OBSERVATIONS FROM AN OUTSIDER

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Those of us who received our legal education in the traditional form, by attendance at lectures on substantive law and the study, briefing and review of innumerable appellate decisions, undoubtedly remember our first efforts at putting this accumulated lore into practice. Real clients, it seemed, had somehow failed to receive proper instruction in how to be a good client. The problems they carried to the lawyer's office were not neatly packaged into the legally relevant set of facts required for a ready location and application of a controlling precedent; the client proves somewhat inept, if not downright incompetent, at communicating to us a complete picture of his legal problem in the form we needed to apply our new wisdom; and to make matters worse, the problem most likely involved difficulties on a level we have never encountered in the case decisions we had read — strained relations with family members, fellow workers or business competitors, and unrest on a personal, emotional level that made the legal problem messy. If the matter demanded a court appearance the situation was even more distressing because we were then faced with the prospect of entering a foreign environment, controlled by perceived but only vaguely understood rules and procedures, where our own ineptitude was certain to be exposed, and it became nearly impossible to concentrate on the persuasive presentation of our case when we were spending so much time worrying about what we could and could not do in the process. It soon became apparent that the success or failure of our advice would turn as much on understanding and judgment of a kind we lacked as on our knowledge of legal doctrine and case decision. In short, we had learned the law but not how to be a *lawyer*. This, it seemed, was something we were to figure out on our own, with the assistance of a good number of clients who were to become our unknowing partners in the tutorial. Moreover, we viewed the educational responsibilities of the law schools as sharply divided from those of the profession. Law schools were to teach "the law" and how to "think like a lawyer" (meaning how to locate and analogize controlling precedent); the *art of lawyering*, of effective representation in legal matters, was something that could only be learned in practice, after graduation.

Fortunately for the clients this situation is undergoing change. In recent years legal educators and practitioners have realized there is considerably more that can, and should, be done in the teaching of the skills of lawyering to prospective lawyers, and New Zealand is currently addressing the incorporation of this new instruction into its legal education system.

On 15 January, 1987 Professor Neil Gold issued his Report on the Reform of Professional Legal Training in New Zealand to the New Zealand Law Society and the Council of Legal Education. This document presents Professor Gold's recommendations for revisions in the pre-admission training offered to law students in New Zealand, recommendations which have been the basis for substantial revisions to New Zealand professional legal training. The Report, and the subject of professional legal training in general, will be of interest to anyone concerned with the future of legal education in this country.

The following comments are some personal observations based on my own reading of Professor Gold's report, in light of my experience as a legal educator

in the United States. I should begin with a disclaimer: I can claim no special expertise in "practical" legal education other than twelve years of experience as a teacher with interest and work in this area. Unlike Professor Gold, no one has sought my input on these matters. Moreover, my knowledge of New Zealand legal education and law practice is limited, being that which I have gained during a brief sabbatical visit to this country. I have, however, studied the Gold Report, and have had some opportunity to review course offerings at the University of Canterbury Law School, including personal attendance at some of the professional year lectures. I have also enjoyed a number of discussions on this subject with Professor John Farrar, Dean of the Law School and a member of the Council of Legal Education, and with Mr Nick Davidson, a practitioner and part-time Lecturer in Law who teaches the course in Civil Procedure.[1] The observations offered here are, however, not intended as a detailed review of the Gold Report recommendations, or of the professional training curriculum in this country. Instead they are more general observations relating to questions concerning the organization, staffing and focus of professional training developments in New Zealand, based on my familiarity with similar developments in the United States and my understanding of the Gold Report and the direction of reform in this country.

In brief summary, the Gold Report finds that the system of legal education in New Zealand has been "wholly inadequate" to "prepare new members of the profession adequately to serve the public",[2] and that there was "a pressing need for planning, funding, innovation and wide-ranging reform".[3] It recommended that "skills-based, practical, professional legal training . . . be designed and implemented country-wide",[4] and proposed, in addition, the creation of materials which "adequately state the practical law as it stands and describe the relevant practices and procedures which implement it", and "detailed how-to-do-it materials which set out step-by-step the procedures which should be followed, the pitfalls to be avoided and the most efficient and effective means for accurately completing a transaction".[5] The Gold Report thus proposed a major undertaking for New Zealand legal education, of considerable scope and ambition which will be implemented for the first time in 1988.

