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# Competence as Situationally Appropriate Conduct: An Overarching Concept for Lawyering, Leadership, and Professionalism

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# COMPETENCE AS SITUATIONALLY APPROPRIATE CONDUCT: AN OVERARCHING CONCEPT FOR LAWYERING, LEADERSHIP, AND PROFESSIONALISM

# **Leary Davis\***

[T]his very approximation of theory and practice it is, from which the real improvement of the administration of law must proceed . . . our theory, too, must become more practical, and our practice more scientific than it has hitherto been.<sup>1</sup>

Friedrich Karl von Savigny, 1814

[S]kills training will continue to face an uphill battle unless it is linked with an accepted theory of lawyering that could provide a bridge between theory and practice and perhaps establish a rationale for a more systematic continuing education beyond law school.<sup>2</sup>

William M. Sullivan, Anne Colby, Judith Welch Wegner and Lloyd Bond, 2007

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<sup>1.</sup> FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 145, 147 (Abraham Hayward trans., Littlewood & Co. Old Bailey 2d ed. 1828).

<sup>2.</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 94 (2007).

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#### INTRODUCTION

The idea of professional competence as a mere state of being or trait, without reference to the conduct it empowers or to specific situations and persons with whom the lawyer is involved, lacks the richness, complexity and explanatory

power needed to guide professional development.<sup>3</sup> That state of being, the state of possessing legal knowledge and technical skills, was the dominant view of lawyer competence at the end of the Twentieth Century.<sup>4</sup> That view contributed to an expansion of skills training in law school,<sup>5</sup> encouraged and then mandated by accreditation standards.<sup>6</sup> Yet the coalescence of theory and practice for which Savigny yearned two centuries ago remains unrealized, as does the accepted theory of lawyering to which the latest Carnegie report aspires.

Our espoused theory of competence as a state of being fails to explain our practice<sup>7</sup> and is inadequate to support a

- 4. The conception of competence as consisting of these two elements, knowledge and skill, has been shared across callings. See, e.g., THE ASTD LEADERSHIP HANDBOOK 13 (Elaine Beach ed., ASTD Press 2010) ("Competencies are the skills and knowledge that ensure a leader is equipped to lead—that constitute leadership effectiveness."). But see Mark David Jones, Identifying Real-World Competencies, in THE ASTD LEADERSHIP HANDBOOK 171, 172 (Elaine Beach ed., ASTD Press 2010) ("I generically define competence as the ability to use either knowledge or a skill in the performance of a role." (emphasis added)).
  - 5. See discussion infra Part I.B.
- $6.\,$  Standards and Rules of Procedure for Approval of Law Schools 302 (2011).
- 7. Chris Argyris and Donald Schön contrast two different kinds of theories in action, espoused theories and theories in use, and argue that effectiveness will increase with congruity between the two. Theories in use are the theories that we actually follow in acting, and espoused theories are the theories we communicate to others as the basis for our actions. Chris Argyris & Donald A. Schön, Theory in Practice: Increasing Professional Effectiveness

<sup>3.</sup> The traditional dictionary definition of competence is "the state of being competent," where competent is defined as "having adequate ability or qualities." Webster's Ninth New Collegiate Dictionary 268 (1985). The beginning of a shift to broader conceptions of competence in the legal profession, acknowledging competence as a state of being while recognizing the incompleteness of that view, can be found in two documents three decades in the past. In 1979 the ABA Task Force on Lawyer Competency said competence and performance were not synonymous, yet called for an expansion of the concept of competence sufficient to assure adequate service. Am. BAR ASS'N, LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 9 (1979) [hereinafter CRAMTON REPORT]. Two years later an ALI-ABA report stated, "Competence is different from performance, . . . we refer to competence as a personality trait or characteristic or set of habits we wish to inculcate in the lawyer . . . . " See infra notes 44-46 and accompanying text. It then adopted the performance-based definition of competence that ALI-ABA had recently proposed. See infra notes 44-46 and accompanying text. AM. LAW INST.-AM. BAR ASS'N COMM. ON PROF'L EDUC., ENHANCING THE COMPETENCE OF LAWYERS: THE REPORT ON THE HOUSTON CONFERENCE xi (1981) [hereinafter ENHANCING THE COMPETENCE OF LAWYERS].

general theory of lawyering. Today, more and more law firms are using competency models based on observed *behaviors*, rather than perceived qualities, to develop and reward their talent.<sup>8</sup> Disciplinary rules treat lawyer competence not as an attribute or state of being to be attained, but as action that is situationally contingent and constantly monitored.<sup>9</sup> Evolving conceptions of professionalism focus on the conduct of lawyers; they demand that our competence and professionalism be measured by what we *do* or *do not do*, and that those actions be connected to moral purpose.<sup>10</sup>

Talcott Parsons said a general theory in the social sciences should do three things:

- [A]id in the codification of existing concrete knowledge. [M]aking us more aware of interconnections among items of existing knowledge which are now available in a scattered, fragmentary form[,]
- 2. [B]e a guide to research [and]

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 [F]acilitate the control of the biases of observation and interpretation which are at present fostered by the departmentalization of education and research in the social sciences.<sup>11</sup>

A general theory of lawyering that draws from leadership theory can do those three things. Leadership has emerged as an academic discipline<sup>12</sup> that provides multidisciplinary<sup>13</sup> and

<sup>(1974).</sup> As discussed in Part VI, it is problematic that the profession has no shared theory of practice.

<sup>8.</sup> Susan Manch, Competencies and Competency Models—An Overview, in The Art and Science of Strategic Talent Management in Law Firms 77 (Thomson Reuters 2010). Manch reported a NALP survey in which seventy-four percent of 242 respondents had or planned competency-based approaches to talent management. Id. at 85. A 2011 American Lawyer survey of associates in large firms revealed that twenty-four percent of them were being compensated on the basis of competency models. By the Numbers: How Midlevels See Their Careers and Their Prospects, Am. Law., Sept. 1, 2011, at 76.

<sup>9.</sup> See discussion infra notes 162-65 and accompanying text.

<sup>10.</sup> See, e.g., Joseph P. Tomain & Michael E. Solimine, Skills Skepticism in the Postclinic World, 40 J. LEGAL EDUC. 307, 315–17 (1990).

<sup>11.</sup> TOWARD A GENERAL THEORY OF ACTION 3 (Talcott Parsons & Edward A. Shils eds., 1951).

<sup>12.</sup> At the end of the last century at least 700 academic institutions had leadership programs. Deborah L. Rhode, *Lawyers and Leadership*, 20 PROF. LAW, no. 3, 2010 at 12.

<sup>13.</sup> It utilizes perspectives from almost all of the arts and sciences, including cognitive science, and management.

interdisciplinary<sup>14</sup> perspectives in integrating theory and practice. Leadership theory helps explain why competence is more than knowledge and skill, which are necessary but not sufficient for competence (lawyers who have good knowledge of legal doctrine and lawyering skills often fail to provide adequate legal services). Rather, lawyer competence is the product of five elements that when properly interwoven produce situationally appropriate professional conduct:

- 1. Knowledge, legal and interdisciplinary
- 2. Skills, technical and interpersonal
- 3. Personal attributes, catalysts capable of converting knowledge and skill into competent representation, chief of which are self-knowledge, knowledge of others, and situational awareness
- 4. Strategies to harness knowledge, skill and personal attributes
- 5. Initiative in implementing strategies

Lawyers and legal educators can implicitly incorporate these five elements by defining professional competence as situationally appropriate conduct. This suggested definition is stipulative, providing a meaning for the purpose of discussion that differs from and extends the traditional dictionary definition of competence as a state of being. It is also a functional definition, telling what competence does and how and why it does it. The adverb and adjective "situationally appropriate" integrate theory and practice in distinguishing competence from behavior that, though producing a beneficent outcome, is the result of mistake or luck.

Broadening the concept of competence from a state of being to personal conduct can be psychologically threatening, a potential attack on individual and institutional self-concepts. For individual lawyers, law firms, and law schools to rise to enhanced levels of competence from plateaus of

<sup>14.</sup> It has melded knowledge and modes of thinking from other disciplines to produce a new art and science.

<sup>15.</sup> See discussion infra Part III.F. Lawyers might fear that adopting a broader definition of competence could broaden bases of liability for malpractice. That threat is addressed to an extent in the concluding sentence of this paragraph.

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substantial achievement, we must overcome organizational<sup>16</sup> and individual ego defense mechanisms<sup>17</sup> that are our primary barriers to change. While accommodating a broad scope of competence, range of conduct within the "situationally appropriate" might exclude behavior shared by an entire professional community.<sup>18</sup> That possibility can be particularly threatening to legal educators. If the latest Carnegie report is correct that a sound legal education would integrate cognitive, practical, and moral apprenticeships, 19 which most law schools do not, one might conclude that the enterprise of legal education as a whole falls short of competence. A valid theory of competence will acknowledge and provide the means to overcome these psychological threats, fostering a growth mindset and providing models for professional development that maximize career satisfaction and performance and minimize malpractice and the threat of liability.

Part I of this Article examines the evolution of ideas of lawyer competence in the context of changes in the profession. Part II discusses the stages in which competence and expertise are acquired as one learns from experience. In Part III I use two models, one legal and one leadership, to illustrate the acquisition and utilization of the elements of professional competence, including self-awareness. Part IV explores bridges and barriers to the achievement of competence. Part V provides justifications for adding strategy and initiative to knowledge, skill and personal attributes as elements essential to lawyer competence. Part VI discusses the extent to which conceptions of competence must be linked to conceptions of what a lawyer is. It includes definitions of the legal profession, professionalism and Those definitions mirror the ALI-ABA unprofessional.

<sup>16.</sup> For organizational defenses, see Chris Argyris, Overcoming Organizational Defenses: Facilitating Organizational Learning (1990).

<sup>17.</sup> See supra note 15 and accompanying text.

<sup>18. &</sup>quot;The fact that a professional followed the common professional practice at the relevant time is not sufficient to avoid liability. Such practice must be demonstrably reasonable. Accordingly, when a professional adheres to a common professional practice which does not accord with the general standards of liability, i.e., that one must act in a reasonable and diligent manner, he can be found liable, depending on the facts of each case." Roberge v. Bolduc, [1991] 1 S.C.R. 374, 379 (Can.), available at http://www.canlii.org/en/ca/scc/doc/1991/1991canlii83/1991canlii83.pdf.

<sup>19.</sup> SULLIVAN ET AL., supra note 2, at 191–92.

approach to defining *competence* and *incompetence* and link knowledge and skill to purpose and morality.

# I. WHERE WE ARE AND HOW WE GOT HERE: EXPANDING CONCEPTIONS OF COMPETENCE

The profession has experienced two paradigm shifts with respect to the way we think, assign responsibility, and behave with respect to professional development in the United States.<sup>20</sup> The first shift was from the apprenticeship system to a competence as knowledge paradigm, focused on development of knowledge and analytical and research skills within law schools. The problems of knowledge and doctrine having been substantially solved by the first paradigm shift, the second shift focused on skills other than analysis and research. The new knowledge plus skills paradigm addressed new problems in an expanding economy. Today the domestic and global economies are stagnant or in crisis. Change is likely. One of the profession's possible futures could involve a paradigm shift in professional development that draws upon and applies leadership theory. It would focus on what the 1978 Cramton report called "a complex of attitudes and values" and other attributes that discipline and support knowledge and skill to produce competent lawyering.<sup>21</sup>

In 1890, three-fourths of all new lawyers came to the profession through the apprenticeship system, which was still the existing paradigm. One-fourth came through law school graduation, which constituted an emerging paradigm. By 1910 eighty percent of all new lawyers were law school graduates, a dramatic change.<sup>22</sup> Credit for the rise of law

<sup>20.</sup> Thomas S. Kuhn developed the concept of paradigms in the sciences, which he took to be "the universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners." Thomas S. Kuhn, The Structure of Scientific Revolutions at x (1962). Because of the overt disagreements he observed between social scientists about problems and methods, Kuhn did not see that his theory applied to them. *Id.* However, the theory subsequently proved useful in analyzing change and predicting and influencing the future. Joel Barker popularized the concept of paradigm shifts in Joel Arthur Barker, Paradigms: The Business of Discovering the Future (1992). Barker believed Kuhn described not just science but an aspect of the human condition. *Id.* at 39–40.

