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### Rethinking U.S. Legal Education: No More "Same Old, Same Old"

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## Essay

### Rethinking U.S. Legal Education: No More “Same Old, Same Old”

NANCY B. RAPOPORT

*In this Essay, I suggest that we should think about how to create a curriculum that encourages students to develop a variety of skill sets. Law students simply don't need three years of Socratic questioning regarding the fine details of court opinions. They need a wide range of experiences, preferably building on skill sets (like the twenty-six Berkeley factors) that effective lawyers have developed. A law school's curriculum should have courses that focus on different factors in each year of law school. Ultimately, what we should be teaching law students is how to develop the judgment to advise clients. Teaching students how to think about the law is no longer—and probably never was—enough.*

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# Rethinking U.S. Legal Education: No More “Same Old, Same Old”

NANCY B. RAPOPORT

*What distinguishes good lawyering from mechanical lawyering is thoughtful, flexible, and comprehensive deliberation. Identifying relevant issues involves much more than legal analysis. It requires coming to grips with the complexity of real-life situations psychologically and sociologically as well as legally. An overarching, pedagogical goal of law school should be facilitating the cognitive and emotional development of students in ways that provide them with a sufficient foundation to become lawyers who, in pursuing their profession, are able to analyze problems in full context, which includes recognizing both patterns and uniqueness in different situations and knowing how to synthesize, prioritize, and apply appropriate breadth and depth of knowledge. Learning about law is pivotal, but it is not sufficient. The mindset needed entails being adept at drawing on knowledge from multiple sources and looking at problems from plural perspectives. It is the mindset of the fox.*

– Mark Aaronson<sup>1</sup>

## I. INTRODUCTION

Some of the most vocal critics of legal education have leveled the charge that law school emphasizes too much of one skill (the Socratic method; issue-spotter exams)<sup>2</sup> and employs a professoriate that couldn't

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<sup>1</sup> Interim Dean and Gordon Silver Professor of Law, William S. Boyd School of Law, University of Nevada–Las Vegas. Special thanks to the *Connecticut Law Review* for holding this symposium, to John Bloomquist, Pamela Siegel Chandler, and Louis Higgins of Thomson Reuters for the wonderful retreat held in July 2012 that brought together several smart people to talk about curricular change, to Mark Aaronson, Jack Ayer, Catherine Carpenter, Jennifer Carr, Jay Conison, Frank Durand, Dianne Fouret, Catherine Glaze, Jennifer Gross, Peter Hoffman, Kay Kindred, Adam Lewis, Nettie Mann, Ngai Pindell, Jeanne Price, Layke Stolberg, Brian Tamanaha, and Scott Unger, and to my two most constant and loyal editors, Jeff Van Niel and Morris Rapoport. This Essay stems from the discussions at the Thomson Reuters retreat.

<sup>2</sup> Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 8 (2002).

<sup>3</sup> See, e.g., PAUL CAMPOS, DON'T GO TO LAW SCHOOL (UNLESS) 10–11 (2012) (arguing that the popular law school teaching styles, such as Socratic Method cold-calling and “issue spotting” exams, bear no resemblance to the work that lawyers actually do and thus do not adequately prepare students for their future careers); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 172–76 (2012) (presenting a wide-ranging critique of legal education).

possibly convey what “real lawyers” actually need to know.<sup>3</sup> Other critics have done the math supporting an ugly truth: law schools are graduating far too many lawyers for the number of legal jobs available.<sup>4</sup> Still others have pointed out that we’ve been complaining about legal education since, well, legal education began.<sup>5</sup> Along with lots of others, I’m one of those writing about some of the hard-wired problems in legal education.<sup>6</sup> From talking to lawyers and from reading various articles and blogs, I know that the practice of law is (either “still” or “again”) at a crossroads.<sup>7</sup>

But so is legal education. There are countless pressures on law schools these days. The job market is one pressure; the changes in what lawyers need to do is another; the decline in applications is a third.<sup>8</sup> As a way of

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<sup>3</sup> See CAMPOS, *supra* note 2, at 9. Campos suggests that law schools are largely staffed by “lawyer-academic” professors and describes the typical career path: clerking for a federal judge immediately after graduation, working as a junior associate in a large law firm for two or three years, and then becoming a law professor. To the extent that this relatively limited experience is the norm, it is unlikely that many law professors are in tune with the current demands of law practice. *See id.*

<sup>4</sup> I highly recommend everything that Bill Henderson has written. For a description of his work, see *William D. Henderson: Faculty Profile*, IND. U. MAURER SCH. OF LAW, <http://info.law.indiana.edu/sb/page/normal/1415.html> (last visited February 13, 2013). Henderson’s research includes empirical analyses of the legal profession and legal education, with a particular focus on the recent changes that the legal world is experiencing. Henderson’s not alone. Deborah Jones Merritt has also pointed out the simple mathematical discrepancy between the number of lawyers graduating and the number of law jobs. *See* Deborah Jones Merritt, *Versus How Many Graduates?*, INSIDE THE LAW SCH. SCAM BLOG (Sept. 8, 2012), <http://insidethelawschoolscam.blogspot.com/2012/09/versus-how-many-graduates.html> (providing charts illustrating the number of legal jobs available compared to the number of law school graduates in given years). Of course, even if we were all brilliant at crafting the perfect legal education, the odds are good that we’d still end up with fewer law jobs than we have graduates. *See* email from John D. Ayer, Professor of Law Emeritus, Univ. of Cal. Davis Sch. of Law, to author (Oct. 18, 2012) (on file with author).

