Bar of Texas, Department of Research & Analysis, to Lydia M. V. Brandt (October 13, 1994) (on file with the author).

8. Horne v. Peckham, 158 Cal. Rptr. 714, 721 (Cal. Ct. App. 1979), *quoting* Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975).

and bar examiners were in law school. There has been a geometric increase in the volume of material through which the researcher must sift. To stem the deluge, the electronic age introduced computer assisted legal research (CALR) programs. All for naught. In 1993, approximately 60,000 cases were entered into West's printed reporters, and another 40,000 cases appeared exclusively in electronic format.[9]

Computerization created an additional problem: the need for research education in the use of CALR products, and the integration of them with print products. As the practice of law has become more competitive, cost-effective and time-efficient research strategies have become one more aspect of legal research instruction. Even the Bluebook,[10] a slim 84 pages in 1949, quadrupled into 343 pages in the 1991 fifteenth edition, making the legal research learning curve steeper.

The MacCrate Report sets the stage for a radical change in legal education. This change must apply to legal research instruction as well. This author proposes that:

1. Texas law schools must legitimize legal research courses by providing course credit and grades on the same parity with *substantive* courses (4-5 hours of graded course credit).
2. The legal research course must be taught from a state-specific viewpoint, and given co-equal instruction with that in federal research materials.
3. The legal research course must cover the following minimal course requirements in:
   (a) each Texas legal institution—the Texas judiciary, the Texas legislature and the Texas administrative agencies—and the legal information each institution produces;
   (b) the legal information containers, each in its various formats and multiple uses;
   (c) the process of devising and implementing a time-efficient, cost-effective research strategy; and
   (d) Texas citation form, the purpose of which is to provide the directional signal to locate the information.
4. Because legal research is a skill, the law school curriculum must require a mandatory upper level research course either in a particular subject (*e.g.,* tax research) or a general advanced legal research course to reinforce and refine the learning from the first year.[11]
5. The Texas bar examination must test legal research knowledge.

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9. Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 27 (1994).

10. THE BLUEBOOK, A UNIFORM SYSTEM OF CITATION (15th ed. 1991).

11. "When students come to our law firms from Chicago Kent School of Law they really know how to research — not only online research but manual research as well. I think it is because of the three year program of research." P. Patterson, (1994, June 5). *Teaching Lexis/Westlaw to 1st Semester 1Ls.* [e-mail to Multiple recipients of the list], [Online]. Available e-mail: law-lib @ ucdavis.edu.

Perhaps Texas legal educators and the Texas bar examiners will recognize—as has the judiciary, law faculty, deans and legal practitioners at the national level—that legal research is an essential lawyering skill. More importantly, before a problem can be remedied, it must be recognized: Law schools teach legal research well—NOT![12]

12. WAYNE'S WORLD (Paramount Pictures 1992).