<sup>21.</sup> CRAMTON REPORT, supra note 3, at 10.

<sup>22.</sup> Peter del. Swords & Frank K. Walwer, The Costs and Resources of Legal Education: A Study in the Management of Educational Resources 32 (1974).

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schools and the fall of apprenticeships is sometimes given to Christopher Columbus Langdell. He introduced his "scientific" case method at Harvard, utilized to isolate what he believed to be the relatively few principles of the common law. However, Langdell had a much greater impact on what (doctrine, analysis and legal research, but not other skills), how (Socratic method), and by whom (university professors and not practitioners) students were taught in law school than on the number of students attending law school. He introduced his "scientific" case method at Harvard, utilized to isolate what he believed to be the relatively few principles of the common law. He introduced his "scientific" case method at Harvard, utilized to isolate what he believed to be the relatively few principles of the common law. He introduced his "scientific" case method at Harvard, utilized to isolate what he believed to be the relatively few principles of the common law. However, Langdell had a much greater impact on what (doctrine, analysis and legal research, but not other skills), how (Socratic method), and by whom (university professors and not practitioners) students were taught in law school than on the number of students attending law school.

Upon gaining monopoly status, law schools agreed at least in principle that one of their primary objectives is to train students for the practice of law.<sup>25</sup> They did so by conveying doctrinal knowledge and teaching the knowledge-based technical skills of legal analysis and research, as Langdell had advocated. Lawyers were still expected to pick up other skills in practice, making modest wages accompanied by modest expectations of productivity in their early years, if they could find jobs. Formation of professional identity was assumed, or an afterthought. Law firms could afford to have new lawyers spend time in each of their practice areas, earning little money for themselves or their firms but often becoming well-rounded lawyers. There being few graduate schools of business, many aspiring businessmen

<sup>23.</sup> Langdell desired to show the superiority of university-based legal education to apprenticeships, and that university professors would be better teachers than practitioners. His vision of law was that of a self-contained science consisting of a limited number of principles or doctrines, best discovered within the common law through the study of appellate decisions. His "scientific" approach denied the complexity inherent in the common law tradition, the status as law of decisions inconsistent with his relatively few principles and, consequently, the limitations of human intelligence for which the doctrine of *stare decisis* corrects through lessons of experience. Experience being irrelevant, there was no possibility that practitioners could teach anything about the law better than university professors. Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 181–84 (1993).

<sup>24.</sup> Also important in the triumph of law schools over apprenticeships were a rapidly growing U.S. population, the invention of the typewriter, and efforts of the organized bar to establish law as a learned profession. SWORDS & WALWER, *supra* note 22, at 32–33.

<sup>25.</sup> HERMAN OLIPHANT, SUMMARY OF STUDIES IN LEGAL EDUCATION BY THE FACULTY OF LAW OF COLUMBIA UNIVERSITY 18 (1928) (noting that without exception the then members of the Association of American Law Schools "set up as one of their prime objects to give the best preparation for the practice of the profession of law in any place where the English and American systems of law prevail.").

also pursued legal educations. Other law graduates entered government or business until they could secure legal employment or become financially secure enough to open their own practices. <sup>26</sup> Few complained about the narrowness of their educations in a buyer's market for legal services while contending with World War I, the Depression, World War II, the Korean Conflict, and a post-war rush of veterans to university campuses and law schools under the GI Bill. <sup>27</sup>

That complacency disappeared with the advent of a seller's market for legal services generated by a rapidly expanding economy in the 1960s. With an undersupply of lawyers and an oversupply of work, many lawyers were pushed into new practice situations for which they were ill prepared. The number of lawyers grew rapidly to meet demand,28 with the growth of large law firms being particularly noticeable.<sup>29</sup> Law school enrollments grew at an even greater rate than the profession<sup>30</sup> as law schools sought to accommodate the increased demand for legal services, a doubling of the twenty-two year-old population, applications from legions of well-qualified women previously excluded from legal education. Law firms had to pay substantially higher salaries across the board during this new seller's market for legal services. They and their clients needed new associates to be skillful and productive immediately.

They were not. The limitation of law schools to the case method of instruction and the abolition of the apprenticeship system had combined with the undersupply of lawyers to

<sup>26.</sup> Leary Davis, Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation, 16 CAMPBELL L. REV. 147, 149–51 (1994).

<sup>27.</sup> *Id.* The few complaints, primarily from legal realists, were cogent, though not always about the skills gap. The leading article addressing that subject was Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

<sup>28.</sup> Davis, *supra* note 26, at 153–55.

<sup>29.</sup> Id. at 160-61, 167-68.

<sup>30.</sup> Law school populations grew from 35,769 law students (obtaining a J.D.) in 1959 to 129,580 in 1991, declined slightly to 125,173 by 2000, then rose to 145,239 in 2009. The percentage of female law students rose from 3.5% of the total in 1959 to 47.2% in 2009, having previously risen to 49% in 2001 and 2002. Am. Bar Ass'n, First Year and Total J.D. Enrollment by Gender, 1947–2010, http://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/1947\_20 10\_enrollment\_by\_gender.authcheckdam.pdf.

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produce a skills training gap between law school and law practice. New lawyers (and many experienced lawyers) were simply not equal to the tasks posed by the increasing demands of commerce and the needs of the law firms that employed them. This combination produced a crisis of competence in the profession, heightened by criticism from Chief Justice Burger, who estimated that from one-third to one-half of lawyers practicing in federal courts were "not really qualified to render fully adequate representation." A host of committees, commissions, and task forces explored and made suggestions to improve the state of professional competence in various reports.

# A. Organized Bar Responses to the Crisis of Competence

ABA President David Brink summarized the efforts of the organized bar when he stated, "There is a single word to characterize the single dominant issue [for the legal profession] in the 1980s. That word is competence." The bar responded to its studies of competence with initiatives ranging from establishment and expansion of Continuing Legal Education (CLE) offerings to establishment of lawyer assistance programs that counseled broad ranges of lawyers, from those who were impaired to those seeking job counseling.<sup>34</sup>

<sup>31.</sup> Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227, 234 (1973).

<sup>32.</sup> See, e.g., AM. LAW INST.-AM. BAR ASS'N COMM. ON PROF'L EDUC., ARDEN HOUSE II: TOWARD EXCELLENCE IN CONTINUING LEGAL EDUCATION, THE REPORT OF THE SECOND NATIONAL CONFERENCE ON THE CONTINUING EDUCATION OF THE BAR (1964); Qualifications for Practice Before the United States Courts in the Second Circuit, 67 F.R.D. 159 (1975); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, 83 F.R.D. 215 (1979); CRAMTON REPORT, supra note 3; AM. BAR ASS'N SPECIAL COMM. FOR A STUDY OF LEGAL EDUC., LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS (1980); AM. LAW INST.-AM. BAR ASS'N COMM. ON PROF'L EDUC., A MODEL PEER REVIEW SYSTEM (Discussion Draft 1980) [hereinafter MODEL PEER REVIEW SYSTEM]; ENHANCING THE COMPETENCE OF LAWYERS, supra note 3; AM. BAR ASS'N, FINAL REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON PROFESSIONAL COMPETENCE (1983) [hereinafter FINAL REPORT ON PROFESSIONAL COMPETENCE].

<sup>33.</sup> Enhancing Lawyer Competence: ALI-ABA confab faces the issues, 67 A.B.A. J. 265 (1981) (internal quotation marks omitted).

<sup>34.</sup> Other bar initiatives included mandatory CLE, specialty examination and certification, special rules and testing for admission to practice in some federal courts, mandating of competent representation in codes of professional

While they encouraged these initiatives of practicing lawyers, the reports pointed to ABA-approved law schools as the one place that could best address the deficiency of skills in the profession. In 1983 the Final Report of the ABA Task Force on Professional Competence acknowledged the strength of law schools in teaching substantive law and developing analytical skills. But when it continued, "The problems and issues in American legal education involve chiefly the teaching of lawyering skills other than analytic reasoning . . . ," it signaled the emergence of a new paradigm in legal education, the shift from competence as knowledge to competence as knowledge plus skill.

# B. Law School Responses

"Unquestionably, the most significant development in legal education in the post-World War II era has been the growth of the skill training curriculum." Thus the 1992 MacCrate report was introduced, as it explored the strengths and shortcomings of legal education in closing the gap between law school and law practice. That statement was true, but new skills courses in law school were not the foreordained solution to the problem. Two decades earlier a leading study had concluded that the bar was better suited to provide that training and suggested responsibility for the education of new lawyers should be shared accordingly. The Association of American Law Schools (AALS) Carrington Committee suggested reorganizing the graduate legal

responsibility, enhanced lawyer discipline, "bridge the gap" courses for new law graduates, establishment of the National Institute for Trial Advocacy, proposals for peer review, standards and checklists for self-evaluation by individual lawyers and law firms, and the multiplication of specialty bars and sections (including law practice management sections).

<sup>35.</sup> FINAL REPORT ON PROFESSIONAL COMPETENCE, supra note 32, at 6.

<sup>36.</sup> AM. BAR ASS'N SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 6 (1992) [hereinafter MACCRATE REPORT].

<sup>37.</sup> Law schools had begun analyzing their problems in providing skills training well before Chief Justice Burger complained about the competence of lawyers appearing in federal court. Gordon Gee and Donald Jackson wrote a monumental 296-page article providing a history of the tension between practical and academic education for lawyers through the mid-1970s, detailing the pre-1975 studies referred to in this Article. E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competence*, 1977 B.Y.U. L. REV. 695.

education curriculum to produce a two-year Juris Doctor degree for professional generalists, with options for further practical or theoretical education.<sup>38</sup> Various recommenddations, including that of Chief Justice Burger,<sup>39</sup> echoed Carrington in suggesting work for the Juris Doctor degree should be shortened to two years, followed by practical training or a year in a lawyering school run by practicing lawyers.<sup>40</sup> While the arguments were compelling intellectually, the change they suggested was not convincing politically or emotionally to universities and law professors.

Law schools maintained the three-year course of study and began adding skills courses and clinics. The Ford Foundation had already provided a major impetus to the teaching of skills in clinical settings. Between 1958 and 1968 the Foundation funded several successful pilot and demonstration projects for clinics and the teaching of professional responsibility. In 1968 it established CLEPR, the Council on Legal Education Professional Responsibility,

A second cause of inadequate advocacy derives from certain aspects of law school education. Law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette as things basic to the lawyer's function. With few exceptions, law schools also fail to provide adequate and systematic programs by which students may focus on the elementary skills of advocacy. I have now joined those who propose that the basic legal education could well be accomplished in two years, after which more concrete and specialized legal education should begin. If the specialty is litigation, the training should be prescribed and supervised . . . .

Id.

<sup>38.</sup> CURRICULUM STUDY COMMITTEE, ASSOCIATION OF AMERICAN LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971. PART ONE. SECTION II, PROCEEDINGS, ASSOCIATION OF AMERICAN LAW SCHOOLS, 1971 ANNUAL MEETING, reprinted in HERBERT L. PACKER AND THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 93–329 (1972).

<sup>39.</sup> Burger, supra note 31, at 232.

<sup>40.</sup> Gee & Jackson, *supra* note 37, 845–56. The third-year lawyering school was the recommendation of former Stanford Dean Bayless Manning. Bayless Manning, *Law School and Lawyer Schools—Two-Tier Legal Education*, 26 J. LEGAL EDUC. 379, 382–84 (1974).