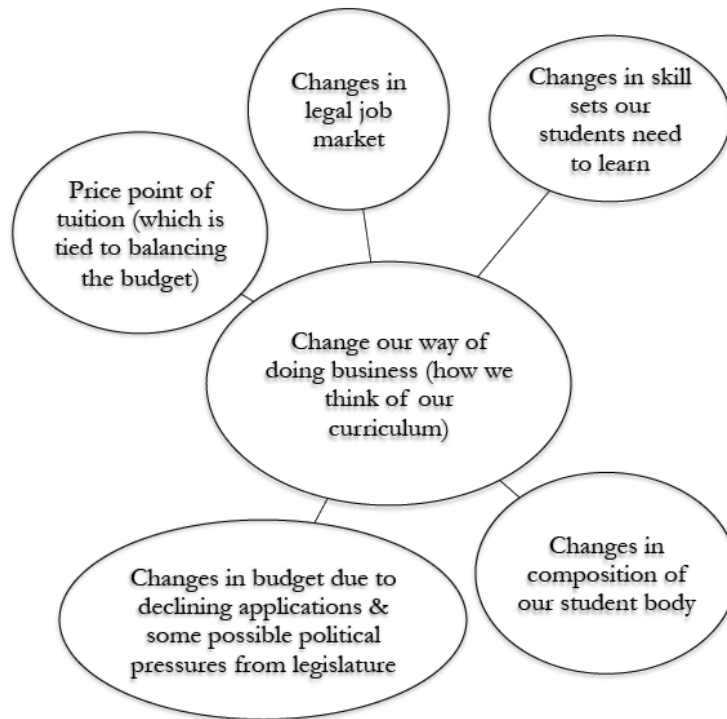
<sup>5</sup> Email from John D. Ayer, Professor of Law Emeritus, Univ. of Cal. Davis Sch. of Law, to author (Oct. 18, 2012) (on file with author).

<sup>6</sup> *See* Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN ST. L. REV. 1119, 1142 (2012) [hereinafter Rapoport, *Changing the Modal Law School*] (arguing that, although “elite” law schools don’t need as much “reforming” as do schools with problematic bar passage and employment rates, all schools could benefit from changes that help students focus more on the practical application of the legal theories that they’re learning); Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRECTORS 91, 91 (2002) (arguing that teaching students to “think like lawyers” is only part of what law schools should be doing).

<sup>7</sup> *See, e.g.*, Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1 (2011). During the recent recession, many “BigLaw” firms were forced to lay off employees, limit their hiring, and reduce people’s pay. Although many big firms are now recovering, the BigLaw model has undergone structural and permanent changes, and it’s unclear what the future will bring. *Id.*

<sup>8</sup> I believe that part of the reason that applications are declining is that potential law students are doing the math: high debt + reduced job opportunities = a bad bet for many law students. Law schools have to articulate—both inside and outside their own walls—exactly what educational value they are providing to their students. Students deserve some tangible value in exchange for their tuition. *See* email from Jay Conison, Dean & Professor of Law, Valparaiso Univ. Law, to author (Nov. 14, 2012) (on file with author). Our students deserve an education good enough to enable most of them to pass

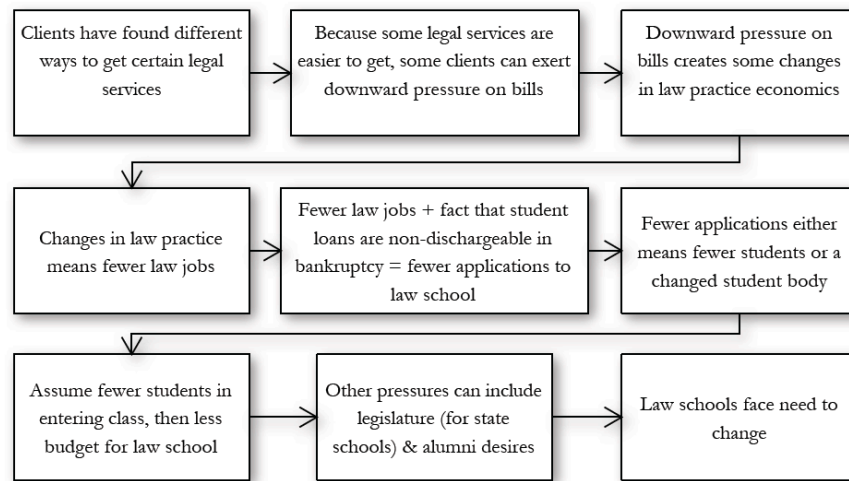
dealing with declining applications, some schools can balance the budget by raising tuition. Most can't, unless they want to risk exceeding their school's price point. Here's one way of thinking about all of the pressures:



Another way of thinking about the pressures on law schools is by seeing the ripple effects that started with the outsourcing of certain types of legal work—say, research or document review—from law firms to contract lawyers (including foreign ones).

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the bar, and they deserve professors who can contribute to a better understanding of law and legal systems, as well as professors who can guide them through some of the complexities that the actual practice of law entails.



If the practice of law is changing dramatically, the number of applicants to law school is decreasing, and the price of getting a legal education is creeping ever higher, then at some point, we need to admit that we're facing the perfect storm.<sup>9</sup> Something has to give.

We don't have many options. We could close some law schools to reduce the oversupply (and, frankly, I expect some law schools to shut their doors within the next decade).<sup>10</sup> We could try to persuade the American Bar Association to relax some of the rules that tend to push law schools into a one-size-fits-all approach.<sup>11</sup> We could even consider moving law from a graduate degree to an undergraduate degree,<sup>12</sup> which would, at least, reduce the overall debt load that most law graduates face.

But on the theory that drastic change will take years, there is one thing that law schools could do right now to improve legal education: law schools could take a good, hard look at creating deliberate building blocks of skill sets.<sup>13</sup> Right now, most law schools tend to do what they've always done: they teach the same series of courses in the first year, they

<sup>9</sup> Cf. SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (1997) (providing one of the best definitions of a "perfect storm" that I've ever read).

<sup>10</sup> See, e.g., Rapoport, *Changing the Modal Law School*, *supra* note 6, at 1150 ("[T]he world has figured out that it doesn't need as many U.S.-based Big Law firms as it once did, and I wouldn't be a bit surprised if some law schools closed over the next decade or so.").

<sup>11</sup> I'd say "don't get me started," but I'm already thinking about doing an essay about this topic.