I share Professor Gold's belief in the importance, and feasibility, of improving the way we educate people to be lawyers, and much of his enthusiasm for "skills-based training" as a means of doing that, although I have questioned some of his specific curricular recommendations.[6] The concerns I wish to express here are not with the general goals and direction of his recommendations but rather with what I anticipate may be fundamental, practical obstacles to an effective implementation of any reform pursued in New Zealand. They concern the substance of the instruction to be provided, but are primarily concerned with the teachers who will present this new discipline in New Zealand,

[1] Although my thoughts have been shaped in response to these discussions, the opinions expressed herein are entirely my own, and do not necessarily represent those of either Professor Farrar or Mr Davidson.

[2] Gold Report, p. 4.

[3] Ibid., p. 11.

[4] Ibid., p. 8.

[5] Ibid., p. 14.

[6] I have earlier provided Professor John Farrar, Dean, University of Canterbury School of Law, with comments on specific curricular recommendations contained in the Gold Report. I assume these would be available to anyone interested.

and with the manner in which these teachers will be incorporated into the structure of the legal education system.

I. The Focus Of Skills Based Training

What, exactly, is envisioned for this "reform of professional legal training" in New Zealand? What is it that has needed to be added to existing pre-admission legal education in the hope of improving the abilities of graduates to perform as lawyers, and to grow with experience? The Gold Report suggested answers when it referred to "client relation skills, fact marshalling and analysis skills, general problem solving capability and the arts of persuasion applicable to those who negotiate and advocate", and "writing, drafting and organizational skills".[7] In addition, Professor Gold identified twelve skills essential to the function of lawyering.[8] These are readily acceptable as desirable educational objectives for program reform. The real difficulty is, of course, in deciding how to structure a teaching program to achieve these objectives.

Elsewhere in his Report Professor Gold hinted at the structure he had in mind, and it is here that I might differ with his recommendations. It is when Professor Gold described teaching materials for the new course which are to be "detailed how-to-do-it materials which set out step-by-step the procedures which should be followed, the pitfalls to be avoided and the most efficient and effective means for accurately completing a transaction"[9] to "routinize practice across the country and set the basic standards for acceptable practice",[10] and when he stated that the "skills should be taught . . . in the context of typical and routine transactions", and that the "elements of all the skills mentioned should be carefully analysed, described, and in particular, give rise to clearly stated criteria of effective performance"[11] that I began to wonder whether he and I share the same view of what makes good skills training. This apparent emphasis on the "routine", the "clearly stated" and the "carefully described", to the possible exclusion of more subjective aspects of good lawyering, suggests a focus on the non-analytic, non-judgmental skills of lawyering that could trivialize the potential of lawyering skills training.

The danger I perceive is the risk that the focus of practice-oriented legal education in New Zealand might be on the "find the courthouse door" aspects of lawyering, rather than the theoretical, analytic and critical skills that good "skills training"[12] can produce. A newly admitted lawyer may not know exactly

[7] Gold Report, p. 4.

[8] "The ability to: 1. Listen, read, observe; 2. Organize information; 3. Explain, describe, instruct; 4. Analyze other's behaviour; 5. Create conditions for effective communication; 6. Question; 7. Respond and react; 8. Identify options; 9. Implement a plan; 10. Analyze (a) fact, and (b) law; 11. Predict results; 12. Manage." Ibid., p. 24.

[9] Ibid., p. 14.

[10] Ibid., p. 15.

[11] Ibid., p. 25.