<sup>41.</sup> These projects were funded by providing grants totaling about 500,000 dollars to nineteen law schools between 1959 and 1965 through the National Legal Aid and Defender Association (NLADA) and the National Council on Legal Clinics (NCLC), plus another 150,000 dollars for teaching materials, then another 290,000 dollars to twenty-one law schools through AALS between 1965 and 1968. J. P. "Sandy" Olgivy, *The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1, 11–13 (2009).

with an immediate grant of 6,000,000 dollars toward the first five years and a commitment for an additional five years. By the end of 1972 CLEPR had granted 4,000,000 dollars to more than ninety law schools, and by 1980, almost all law schools in the country had at least one clinical course, though not all possessed the in-house structure CLEPR favored.<sup>42</sup>

Concurrently, law schools expanded opportunities for significant legal writing experiences. Eventually, most created faculty directorships for legal research and writing programs staffed with legal writing instructors to provide the feedback and opportunities for rewriting that were byproducts of work in the best law firms. Trial advocacy courses flourished, using NITA and related approaches and materials. The success of these programs encouraged development of other simulation experiences for students to apply doctrine in various lawyering roles, including interviewing, counseling, negotiation, arbitration, mediation, planning and the drafting of documents needed to effectuate plans. Unfortunately, with rare exception these courses were offered at the margins of the traditional core curriculum.

# C. Intermediate Evolution of Conceptions of Lawyering Competence

Before exploring emerging conceptions of competence in the twenty-first century that justify moving skills and leadership training to the core of the curriculum, it is worthwhile to examine intervening initiatives that presaged that movement. Three provide examples of divergent thinking that were important in broadening concepts of competence. The fourth, the MacCrate report previously cited, represents an admirable attempt to explore the nature and development of lawyering skills throughout the life of a lawyer. Unfortunately, in the process it also arrested development of expanding conceptions of competence, prematurely shifting to convergent thinking in the creative problem-solving process.<sup>43</sup>

<sup>42.</sup> *Id.* at 14–17.

<sup>43.</sup> Cognitive scientists generally divide the creative problem-solving process into four stages:

<sup>1.</sup> Preparation or saturation [Gathering information]

<sup>2.</sup> Incubation [Thinking about it]

<sup>3.</sup> Illumination or insight [Reaching a creative solution], and

### 1. The ALI-ABA Definition

In 1980 the American Law Institute-American Bar Association Committee on Professional Education (ALI-ABA) introduced a working definition of competence that expanded its scope beyond a mere trait. Its definition was iterative, detailing elements by which competence is measured:

Legal competence is measured by the extent to which an attorney,

- (1) [I]s specifically knowledgeable about the fields of law in which he or she practices,
- (2) [P]erforms the techniques of such practice with skill,
- (3) [M] anages such practice efficiently,
- (4) [I]dentifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention,
- (5) [P]roperly prepares and carries through the matter undertaken, and
- (6) [I]s intellectually, emotionally and physically capable.

Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.<sup>44</sup>

The definition is important because it makes performance the measure of competence, expanding the concept beyond that of a mere trait consisting of the possession of technical knowledge and skill. The majority of its elements emphasize conduct (performs, manages, identifies, bringing, prepares, and carries through).<sup>45</sup> The

HARRY NYSTRÖM, CREATIVITY AND INNOVATION 39 (1979).

The preparation or saturation phase's information provides the material for problem-solving. Divergent thinking, which provides many perspectives for problem-solving, is essential for collection of all of that information. Diversity, openness to new experience, a tolerance for ambiguity, willingness to redefine concepts, and intuitive ability join divergent thinking to create a broad range of possibilities for incubation and insight. Illumination or insight comes from convergent thinking, which should come only after adequate preparation and incubation. *Id.* at 39–41.

<sup>4.</sup> Verification [Testing the solution]

<sup>44.</sup> MODEL PEER REVIEW SYSTEM, supra note 32, at 11.

<sup>45.</sup> The fact that the definition of incompetence referred to the words performs, manages, identifies, prepares, and carries through as qualities rather than as actions reflects the power of the conception of competence as a trait.

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definition was ultimately adopted in the 1983 final report of the ABA Task Force on Lawyer Competence.<sup>46</sup>

# 2. Zemans and Rosenblom

In 1982, Francis Zemans and Victor Rosenblom expanded conceptions of competence beyond technical legal knowledge and skill when they asked Chicago lawyers to rate the importance of twenty-one skills and areas of knowledge. Ten of the twenty-one were viewed as important by three-fourths or more of the lawyers. Seven of the top twelve items were generic, not peculiar to the legal profession (fact gathering, marshalling facts so concepts can be applied, instilling others' confidence in you, and oral expression [ranked one to four], negotiating [eight], understanding the viewpoint of others [ten] and getting along with other lawyers [twelve]).<sup>47</sup>

# 3. The Cramton Report

In 1979 a task force of the ABA Section of Legal Education and Admissions to the Bar provided the most insightful examination of lawyer competence to that time. Known as the Cramton report, it pointed out that knowledge and skill, while necessary, are not sufficient to assure competent representation. It added to knowledge and skill a third element of lawyer competence, the "ability and motivation to apply both knowledge and skills to the task undertaken with reasonable proficiency." explained:48

The notion of competence must be expanded to include elements of character and professional responsibility in order to comprehend most of the factors necessary to assure an adequate level of professional service. Technical virtuosity does not translate into the routine rendition of high quality professional service unless it is disciplined and

<sup>46.</sup> FINAL REPORT ON PROFESSIONAL COMPETENCE, supra note 32, at 4.

<sup>47.</sup> Frances Kahn Zemans & Victor G. Rosenblum, The Making of a PUBLIC PROFESSION, 123-64 (1981). Top twelve items peculiar to the legal profession were ability to understand and interpret legal authority [5], knowledge of the substantive law [6], legal research [7], drafting legal documents [9], and ability to synthesize law [11].

<sup>48.</sup> CRAMTON REPORT, supra note 3, at 9.

controlled by proper attitudes, work habits, and values.<sup>49</sup>

The task force's recommendations called for law schools to develop more structured, coherent curricula; provide individualized instruction in fundamental lawyering skills to all students; provide instruction in other practice fields, such as trial practice, to all students desiring such instruction; enhance assessment and provide more comprehensive and detailed critiques; provide opportunities to do and redo tasks until professional quality is attained; and provide increasingly challenging assignments of broader scope in which students apply learned skills and knowledge.<sup>50</sup> Although it had stated that the notion of competence must be expanded to comprehend its essential factors, it did not recommend research devoted to that end.<sup>51</sup>

# 4. The MacCrate Report

Nine years after the Cramton report recommended expanding the profession's conception of competence, Minnesota Justice Rosalie Wahl, as chair of the ABA Section of Legal Education and Admissions to the Bar, appointed a task force to address that problem, among others. Its chair, former ABA President Robert MacCrate, reported that Justice Wahl charged the task force with answering the rhetorical questions, "Have we really tried to determine . . . what skills, what attitudes, what character traits, what qualities of mind are required of lawyers?" In 1992 the Report of the Task Force on Law Schools and the Profession (the MacCrate report) produced lists of fundamental skills and values that lawyers should acquire. However, beyond its brief articulation of four values, 53 it neglected to address the

<sup>49.</sup> Id.

<sup>50.</sup> Id. at 3-4, 16-18.

<sup>51.</sup> It did recommend research to address how relevant skills are learned. *Id.* at 5. This recommendation was included in the research agenda of the MacCrate report's recommended American Institute for the Practice of Law. MACCRATE REPORT, *supra* note 36, at 413.

<sup>52.</sup> Robert MacCrate, Keynote Address—The 21st Century Lawyer: Is There a Gap to be Narrowed? 69 WASH. L. REV. 517, 521 (1994).

<sup>53.</sup> Its treatment of values has been criticized for assigning values a lower priority than skills, not explaining them coherently, and not addressing their conflict with other values of the Bar and Academy. Russell G. Pearce, MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values, 23 PACE L. REV. 575, 576 (2003). The report never defined

issue of attitudes, character traits and qualities of mind as charged by Justice Wahl. In failing to undertake that exploration it stymied, for a while, the expansion of conceptions of lawyer competence.

The MacCrate report did make two substantial contributions to a better understanding of competence. First, it emphasized that professional development is a continuum, beginning with pre-law education and experience and proceeding throughout a lawyer's career. Second, when it catalogued its ten fundamental skills, it elaborated upon the components of each skill to a considerable extent.<sup>54</sup> One can understand the report's emphasis on skills. For two decades skills had provided the primary prism through which competence had been viewed. However, its emphasis on skills was unduly narrow. The task force chose to concentrate on "the teaching of lawyering skills other than analytic reasoning . . . ,"55 and to ignore the Cramton report's plea that conceptions of competence be expanded. Its work was consequently truncated in several ways, minimizing the roles of both knowledge and personal attributes. acknowledging that knowledge was an essential complement to skills and values in producing competent representation, it concluded that the issue of knowledge "is sufficiently distinct from an analysis of skills and values" that it should not attempt to address knowledge.<sup>56</sup>

Its cursory nod to what it called values,<sup>57</sup> without an examination of the nature of values or their place in a taxonomy of motivators, fell far short of an examination of the complex of habits, attitudes, values, character traits, and qualities of mind that interested Cramton and Wahl. The

values. A generally accepted definition of a *value* is "an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence." MILTON ROKEACH, THE NATURE OF HUMAN VALUES 5 (1973).

<sup>54.</sup> Its ten fundamental skills are Problem Solving, Legal Analysis and Reasoning, Legal Research, Factual Investigation, Communication, Counseling, Negotiation, Litigation and Alternative Dispute Resolution Procedures, Organization and Management of Legal Work, and Recognizing and Resolving Ethical Dilemmas. MACCRATE REPORT, *supra* note 36, at 138–207.

<sup>55.</sup> FINAL REPORT ON PROFESSIONAL COMPETENCE, supra note 32, at 6.

<sup>56.</sup> MACCRATE REPORT, supra note 36, at 125.

<sup>57.</sup> The four fundamental values were Provision of Competent Representation; Striving to Promote Justice, Fairness, and Morality; Striving to Improve the Profession; and Professional Self-Development. *Id.* at 207–21.

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decisions to eliminate knowledge and to limit personal attributes to four isolated values deprived the task force of the ingredients to construct a comprehensive theoretical framework for lawyering. In effect, despite its other virtues, the Task Force elected to replow only a portion of the ground Cramton and Zemans and Rosenblum had broken, leaving fallow fertile fields of interdisciplinary study that pioneers of leadership education were finding fruitful.<sup>58</sup>

Seven of the ten MacCrate skills, (problem solving, communication, factual investigation, counseling, negotiation, organization and management of legal work, and recognizing and resolving ethical dilemmas) can be viewed as leadership

58. That election is puzzling and inconsistent with the task force's prescriptions for its first skill of problem solving. Its analysis of problem solving included elements of classic planning processes: assessment, goal setting, resource analysis, action planning with timetables, alternative strategies, resolution of goal and plan conflicts, openness to new information, plan revision and implementation. Id. at 141-48. The commentary emphasized the need for creativity and judgment, recognizing that the capacity for sound judgment had to be accompanied by willingness to exercise judgment independently, a conception of sound judgment (more than a state of being) consistent with the conception of competence as situationally appropriate conduct. Id. 150-51. The centrality of planning to the work of lawyers is evidenced by the fact that many of these elements also appear in task force analyses of factual investigation: communication, counseling and negotiation. Id. at 164-67, 173, 178-80, 182-84, 185-88. For examples of interdisciplinary work being mined by leadership scholars at the time, see HOWARD GARDNER, FRAMES OF MIND (1983); EDGAR SCHEIN, CAREER DYNAMICS 124-72 (1978); A. H. MASLOW, MOTIVATION AND PERSONALITY (1954); C. P. Alderfer, An Empirical Test of a New Theory of Human Needs, 1969 Org. Behav. & Hum. Performance 4, 142-75; Milton ROKEACH, THE NATURE OF HUMAN VALUES (1973); DAVID KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (1984); ISABEL BRIGGS MYERS, GIFTS DIFFERING (1980). David Kolb, Milton Rokeach, Isabel Myers, Will Schultz, David Campbell, Robert and Joyce Hogan and a host of others were devising valid, reliable and non-judgmental psychological instruments to assess aspects of normal personality, the understanding of which provide bridges to enhanced competence. See KOLB, supra; Rokeach, supra; Myers, supra; W. C. Schutz, FIRO: A Three DIMENSIONAL THEORY OF INTERPERSONAL BEHAVIOR (1958); DAVID P. CAMPBELL ET AL., MANUAL FOR THE CAMPBELL INTEREST AND SKILL SURVEY (1992). DAVID CAMPBELL, MANUAL FOR THE CAMPBELL LEADERSHIP INDEX (1992); DAVID P. CAMPBELL & SUSAN P. HYNE, CAMPBELL ORGANIZATIONAL SURVEY MANUAL (2d ed. 1992); ROBERT HOGAN ET AL, THE HOGAN GUIDE: INTERPRETATION AND USE OF HOGAN INVENTORIES (2007) (The Hogan Guide provides fundamental information about three Hogan Inventories: the Hogan Personality Inventory, the Hogan Development Survey, and the Motives, Values, Preferences Inventory.). They and other theorists were utilizing research to develop theories of leadership and leadership development that offered potential frameworks for development of theories of lawyering.