<sup>12</sup> I'm not the only one who has toyed with suggesting that law return to being an undergraduate degree. See, e.g., John O. McGinnis & Russell D. Mangas, Op-Ed, *First Thing We Do, Let's Kill All the Law Schools*, WALL ST. J. (Jan. 17, 2012), <http://online.wsj.com/article/SB10001424052970204632204577128443306853890.html> (discussing the benefits of permitting undergraduate colleges to provide training to students that would let them take the bar exam).

<sup>13</sup> My dad has pointed out to me that the phrase "right now," when used by academics, means a process that will take more than one year.

teach the same sorts of upper-level courses, and they provide some of their students with some real-life experience with clinics and externships. But how many law schools have asked how to layer skill sets all the way from the first year to the third year?<sup>14</sup> And, for that matter, is the second year of law school—as many schools have structured it—really building any new skill sets at all?

There are many forces pushing against an examination of law school as a series of building blocks.<sup>15</sup> For one thing, law professors have a cushy life.<sup>16</sup> We teach what we want, usually at the times that we want to teach, and we get to study what we want without having to put clients' needs first. We have flexible hours and high salaries (at least if we're tenured or on the tenure track).<sup>17</sup> Moreover, most law professors haven't had the sort of training in educational theory<sup>18</sup> that would encourage them to create a coordinated curriculum from scratch. And finally, law schools don't tend to reward the painstaking amount of time that it takes to think seriously about the curriculum and then (1) develop new courses that reflect the building of skill sets over time; (2) determine better ways to evaluate whether a student is actually developing those skills;<sup>19</sup> and (3) recalibrate the curriculum if some of the evaluations reflect that the curriculum needs more work. At most law schools, law professors are rewarded first for their scholarship, and then maybe for their teaching. People tend to do those things for which there are clear rewards, so it's not shocking to see that law schools haven't leapt to create wholesale change.

But we could create that change. If we want to create a series of building blocks, we must first think deliberately about what we expect law students in various stages of development to be able to do. We know, for

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<sup>14</sup> I'd be a bad interim dean if I failed to mention that the Boyd School of Law is considering this very process.

<sup>15</sup> See Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 359 (2006) (discussing the "strategic planning" that the University of Houston Law Center conducted to "take stock of where we were in relation to other schools with which we wanted to compare ourselves").

<sup>16</sup> My husband calls law teaching the "loophole in life," when he isn't calling it some other choice phrase.

<sup>17</sup> One of my favorite discussions of the caste system within law schools is still the one that Kent Syverud wrote. See Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRECTORS 12 (2002) (discussing the "evolution and adoption of 'best practices' in legal education" and the effect of the caste system on these practices).

<sup>18</sup> I know nothing about educational theory, so I don't know if knowing any would help us teach better. All I know is that *not* knowing any means that we're guessing about whether we're teaching things in a way that enables students to master the material.

<sup>19</sup> After all, assessment is going to become increasingly important in the years to come, and not just because the American Bar Association Standards are moving us in that direction. See, e.g., AM. BAR ASS'N, 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 19–20 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf).



example, that we expect third-year law students to be able to do more than brief cases. We want them to be able to use both inductive and deductive reasoning to solve complicated legal problems—and we want the best ones to be able to use various soft skills that tend to relate to a person’s “EQ” rather than just his or her IQ, including the skills of listening, empathy, and judgment. But how can we be sure that we’re getting them there?

I suggest that we start by framing what we expect each year of law school to produce. There are numerous studies that talk about what law schools should be doing, including the MacCrate Report,<sup>20</sup> the Carnegie Report,<sup>21</sup> and Berkeley’s “26 factors.”<sup>22</sup> (I’m going to add a 27th factor as well, suggested to me by Brian Tamanaha: mutual respect.<sup>23</sup>) For ease of discussion, I’ll be working with the “26+1” factors and mapping them onto my vision of which building blocks should come first and which should come later.

Let’s take a typical three-year program, even though I know that there are shorter and longer programs. What should we be teaching, and when? This Essay will set forth my nominations for where the “26+1” factors would go, although I know that reasonable minds will differ on what goes where.

I believe that each year of law school should focus on different building blocks, so that a law student’s progression from the first semester to the last semester represents distinct skill sets rather than a replication of the skill sets taught in the first year. There is a tendency in many law school curricula to repeat, throughout the entire curriculum, the teaching methods that we use with first-years (the “same old, same old”). It’s time to move away from the old saying about legal education: “The first year they scare you to death. The second year they work you to death. The third year they bore you to death.”<sup>24</sup>

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<sup>20</sup> *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. ON LEGAL EDUC. & ADMISSION TO THE BAR.

<sup>21</sup> WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>22</sup> See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 *LAW & SOC. INQUIRY* 620, 630 (2011) [hereinafter Shultz & Zedeck, *Predicting Lawyer Effectiveness*] (setting out twenty-six factors that relate to “lawyer effectiveness”) (reproduced in Appendix).

<sup>23</sup> Email from Brian Tamanaha, William Gardiner Hammond Professor of Law, Wash. Univ. Law, to author (Oct. 18, 2012) (on file with author).

<sup>24</sup> *Thinking of Going to Law School?*, ALA. ST. BAR, <http://www.alabar.org/public/thinking-of-law-school.cfm> (last visited Feb. 18, 2013); see also Peter Lattman, *N.Y.U. Plans Overhaul of Students’ Third Year*, *N.Y. TIMES* (Oct. 16, 2012, 6:58 PM), <http://dealbook.nytimes.com/2012/10/16/n-y-u-law-plans-overhaul-of-students-third-year/>. I’m not sure that we really scare first-year students to death, although they seem to be pretty nervous about whether they’re mastering the material, and not every second-year student is worked to death. As for third-year students, my guess is that some of them really are bored to death.