[12] The term "skills training" as I use it here encompasses a diversity of programs which share the central theme of "lawyering" as a learned skill. These include, for example, courses using simulation and critique as well as lecture and study in the teaching of negotiation, mediation, counselling, interviewing and courtroom advocacy skills. In addition, it can include "clinical" courses that rely on supervised student representation of real clients as the learning vehicle. Despite considerable experience in American law schools with clinical and practice-oriented instruction there is no consensus about the way lawyering skills should ideally be taught and administered, and there is a lively scholarly discussion in American law journals about these matters and ongoing development of skills-oriented teaching methods.

how to go about filing a civil complaint — what fees must be paid, who receives the paper, etc., but she can effectively learn those "skills" the first time she walks through the process. To be sure, one desirable objective for a skills training program will be to provide those walks. But the pedestrian, motor functions of lawyering are the easiest to teach, the easiest to describe, and the easiest to learn on one's own once in practice. Although there are identifiable, teachable theories and principles that underlie effective interviewing, counselling, negotiation, and trial advocacy skills, these are not readily apparent, and indeed are usually only imperfectly understood by the practitioners who are themselves expert in these areas, who may be able to practice skillfully but who lack insight into *why* their approach is successful.

Practising lawyers (and, until recently, legal educators) have thus tended to think of these important lawyering skills as intuitive rather than principled. To this way of thinking, skill in lawyering is something that can be learned by those with natural ability, but cannot really be taught. In fact, we now know otherwise; we know that these skills, although in part intuitive and judgmental, are principled, and *can* be taught by thoughtful study of the lawyering process. The situation is not unlike that of the natural musician who can produce great music without understanding the theory a trained musician can identify in his work. Although the natural musician might be ineffective at teaching others how to do what comes so naturally to him, those who lack his unique talent can nonetheless learn how to make good music by learning the fundamentals of music structure and theory found in his music.

There is a place in the law school curriculum for introducing law students to the non-analytical, non-judgmental aspects of law practice. Familiarity with the routine demands and procedural hurdles of practice is necessary to the shared understanding of the process from which higher levels of understanding can come. But the real meat and the real benefit of clinical legal education is found in the opportunity the law school setting can provide for performance, observation, reflection, critique and analysis of lawyering as a complex, humanistic, interactive advocacy process, to learn decision and judgment-making skills, to understand the law of evidence and court procedure in the context of persuasive litigation techniques, and to see the interplay between substantive legal doctrine and solutions to real-life problems. At its best this kind of instruction can also provide the student a greater awareness of the behaviour of lawyers, clients and judges that may benefit him in a future law-making role. Roger Cramton, a Cornell University law professor and head of an American Bar Association task force that produced an influential study and recommendation on the future of legal education in the United States commonly known as the "Cramton Report"[13], put it thus:

> Courses in interviewing, negotiating, counselling and advocacy will acquire a permanent place in the basic curriculum of the university law school because they are founded on insightful, theoretical explanations of why lawyers and officials behave as they do and because they produce important empirical findings that illuminate how lawyers, clients, and officials behave

[13] ABA Legal Education and Admissions to the Bar Section Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools (Chicago: ABA Press, 1979).

and interact or lead to valuable normative statements of how they should behave.[14]

II. The Skills-Training Faculty

It follows that successful skills training requires teaching faculty who are theoreticians as well as practitioners, who are students of the lawyering process as well as the law. They must also be skilled as trainers, adept in the new methods of skills training instruction that involve demonstration, observation of student performance, and insightful critique. These are qualities and abilities that do not naturally flow from experience as a practitioner, although there are, of course, practitioners who possess the potential to be excellent teachers in this new curriculum. However, two factors combine to make unlikely the possibility that major improvements in lawyering skills training would come from a program which placed principal reliance on the teaching efforts of the bar rather than full-time teachers: the time and the undistracted intellectual energy the development of such a program will demand.

The development of the skills requisite to successful lawyering skills teaching demands an exceptional amount of time devoted to the task, on a level rarely available to a practising lawyer. It demands time for reflective study of the new scholarship that enlightens the discipline, time for training and practice in the new teaching methods, and time to develop one's own teaching style and facility. We accept this in the case of traditional law teaching when we sympathize with the difficulties encountered by new faculty members and acknowledge that they will need two or three years of concentrated effort to "find themselves in the classroom" and "develop a feel for their courses". Moreover, effective instruction in lawyering skills is particularly demanding of time because it frequently requires unusual levels of personalized attention and individual instruction. Regardless of his dedication to legal education, the time demands of a law practice are such that the practising lawyer will simply find it logistically impossible to carve out of his day the uninterrupted blocks of time required.