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skills used in legal contexts. A rich interdisciplinary literature on planning, problem solving (skill number one). and creativity was available to the task force, 59 including work that explored planning as a political and interpersonal process as well as a cognitive process.<sup>60</sup> In its commentaries on problem solving and negotiation, the task force referred to several law review articles that suggested interdisciplinary avenues to development of a theory of lawyering and legal problem solving.<sup>61</sup> As it had with respect to knowledge, the task force deliberately elected to leave those opportunities unexamined.62

<sup>59.</sup> E.g., RUSSELL L. ACKOFF, THE ART OF PROBLEM SOLVING (1978); NYSTRÖM, supra note 43; GEORGE A. STEINER, STRATEGIC PLANNING (1979); ROBERT WILENSKY, PLANNING AND UNDERSTANDING (1983).

<sup>60.</sup> C. E. Lindblom, The Science of Muddling Through, 19 Pub. Admin. Rev. 78 (1959); John M. Bryson & Andre L. Delbecq, A Contingent Approach to Strategy and Tactics in Project Planning, J. AM. PLAN. ASS'N (1976); Richard C. Bolan, Community Decision Behavior: The Culture of Planning, 37 J. Am. INST. PLANNERS 301 (1969).

<sup>61.</sup> Anthony Amsterdam, Clinical Legal Education — A 21st Century Perspective, 34 J. LEGAL EDUC. 612 (1984) (criticizing Twentieth Century legal education in part for not realizing that critical analysis, planning and problem solving constituted the "conceptual foundations for practical skills and much else" and failing to teach students to learn law by practicing law); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem-Solving, 31 UCLA L. REV. 754 (1984) (citing work from economics, game theory, anthropology, and other social sciences); David R. Barnhizer, The Clinical Method of Legal Instruction: Its Theory and Implementation, 30 J. LEGAL EDUC. 67, 102–08 (1979) (recognizing that relaxation often falls between the incubation and insight steps in the creative process outlined at supra note 43 of this Article in developing conceptions, and relating the relevancy of the work of the psychologist Carl Rogers and the sociologist Erving Goffman).

<sup>62.</sup> With respect to planning and problem-solving theory, the task force decided to emphasize only aspects of problem solving "essential to minimum competency," and "therefore some of the more sophisticated aspects described in the literature were excluded." MACCRATE REPORT, supra note 36, at 149. With respect to negotiation skills, "[T]he Statement consciously excludes a more extensive development of theoretical aspects of the negotiation process . . . [w]hile an understanding of these theoretical aspects of negotiation is certainly conducive to effective negotiation, it was felt that such an understanding is not critical for minimum competency in using the skill of legal negotiation." Id. at 190 (emphasis added). These decisions to discount theory seem inconsistent with the MacCrate values of competent representation and self-development, which encourage reading about and taking courses in other relevant disciplines. Id. at 207-12, 218-21. It also ignores the importance of the saturation or preparation stage of the creative process, see *supra* note 43, and of the thought or cognition stage in the acquisition of competence and expertise discussed in Part II of this Article.

As a consequence, the legal literature remained far less advanced with respect to competence than the leadership literature. In legal education, the applied behavioral sciences remained isolated with skills training at the margins of the core curriculum. The organized bar's consideration of personal attributes in addition to knowledge and skill was limited to an exploration of lawyer impairment as a personal characteristic that could limit competence, 63 an approach also taken by the MacCrate report.<sup>64</sup> Personal attributes were thus viewed only as a barrier and not as a bridge to competence, leaving the problem of competence only partially solved.

Herbert Simon has stated that problem solving can be called creative when the problem as initially posed is vague and ill-defined, so that part of the task is to formulate the problem itself.<sup>65</sup> Had the problems posed by Justice Wahl and wrestled with by the Cramton report—those relating to the complex of personal attributes and behaviors that translate knowledge and skill into competent representation—been better defined, they might have been better solved and led to a general theory of lawyering.

# D. Reemergence of Divergent Thinking About Competence in the Twenty-First Century

Undefined or poorly-defined problems do not go away merely because they are not articulated. People ultimately respond to them, some through action, some through study and some through both. Five twenty-first century responses to the competence problem are noteworthy: a revised definition of lawyer competence in Canada's Rules of Professional Conduct, the latest Carnegie report, education's bestcompendium oflegal practices for development of competence, creation of a third-year "lawyering school" at Washington and Lee, and leadership education initiatives at several law schools. Each response provides an example of divergent, expansive thinking about lawyer competence and its development.

<sup>63.</sup> AM. LAW INST.-AM. BAR ASS'N, A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW: STANDARDS, METHODS AND SELF-EVALUATION 49-52 (1992).

<sup>64.</sup> MACCRATE REPORT, supra note 36, at 208-09, 212.

<sup>65.</sup> HERBERT A. SIMON ET AL., MODELS OF THOUGHT 144, 145 (1979).

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### The Canadian Definition

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In 2000 the Law Society of Upper Canada (Ontario) adopted a disciplinary rule that made explicit that personal attributes, like knowledge and skill, are necessary for competence. 66 Like the ALI-ABA definition of competence, it is iterative, expanding ALI-ABA's list of lawvering functions from six to eighteen, but first stating, "'competent lawyer' means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client . . . . <sup>67</sup>

The Canadian definition represents an important step toward the Cramton goal of expanding our conception of lawyer competence. In the process it solved two problems posed by the Cramton report. The task force charged with examining and defining competence:

- 1. Rejected the conception of competence as a trait or state of being and identified competence as conduct, stating, "It is not what lawyers can do that is important, but what they do do. It is the manner in which the skills, abilities and attributes lawyers are expected to have are interwoven to serve client needs that forms the key to the definition of competence."68
- 2. Emphasized that the definition was not intended to address the standards of competence. Rather, the appropriate standard to apply in a particular instance would be a part of the analysis, determined in the context of all the circumstances of a matter being considered, 69 i.e., the standard to be determined for the conduct would be situational appropriateness.

Situational appropriateness of conduct is thus evaluated independently of the result it obtains. It is dependent not on

<sup>66.</sup> The rule was intended to be holistic, inclusive, framed in active language, and to describe the appropriate interweave among lawyering skills, knowledge and attributes. THE LAW SOCIETY OF UPPER CANADA, COMPETENCE TASK FORCE—FINAL REPORT, REPORT TO CONVOCATION 3-4 (1997) (hereinafter REPORT TO CONVOCATION). I am grateful to Simon Chester, Jim Varro, Derry Millar and Gavin McKenzie of the Ontario Bar for their assistance in exploring the work of The Law Society of Upper Canada and the broader Canadian legal profession, and especially to Simon Chester for a broad range of insights.

<sup>67.</sup> LAW SOCIETY OF UPPER CANADA RULES OF PROFESSIONAL CONDUCT Rule 2.01 (Toronto: LSUC, Nov. 2000) (emphasis added).

<sup>68.</sup> REPORT TO CONVOCATION, supra note 66, at 3.

<sup>69.</sup> Id. at 4.

the result, but on the extent to which theory supports the manner in which knowledge, skills, and attributes of lawyers are interwoven to achieve a desired result.

# 2. The Carnegie Report

While not focusing explicitly on competence as an outcome, the latest Carnegie report. Educating Lawyers: Preparation for the Practice of Law, 70 talks about how best to produce competent lawyers. In calling for comprehensive, integrative reform of legal education, it rectifies the MacCrate report's separation of knowledge from skills and values.<sup>71</sup> It notes that collective reforms over the years, such as clinical education and interdisciplinary study, have been incremental and additive rather than comprehensive in nature, creating pressures to do too much in too little time, and ignoring the potential for synergy offered by the coalescence of theory and practice.<sup>72</sup> It recommends more experiential learning, integrating within the curriculum three different professional apprenticeships: the intellectual or cognitive, the practical or skills-based, and the ethical-social within which one's professional identity is formed.<sup>73</sup> It also recommends transitioning from the dominant summative evaluation of legal education to the more formative evaluations favored in leadership development.<sup>74</sup> The Carnegie report predicts that integration of the three apprenticeships would generate mutual positive transformations of each, 75 akin to synergy that comes from the interweaving of personal attributes with knowledge and skill.<sup>76</sup>

# 3. Best Practices

The Carnegie report favorably cites at several places the 2006 study, Best Practices for Legal Education. <sup>77</sup> Best

<sup>70.</sup> SULLIVAN ET AL., supra note 2.

<sup>71. &</sup>quot;Expert judgment requires not the separation but the blending of knowledge and skill." *Id.* at 172.

<sup>72.</sup> Id. at 189-93.

<sup>73.</sup> Id.

<sup>74.</sup> Id. at 172-77.

<sup>75.</sup> Id. at 200.

<sup>76.</sup> Each apprenticeship corresponds to an element of competence: the cognitive with knowledge, the practical with skill, and the social-ethical with personal attributes.

<sup>77.</sup> STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2006).

*Practices* argues for context-based legal education, the problem method, clinical experiences, simulations tailored to allow students to learn doctrine and to practice professional skills in applying that doctrine, in short, to learn to learn by doing. It is rich with examples of opportunities for formative evaluation using the problem method in simulated practice contexts, including the feedback the student gets from the work itself, a staple of leadership education.

### 4. Washington and Lee University School of Law

In 2010, Washington and Lee University School of Law began devoting its entire third year to experiential education—what could be called a lawyering school for development of competence. With the exception of a full-year professionalism course, students spend their third year in two-week litigation and transactional skill immersions, a client contact clinic, service learning, and a series of courses built around complex simulations that blend the cognitive, practical, and ethical apprenticeships advocated by the Carnegie report. In a typical course a student might learn bankruptcy law while engaged in a complex simulation that requires her to apply the law she learns, as she would in practice if given an assignment in a field she had not studied in law school.

While Washington and Lee's conscious goal was to build a context-based program of experiential learning for legal, and not leadership, competence, the relationship between law and leadership becomes apparent when one realizes that of the six development goals of the third year, only legal writing would be considered a pure technical skill. Strategic thinking, project management, interpersonal skills, and values are all leadership as well as lawyering subjects. The means for achieving the final development goal of maturity are described as challenge, mentors, feedback, introspection, development and improvement, all elements of leadership

<sup>78.</sup> Washington and Lee's New Third Year Reform, WLU.EDU, http://law.wlu.edu/thirdyear/ (last visited Apr. 6, 2012). I am grateful to Jim Moliterno for the time he took to discuss Washington and Lee's program with me.