So what are we trying to develop? I believe that, in year one, we're trying to inculcate the skilled novice with the language and customs of law. In year two, we add more substantive law courses in order to give students enough legal background to think about client problems more broadly (but I'm skeptical that we're building new skill sets along the way). In year three, we're trying to turn out novice professionals who have at least some judgment when addressing client problems. In other words, in year one, we teach our students to come up with every plausible argument for and against a proposition. By the end of year three, we'd like those students to be able to distinguish good arguments from bad ones, and we'd be ecstatic if the students also understood that law is but one tool (and not always the most useful tool) for solving their clients' problems.

## II. THE FIRST YEAR OF LAW SCHOOL: CREATING THE SKILLED NOVICE

I've made a first cut at placing most of the "26+1" factors—at least the ones that might belong in law school—in one of the three years of law school.<sup>25</sup> The chart below shows my overly ambitious (or overly optimistic) placement of some of these factors in the first year:

First-year skill sets	<ul style="list-style-type: none"> <li>• Able to See the World Through the Eyes of Others<sup>26</sup></li> <li>• Analysis and Reasoning<sup>27</sup></li> <li>• Diligence</li> <li>• Integrity/Honesty<sup>28</sup></li> <li>• Listening</li> <li>• Mutual Respect<sup>29</sup></li> </ul>
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<sup>25</sup> The credit for parceling out the factors into years of law school, rather than semesters, goes to my buddy Catherine Glaze. See email from Catherine Glaze, Assoc. Dean for Student Affairs, Stanford Law Sch., to author (Oct. 19, 2012).

<sup>26</sup> At the risk of being shunned in some circles, I still have to say that I'm not convinced that all points of view are welcome in the classroom. Some schools have predominately liberal professors, and others have predominately conservative ones. Like Goldilocks, a few schools have it "just right"—but my guess is that those schools are few and far between.

<sup>27</sup> The Law & Rhetoric movement has contributed a great deal to our understanding of how narrative affects understanding. For a partial listing of particularly relevant articles, see Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 3 (2010); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. FORUM 7 (1996); Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How It Matters in Judging*, 9 LEGAL COMM. & RHETORIC: JALWD 173 (2012).

<sup>28</sup> People ask me all the time if, as a Professional Responsibility teacher, I can teach my students integrity and honesty. I can't. I can, though, make them hyper-aware of the consequences of being caught doing something wrong. But to the extent that people want to think about teaching professionalism as a positive value, there are some very useful articles, including Santa Clara Law Review's *Symposium on Leadership Education for Lawyers and Law Students*, 52 SANTA CLARA L. REV. 685 (2012), and Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons From the Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012).

	<ul style="list-style-type: none"> <li>• Organizing and Managing One’s Own Work</li> <li>• Passion and Engagement</li> <li>• Researching the Law<sup>30</sup></li> <li>• Speaking</li> <li>• Stress Management</li> <li>• Writing</li> </ul>
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We know intuitively that there’s a difference between how novices learn (and think) and how experts do. Sometimes, though, it’s difficult to put our collective finger on just what those differences are. Luckily for me, the McGraw Center for Teaching & Learning has set out a nice description of the differences between novice and expert problem-solvers<sup>31</sup>:

Novices . . .	Experts . . .
Memorize how to solve specific problems.	Believe that you can solve most problems by memorizing only a few central principles.
Identify problems in terms of surface elements . . . .	Identify problems using principles by which you can solve them . . . .
Believe that most problems are too difficult for them to solve.	Are confident that they can solve problems, work a long time before giving up, and do not believe that this is a waste of time.
Do not think about how they solve problems but instead just plow through them.	Are able and willing to evaluate their own thinking.
Move on to the next problem without considering possible connections between them or the concepts that may inform them.	After solving problems, review why the question was important, by asking why the professor gave the assignment.

Even if this list of differences between novices and experts is

<sup>29</sup> Modeling respect must include not just professor-to-student interactions, but also student-to-student and professor-to-professor interactions.

<sup>30</sup> My colleague Jeanne Price has pointed out that one really interesting way to think about legal research is to focus on how one discovers the “universe of authority.” The first year of law school can begin the process of discovering such a universe, but the “aha” moment will likely come during the student’s upper-level experience, when she realizes that the universe of authority will shift depending on the subject at hand. See email from Jeanne Price, Director of the Wiener-Rogers Law Library and Assoc. Professor of Law, William S. Boyd Sch. of Law, to author (Oct. 19, 2012) (on file with author).

<sup>31</sup> *Novice v. Expert Problem-Solvers*, MCGRAW CTR. FOR TEACHING & LEARNING, <https://www.princeton.edu/mcgraw/library/for-students/problem-solvers/> (last updated Oct. 27, 2010).

incomplete, inexact, and too simple, it does give us a sense of the difference in skill sets between the two groups. When I teach first-year students, I can feel their frustration when they discover that law isn't a series of clear rules that they can memorize. (Memorizing got them good grades as undergrads, so it's distressing to them that the skills that got them into law school aren't sufficient to help them thrive in law school.)

Let's assume that the most we could provide the first-year law student is a transition from knowing nothing about the law to being a skilled novice, able to solve some problems and able to extrapolate principles to solve others, but still not yet able to teach themselves new areas of law. How do we get first-year law students from Point A (ignorance) to Point B (novice)?

I've often described the first year of law school as being the equivalent of being dropped into a foreign country without knowing the language or the customs. For almost all first-year law students, the language of legal opinions and the ability to parse the rules is brand new. No one goes around as a first-year law student saying "assumpsit" in normal conversations,<sup>32</sup> but that's exactly how the famous *Hawkins v. McGee* case starts out.<sup>33</sup> We need to walk our students through the arcane ways that cases are cited and reported, as well as how a court analyzed the parties' arguments, what facts were important to a court's holding, and how one line of cases might apply in a brand new situation (the hypothetical). We need to teach them how to find the law (legal research)<sup>34</sup> and how to communicate what they know (legal writing). We should also teach them that integrity and honesty are (or are supposed to be) the hallmarks of a good lawyer, and we should help them learn to manage a heavy load of information. We should model mutual respect as well: not just the respect between a teacher and a student, but respect between students.<sup>35</sup> We should encourage our students to listen to each other and to hear and critique opposing viewpoints without making personal attacks.<sup>36</sup> If we can do all of these things without crushing their passion and engagement, then we've done a good job of creating novice learners.