A corollary of these time demands is the undistracted intellectual energy real growth as a scholar of the lawyering process requires. The process of good legal education is a consuming one, and the process of educating oneself as a teacher and scholar equally so. I know from personal experience that active law practice is a jealous mistress; for the practitioner who doubles as a teacher the problem is compounded because this mistress always has the right of priority.

It should be obvious from these comments that I believe an effective program of instruction in the lawyering process must rely in the first instance on the work of professional teachers, a body of full-time faculty whose professional responsibilities and concentration are found in teaching rather than practice. I hasten to add that nothing I have said is meant to denigrate the contributions the practising bar has made to professional instruction in New Zealand. The New Zealand bar has until now accepted responsibility for professional year instruction to a degree unheard of in the United States, the more remarkable in light of the limited resources and compensation available, and this instruction can be of high quality. I have been privileged to observe the teaching of

[14] Cramton "The Current State of the Law Curriculum" (1982) 32 J. Legal Ed. 321, 331-332.

civil procedure by Mr Davidson, and found it thoughtfully and skillfully done. But one need not criticize the efforts of the legal practitioners who have shouldered the major burden of professional year instruction to conclude, as I do, that the real success of any reform in New Zealand will depend on the creation of a hard core of career legal educators with the qualifications, interest and ability to develop this new curriculum, as well as the practical ability to devote a substantial part of their energies to the task, without the distractions of a concurrent law practice.

I do not mean to suggest that capable practitioners should no longer assist in the professional legal education program. In fact practitioners serving as adjunct or part-time faculty will be a necessary component of a successful program, to serve as trainers working with full-time faculty in skills-oriented tutorials, to demonstrate successful practice techniques for analysis and discussion, and to contribute insights into the real world of law practice. Their efforts should, however, be coordinated by professional educators with major responsibility for the design and implementation of the skills training curriculum. It may also be that New Zealand will be fortunate enough to find skilled practitioners whose interest in the new program will lead them to set aside a substantial part of their professional practice to participate as principal faculty in the program.

III. The Status Of The Skills Training Faculty

The foregoing comments suggest the importance to meaningful curricular reform of an energetic, creative and dedicated group of New Zealand "clinicians" — teachers whose interest and abilities lie in the study and teaching of lawyering as a process rather than in the more traditional areas of substantive legal doctrine.

In the United States, the lawyering skills curriculum has developed, almost without exception, through the law schools, by the expansion of law faculties to include clinicians. Although there are still law schools in the United States which relegate these teachers to a non-faculty, or "almost-faculty" status, the more progressive, and more successful programs are those which have successfully integrated clinicians into their faculties as an intellectually equal, but different, facet of the curriculum. As one would expect, this process of integration has not always been easy. The change in the structure of legal education to incorporate this new curriculum and its ministers has been unwelcome to some traditional teachers, and perhaps somewhat threatening. Although they might be reluctant to so admit, this may be due in part to their jealousy of the interest senior law students often show in good clinical instruction, which offers a different and obviously relevant experience at a time when they may have had their fill of lectures and appellate decisions. It is also due in part to the intrusion into the traditional faculty structure of the clinicians, who may not share the interests and competencies comfortably associated with traditional scholarship and teaching, and undoubtedly in part to the clinicians themselves, who have not always been selected under the same rigorous standards that characterize the hiring process for traditional faculty. As a consequence, lawyering skills training has struggled for legitimacy in American law schools, and it is only recently that it has been accepted as a necessary and coequal part of legal education. This acceptance has been achieved through major improvements in the substantive and theoretical content

of the clinical curriculum, and through the growth of a body of thoughtful scholarship devoted to the issues raised by this new discipline — in short, through the professional growth of its teachers.

Thus one critical undertaking for New Zealand legal education will be to find the means to create this hard core of capable lawyering skills teachers — to attract, and keep, people whose qualifications for this work are the equivalent of those expected of law faculty teaching traditional substantive courses. One can no more expect high quality, successful instruction in lawyering skills from a person who lacks superior intellectual and pedagogic ability than one could for the teaching of jurisprudence from a person of equal limitations. People must be found who have the intellectual ability, the interest in the new curriculum, and the interest in teaching as a profession that will foster their growth as teaching professionals. It may be that faculty satisfying these qualifications can be obtained and retained through a system which does not include them within the established law faculty framework, but there is cause for doubt. Such people would hesitate to commit to a position that lacked what we have come to regard as essential attributes of an academic setting: substantial freedom for personalized efforts; time for, and an expectation of, scholarly inquiry and development; and the intellectual stimulation of involvement with a group of colleagues with shared interests in teaching, scholarship and legal theory.