<sup>79.</sup> Jack Mudd has suggested that applying the law in simulations will likely lead Washington and Lee students to improve their knowledge of substantive law. J. O. Mudd & J. W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 26–27 (1988).

development's spiral of experience.

Given that seventy percent of the MacCrate report's lawyering skills are also leadership skills, and that over eighty percent of Washington and Lee's third year development goals also relate to leadership development, it is likely all law schools are providing at least some leadership education, whether they realize it or not. Leadership education develops personal attributes crucial to competence, and it can lead to improvement of strategies and initiative in employing knowledge, skills and personal attributes.

# 5. Law School Leadership Initiatives

Several law schools have developed leadership initiatives. Early pioneers include Santa Clara University School of Law, which has offered a leadership course since 2005. Its dean, Don Polden, teaches a second course for leaders of student organizations. He also hosts an annual Leadership Roundtable at which law school faculty and staff conducting research and developing leadership courses and programs are invited to share their work and perspectives. They are joined by law firm professionals and general counsel who work in the area of leadership education and development for lawyers.

Several other law schools also have leadership initiatives in place. The University of Maryland School of Law, which has offered a course in leadership development for women since 2002, has created a Leadership, Ethics and Democracy program (LEAD) with the assistance of the Fetzer Institute. It has a research component and is developing additional leadership courses and materials.<sup>81</sup> Ohio State has a Program on Law and Leadership that features a Lawyers as Leaders course.<sup>82</sup> Since its founding in 2006, Elon University School of Law has required first- and second-year leadership development courses focusing on leading oneself and leading teams, respectively; students may elect a third-year capstone

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<sup>80.</sup> Leadership Education Roundtable IV: How We Teach: Developing Core Competencies on both Sides of the Gap, LAW.SCU.EDU, http://law.scu.edu/leadership/index.cfm (last visited Apr. 6, 2012).

<sup>81.</sup> *LEAD Initiative*, LAW.UMARYLAND.EDU, http://www.law.umaryland.edu/programs/initiatives/lead/ (last visited Apr. 6, 2012).

<sup>82.</sup> Initiatives, MORITZLAW.OSU.EDU, http://moritzlaw.osu.edu/pll/initiatives/index.php (last visited Apr. 6, 2012).

leadership experience.<sup>83</sup> The University of St. Thomas in Minneapolis is home of the Holloran Center for Ethical Leadership in the Professions and offers three courses on ethical leadership in the School of Law.<sup>84</sup> Stanford Law School<sup>85</sup> and Harvard Law School<sup>86</sup> now offer leadership courses as well.

Leadership initiatives tend to extend the reach of the law schools into the rest of the university and its disciplines. They also lead to collaborations with other law schools. Santa Clara has drawn on the expertise of Barry Posner, twelve-year Dean and Professor of Leadership at its Leavey School of Business and an internationally renowned leadership scholar and best-selling leadership author. University of Maryland School of Law has benefitted from the participation of Georgia Sorenson, Founder Distinguished Leadership Scholar at the James MacGregor Burns Academy of Leadership at the University of Maryland. Elon Law faculty members have worked with leadership educators from the Center for Creative Leadership and Elon's Love School of Business and College of Arts and Sciences.

The courses being taught at these schools can be viewed as additive, at the margins of their curricula, as the Carnegie report described skills courses generally. However, when one reads the schools' websites one sees that the courses are parts of initiatives, and that the movement of the initiatives is holistic, joining law school and law practice. One also sees that unlike many other skills courses, law and leadership courses introduce and apply rich theory developed over the years in the field of leadership education. The rest of this Article explores how that theory validates this essay's expanded conception of competence, how it might facilitate the integration of the Carnegie report's three apprenticeships, and its potential to contribute to a general theory of lawyering. A good place to begin that exploration is with cognitive science.

<sup>83.</sup> The Leadership Program, ELON.EDU, http://www.elon.edu/eweb/law/leadership/default.xhtml (last visited Apr. 6, 2012).

<sup>84.</sup> Hollaran Center for Ethical Leadership, STTHOMAS.EDU, http://www.stthomas.edu/hollorancenter/ (last visited Apr. 6, 2012).

<sup>85.</sup> Leadership, LAW.STANFORD.EDU, http://www.law.stanford.edu/program/courses/details/618/Leadership/ (last visited Apr. 6, 2012).

<sup>86.</sup> Course Catalog, LAW.HARVARD.EDU, http://www.law.harvard.edu/academics/curriculum/catalog/index.html (last visited Apr. 6, 2012).

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### SANTA CLARA LAW REVIEW

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# II. STAGES IN THE ACQUISITION OF COMPETENCE AND EXPERTISE

Lawyers become competent, or more competent, by adapting when put in new situations.<sup>87</sup> That is why it is considered appropriate for lawyers to undertake representation of clients in situations they are not yet competent, but may become competent, to handle.<sup>88</sup> They respond to the challenge of the new situation to become more competent through study and preparation. However, they must first have "learned to learn" from experience, after which they are able to teach themselves.

Three different but compatible models of this process have been helpful in explaining how these adaptations proceed—how basic and advanced levels of competence are attained in stages. The models are important because they suggest situationally appropriate approaches to the acquisition and enhancement of competence at each stage of development. They are the three-phase model of Paul Johnson and associates, a four-level model attributed to Noel Burch of Gordon Training International, and the five-stage model of Dreyfus and Dreyfus.

The most illuminating of the models, because it links the acquisition of knowledge, skill, and interpersonal awareness in a legal context, is Johnson's research. A basic premise of the Johnson study is that one acquires competence and expertise over the course of three phases:

**Phase I. Thought (or Cognition).** In this phase novices think about what it is that is being done. They acquire knowledge about what actions are appropriate in various circumstances (and the relationships between action and circumstance) from instruction or from observation and evaluation of their own performance.

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<sup>87. &</sup>quot;[W]e can now suggest a framework for interpreting behavior in which people (attorneys included) are seen as adaptive, rule-following agents. What people are at any given point are products of the adaptations that they have made, which are in turn functions of the situations they have encountered, and their fundamental human attributes—their genetic heritage. An individual adapts to the situation he encounters, and in the process of doing so, changes himself."

Paul E. Johnson et al., Expertise in Trial Advocacy: Some Considerations for Inquiry into Its Nature and Development, 7 CAMPBELL L. REV. 119, 136 (1984). 88. MODEL RULES OF PROF'L CONDUCT § 1.1 cmts. 2, 4 (2002).

**Phase II. Association.** In this phase novices practice the processes about which they obtained knowledge in Phase I, while thinking about the processes, until they become efficient and proficient in their utilization.

**Phase III. Automaticity.** In this phase proficient practitioners over-practice processes to the point that they can be done automatically, without thinking.<sup>89</sup>

The distinction between competence and expertise is primarily a matter of degree of the proficiency and efficiency with which tasks are performed ("to be expert implies more than to be competent"). What the expert does automatically, the non-expert lawyer must think about, practice, evaluate, and otherwise adapt situationally in order to perform competently. Most of those adaptations will involve the acquisition of knowledge about law and about the situations in which it might be applied.

In comparing expert and non-expert trial attorneys, Johnson concluded that experts are better at analyzing legal situations<sup>91</sup> and anticipating possible future situations,<sup>92</sup> have more adequate implicit psychological theories,<sup>93</sup> and are more sensitive to the nuances of particular legal contexts.<sup>94</sup> He states, "A key distinguishing characteristic for differentiating expert and non-expert lawyers may be the willingness and ability of the expert to modulate his actions according to the specific situation, and to take a large number of factors into account in deciding on a course of action."<sup>95</sup> The core of

<sup>89.</sup> Johnson et al., supra note 87, at 129. Johnson states that:

The result of Phase III learning is that the relationships which form the basis for actions are placed beyond reach of conscious awareness . . . . This state of affairs is not the result of any lack of interest in understanding what they know on the part of experts, but rather the end product of a process of cognitive adaptation. The result of our evolutionary history is a relatively large long-term (unconscious) memory for storing facts, principles, events and knowledge of various sorts, and a severely limited conscious awareness which forces us to automate or place into unconscious memory most of the things that are done with any regularity, and especially those things in which we become highly practiced.

Id. at 129-30.

<sup>90.</sup> Id. at 126.

<sup>91.</sup> *Id.* at 140.

<sup>92.</sup> Id. at 140-41.

<sup>93.</sup> Id. at 141.

<sup>94.</sup> Id. at 141-42.

<sup>95.</sup> Id.

expert ability is knowledge. But it is not knowledge in the sense of knowing how to perform one specific task very well, which Johnson calls expertness<sup>96</sup> and distinguishes from expertise. It is rather knowledge of a scope sufficiently broad to provide solutions to a range of situations arising within an environment, combined with the ability to apply that knowledge. This operative knowledge,<sup>97</sup> which permits effective lawvering, consists of two components:

- 1. Knowledge of law, derived from the lawyer's adaptation to legal training; and,
- 2. Knowledge of people, derived from adaptation to social situations of all kinds, including those arising in legal environments.<sup>98</sup>

Effective lawyering is grounded in the coordination and simultaneous utilization of legal and social knowledge. Competence is acquired in the same manner as expertise. Cognition and association, the first two phases in the acquisition of expertise, are essential to proficient application of knowledge (competence) by lawyers, though the process need not proceed to the third phase of automaticity to insure competence. In analyzing the development of competence it is important to understand that it is not what tasks competent lawyers can perform, but rather what they know about law and people that enables them to perform those tasks.<sup>99</sup> Drawing upon some of the research previously referred to, Johnson concludes, "If it is true that deficiencies in knowledge of the law are not the real problem in training for expertise in trial advocacy, then the problem may in fact represent deficiencies in knowledge of people, or more likely, in utilizing this knowledge."100 The possession of both technical knowledge and skill and interpersonal knowledge and skill is key to competence, or situationally appropriate conduct, in domains of both law and leadership.

The Burch and Dreyfus models emphasize skill development. Though they largely ignore the broad

<sup>96.</sup> Id. at 127–28 (noting expertness is a characteristic of technicians and paraprofessionals in many fields and is achieved through training on specific and limited sequences of actions).

<sup>97.</sup> Id. at 127.

<sup>98.</sup> Id. at 138.

<sup>99.</sup> Id. at 126, 138.

<sup>100.</sup> Id. at 138.

knowledge and interpersonal components of comprehensive competence, they are helpful in making explicit concepts implied in the Johnson model. theory of four levels of competence is important because it adds a preliminary level to Johnson's novice phase, that of unconscious incompetence, in which one does not realize one is incompetent. Unless overcome, this state will prevent one from ever embarking on the path to competence. We will later see that ego defense mechanisms may impede one from proceeding from unconscious to conscious incompetence. Burch's four levels, almost ubiquitous on websites promoting training for skill development, 101 are Unconscious Incompetence, Conscious Incompetence, Conscious Competence, and Unconscious Competence.

The five-stage Dreyfus model<sup>102</sup> provides intermediate steps to Johnson's Association phase as one progresses from novice to expert, and within which one becomes competent. The five stages are Novice, Advanced Beginner, Competence, Proficiency, and Expertise.<sup>103</sup> Its purpose was to provide an analytical tool for addressing appropriate issues at each stage of talent development.<sup>104</sup> The Dreyfus Advanced Beginner, Competence, and Proficiency stages describe that progression from Instruction to Automaticity that occurs during Johnson's Association phase. They also make explicit that one can

<sup>101.</sup> See, e.g., Linda Adams, Learning a New Skill is Easier Said Than Done, GORDON TRAINING INTERNATIONAL, http://www.gordontraining.com/freeworkplace-articles/learning-a-new-skill-is-easier-said-than-done/ (last visited Apr. 6, 2012) (noting Learning Stages Model in the article was created by Noel Birch); Conscious Competence Learning Model, BUSINESSBALLS.COM, http://www.businessballs.com/consciouscompetencelearningmodel.htm visited Apr. 6, 2012); Moving from conscious incompetence to unconscious theUKpublicsector, THE CQI inhttp://blog.thecqi.org/index.php/2010/04/14/moving-from-consciousincompetenceto-unconscious-competence-in-the-uk-public-sector/ (last visited May 13, 2012); Conscious Competence Model, EDUCATIONAL ORIGAMI, http://edorigami.wiki spaces.com/Conscious+Competence+Modela (last visited Apr. 6, 2012).