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<sup>32</sup> At least I hope that's true.

<sup>33</sup> *Hawkins v. McGee*, 146 A. 641, 642 (N.H. 1929) ("Assumpsit against a surgeon for breach of an alleged warranty of the success of an operation.").

<sup>34</sup> We also need to think seriously about whether using one professor to teach both legal writing, which is its own field, and legal research, which is *its* own field, is a good idea. For some professors on some faculties, teaching both skills in one course makes sense. But for others, divvying up the two subjects in the first year might be a better way to use their separate expertise. As far as I can tell, the best people to teach legal research in depth have always been law librarians.

<sup>35</sup> Thanks to Brian Tamanaha for this point. Email from Brian Tamanaha, *supra* note 23.

<sup>36</sup> I'm not convinced that professors are any better than students are in terms of respecting others' opposing viewpoints. I'm a tenured professor, and I'm still very careful not to reveal my own political philosophy to my colleagues on either side of the aisle, because I've observed too much of the "you must be deranged if you don't agree with me" behavior.

Thanks to the American Bar Association's new curriculum survey, here are the courses that tend to make up the first-year curriculum:

- Contracts
- Criminal Law
- Civil Procedure
- Constitutional Law
- Property
- Elective, Criminal Procedure, or some other requirement
- Torts
- Legal Research and Writing<sup>37</sup>

If we map the factors against the curriculum, we can see a congruity: the course load itself teaches “organization and managing one’s own work” (preferably without quashing “passion and engagement”),<sup>38</sup> the podium courses teach analysis and reasoning, the legal research and writing course covers the research and writing factors,<sup>39</sup> and—with any luck—the school’s faculty and staff are modeling the factors of integrity and honesty, and maybe they’re even bringing the concepts of integrity and honesty into classroom discussions. We might also be introducing our students to the concept that different people might view the world differently from us—and not just by referring to critical legal studies—and we should be encouraging our students to find ways to alleviate the stress of law school. If so, then “well done,” us. Now we can move to the second year, where many schools start to drop the ball.

### III. THE SECOND YEAR OF LAW SCHOOL: CREATING THE NOVICE PROBLEM-SOLVER

Second-year skill sets	All of those developed in the first year, plus: <ul style="list-style-type: none"> <li>• Community Involvement and Service</li> <li>• Problem Solving</li> </ul>
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If we assume that the second year of law school should offer something different to all law students, and not just to those who are on law review, then we should be examining whether our current combination of podium courses and externships is doing the trick. Certainly, the podium courses are reinforcing the skill sets that we introduced in the first

<sup>37</sup> A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 55 (Catherine L. Carpenter ed., 2012).

<sup>38</sup> Shultz & Zedeck, *Predicting Lawyer Effectiveness*, *supra* note 22, at 630.

<sup>39</sup> If I could wave a magic wand, I’d use law librarians more in teaching legal research. They’re the best I’ve seen in terms of finding and organizing legal knowledge. *See supra* note 34.

year, but they're not really leading our students to the realization that, at their core, lawyers are problem-solvers. Of course, externships might bring home the concept of diligence and the ability to apply legal rules to new issues, and second-year students who are "peer partners" with the new first-years might start using the skills of evaluation, development, and mentoring. The problem with externships, peer partnerships, and the like, though, is that not every student experiences them. No matter how we slice things, if we're using the same types of instruction that we did for the first year, then we're really not teaching law students any new skills. We're teaching them new *law*, but not new ways of using what they're learning.

How could we do a better job? For one thing, we could change how we spend our class time. Yes, the substantive law taught in the second year is difficult and complex. But is it so difficult and complex that we need to spend significant amounts of class time parsing cases?<sup>40</sup> What would happen if we did what so many other disciplines in higher education are considering, like flipping our classrooms? Classroom "flipping," as best as I can tell, means to have the students get a basic understanding of the material before class and then use the in-class time to explore the parts of the material that aren't basic.<sup>41</sup> It's not the elimination of the classroom component of learning; rather, flipping uses the time in class to answer questions that the students have about the basic material and then demonstrate how what they learned outside class is chock-full of nuances that the outside-class portion didn't cover. I teach my Professional Responsibility course as a "flipped" course, although my students might not realize that's what I'm doing.<sup>42</sup> I ask them to form small groups ("law firms") and learn the Model Rules of Professional Conduct on a given topic, such as confidentiality or conflicts of interest. Each law firm presents its topic to the entire class in any way that it likes. It can use PowerPoints,<sup>43</sup> film clips, games, one-act plays, or any other method that the firm likes in order to convey both the rule and the nuances of that rule.<sup>44</sup> I don't think of a flipped classroom as a way of dumbing down the

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<sup>40</sup> If Constitutional Law is an upper-level course, then there's no way to teach it without parsing the cases. The same is true of Criminal Procedure. But not every course needs to emphasize the skill set of parsing cases.

<sup>41</sup> E.g., Marc Perry, *Debating the 'Flipped Classroom' at Stanford*, CHRONICLE (Jan. 5, 2012, 12:35 PM), <http://chronicle.com/blogs/wiredcampus/debating-the-flipped-classroom-at-stanford/34811>; Robert Talbert, *How the Inverted Classroom Works: A Manifesto for Students*, CHRONICLE (Aug. 14, 2012, 8:00 AM), <http://chronicle.com/blognetwork/castingoutnines/2012/08/14/how-the-inverted-classroom-works-a-manifesto-for-students/>.

<sup>42</sup> Or appreciate it.

<sup>43</sup> Law students probably need to learn that they shouldn't read their PowerPoint slides to their audiences. Of course, a lot of law professors need to learn that, too.

