Some Thoughts on Dean Nancy B. Rapoport's "Is 'Thinking Like a Lawyer' Really What We Want to Teach?"

Arnold I. Siegel[1]

Are law schools failing the profession by not incorporating "skills," in the broadest sense of the word, throughout the curriculum? And if we are failing the profession, are we not then failing the clients whom our graduates will represent and serve? To a large extent, I agree with Dean Rapoport's analysis that traditional legal education has placed greater emphasis on "thinking" like a lawyer rather than "doing" like a lawyer, leaving the practical training to the law firms and practicing bar. Even though I share many of her views about the limits of traditional legal education, I believe that law schools have changed significantly in the more than twenty years I have been involved in legal education—and even more so in the thirty years since I graduated from law school. However, if law schools are to do even more in skills training, then they must change the composition of their faculties and the content of their courses.

The meaning of "thinking like a lawyer" has expanded over time. We expect lawyers to have a wider variety of mental abilities in addition to the analytical skills Dean Rapoport has described. Today, thinking like a lawyer probably includes problem solving and strategic thinking. In my view, it also includes the ability to analyze, organize, and explain, either orally or in writing, large amounts of complex information. Our increasingly complex society requires lawyers to deal with huge quantities of information. (Hence, the new legal specialty of "complex commercial litigation"—with the emphasis on complex.) Traditional law school courses, with their heavy reading loads and all-or-nothing final exams, may effectively teach this skill to at least some of our students. Whether and to what extent faculty members have expanded the content of their courses to include the other mental abilities that Dean Rapoport describes is unclear to me.

Dean Rapoport identifies several reasons why law schools continue to adhere to the "thinking" rather than "doing" model. Of the reasons that she offers in her paper, I think the self-replicating nature of law school faculties is the primary explanation. Law school faculties and their hiring committees largely choose people just like themselves (very good grades at a top-rated law

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 Arnold I. Siegel is a Clinical Professor, Director of Legal Writing, and Co-Coordinator of Ethical Lawyering at Loyola Law School.

school, law review, federal clerkships). Consequently, the people who land law school teaching jobs are those who were very successful in law school, and not necessarily those who were successful practitioners. Furthermore, most new "doctrinal" professors often have a Ph.D. and virtually no practice experience, other than one or two years as an associate in a big firm. It is extremely unlikely that these young professors will have either the interest or the ability to incorporate skills into their courses.

To her list, I would add the factor that legal education, with its large classes and lack of expensive facilities, is relatively cheap when compared to education in the sciences or medicine. If we were to change to a "doing" model, this would require more clinics, more small classes, more written assignments, more classrooms with video equipment, more trial advocacy rooms, etc. We would have to increase the size of faculties to staff these labor-intensive activities. All these changes would strain the law school's budget.

Nevertheless, legal education has incorporated more and more skills training in the curriculum. Clinical education has made enormous strides during the last twenty-five years. The variety and number of clinics in schools across the country is impressive. A clinician has served as president of the Association of American Law Schools. Likewise, legal writing instruction has expanded exponentially. Not only do we have the Legal Writing Institute, we also have the Association of Legal Writing Directors. These organizations have put legal writing on the agenda of legal education. In addition, law schools typically offer courses in ADR, interviewing and counseling, negotiation, and trial and appellate advocacy. Students are involved in competitions in all these areas. As Dean Scott Bice points out, virtually all law schools at least articulate a vision that is broader than merely teaching students to think like lawyers.[2]

While skills education may have infiltrated the law schools, it remains a collateral goal in most schools. In my experience, law schools avoid identifying the skills that all graduates should have when they leave law school. Because faculties cannot, or will not, define these necessary skills, or feel that they cannot teach them, or that others are better qualified to do so, skills teaching is relegated to a few faculty members, adjuncts, or even students. Other than first-year legal writing, not many schools have a mandatory skills curriculum in the second and third years. Many students must rely on the training they receive in clerking positions in firms, legal services programs, or government offices to develop their lawyering skills because space may be limited in clinics or skills courses. Law schools exert no control over this experience, and receive no guarantee that their students get competent or even ethical supervision in a firm.