<sup>102.</sup> Stuart E. Dreyfus, *The Five-Stage Model of Adult Skill Acquisition*, 24 BULL. SCI. TECH. & SOC'Y 177–81 (2004).

<sup>103.</sup> Id.

<sup>104.</sup> STUART E. DREYFUS & HUBERT L. DREYFUS, OPERATIONS RESEARCH CENTER, UNIV. OF CAL., BERKELEY, A FIVE-STAGE MODEL OF THE MENTAL ACTIVITIES INVOLVED IN DIRECTED SKILL ACQUISITION (1980), available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA084551. In this earlier paper, the Dreyfus brothers called the stages Novice, Competence, Proficiency, Expertise and Mastery. *Id.* at 15.

become competent without ever becoming an expert. 105

Theory underlying the models suggests that by diligently reading, analyzing, and synthesizing cases, statutes, and regulations law students can move well along the pathway to expertise as legal analysts during their law school careers. Students should also be given opportunities to practice other fundamental skills at Johnson's Association phase in context-based assignments. The greatest benefit of these opportunities will not necessarily be development of skill, but development and refinement of theories that can equip the emerging lawyer to continue to learn.

David Kolb defines learning as "the process whereby knowledge is created through the formation of experience." His model of a four-stage cycle of experiential learning includes four adaptive learning modes:

- 1. Engaged concrete experience
- 2. Observation and reflection about the concrete experience
- 3. Detached abstract generalization based on observation and reflection (thereby creating theory about the concrete experience)
- 4. Active experimentation informed by theory that results in new concrete experience. 107

In the leadership literature this process is often referred to as the "spiral of experience." Experience, without observation and reflection, produces little learning. When a law student critically observes her own performance (perhaps a class recitation for first year law students) and its impact

105. Counterparts among the three theories can be visualized thusly:

Burch's Levels	Johnson's Phases	Dreyfuses' Stages
1. Unconscious Incompetence		
2. Conscious Incompetence	I. Thought (Cognition)	1. Novice
		2. Advanced Beginner
3. Conscious Competence	II. Association	3. Competence
		4. Proficiency
4. Unconscious Competence	III. Automaticity	5. Expertise

See Adams, supra note 101; Johnson et al., supra note 87, at 129; Dreyfus, supra note 102.

<sup>106.</sup> KOLB, supra note 58, at 41.

<sup>107.</sup> David A. Kolb & Ronald Fry, *Towards an Applied Theory of Experiential Learning*, in Theories of Group Processes 33, 34 (Cary L. Cooper ed., 1975).

<sup>108.</sup> RICHARD L. HUGHES ET AL., LEADERSHIP: ENHANCING THE LESSONS OF EXPERIENCE 52-73 (6th ed. 2009).

on oneself and others; reflects upon why that experience unfolded as it did (perhaps because of inadequate preparation, misconception of doctrine, or anticipatory stressors); assimilates those observations into a theory of sound performance; uses the theory to formulate strategy to improve performance (perhaps more thorough preparation, mastery of definitions, or access to coaching); and returns to the arena to test the strategy and theory in another concrete experience, one learns. As the process repeats itself, the student's strategies become more effective, and her abstract theories encompass increasingly broader and deeper concrete experiences. Higher levels of abstraction are transformed into more complex concrete experiences. The successful coalescence of the practical (concrete experience) and theoretical (abstract generalization) is not a finished product, but an ongoing dialectic in which both practice and theory continue to improve.

Kolb emphasizes that "learning is best facilitated in an environment where there is a dialectic tension and conflict between immediate, concrete experience and analytic detachment." His model is very important for legal education, for it holds the key to the elusive goal of coalescence of the practical and theoretical. Indeed, it shows that one without the other is insufficient for competence. Higher levels of abstraction precede and support more complex concrete experiences that become the basis for observation and reflection that lead to new theory that adds to, refines, or substitutes for the initial theory. The more complex theory becomes the source of hypotheses that guide

<sup>109.</sup> Kolb & Fry, *supra* note 107, at 35.

<sup>110.</sup> *Id.* at 36. Crediting Goldstein and Scheerer with a list of eight abilities that great abstractness advances:

<sup>(1)</sup> To detach our ego from the outer world and from inner experience.

<sup>(2)</sup> To assume a mental set.

<sup>(3)</sup> To account for acts to oneself, to verbalize the account.

<sup>(4)</sup> To shift reflectively from one aspect of the situation to another.

<sup>(5)</sup> To hold in mind simultaneously various aspects.

<sup>(6)</sup> To grasp the essential of a given whole: to break up a given whole into parts to isolate and to synthesize them.

 $<sup>\</sup>left(7\right)$  To abstract common properties reflectively; to form hierarchic concepts.

<sup>(8)</sup> To plan ahead ideationally, to assume an attitude toward the more possible and to think or perform symbolically.

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experimental strategy for improving performance, which becomes a new concrete experience.

Part III will continue this theme, exploring two competence models that aid further development of theory, as well as bridges and barriers to competence.

#### III. MODELS OF SITUATIONALLY APPROPRIATE CONDUCT

Two models help explain the nature of lawyer competence. The first, a four-stage model of the legal professionalization process, shown as Appendix A, outlines the elements of lawyer competence. The second is a leadership model that explains how those elements are utilized. The first model's systematic categorization of lawyer roles, knowledge, skill, and personal attributes is designed to assist lawyers, law students, and law schools in improving the legal professionalization process.

### A. Roles

In the first model, the acquisition and utilization of different components of knowledge, skill, and personal attributes are assigned to four lawyering roles. The first three roles, analyst (Stage I), advocate (Stage II), and counselor-planner-implementer (Stage III), progress toward an ideal future state, that of the Stage IV lawyer. This is the lawyer who attains, coordinates, and simultaneously utilizes, smoothly and efficiently, and at appropriate times, all of the knowledge essential for competent representation. The Stage IV lawyer is the integrated professional, one who has synthesized the skills and knowledge of the preceding three stages with life experiences to arrive at a stage of continuing growth and self-realization. The Stage IV lawyer is one from whom we may expect situationally appropriate conduct.

#### B. Knowledge

The knowledge used by lawyers is categorized as either interdisciplinary (general) or legal. Both legal doctrine and general knowledge move from that needed to understand foundation fields (Stage I), to that needed in particular cases (Stage II), to that needed in broad ranges of interrelated cases and situations (Stage III). As the process progresses theory generally moves away from the special foundational provinces

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of the law school and toward theory about people and the broader world.

#### C. Skills

Skills that are peculiar to lawyers or that are cognitive and utilized primarily in legal contexts are categorized as technical skills. Those that involve primarily application of knowledge of human beings are categorized as interpersonal skills. Stage I skills involve things that can be done by oneself. Stage II skills involve things that are done to, for, or with a series of individuals, commonly in an adversarial context, and Stage III skills are often exercised with groups of people, frequently in non-adversarial contexts.

#### D. Personal Attributes

The model acknowledges that it is only through the development and utilization of personal attributes—the complex of attitudes, values, and other characteristics to which the Cramton report referred—that lawyers translate knowledge and skill into situationally appropriate conduct. The personal attributes that people bring to legal education, or are willing to develop, may well constitute the most important factor in the professionalization process. These attributes determine to what extent skills and knowledge will be attained, the degree to which the lawyer will be committed to utilize them, for what ends they will be utilized, and their ultimate impact.

A brief sample of personal attributes that are believed to facilitate situationally appropriate conduct in professional situations is included in the model. Like interpersonal skills, personal attributes are generic and not peculiar to the profession. It is probable that all of these attributes are being utilized during each stage of the professionalization process. But it is also probable that such attributes as a tolerance for ambiguity and complexity assume greater importance in the analyst stage; persuasiveness in the advocacy stage; and intellectual humility in the counselor-planner-implementer stage.

# Stage I: Analyst

Stage I is comprised of "learning to think like a lawyer" in the narrow sense of the phrase, the process law schools

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have traditionally considered their primary reason for being, and what Langdell considered to be clinical education in the 1870s. It includes learning new language systems; developing an understanding of the operation of the legal order; being able to extract rules and the reasons therefor from cases and legislation and to construct, inductively, theoretical systems which provide major premises from which the lawyer can then reason deductively; appreciating the importance of facts and their proof to the decisions of public officials; determining which way officials will in fact make decisions; and learning and utilizing modes of legal argument that can be utilized, within the open texture of the law, to influence those decisions. Stage I cognitive skills are disciplined, analytical, and convergent.

There is a difference between having knowledge about how to do something and being able to do it smoothly and efficiently, i.e., between having intellectual knowledge and having what Johnson called operative knowledge. We do not believe students have "learned" to think like a lawyer until they are proficient at legal analysis, synthesis, and expression, regardless of how well they can explain these processes. In first-year legal method courses and orientation programs students are instructed in how to "think like a lawyer"; throughout law school they practice until they are able to do it not only efficiently and proficiently, but also automatically. Thus Stage I legal analysis is the one place in which true expertise can be acquired in law school. That expertise provides the lawyer with the capacity for continued self-education and serves as a foundation for development of wider competence and continued professional progression. The reading of thousands of cases leads not only to automaticity, but also to the development of judgment.

# Stage II: Advocate

The skills movement has brought to law schools the tools to help facilitate the transition of the individual to Stage II. The Stage II lawyer applies Stage I skills and knowledge in the context of the adversary system, helping individual clients in individual cases. In learning or constructing legal doctrine involved in the case, the lawyer may use both Stage I convergent thinking and more divergent, plausible, hypothesis-oriented thinking. The lawyer must use non-legal

knowledge of the client's business and other environments to determine which facts should operate to bring about specific legal consequences. Gathering and marshalling facts involves the interplay of technical and interpersonal skills. The lawyer must interview, counsel, and negotiate. If negotiations are unsuccessful, the lawyer must be capable of handling all aspects of the administrative hearing or trial that follows, plus any appeal.

It can be argued that many lawyers proceed from Stage I to Stage III without acquiring the Stage II skills of trial and appellate advocacy and that an alternative model might better represent that reality. It is helpful to remember that just as there is a difference between knowing how to do something and being able to do it smoothly and efficiently, there is also a difference between knowing how, without being able, to perform a task (conscious incompetence) and being totally ignorant of how the task is performed (unconscious incompetence). While the Stage III lawyer may not need to practice all Stage II tasks until competence is attained, he or she must be aware of information that is relevant to the performance of those Stage II tasks. Likewise, advocates need Stage III knowledge and skill to develop strategy for adversarial proceedings.

# Stage III: Counselor-Planner-Implementer

Stage III activity is the MacCrate report's problem solving. It involves the bulk of lawyering activity, most of which is conducted in a law office and not in a courtroom. Stage III includes much of the "policy-making" orientation that Harold Laswell and Myres McDougal contended law schools should inculcate in their students, if policy is considered to be, as they defined it, "the making of important decisions which affect the distribution of values." They even explained, parenthetically, that policy-making is planning and implementation. Just as there is a Stage I "legal method", there is a Stage III "planning method".

That planning method is essentially a generic planning

<sup>111.</sup> Harold D. Laswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 207 (1943).

 $<sup>112.\,</sup>$  Id. at 272. Planning and implementation can be considered synonymous with strategy and initiative.

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process. Lawyers plan in the same way non-lawyers plan, but they bring to their task special Stage I and II skills and knowledge. Because the entire process depends upon initial valid assessments of all relevant environments, the amount of doctrinal, general, and interdisciplinary knowledge needed by the Stage III lawyer is enormous.