<sup>44</sup> This year, one of the components of grading for my course is the feedback of the other students on how effective a firm's presentation was in conveying the complexity of the material.

material. I see it as a jazz riff off of the tutorial system that Oxford and Cambridge use, but with more students.<sup>45</sup>

There are all sorts of ways to change the way that our upper-level students learn. There are commercial computer programs that test students' basic knowledge, like CALI exercises<sup>46</sup> or BARBRI's "amp" courses.<sup>47</sup> A professor could come up with her own outside-class materials. She could assign a review book, such as an *Examples and Explanations*<sup>48</sup> in addition to assigning the normal reading.

Not every course lends itself to "flipping"—the classic bankruptcy course comes to mind—but every course lends itself to new ways of learning beyond merely parsing cases through the Socratic method. Students do need to spend in-class time with really complex material, but they don't need to go case-by-case through a textbook. There should be other ways of building new skill sets in the second year, rather than just teaching complex material in the same general manner that we use in the first year. What would happen if we combined Evidence and, say, Criminal Procedure?<sup>49</sup> Regulated Industries and Insurance Law? At least then we'd give second-year students the realization that a client's problems don't fall neatly into a single subject area. There is no such thing as "just" an Evidence problem. Whether something is or isn't admissible is part of a larger issue involving a conflict, a resolution of that conflict, and the various systems (e.g., legal, political) that set that conflict into action. People don't want to form a business organization for the sheer joy of writing bylaws. They want to create an organization that will let them do that which got them interested in a business in the first place, and they want to think about tax consequences, employment law consequences, and maybe intellectual property implications in addition to thinking about fiduciary duties and limitations of liability. If the first year of law school

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<sup>45</sup> See *Tutorial Teaching*, UNIV. OF OXFORD, <http://www.learning.ox.ac.uk/support/teaching/resources/teaching/> (last visited Feb. 5, 2013) (describing a tutorial system where a student discusses his own assigned readings and written material with a tutor from his or her discipline once a week or once every two weeks); *The Supervision and Tutorial Systems*, UNIV. OF CAMBRIDGE, <http://www.trin.cam.ac.uk/index.php?pageid=885> (last visited Feb. 5, 2013) (explaining a supervision and tutorial system where all students at Trinity College, a college in the University of Cambridge, are assigned a supervisor who is responsible for giving feedback on their work and a tutor who is responsible for their general welfare).

<sup>46</sup> *About CALI*, CALI: CTR. FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, <http://www.cali.org/content/about-cali> (last visited Feb. 5, 2013).

<sup>47</sup> BARBRI AMP, [http://www.barbriamp.com/law\\_school.html](http://www.barbriamp.com/law_school.html) (last visited Feb. 5, 2013).

<sup>48</sup> The *Examples and Explanations Series* is a set of books published by Aspen Publishers that offers a combination of hypothetical questions in different subject areas, accompanied by explanations. *Study Aids at a Glance*, ASPEN PUBLISHERS, [http://lawschool.aspenpublishers.com/bookstore\\_manager/study\\_aids.asp](http://lawschool.aspenpublishers.com/bookstore_manager/study_aids.asp) (last visited Feb. 5, 2013).

<sup>49</sup> Of course, we'd have to come up with new ways to give professors sufficient credit for combining courses, possibly with some release time to develop the new courses. Such changes would take a significant amount of additional effort.

teaches students about the language and culture of law, then the second year should be teaching them that a client's problems will create overlapping areas of subjects necessary to consider when addressing those problems. Using only the Socratic Method to teach a subject simply won't provide students with sufficient perspective, and it certainly won't develop the skill sets necessary to create basic good judgment.

We could do more with the extracurricular aspects of the second year as well. Many of the "26 + 1" skills can be reinforced in conjunction with a school's Career Development Office.<sup>50</sup> In particular, the skills of "networking and business development," "providing advice and counsel and building relationships with clients," "developing relationships within the legal profession," and "evaluation, development, and mentoring" all come to mind. In addition, a school's academic support department already reinforces a significant portion of the skills that we want our students to learn in our courses, and we could be far more explicit in conveying the value of academic support to our students.<sup>51</sup>

If I'm right in believing that the second year of law school should create novice problem-solvers, then the second year is an ideal time to start sneaking in references to different ways that problem-solvers could approach dilemmas. One way to do that is to use the concept of "framing" that Bolman & Deal suggest in their classic text, *Reframing Organizations*.<sup>52</sup> Stripped down to its basics, *Reframing Organizations* describes four ways of looking at something: through a structural frame, through a human resources frame, through a political frame, and through a symbolic frame.<sup>53</sup> In a way, those frames describe both the human condition as well as every group of people I've ever known. The structural frame is the skeleton: how the organization actually is organized. An organization chart is akin to someone's bones and muscles. The human resources frame is the heart: people's emotional responses. The political frame is the brain: figuring out where the real power is in an organization, despite what an organizational chart tells you. And the symbolic frame is the soul: what we tell ourselves about who we are and what we value.

Were we to teach law students how to use different frames in their understanding of substantive law, we'd be able to give them multiple ways to approach a problem. Let's say that the client wants to breach a contract.

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<sup>50</sup> Kudos to Jay Conison for suggesting this approach to me. See Email from Jay Conison, Dean & Professor of Law, Valparaiso Univ. Law Sch., to author (Nov. 14, 2012) (on file with author).

<sup>51</sup> Our Academic Success Program Director, Professor Jennifer Carr, has generously taken the time to attend several of my Contracts class sessions and to debrief the students afterwards on what they should have learned during the class sessions.

<sup>52</sup> LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE AND LEADERSHIP* 6 (4th ed. 2008). I would not have come across this book but for Harvard Graduate School of Education's Institutes for Higher Education. Thank goodness for those Institutes.

<sup>53</sup> *Id.* at 43, 117, 189–90, 247–49.



