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## A Look At Lawyer Competency

EDITOR'S NOTE: The following is the edited typescript of an address delivered by Dean Spong to the Council of the National Center for State Courts in Williamsburg, Virginia on December 7, 1979. Because it directly confronts the issue of the role of the law schools in enhancing lawyer competence, it is printed here for the information of the readers of the *Journal*.

**T**HIS year, we have been observing the Bicentennial of establishment of the first chair of law in the United States. On December 4, 1779, Thomas Jefferson, then Governor of Virginia, saw his suggestion that a chair of law be established at William and Mary become a reality when George Wythe, under whom he had studied, was named Professor of Law and Police. Wythe brought a wide experience to his professorship. A signer of the Declaration of Independence, he had served both as a member and Clerk of the Virginia House of Burgesses, a member and Speaker of the Virginia House of Delegates, and was considered one of the foremost lawyers in Virginia. Professor Wythe employed the lecture method of teaching and in 1780 instituted Moot Court sessions for his students, as well as mock legislative sessions. The present day concerns of Chief Justice Burger and the Devitt Commission were shared by Wythe who required simulated trial experience for his pupils.

Until recent years historians overlooked Wythe's greatness. Yet few, if any, can match his accomplishment of having taught law to Thomas Jefferson, John Marshall and Henry Clay.

The questions that may have concerned Wythe when he began his professorship 200 years ago remain with us: What to teach? Who to teach? A few years ago Dean Roger Cramton of the Cornell Law School observed that the law schools were doing one of the

best academic jobs in America in the first year of instruction and one of the worst jobs in the last two years. Perhaps for that wisdom, shared by many of his colleagues, Dean Cramton was appointed chairman of an ABA Task Force on Lawyer Competency. That group has just released its report entitled, *Lawyer Competency: The Role of the Law Schools*. Among its recommendations, the Task Force concluded that educating for lawyer competency should involve the development of certain fundamental skills: the ability to analyze, the ability to do legal research, the ability to write effectively and the ability to communicate orally. These fundamental skills should be combined with the traditional law school mission of imparting knowledge about law and legal institutions. Such skills and knowledge must be supported by disciplined work habits, personal integrity and conscientiousness. In sum, the Task Forces report calls for a significantly greater or different law school role.

Despite opposition by the law school to parts of the Devitt report and opposition to being told what to teach, many law schools are moving toward the goals of the Devitt report and those of the ABA Task Force. For instance, at William and Mary, we are conducting a year-long faculty study of our curriculum. We have adopted a three-year required program for developing oral and written skills. We have instituted a course in intensive legal writing. We are now conducting a nationwide search for a professor to direct and develop a program to make maximum use of our electronically equipped Moot Court facility. We have a clinical professor working with students to improve skills in negotiating, counseling and interviewing.

An answer to the question of who to teach does not come easily, at least not so easily as in earlier days. Until the end of the second World War, most law schools would take all who appeared and asked for admission. During the nineteenth century it was not



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necessary to have any preliminary academic training. In this century the prerequisite for law school admission moved from two to three years of prior academic work. Finally, after the second World War, an undergraduate degree was required. Today, there has been a dramatic rise in the number of women applicants and a corresponding increase in applications by those who do not intend to practice law. Moreover, there is an abundance of applicants who are not certain what they wish to do. President Derek Bok of Harvard, a former law dean, recently observed that "... law school has always been the last refuge of the able, ambitious but vocationally uncertain student." These factors have made the admissions process more complicated.

At Marshall-Wythe over the past three years, we have received an average of over 2,000 applications for

150 places. Our most recent entering class had a median grade point average of 3.3 and a median LSAT score of 648. We are not comfortable with our emphasis upon these objective standards. I believe those in legal education would agree with the desirability of the ABA Task Force's first recommendation that in the admissions process, law schools weigh writing and oral skills, diligence, motivation and dependability in addition to the traditional criteria of the grade point average and the aptitude test. However, for State supported law schools, perhaps more vulnerable to law suits by unsuccessful applicants, brought in the era of affirmative action and *Bakke*, it is difficult to stray too far from objective standards.