Perhaps this academic setting can be built into a skills-training structure outside the existing law faculties, and perhaps these new teachers would find the necessary collegiality among themselves. It may also be that qualified people would welcome a structure which provided some separation from the confines of a traditional law faculty. I lack the ability to predict these matters. I can only suggest that the choice of structure will be important to the success of the program, and that it should be made with awareness of its potential impact on both the hiring process and the performance of the new teachers.

IV The Cost Of Lawyering Skills Training

An unfortunate characteristic of good lawyering skills instruction is that it is frequently expensive in terms of the faculty time and energy that must be devoted to it. The traditional lecture method of instruction has always enjoyed the advantage of efficiency in the number of students who can be effectively taught by a single teacher. Those who fund and administer legal education programs, and who have become accustomed to this efficiency, may be shocked by the intensity of individual instruction the skills teachers claim necessary. Although there are aspects of lawyering skills instruction that can be done with large groups of students if the educational goals and expectations are appropriately modest,[15] with other skills, for example, forensic advocacy, there is simply no substitute for the individual student performance, with faculty observation and critique, that requires small student groups and individual faculty attention. This is in part attributable to the fact that a substantial part of the learning process occurs during the student's effort to

[15] Compare, for example, the format and content of the courses in negotiation skills, for classes of 24 and 26 students, described in Moberly "A Pedagogy for Negotiation" (1984) 34 J. Legal Ed. 315 and Ortwein "Teaching Negotiation: A Valuable Experience" (1981) 31 J. Legal Ed. 108 with that of the unsupervised exercises in negotiation conducted with a class of 64 students, described in Little "Skills Training in the Torts Course" (1981) 31 J. Legal Ed. 614.

prepare for a performance, applying the substantive principles under discussion to a discrete problem, with her efforts amplified by the knowledge that her work will be individually exhibited and reviewed. And because this kind of teaching is both demanding and intense it is physically and intellectually impossible for a single faculty member to do a satisfactory job of instructing students in the numbers normally encountered in lecture courses. The Gold Report recognised these limitations when it recommended that "each instructor should lead a group of twenty, and preferably fewer",[16] although it did not appear to distinguish the particular skills training for which this group size was required. My own experience teaching litigation skills leads me to believe an individual group size of no more than six students is required for an effective exercise session, although a single instructor might be able to handle three or four such sessions in a week and still keep his sanity.

This does not mean that the improvement of professional legal training in New Zealand requires a doubling of the number of legal educators. It may, however, mean the addition of two or three teachers at each of the law schools whose primary duties will be in the development and implementation of lawyering skills instruction.[17] One reason is that a good program need not provide training in *all* skills to *all* students. Trial advocacy skills training, for example, should be available for students with interest in potential litigation-related careers, but would be largely wasted on the majority of lawyers who will never examine a witness. It is thus possible to attempt meaningful skills instruction with limited expansion of a teaching faculty. By way of example, at the University of Idaho Law School, a small (graduating class of approximately 85 students), chronically underfunded, rurally situated institution, with the equivalent of two full time faculty positions and the occasional assistance of adjunct faculty trainers, we provide a clinical and practice-oriented curriculum that includes two limited enrolment courses in trial advocacy skills, a civil law clinic and a separate criminal law clinic, small enrolment clinics in Indian tribal law, juvenile law, and representation of the handicapped, a week-long intensive trial advocacy training program required of all students in the clinics, and a large enrolment semester-long course in interviewing, counselling, negotiation and other lawyering skills, which, although elective, is taken by nearly all second-year students.

If law schools in New Zealand are at all like those in the United States they already find themselves understaffed, underfinanced, and short of adequate library facilities. Thus the prospect of any significant increase in faculty resources for an expanded professional training program will be a legitimate source of concern if the funding comes through a diversion of the resources available for existing programs, rather than an allocation of new, additional funds to the effort at reform. One can only hope that realistic funding will be made available, and that this admirable effort at improvement of legal education will not fail by reason of inadequate resources devoted to the task.