The legal frame, which students already should know, talks about when breach is efficient and what the ramifications of breach are, but that's not enough information to give a client complete advice. Taking a look at the potential breach from a human resources frame brings in the emotional response that is even a part of business-side breaches. (CEOs can get hurt and angry, too, just as much as "the little guy" can.) The political frame talks about the levers (both people and strategy) that a potentially breaching party might need to consider. The symbolic frame would ask the client, in essence, to consider what a breach would add to the narrative of how the client views himself—and how people dealing with the client would view him, post-breach.

Again, take a Professional Responsibility course as an example. When the subject of organizations as clients comes up, a professor could ask her students how they might be able to discover if an employee's complaint should be investigated further by the organization's lawyers. Students will learn the rule that a lawyer represents the organization *qua* organization, rather than necessarily also representing the officers or directors (legal frame). But when it comes to investigating the complaint, should a lawyer dig around according to people's titles on the organizational chart (structural frame) or by who's most likely to know whether the employee's complaint has some truth to it (political frame)?<sup>54</sup> Whether the organization ends up making the results of the investigation public or keeps them private, it is choosing to add to the story of what the organization values (symbolic frame). And, of course, how the employees feel during and after the investigation would involve the human resources frame. The same situation will create a variety of different viewpoints—all of which are important for a budding lawyer to know. But knowing that there are different viewpoints is not enough. That budding lawyer also needs to understand how to use judgment to sift through all of the information that she is getting.

#### IV. THE THIRD YEAR OF LAW SCHOOL<sup>55</sup>: CREATING A NOVICE PROFESSIONAL WITH BASIC JUDGMENT

*Nasrudin is known as much for his wisdom as his foolishness, and many are those who have sought out his teaching. One devotee tracked him down for many years before finding him in the marketplace sitting atop a pile of banana peels—no one knows why.*

*"Oh great sage, Nasrudin," said the eager student. "I must ask you a very*

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<sup>54</sup> Then they'd have to bounce back to the legal frame with *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and its progeny.

<sup>55</sup> For those schools with part-time programs, I'd expect to develop the final set of skills during both the third and fourth years.

important question, the answer to which we all seek: What is the secret to attaining happiness?”

Nasrudin thought for a time, then responded. “The secret of happiness is good judgment.”

“Ah,” said the student. “But how do we attain good judgment?”

“From experience,” answered Nasrudin.

“Yes,” said the student. “But how do we attain experience?”

“Bad judgment.”<sup>56</sup>

Third-year skill sets	<p>All of those developed in the first two years, plus:</p> <ul style="list-style-type: none"> <li>• Creativity/Innovation</li> <li>• Evaluation, Development, and Mentoring</li> <li>• Fact Finding</li> <li>• Influencing and Advocating</li> <li>• Negotiation Skills</li> <li>• Organizing and Managing Others (Staff/Colleagues)</li> <li>• Practical Judgment</li> <li>• Providing Advice &amp; Counsel &amp; Building Relationships with Clients</li> <li>• Questioning and Interviewing</li> <li>• Strategic Planning</li> </ul>
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Many law schools are rethinking the third-year curriculum to embrace a wider range of learning opportunities. A recent *New York Times* story described some of these changes:

N.Y.U. Law is the latest law school to alter its academic program significantly. Stanford Law School recently completed comprehensive changes to its third-year curriculum, with a focus on allowing students to pursue joint degrees. Washington and Lee University School of Law scrapped its traditional third-year curriculum in 2009, replacing it with a mix of clinics and outside internships.<sup>57</sup>

Those reforms are great, but they’re far from enough, and I think that the reason that they’re far from enough is that they’re assuming a progression of skill sets from the first year to the second year that doesn’t actually occur.

Let’s assume that we’ve somehow managed to convey to second-year

<sup>56</sup> JOEL BEN IZZY, *THE BEGGAR KING AND THE SECRET OF HAPPINESS* 206 (2003).

<sup>57</sup> Lattman, *supra* note 24.

students the idea that a client's problems are not bounded by individual subject areas.<sup>58</sup> If our job as law professors is to turn out a graduate with some basic understanding not just of law but of the larger skill of problem-solving, then we have to come up with ways to let students develop some judgment. Developing that judgment takes both time and significant deliberative effort.<sup>59</sup>

Moreover, we need to figure out just what type of judgment we want to develop. By definition, the best lawyers can give their clients advice on the spectrum of options open to them and the relative risks and benefits of choosing each option,<sup>60</sup> and the best lawyers actually enjoy puzzling out viable answers to issues that really have no clear legal answer. But giving good legal advice can be pretty nerve-wracking,<sup>61</sup> and traditional podium courses are just not designed to give students experience with the skill sets of eking out a set of facts from a client, testing those facts for veracity and completeness, figuring out a game plan for how to proceed, factoring in the likely responses from the other side, supervising support staff, developing creative solutions, and negotiating those solutions.<sup>62</sup> Seminars might be a good place to start; for example, Mark Aaronson teaches a course that, quite deliberately, is a search for developing judgment.<sup>63</sup> At the very least, students need a practicum where they face challenging hypothetical problems and have to test their skills and judgment in an area. Externships help somewhat, but they don't replace the very best learning opportunity: advising a live client.<sup>64</sup>

I know that clinical education is very expensive. It has to be. Supervising law students while giving them room to test their skills is a very hands-on type of teaching. Too large a class means too large a risk of malpractice. But the benefit to the students from taking a clinical course is

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<sup>58</sup> That assumption reminds me of this old joke: "A physicist, a chemist and an economist are stranded on an island, with nothing to eat. A can of soup washes ashore. The physicist says, 'Let's smash the can open with a rock.' The chemist says, 'Let's build a fire and heat the can first.' The economist says, 'Let's assume that we have a can-opener . . .'" *Definition of Assume a Can Opener*, ABOUT.COM, [http://economics.about.com/od/termsbeginningwith1/g/assume\\_a\\_can\\_opener.htm](http://economics.about.com/od/termsbeginningwith1/g/assume_a_can_opener.htm) (last visited Feb. 13, 2013).

<sup>59</sup> For a marvelous discussion of developing judgment, see Aaronson, *supra* note 1, at 30–42.

