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MANDATORY PRELICENSURE LEGAL INTERNSHIP: A RENEWED PLEA FOR ITS IMPLEMENTATION IN LIGHT OF THE MACCRATE REPORT

STEPHEN R. ALTON†

Since its publication in 1992, virtually everyone who has any opinion about American legal education has been talking about the MacCrate Report.¹ Relatively few among this multitude seem actually to have read the report itself.² The purpose of this essay is to present an overview of this thoughtful document, along with some thoughts of my own regarding its implications for the future of legal education, particularly its implications for a mandatory prelicensure legal internship.

The American Bar Association Task Force of Law Schools and the Profession, which authored the MacCrate Report (named after the task force's chair, former ABA president Robert MacCrate), was comprised of practicing attorneys, judges, and legal educators. The major thesis of the report is that legal education is—and should be—acquired in a continuum beginning with the prospective attorney's prelegal education and continuing through his or her law school years, and throughout the duration of the attorney's professional career.³

The perception among those in the profession is that there is a gap between the education which law students receive in law school and the skills necessary for practice when graduates join the bar.⁴ In fact, as the report points out, law schools' skills curriculum has grown rap-

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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., 1992) [hereinafter MACCRATE REPORT].

2. Perhaps they became exhausted after reading the title!

3. MACCRATE REPORT, *supra* note 1, at 3. Indeed, Mr. MacCrate himself has asserted as much in a recent essay in the Journal of Legal Education. Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 89 (Mar. 1994) [hereinafter MacCrate, *Preparing Lawyers*].

4. MACCRATE REPORT, *supra* note 1, at 4-5.

idly since World War II.⁵ Thus, this perception lags reality, to a considerable extent. Nevertheless, the report concludes that the law schools and the practicing bar do indeed have joint responsibility for imparting the requisite professional skills and values to individuals as they move along the continuum from law student to new lawyer to mature member of the profession.⁶

What are these professional skills and values, the possession of which are necessary for any competent lawyer? According to the report, there are ten such "fundamental lawyering skills" and four "fundamental values of the profession." The ten skills are: (1) "problem-solving;" (2) "legal analysis and reasoning;" (3) "legal research;" (4) "factual investigation;" (5) "communication (both oral and written);" (6) "counseling;" (7) "negotiation;" (8) knowledge of "litigation and alternative dispute-resolution procedures;" (9) "organization and management of legal work;" and (10) "recognizing and resolving ethical dilemmas."⁷ The four values are: (1) "provision of competent representation;" (2) "striving to promote justice, fairness, and morality;" (3) "striving to improve the profession;" and (4) "professional self-development."⁸ The report calls these "the skills and values with which a well-trained generalist should be familiar before assuming ultimate responsibility for a client."⁹ Significantly, the MacCrate Report recognizes that substantive legal knowledge is necessary to complement these professional skills and values and that new lawyers are unlikely to become acquainted with all of these skills and values before their admission to the bar.¹⁰ By its own admission, the report notes that its main concern is simply "with what it takes to practice law competently and professionally."¹¹

The MacCrate Report clearly is a useful document which can serve as an aid to law students as they prepare for practice, to the practicing bar and the providers of continuing legal education as they seek to train new lawyers and to further the professional development of practitioners, and to individual members of the profession as they seek to engage in self-development and self-evaluation.¹² The report can also serve as an aid to law schools in curricular development, as the schools look for ways to teach skills and values more extensively than they do at the present time.¹³

5. *Id.* at 6. See also Frank J. Macchiarola, *Teaching in Law School: What Are We Doing and What More Has to Be Done?*, 71 U. DET. L. REV. 531 (1994) [hereinafter Macchiarola].

6. MACCRATE REPORT, *supra* note 1, at 8.

7. *Id.* at 138-40.

8. *Id.* at 140-41.

9. *Id.* at 125.

10. *Id.*

11. *Id.*

12. *Id.* at 127-30.

13. *Id.* at 128.

But, the report is subject to abuses, as well. In its own view, it is not meant to serve as a standard for a law school curriculum.¹⁴ Nor is the report “designed to be used as a measure of performance in the [law school] accrediting process.”¹⁵ Moreover, it is “not an enumeration of ingredients that are either necessary or sufficient to avoid malpractice” nor should the report “be used as a source for bar examinations.”¹⁶ Finally, the Task Force notes that the report is not meant to denigrate other professional skills or values which are not included in the report and which mark an outstanding lawyer.¹⁷ “The Statement of Skills and Values is concerned with the limited goal of ensuring practice at a minimum level of competency”¹⁸—no more and no less.