[16] Gold Report, p. 34.

[17] A larger number of teaching faculty may be required for particular portions of the skills training programme, but this need can be met by the use of adjunct faculty who have received the necessary training. I have made effective use in my own teaching of practitioners, themselves trained in both litigation skills and training techniques, to assist in the observation and critique of student performances. I have benefited in this from the availability of former students, now practitioners, who have themselves undergone the skills training during their law school education.

V. Diversity In The New Programs

One matter that has had to be addressed in the design of a revised professional training curriculum in New Zealand is the extent to which the program was to be centrally designed and managed, with branches at each of the university centers, and to which it was to be left to the design and implementation of the individual faculty who teach at each institution. There are, of course, substantial advantages to be had from centralization, among them the possibilities of shares resources, closely coordinated programs and homogeneity in the kind and quality of professional instruction New Zealand practitioners will receive. The Gold Report envisioned centralization of the program, recommending the retention of a single Director of Professional Training for New Zealand, with local coordinators at each university center,[18] and deplored the fact that "there [was] no overall consistency of learning objectives and teaching methods within the professional courses around the country" which led to "problematic inconsistency in the content and quality of instruction", and that "as the instructors change[d] so [did] the courses".[19] This is now being implemented in 1988.

Professor Gold's remarks may have been just criticisms of past professional year programs, but there is a cost to centralization which should be recognized — that of missing out on the kinds of creative improvements that can be distilled from the combined results of diverse approaches to a shared goal of effective professional training. The most interesting developments in American professional legal education have been the products of individual faculties and faculty members rather than any central authority. This is, after all, no different than any other area of legal education, where we have always relied on individual instructors to decide how they can best teach, and to generate the innovations in teaching method which improve legal education. Thus concern for "consistency of learning objectives and teaching methods", while appropriate in a general sense, should not displace a desire for innovation and growth of the lawyering skills curriculum.

VI. Conclusions

New Zealand's approach to these matters will substantially depend on the manner in which the professional training faculty are retained. If the faculty are selected and retained by, and answerable to, a central authority, e.g. the Law Society, one could anticipate a more unified and consistent approach in their teaching. One could also question whether such an arrangement will attract qualified people with career teaching ambitions, will provide appropriate machinery for their selection, and will promote high standards of scholarship and innovative teaching from the new faculty to the extent an integration into the existing law faculties might. A decision to provide for reform through the addition of new faculty at the universities would, to be sure, raise problems that might be avoided by another approach, including the burden it would place on the existing faculties of selecting, accepting, and encouraging these new, and perhaps different, colleagues, and the creation of sticky questions concerning their professional rank and career status, and the logistics of funding.

[18] Gold Report, p. 35.
[19] Ibid., p. 4.

Whichever course is chosen, in my view consideration should be given to preservation of room for diversity, for individual solutions, for trial and error, and provision of working conditions and professional expectations for these new faculty equivalent to those the university setting offers. This seems to me doubly important to a new, untested, and developing program such as New Zealand's, the direction and success of which will depend heavily on the creative energies of those who implement it.

The Gold Report represents an ambitious and praiseworthy step in the right direction for New Zealand professional legal education. The fact that the Council of Legal Education and the New Zealand Law Society have endorsed its general recommendations is encouraging proof that the work necessary for meaningful change will be done and constructive change accepted. The breadth and complexity of the potential for lawyering skills training suggests to me that the Report's recommendations for New Zealand reform should be regarded as a reference point from which New Zealand can develop its own distinctive approach to a better system for educating lawyers, rather than an unalterable prescription for that task. Hopefully, New Zealand will be able to draw on the successes and failures of similar efforts in other jurisdictions to create a program which can serve as a model for our own future reforms.

[Editor's note: Professor Lewis' article was written before the final blueprint of the Professional Legal Studies Programme had been worked out. Some small revisions have been necessary but it was thought better to retain his conclusion in its present form. To a substantial extent, therefore, the article speaks as at May 1987].