<sup>60</sup> And, in my opinion, the "best of the best" give the type of advice that goes far beyond just the legal ramifications of an issue.

<sup>61</sup> When I was a baby lawyer, I asked my supervising partner when I would feel comfortable giving legal advice. His answer? "You never really do get comfortable with it." Good lawyers always worry about covering all the bases, but they get used to that feeling in the pits of their stomachs that they may have overlooked something important, and—of course—they try not to overlook anything important.

<sup>62</sup> Including litigating some of them.

<sup>63</sup> Professor Aaronson has discussed his seminar with me by email.

<sup>64</sup> Even clinical opportunities, by their very nature, tend to group themselves into subject matter areas. See Aaronson, *supra* note 1, at 4–5 (discussing how clinical opportunities group themselves into subject-matter areas).

enormous. Just as I wouldn't want a doctor to give me medical advice after the doctor has only read about symptoms in a book, I wouldn't want a lawyer to give me legal advice if the lawyer has only read cases and statutes.<sup>65</sup>

There are also some outside-class experiences that might help law students develop judgment. Some of those experiences are unique to places like Las Vegas; I believe that games of strategy and luck involving eye contact with competitors (like poker) can provide some of the necessary background.<sup>66</sup> A good poker player takes his luck (the cards dealt) and makes his luck (by reading the "tells" of the other players). A good lawyer takes her luck (the facts, as best as she knows them) and makes her luck (how she characterizes those facts and how she relates to the lawyers on the other side). Other experiences aren't location-specific at all. Some useful experiences are available to students who serve as active members of student organizations. Certainly, some of them are available to boards of law reviews or moot court societies. But law schools should make a deliberate effort to make them part of the curriculum as well—no easy feat as law schools struggle for resources.<sup>67</sup> If we are to make sense of the third year of law school, that year needs to have more to its curriculum than merely an additional succession of podium courses. We need to be deliberate about integrating soft skills, and we need to be deliberate about addressing other fields whose knowledge base overlaps ours. Students who finish law school without some understanding of psychology, sociology, history, economics, accounting, and literature are actually at a disadvantage when they're matched against more senior lawyers who do have some understanding of these fields.<sup>68</sup>

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<sup>65</sup> Actually, I'd always prefer to be at least the hundredth person on whom the doctor has practiced or for whom the lawyer has given the same type of advice.

<sup>66</sup> I'm not alone. See, e.g., STEVEN LUBET, *LAWYERS' POKER: 52 LESSONS THAT LAWYERS CAN LEARN FROM CARD PLAYERS* 5 (2006) ("The best card players, like the best lawyers, have a knack for getting their adversaries to react exactly as they want."); Roberto Aron et al., *The Importance of Non-Verbal Communication in Negotiation—Avoid Revealing Too Much with Non-Verbal Signals*, *TRIAL COMMUNICATION SKILLS* § 34:31 (2d ed. 2011) (mentioning poker as a way to learn negotiation); John Valery White et al., *How to Play Your Hand: Lessons for Negotiators from Poker*, 2 *UNLV GAMING L.J.* 231, 231 (2011) (discussing lessons to be learned from poker).

<sup>67</sup> Funding clinical education is expensive (although I believe that clinics are exceptionally valuable and are well worth their costs). For a discussion of the ways in which clinics might be funded, see, e.g., Philip G. Schrag, *Constructing a Clinic*, 3 *CLINICAL L. REV.* 175, 177 n.9 (1996).

<sup>68</sup> One promising development comes from one of my colleagues, Jean Sternlight, whose book, *Psychology for Lawyers*, walks law students through such topics as memory, decision-making, and perception. JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012). For another good "fundamentals" text, see WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* (2007). These books are marvelous at providing introductions to necessary perspectives.

## V. CONCLUSION

If my Essay is useful as a way of getting us to ask just what the second and third years of law school are supposed to be doing, that's great. We need to ask what we can do to make the second year build on the first year and to make the third year build on the second year. Surely, the answer can't be that we continue to follow in lockstep the same curriculum and teaching styles that we've had for so long. Many good law schools have already shaken up the curriculum by experimenting with capstone courses, experimenting with online education, and shortening the time necessary to graduate with a J.D. The rest of us need to have a broader discussion of what makes sense, so that we don't get locked into the "same old, same old." After all, "insanity [is] doing the same things over and over again and expecting different results."<sup>69</sup>

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<sup>69</sup> Attributed to Albert Einstein (although my dad says it all the time, as well). See BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/a/alberteins133991.html> (last visited Feb. 13, 2013) (attributing the quote to Einstein).

## APPENDIX

List of 26 Effectiveness Factors<sup>70</sup>

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**Factors Identified as Important to Lawyer Effectiveness**

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Analysis and Reasoning  
Creativity/Innovation  
Problem Solving  
Practical Judgment  
Researching the Law  
Fact Finding  
Questioning and Interviewing  
Influencing and Advocating  
Writing  
Speaking  
Listening  
Strategic Planning  
Organizing and Managing One's Own Work  
Organizing and Managing Others (Staff/Colleagues)  
Negotiation Skills  
Able to See the World Through the Eyes of Others  
Networking and Business Development  
Providing Advice & Counsel & Building Relationships with Clients  
Developing Relationships within the Legal Profession  
Evaluation, Development, and Mentoring  
Passion and Engagement  
Diligence  
Integrity/Honesty  
Stress Management  
Community Involvement and Service  
Self-Development

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<sup>70</sup> Shultz & Zedeck, *Predicting Lawyer Effectiveness*, *supra* note 22, at 630; *see also* Marjorie Shultz & Sheldon Zedeck, Op-Ed, *Looking Good on Paper Is Low Indicator of Effective Lawyering*, UNIV. OF CAL. BERKELEY L. DAILY J., available at <http://www.law.berkeley.edu/11589.htm> (last visited Feb. 13, 2013) (discussing how “looking good on paper” isn’t a good indication of future performance as a lawyer).