Stage III development is complex, not only because of the broad theoretical, skill, and doctrinal foundations on which it is constructed, but also because it involves the synthesis of potentially antagonistic planning and management roles. To be effective a lawyer must be able to balance the analytical and intuitive in planning and management, particularly at the policy-making level. Stage III planning method requires the same intellectual rigor and discipline as Stage I legal method; at the same time it requires greater flexibility of thought. Team approaches, both in working with clients and with other lawyers and support staff, assume greater importance. Leadership becomes an important skill.

Stage III lawyering provides tremendous opportunities for exercise of imagination and creativity, traits which some contend are stifled in the second and third years of law school. It is for the Stage III lawyer that law school must be graduate education, and it is the breadth and depth of the Stage III lawyer's work that make possible development of the Stage IV lawyer.

#### Stage IV: Integrated Professional

That a Stage IV lawyer has developed a philosophy of law does not mean that all Stage IV lawyers will share that philosophy. Indeed, that philosophy may change considerably over a lifetime. The acquisition of Stage IV status represents not the end of the professionalization process, but rather the construction of a new foundation for a continuing stage of growth and self-realization that is required in a world in which society and law are in continuous flux. Feedback loops in the model show the expansion of knowledge and skill throughout one's career, and the strengthening of personal attributes through experience, observation, reflection, and participation in a professional community.

The beauty of thinking of competence as situationally appropriate conduct is that one can behave like a Stage IV lawyer before becoming one. The experience of modifying

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perspective and behavior in adapting to new situations is a normal part of law practice. It is likely that most lawyers conduct most of their practice at the Association and Proficiency phases explained by Johnson and Dreyfus, respectively. One need not be an expert to be competent, or to be a Stage IV lawyer.

# E. Implications and Qualification of the Model

The greatest advantage of the model is that it provides an overall view of the professionalization process. Viewing the system of lawyers' work as a whole shifts attention, at least in part, from the courtroom to the law office. The range of skills and knowledge contained in the model demonstrates the improbability that law schools could produce completely competent lawyers in three years, but it also provides law schools a blueprint for construction of better foundations for development of competence over a career.

Any model will have disadvantages. Critics may offer two examples to demonstrate that the model does not comport with reality with respect to sequence. One is that early in their careers many lawyers settle into either office (Stage III) or litigation (Stage II) practices, <sup>113</sup> and concentrate solely on that area of practice, often in narrow specialties. The second example is provided by lawyers who proceed through both Stages II and III, but for whom the stages are transposed.

Certainly, many lawyers never complete the process; some Stage IV lawyers complete Stage III before Stage II; and with other lawyers Stages II and III progress coextensively. It is obvious that one stage does not wait for the preceding stage to end before it begins. All four begin at the same time, in law school. Methods of instruction in the first year of law school have always assured that at least some advocacy skills are developed there. Likewise, Stage I analysis and synthesis involve thinking about practical consequences implementation of doctrine, which naturally leads development of Stage II and Stage III strategies to avoid or maximize those consequences. Nevertheless, the process does

<sup>113.</sup> JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 328–33 (1982). Heinz and Laumann divided individual law practices into four quadrants, formed by the intersections of types of practices (litigation and office practice) with types of clients (corporate and personal).

have a natural sequence. Certainly Stage I accurately describes the consensus about the minimum that should happen in the first year of law school, and Stage IV describes the ideal to which most lawyers aspire.

What distinguishes the model from earlier conceptions of competence are its inclusion of personal attributes and the feedback loops that illustrate the dynamism involved in attaining, maintaining, and improving competence. Because an attribute of the Stage IV lawyer is "Appropriate behavior in differing contexts," it is important to emphasize the three personal attributes most responsible for that achievement.

They are self-awareness (self-knowledge), knowledge of others<sup>114</sup> and situational awareness, or knowledge of relevant environments. 115 For lawyers these attributes constitute the source of self-management strategies and strategies for dealing with others and with tasks that take advantage of strengths while protecting themselves and their clients from their weaknesses. 116 Lawyers develop these three critical attributes through experience in law school, law practice, and life. They usually do this on their own, utilizing the spiral of experience outlined in Part II. Too seldom is the acquisition of these attributes planned and facilitated in law school.

Neil Hamilton asserts that legal education continues to ignore the development of self-insight, which he considers the foundation for both ethical leadership and an ethical professional identity.<sup>117</sup> Leadership education, which relies heavily upon the applied behavioral sciences, provides a vehicle to address this shortcoming. As discussed in Part I, educators continue to develop frameworks applicable to both lawyering and leadership. Part of that framework is a taxonomy of motivating personal attributes that includes the self-concept, needs, values,

<sup>114.</sup> Howard Gardner refers to self-awareness as intrapersonal intelligence and to knowledge of others as interpersonal intelligence. They are two of the eight forms of intelligence, or frames of mind, he cataloged in 1983. GARDNER, supra note 58, at 237-76. Interpersonal intelligence includes "the ability to notice and make distinctions among other individuals and, in particular, among their moods, temperaments, motivations, and intentions." Id. at 239.

<sup>115.</sup> Situational awareness includes knowledge of the law, its instruments of enforcement and how to use them.

<sup>116.</sup> Davis, *supra* note 26, at 149.

<sup>117.</sup> Neil Hamilton, Ethical Leadership in Professional Life, 6 St. Thomas L. REV. 358, 369-70 (2009).

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attitudes, and interests in that order. This taxonomy, together with cognitive and behavioral preferences, provides excellent starting points for learning about ourselves and others, but there are barriers to that learning.

# F. Difficulties in Learning About Self and Others

It will be difficult to know others if we assume that others are, or should be, like we are; that whatever motivates us motivates them; that we share the same needs, values, attitudes, interests, and cognitive and behavioral preferences. Johari's Window can help us visualize difficulties and opportunities in knowing self and others. This heuristic device, a two-by-two matrix, is built around two simple facts, that there are some things we know about ourselves and some things we do not know (the vertical halves of the matrix); and there are some things about us that other people know and some things they do not know (the horizontal halves of the matrix). 119 We can use Johari's Window to visualize a horizontal insensitive line between what we know about others and what we do not know. While we may tend to assume that others are, or should be, like we are, the more we interact with others, the more the lessons of experience teach us that they are not necessarily like us, and that they

<sup>118.</sup> ROKEACH, *supra* note 53, at 1–21, 215–17. We can readily understand the interactions of these attributes by thinking about a job that meets our needs, provides interesting work, is consistent with our values, and allows us to use preferred behaviors and ways of thinking. We will have a good attitude about that job. In an uninteresting job that does not meet our needs, compels us to behave in ways that contravene our values, and requires that we use less preferred and unpracticed ways of thinking and behaving, our attitude is unlikely to be good.

<sup>119.</sup> Joseph Luft, Of Human Interaction: The Johari Model 13 (1969). The Johari Window was created by Joseph Luft and Harry Ingham (hence Johari) to explain and improve aspects of interpersonal communication and relationships within organizations. In constructing their two-by-two matrix, Luft and Ingham fashioned a window with four panes and gave each pane a name. In healthy organizations and relationships it is helpful for the open pane, what is known by both self and others, to be as large as possible. In other relationships, such as negotiations, it may be situationally appropriate to preserve much of the hidden window, keeping hidden from others, for instance, less favorable terms on which one might be willing to settle. The blind pane is dangerous to the lawyer, for if others know things about lawyers they do not know about themselves, others might be able to use that information to control the lawyer. The unknown pane represents an area of untapped growth and potential synergy, once it becomes accessible. Changing the size of any one pane necessarily changes all four panes. *Id.* at 14.

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may have different motivations than we. These lessons of experience serve to lower the level of our insensitivity to others. These lessons also equip us to engage in situationally appropriate conduct when interacting with others.

A second and more durable barrier to competence, and to self-awareness, can be visualized as a sensitive line, a vertical line between what we know of ourselves and what we do not know. Gaining insight into our selves can be difficult and sometimes painful. So much of our being is tied up in protecting our self-concepts that as we approach the sensitive line we tend to reject automatically information that is inconsistent with them, using such defense mechanisms as denial or repression. 120 Of course, much new information we receive about ourselves is consistent with our self-concepts. and as to that information it is relatively easy to reduce our blind spots. But our ego defense mechanisms may strongly resist information that we fear learning about ourselves. For that reason it is important that such information be objective, delivered in small bits over time, and in a supportive environment. 121 Two stories illustrate the strength of the sensitive line, its dangers, and the rewards of transcending it.

The pioneering clinical teacher Gary Bellow told a story that illustrates how the sensitive line can shield us from information we need in order to become more competent. The story involved the Valdez case, which he made famous when he created it for the ABA Dilemmas in Legal Ethics video series and reproduced and discussed it in *The Lawyering Process*. An illegal immigrant, Valdez, had a wreck when his brakes failed, and his son was killed. He employed an inexperienced solo practitioner, Beach, to represent him in a wrongful death action against the garage that failed to fix his brakes. Beach prepared poorly and was taken advantage of by an insurance defense lawyer, Kepler. The case was settled for a grossly insufficient sum. Professor Bellow said that the Valdez problem was based on a real case, and that several

<sup>120.</sup> DAVID A. WHETTON & KIM S. CAMERON, DEVELOPING MANAGEMENT SKILLS 55-57~(2005).

<sup>121.</sup> *Id.* The concept of the sensitive line was introduced in earlier editions of Whetton and Cameron. The concepts of the insensitive line and using Johari's Window to illustrate sensitive and insensitive lines are mine.

<sup>122.</sup> Gary Bellow & Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy 586–606 (1978).

years after the case he visited the lawyers on whom the Kepler and Beach characters were based. "Kepler" remembered the case and laughed about how he had treated the young lawyer. "Beach," on the other hand, recollected that he had done a good job. Since that time he had gained experience and become much more competent, gaining knowledge and skill and coming to understand law practice situations and contexts. When Professor Bellow re-explored the case with him from the perspective of the competent lawyer he had become, he was devastated. Beach's sensitive line had protected his self-concept, but at the expense of Valdez.

Anthony Amsterdam, the distinguished lawyer and clinical professor, 124 told a story that illustrates that difficulty in gaining self-awareness is not limited to novices and that flashes of insight about oneself can allow the expert lawyer to become even more accomplished. 125 He said that while watching first-year students prepare expert witnesses for direct examination he became aware that they often elicited information from the experts that he would not have obtained, despite the fact that he had vast experience in successfully preparing experts for trial. He became aware that when he interviewed experts he wanted them to feel that he was comfortable with their areas of expertise, so he would use their jargon and initiate the conversation on a relatively high plane. Consequently, he suspected, he often failed to return to a level that would best facilitate the development of testimony in ways that promoted understanding by a jury of He further suspected that the reason he had developed this pattern of behavior was that he wanted to appear more competent than he was. Because he was so good

<sup>123.</sup> Audio tape: unascertained source. Jeanne Charn confirmed that Professor Bellow had told her the same story. She is Director of the Bellow-Sacks Access to Civil Legal Services Project at Harvard Law School and Gary Bellow's widow. She collaborated with him in developing approaches to delivery of legal services, clinical legal education, and the ABA Dilemmas in Legal Ethics videotapes.

<sup>124.</sup> For a view of Professor Amsterdam's esteem in the profession, see Jeffrey Toobin, *Talk of the Town*, *The Bench: Comeback*, NEW YORKER, Mar. 26, 2007, at 33, *available at* http://www.newyorker.com/talk/2007/03/26/070326ta\_talk toobin.

<sup>125.</sup> Telephone interview with Tony Amsterdam, Professor of Law and Director of Clinical Programs, New York University School of Law (Aug. 28, 1990).

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at convincing his experts of his competence, they spoke to him on a higher plane than that at which they explained matters to his students. They incorrectly assumed that he already had information he in fact did not possess but might need. By becoming aware of his behavior and bringing its possible cause to consciousness, Amsterdam, an expert, became an even better lawyer.