So, as between the academy and the profession, how should the responsibility for teaching professional skills and values be divided? The MacCrate Report emphasizes the fact that educating attorneys-to-be in these skills and values is a responsibility which ought to be shared between the academy and the profession, and it recognizes that the law schools and the practicing bar have differing capacities and opportunities to impart skills and values to aspiring lawyers.¹⁹ But, the report does not purport to apportion this responsibility in anything approaching a precise manner.²⁰ None other than Robert MacCrate himself has admitted this. According to Mr. MacCrate, the Task Force

recommended no single set of solutions, but rather identified a *shared* goal for the law schools, the bar, and the bench, working together: to build an educational continuum that would assure all new lawyers the opportunity for comprehensive instruction in lawyering skills and professional values as the key to effective participation in the legal profession.²¹

With respect to the individual skills and values necessary for the competent practice of law, the report recognizes that the first two fundamental lawyering skills—problem-solving and legal analysis—are

14. *Id.* at 131. The Task Force concluded “that the law schools and the practicing bar must share responsibility for giving new members of the profession the training needed to practice competently. This training is best provided through a combination of law school education and opportunities for learning outside the law school environment.” *Id.* Mr. MacCrate has cautioned that the Task Force did not intend that the list of skills and values be read either as “a prescribed catalog of courses” or as “a catechism that law schools must teach.” Robert MacCrate, *Preparing Lawyers*, *supra* note 3, at 90.

15. MACCRATE REPORT, *supra* note 1, at 131.

16. *Id.* at 132.

17. *Id.*

18. *Id.*

19. *Id.* at 234.

20. On this important point, the report states, somewhat cryptically, that “law schools should *work with* the organized bar to assure that the development of lawyering skills continues beyond law school. . . .” *Id.* at 260 (emphasis added).

21. MacCrate, *Preparing Lawyers*, *supra* note 3, at 91 (emphasis added).

the “conceptual foundations for virtually all aspects of legal practice.”²² There seems to be general agreement among members of the academy and the profession that the law schools do teach these fundamental skills and that they do so well. Additionally, the schools also seem to be doing a good job of teaching legal research. The report agrees and calls for such teaching to continue: “the unfortunate tendency to define ‘skills instruction’ as dealing with skills other than legal analysis and research has obscured the obvious fact that appellate-case analysis—the technique for teaching traditional courses—involves the teaching of important professional skills.”²³ Nor should such a definition of “skills instruction” crowd out the substantive legal content of law school courses.²⁴

When it comes to the inculcation of fundamental professional values—as opposed to lawyering skills—the report stresses the task force’s belief that the practicing bar has the greater responsibility for this task.²⁵ This is not to say that the law schools cannot and should not expose their students to these values—indeed, they should do so at every reasonable opportunity.

Still, for all its strengths, the MacCrate Report leaves nebulous the precise division of responsibility for the skills and values training of aspiring lawyers.²⁶ I would propose a more concrete—and, some might argue, simplistic—division of responsibility in this regard: the law schools and the practicing bar should each teach what it teaches best. Certainly, law schools can, should, and must give their students at least some exposure to all ten of the fundamental lawyering skills and all four of the fundamental professional values discussed in the report. After all, by the very nature of American legal education, the law schools are the initial providers of such education.

What, then, is the academy better at teaching? And where does the profession’s pedagogical strength lie? In my view, the law schools are strongest at teaching the following skills: (1) problem-solving; (2) legal analysis and reasoning; (3) legal research; (4) communication (oral and written); and (5) knowledge of litigation and alternative dispute-resolution procedures. The schools teach these skills primarily by means of appellate-case and statutory courses, classes in legal re-

22. MACCRATE REPORT, *supra* note 1, at 135.

23. *Id.* at 234.

24. Macchiarola, *supra* note 5, at 536.

25. MACCRATE REPORT, *supra* note 1, at 235-36.

26. Mr. MacCrate opines:

[T]he challenge at this time is for each state, each bar, each law school and each faculty member, as well as the judiciary in each state, to examine together and to define the roles each will seek to play in building the educational continuum. There is no single or right way to construct the continuum.

MacCrate, *Preparing Lawyers*, *supra* note 3, at 94. Thus the appropriate division of labor is left for the concerned parties in each jurisdiction to work out among themselves.

search and writing, and courses in civil and criminal procedure, trial and appellate advocacy, and alternative dispute-resolution. Law schools do these things well, and they should not abandon these strengths. On the other hand, the practicing bar is probably best at teaching the skills of factual investigation; counseling; negotiation; and the organization and management of legal work. The academy and the profession should be equally adept at imparting the skill of recognizing and resolving ethical dilemmas—a most important and sensitive professional skill.