Who to teach and what to teach relate directly to the problems of lawyer competency, to unfavorable public perceptions and the expressed concerns of Chief Justice Burger and others. In discussing what to do about lawyer competency, an industrial term, "quality control" has often been employed. Where are the points of quality control where law schools, practicing attorneys and judges might act to raise the level of lawyer competency? We have talked about the first two: the admissions process and the requirements of a three-year law school education.

Let us assume that most law schools are able to raise the level of lawyer competence. It is unlikely that *all* law schools can do so to a degree that the traditional academic backup—the bar examination—may be done away with. The bar examination is the third point of quality control. As you know, a task force of the Conference of Chief Justices is now working on bar admissions. There appears to be empirical data, compiled by statisticians rather than legal educators, that would support a finding that the multi-state, multiple choice examination is "fairer" than the more subjective essay type of examination. There are many, however, in legal education who have reservations about the multi-state examination. Allow me to express two of them that relate to lawyer competency and the recommendations of Dean Cramton's task force. In most states, the bar examination is a combination of essay questions, prepared by court appointed bar examiners, and the multi-state test, consisting of 200 multiple choice questions, prepared by the National Conference of Bar Examiners and scored by the Princeton Educational Testing Service. These questions cover subjects that comprise most of the core law school curriculum: Constitutional Law, Torts, Contracts, Real Property, Evidence and Criminal Law. It is questionable if multiple choice queries can be sufficiently related to the substance of those

subjects, or if they can reflect the uniqueness of state laws, particularly in areas such as evidence and real property. Secondly, if the raising of lawyer competency levels is to be done by the sharpening and testing of fundamental skills—skills such as analyses and written communications, and if the bar examination is to be an academic backup to legal education—a second test of substantive knowledge and fundamental skills—it is difficult to believe that a multiple choice examination will accomplish that purpose in subject areas that are the very core of the law school curriculum.

The fourth and remaining chance for quality control is after the lawyer has been graduated, has passed the bar examination and is practicing. This is when the lawyer will either practice competently or, by not doing so, contribute to a negative public perception of a legal profession that today is suffering slings and arrows from a consumer oriented society. What is there other than the market place and growing malpractice suits to expose lawyer incompetency?

Since repeal of Prohibition, the greatest form of mass hypocrisy could be the perpetuated myth that the practicing bar regulates itself to weed out incompetent lawyers. The Code of Professional Responsibility mandates this but it is a mandate that goes unheeded. Each year, when representatives of the Virginia State Bar, charged with implementing requirements of the Virginia Code of Professional Responsibility, visit our law school, I ask if they know of any instance where a Virginia lawyer has reported another for incompetence. Thus far, I have heard of no such instance.

Perhaps human nature is such that the drafters of the present Code expected too much.

I have been reading preliminary drafts of the forthcoming report of the Kutak Commission, charged with drawing new rules of professional responsibility. Their approach to self regulation appears less hypocritical. The Commission's early drafts, by silence about self regulation of competency, could lead one to conclude that much responsibility for dealing with incompetency will rest with the judiciary; that hope for most improvement will depend upon future developments such as expanded continuing legal education programs, peer review, special examination for practice before certain courts and examinations for specialists.

We *do* live in a consumer oriented society. These are times when confidence in the legal profession and our system of justice is waning. Lawyer incompetency is a source of exacerbations along with trial delays, high costs and inadequate delivery of legal services. Lack of competence by practicing attorneys reflects upon the law schools, but also upon the practicing bar and judiciary. To assure the public that more lawyers will be more competent will require the best efforts of all charged with responsibility for legal education and the administration of justice. For organizations such as the National Center for State Courts, the problems facing the legal profession today represent an opportunity for service. For those of the practicing bar such problems require continuing self appraisal. For those in the judiciary, public concerns about our legal system present an opportunity for leadership.