Developing a more integrated skills curriculum raises a host of questions. Dean Rapoport has identified many of the factors that impede teaching "the

2. Scott H. Bice, *Good Vision, Overstated Criticism*, 1 J. ALWD 109, 110-11 (2002).

full panoply of necessary skills."[3] Assuming that we can get past those impediments (a mighty large assumption), we are still faced with many challenges and obstacles. Following are a few of those challenges.

First, law schools must create incentives for professors to include a skills component (and more than just a research paper) in substantive courses. Faculty members must be encouraged to work together to develop these skills components so that each professor does not have to continually develop new materials. Professors who already incorporate skills need to share their expertise with their colleagues. Possibly teaching assistants can help with skills exercises.

Second, the criteria for hiring and tenure decisions must be modified so that more faculty members will have the ability and interest to incorporate skills. Faculty who teach in the skills area must be treated equally and fairly in hiring and promotion. If law schools cannot afford to add all the additional full-time faculty and choose to rely on adjuncts to teach some skills, law schools must devote more resources to training and supervising them.

Third, law school faculties must consider how to modify the curriculum to accomplish the goal of creating a more integrated curriculum. They need to rethink their substantive courses to determine where particular skills are best incorporated. In addition, law schools might have to eliminate specialized upper-division classes and seminars, which may often reflect the research interests of the faculty rather than the educational needs of the students, in order to have more skills offerings. Deans and associate deans will have to encourage faculty members to shift the focus of their teaching.

Fourth, law school faculties should consider which skills to emphasize. Some skills (e.g., writing) must be offered to all students. Some classes should incorporate more transactional (rather than litigation) skills. Law school curricular offerings also must respond to the many different settings in which lawyers practice today and to the many students who do not want to practice law at all.

Finally, since the curriculum cannot include every possible skill, law schools should make better use of co-curricular activities such as law reviews, moot court competitions, trial advocacy competitions, and negotiation competitions to encourage upper-class students to obtain skills training. And obviously, clinics and traditional simulation courses should be available to more students.

To incorporate skills in the curriculum, law schools must be willing to experiment and devise new courses. At Loyola Law School, we have developed a required course that combines theory, practice, and ethics. It is called "Ethical Lawyering" and is taught in sections of no more than thirty-two to every second-year day and third-year evening student—approximately thirteen sections per year. This course combines professional responsibility

3. Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ALWD 91, 105 (2002).

with the skills of interviewing and counseling. Students are required to complete a writing assignment, as well as take an examination in professional responsibility that tests both the Model Rules and the California Rules. Although most of the professors who teach the course are not tenure track, every section but one is taught by a full-time faculty member.

Students grapple with the role of the lawyer in the advocacy system, the importance of interpersonal skills in working with clients, the nature of a constructive client-lawyer relationship, the ethical rules which constrain a lawyer's conduct, and how to develop solutions to clients' problems, as well as how to work in teams. Students are then required to put this knowledge to use in a series of simulations, all of which are videotaped and reviewed by the professor. The course culminates in a graded exercise in which actors are hired to play clients. Students are given a case file; required to research the legal issues; present alternatives to the client for handling the problem; analyze the alternatives with the client, considering both legal and non-legal consequences of proposed solutions; and formulate a course of action. They then memorialize their meeting and legal analysis in a client letter or file memo, or both.

Success in such a course requires many things, but the following three are most important. First, a law school must have a faculty, both skills and doctrinal, that is committed to a required course that combines doctrine and skills. The school must have a culture that values this kind of course. The administration must give the faculty who teach this course the recognition and credit for the extra work it demands. Faculty members must be encouraged to cooperate with one other to share the burden in designing an effective curriculum.

Second, the law school must be committed to hiring, respecting, and supporting full-time faculty members who have the desire and expertise to teach this kind of course. Hiring committees must look for candidates who want to teach skills. Promotion and retention criteria must value skills teaching and skills teachers.

And third, the law school must devote adequate resources and support staff to make the course a success. If these courses are to be a success, faculty must be free to devote themselves to the design and implementation of these courses, and not just the mechanical and organizational details. Success requires dedicated facilities, good equipment, and an experienced support staff.