By the foregoing, I do not mean to suggest that there should be any strict or formal separation between academy-imparted and profession-imparted skills training. I would like to emphasize my agreement with the MacCrate Report's conclusion that professional skills training should not take place in a vacuum and that there is very much a shared responsibility for such training as between the academy and the profession. There are no skills which should be taught *only* by legal educators or *only* by practitioners to the exclusion of the other group. Thus, the profession must help new lawyers hone their skills of problem-solving, legal analysis and reasoning, legal research, oral and written communication, and knowledge of litigation and alternative dispute-resolution procedures. And the law schools can and should provide their students with some exposure to the skills of factual investigation, counseling, negotiation, and organization and management of legal work. Indeed, law schools are already doing this, largely through the media of clinical courses, simulation courses, certain co-curricular activities, and externship programs (the latter, in conjunction with members of the profession in various practice settings).

None of my comments to this point should be taken as implying that there is not significant room for improvement in the teaching of these professional skills by both the academy and the profession. Certainly, there is always room for improvement. However, the law schools have come a long way in the area of skills training over the course of the last generation.

I agree with the MacCrate Report in its conclusion that the profession has a particularly great responsibility for inculcating professional values in its members. After all, the law schools have students only for a few short years; the profession has its members for a lifetime. The schools should expose their students to these important professional values, and we should reiterate these values whenever and wherever possible. But, as is true of professional skills, professional values are developed over a far greater period than the relatively brief time spent in law school. The practicing bar must take the lead in the inculcation of professional values, as the practitioners simply are in the better position to do so.

To the extent that there is in fact a gap in the continuum of legal education, what is the best way to bridge it? In a 1992 article pub-

lished in the University of Kansas Law Review, I called for the legal profession to adopt a one-year, prelicensure internship requirement for all law school graduates who seek to become members of the profession.²⁷ In light of the findings of the MacCrate report, I hereby renew my call for such an internship program, which is the rule in a number of other American professions²⁸ and is also the rule in the legal profession in a number of British Commonwealth jurisdictions.²⁹

An internship program would have a number of strengths: (1) unlike law schools' simulation courses, the internship experience is "real life;" (2) unlike law schools' skills courses and programs (i.e., clinics, simulations, and externships), the internship provides full-time exposure to the practice of law over a significant period of time (i.e., not simply several hours each week for one semester, but forty—or more—hours per week for a year); (3) coming immediately after law school, internship would serve to reiterate the professional skills and values to which graduates were exposed in law school (again, this reiteration would occur in a real-world, full-time environment, thus increasing the competence of new attorneys); and (4) interns could be encouraged to serve their internships in such settings as not-for-profit, government, and legal aid practices, thus increasing the provision of legal services to sectors of the public which are often under-served.³⁰

There are, however, a number of pitfalls which must be avoided in the implementation of a mandatory internship. There must be some assurance that the interns will not be exploited through low-paying and tedious work which has little or no educational value, that they will receive adequate supervision, training, and feedback, and that they will be exposed to varying areas of legal practice, both in terms of subject-matter and in terms of professional skills. In addition, there must be an adequate number of positions available in which the interns may serve,³¹ and there must be proper regulatory oversight of legal internship programs in order to make certain that the pitfalls of internship are avoided (or at least minimized) and the strengths—the learning experiences—are maximized.

In my earlier article, I called for each jurisdiction's law licensing authority to provide the necessary oversight of the mandatory legal internship programs. I now believe that such oversight can and should be provided jointly by the licensing authorities and the law schools. The law schools are the institutions most likely to be solicitous of the interns' interests—particularly, their educational interests. In essence,

27. Stephen R. Alton, *Mandatory Prelicensure Legal Internship: An Idea Whose Time Has Come Again?*, 41 U. KAN. L. REV. 137 (1992).

28. E.g., medicine, certified public accountancy, architecture, and psychology. See generally, *id.* at 165-67.

29. See *id.* at 143-50.

30. See generally, *id.* at 158-59, 161-63.

31. Given the annual number of law school graduates, placement in suitable positions is a particular concern. *Id.* at 159.

the internship could be a fourth year of law school, during which the intern would be engaged in full-time practice in order to hone his or her professional skills.³²

Admittedly, the MacCrate Report is critical of the few existing American internship programs because of their general failure to avoid the pitfalls noted above.³³ Still, if properly conceived and implemented, a mandatory, one-year prelicensure legal internship could successfully bridge the gap between law school and practice in a way that is consistent with the spirit of the MacCrate Report. In fact, the internship program could be the very embodiment of the report's "continuum" of legal education. I believe that the new attorney, the bar, and, ultimately, the public would all be the beneficiaries of a mandatory internship program, and I encourage the states to begin serious consideration of such programs.

32. Since an internship would, presumably, be served in the jurisdiction in which the intern was seeking licensing, it might be more convenient for law school oversight to be conducted by a school within that jurisdiction, even though that school may not be the one at which the intern had received his or her legal education to that point. The logistical implications of this fact would need to be addressed, along with the other logistical issues relating to the implementation of mandatory legal internship programs.

33. *MACCRATE REPORT*, *supra* note 1, at 287-89.