As the Bellow and Amsterdam stories illustrate, a lack of self-awareness can be a barrier to competence, and enhanced self-awareness a bridge to enhanced competence. lawyers and leaders attend to what motivates others, but do not think critically about how their own needs, values, attitudes, interests, cognitive and behavioral preferences, and other personal attributes influence the way they practice law. Clarification of values and acknowledgement of needs is vital in the formation and maintenance of professional identity, particularly in a profession whose values may be suspect by much of the general population. 126 The need for power provides a good example of an attribute the sensitive line might prevent law students from exploring. Because the need for achievement is highly valued in America, while the need for power is viewed negatively, 127 lawyers and law students may resist thinking of themselves as powerful people, to the detriment of their development.

# G. Competence and Power

Ask a class of first-year law students during orientation how many of them came to law school because they wanted to become powerful people, and it is unlikely many will raise their hands. Being motivated by power as they understand it (or being the kind of person who would admit to being motivated by power) would be inconsistent with their self-concepts. The sensitive line would cause them to reject or suppress that information, which if acknowledged might make them seem manipulative, the kind of person who would use others as pawns. But ask if any would change their minds if power were defined as the potential to influence (a

<sup>126.</sup> For evidence of public attitudes, see Carl Sandburg's famous lines, "Why does a hearse horse snicker Hauling a lawyer away?" CARL SANDBURG, THE COMPLETE POEMS OF CARL SANDBURG 189 (1970).

<sup>127.</sup> DAVID C. MCCLELLAND, POWER: THE INNER EXPERIENCE 255 (1975).

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common definition of power in the leadership literature), <sup>128</sup> and almost all will respond affirmatively. Indeed, any who were not so motivated might want to rethink their career choice. It is likely that a need for power combines with the value of justice and other needs, values, attitudes and interests in stimulating vocational interests in law and politics. <sup>129</sup>

Defining power for new law students as the potential to influence provides a small dose of objective information in a supportive environment to aspiring lawyers who are likely wary of power. Once provided a positive conception of power, students naturally become interested in sources of power they can develop in law school. French and Raven provide a taxonomy of five sources of power: expert, referent (flowing from the strength of personal relationships), legitimate (power that accompanies a position), reward and coercive (power to punish). Students rightfully discern that the two most important sources will be expert power, which is what they come to law school to gain, and referent power, the development of which they ignore at their peril.

The conversation about power as the potential to influence naturally proceeds to the question that will be asked and answered in Part VI: for what purpose are competence and power employed? The national distrust of power is, of course, not groundless. The two faces of power need to be acknowledged. Like other personal attributes, the need for power can have a dark side, in which people *are* used selfishly as pawns. Power can be expressed as a

 $<sup>128.\</sup> B.\ M.\ Bass,\ Bass\ and\ Stogdill's\ Handbook\ of\ Leadership\ 227\ (3d\ ed.\ 1990).$ 

<sup>129.</sup> Of fifty-eight occupational samples that constituted the criterion groups for development of the Campbell Interests and Skills Survey (CISS), none ranked higher than lawyers, or even within half a standard deviation, in vocational interest in law and politics; only five ranked higher with respect to their interest in public speaking. Lawyers' interest in leadership ranked around the sixtieth percentile. DAVID P. CAMPBELL ET AL., MANUAL FOR THE CAMPBELL INTEREST AND SKILL SURVEY 105–06 (1992).

<sup>130.</sup> John R. P. French and Bertram H. Raven, *The Bases of Social Power*, 71 J. APPLIED PSYCHOL. 566–70 (1959).

<sup>131.</sup> McClelland, supra note 127, at 257.

<sup>132.</sup> The nature of dark side traits is explored in Robert T. Hogan and Joyce Hogan, Assessing Leadership: A View from the Dark Side, 9 INTL J. SELECTION & ASSESSMENT, Nos. 1/2, Mar.—June 2001, at 40—51. Exemplary attributes in an extreme form can turn strengths into weakness, as when dependability becomes perfectionism or creativity becomes eccentricity. We all have at least

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personalized or a socialized need. A personalized need is the dark side. It tends to be expressed in a selfish manner to enhance status. People with this personalized need exercise it for self-centered purposes and tend to lack self-control, being impulsive and uninhibited.<sup>133</sup> Socialized power, on the other hand, is exercised more maturely, unselfishly, in service to others or organizational goals, and is often revealed in empowering as opposed to autocratic styles.<sup>134</sup> People with this need seek power in order to accomplish worthwhile tasks, which should make law students feel good about their career choice and motivate them to become more competent and therefore more powerful.

As Paul Johnson showed, competent lawyering requires both knowledge of law, related to technical competence, and knowledge of people, related to interpersonal and leadership competence. Johnson's analysis and other leadership literature should motivate students to apply themselves to gain technical competence while remaining cognizant of the interpersonal aspects of lawyering. Over time, a lawyer's technical competence will become a byproduct of experience and not require the constant monitoring that it did in the lawyer's initial years of practice. At the same time interpersonal and leadership competence will assume greater importance, as professional opportunities expand because of the lawyer's demonstrated technical competence. Jabane 136

# H. The Leadership Model

Johnson's finding that lawyering competence requires the interplay of technical and interpersonal knowledge is mirrored in leadership research. The earliest studies of leadership behavior revealed two primary dimensions, one related to tasks or work product and the other related to people and relationships.<sup>137</sup> These emphases are reflected in leaders' technical competence and interpersonal competence,

one dark-side trait, and the extent of our success is dependent upon the self-knowledge that equips us to negate their untoward effects. HUGHES ET AL., supra note 109, at 222.

135. Johnson et al., supra note 87, at 138.

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<sup>133.</sup> McClelland, supra note 127, at 257-58.

<sup>134.</sup> Id. at 258-59.

<sup>136.</sup> HUGHES ET AL., *supra* note 108, at 64, 67.

<sup>137.</sup> Id. at 265-68.

respectively. For lawyers, general and doctrinal knowledge and technical legal skills represent the technical competence dimension, and interpersonal and leadership skills represent the interpersonal dimension.

One of the earliest models to incorporate the two dimensions as a guide to leadership development was Blake and Moulton's Leadership Grid®. It illustrated five management styles by plotting magnitudes of concern for people and concern for production on different axes of a grid. It assigned values of magnitude of concern from one to nine. Blake and Mouton encouraged development of the 9,9 Team Management style, which they argued was the one best way to lead, irrespective of situation. While effective and versatile lawyers and leaders are observed to be highly competent in both task and relationship arenas, several studies have shown that, contrary to the one best way view, utilizing those capabilities in styles other than 9,9 can at times be more situationally appropriate. 141

The situational leadership model devised by A. P. Hollander provides an expanded framework to explain why differing styles and strategies may be appropriate in differing situations with different people. Hollander views leadership as a transactional process, in which there is a social exchange of benefits between leader and follower. His model consists of three partially overlapping circles representing the leader,

<sup>138.</sup> ROBERT ROGERS BLAKE & JANE SRYGLEY MOUTON, THE MANAGERIAL GRID: KEY ORIENTATIONS FOR ACHIEVING PRODUCTION THROUGH PEOPLE 10 (1964).

<sup>139.</sup> The five original styles were: 1,1 Impoverished Management; 1,9 (low concern for product, high concern for people) Country Club Management; 5,5 Middle of the Road; 9,1 (high concern for product, low concern for people) Authority-Compliance Management; and 9,9 Team Management. ROBERT R. BLAKE & ANNE ADAMS MCCANSE, LEADERSHIP DILEMMAS-GRID SOLUTIONS 29 (1991). A Paternalistic style was subsequently added, in which individuals shifted rapidly between 1,9 and 9,1 behaviors without integrating the two styles. *Id.* at 98–121. A selfish Opportunistic style was also later added in which individuals adopt whatever other styles most advantage themselves. *Id.* at 172–99.

<sup>140.</sup> R. Blake & J. S. Mouton, Management by Grid® Principles or Situationalism: Which?, 6 GROUP & ORG. STUD. 439–55 (1981), available at http://gom.sagepub.com/content/6/4/439.full.pdf+html. They did recognize that leaders had preferred backup styles they would use if their dominant styles did not work. BLAKE & MCCANSE, supra note 139, at 43–45.

<sup>141.</sup> Hughes et al., supra note 108, at 270.

<sup>142.</sup> EDWIN P. HOLLANDER, LEADERSHIP DYNAMICS 7 (1976).

followers (corresponding to concern for people), and the situation (corresponding to concern for task), respectively. When "lawyer" is substituted for "leader" and those the lawyer is tasked with influencing for "followers," the model is as useful for analyzing lawyering as for leadership. Hollander described his view of leadership as an interactive process involving "three elements, each complex within itself. These are the 'leader,' with his or her personality, perceptions, and resources relevant to goal attainment; the 'followers,' with their personalities, perceptions, and relevant resources; and the situation within which all these persons

To be effective, the leader must engage in selfmanagement while attending to tasks imbedded in the situation and to relationships with others. The variables in those factors will determine situationally appropriate strategy, which occurs at the overlap of the three determinants, what Hollander refers to as "the locus of leadership."144 When there is a good fit between the leader's attributes and the demands of the situation, good results should ensue. When there is not a good initial fit between the leader and the situation or the leader and other people involved, to attain competence the leader must change, developing knowledge, skill or attributes or modifying behaviors so that they become situationally appropriate; or the leader must change characteristics of the situation in ways that better fit the leader's skills and personal attributes. A third strategy would be to change leaders to one who provides a better fit. 145 Three complementary theories of situational leadership help clarify and explain these strategies and their rationales.

# 1. Hersey and Blanchard

The most popular prescription for situationally appropriate leadership behavior comes from Hersey and Blanchard's Situational Leadership® model. They assert

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function."143

<sup>143.</sup> Id. at 8.

<sup>144.</sup> Id.

<sup>145.</sup> A leader who delegates responsibility for discrete tasks to someone who provides a better fit for those situations than he or she has changed the situation but might also be viewed as having changed leaders.

<sup>146.</sup> For two different presentations of the model, see Kenneth Blanchard

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that leadership behavior is more effective when both task behaviors and relationship behaviors are modified and coordinated to fit the situational readiness of the follower. The situational readiness of the follower consists of two elements: one's confidence (or willingness) and one's ability to perform a task. The two elements are matched to reveal four stages of readiness, from unable and insecure to able and confident. The situationally appropriate leadership styles for the four stages of follower readiness are Telling, Selling, Participating, and Delegating.<sup>147</sup> The leader must attend to both the follower and the situation, since a single follower may have different levels of readiness when confronting different situations. The model's major contribution is helping lawyers and leaders appreciate the utility of modifying behavior to fit the situation.

# 2. Fiedler

Fred Fiedler's research left him less confident with respect to our ability to master flexibility; he believed it more promising to train individuals to understand their leadership styles and to modify situations to suit those styles. His research concluded that leaders are motivated by both tasks and relationships, but that different leaders prioritize the importance of tasks and relationships differently. He determined that which they assign the higher priority is one of two critical factors affecting leadership effectiveness. He

ET AL., LEADERSHIP AND THE ONE MINUTE MANAGER (2000) and PAUL HERSEY, THE SITUATIONAL LEADER: THE OTHER 59 MINUTES (1985). Hersey calls the four leadership behaviors Telling, Selling, Participating and Delegating: Blanchard calls them Directing, Coaching, Supporting and Delegating. HERSEY, supra, at 63; BLANCHARD ET AL., supra, at 30.

147. For the unable and insecure level of readiness, Telling, with high task and low relationship behaviors, would be appropriate. As follower willingness grows, supportive relationship behavior increases and leadership style changes to Selling. For the able but insecure follower, the low task-high supportive Participating style becomes appropriate. Finally, for the able, confident follower the Delegating style, in which levels of both task and supportive behaviors are modest, is appropriate. HERSEY, *supra* note 146, at 64–65.

148. F. E. FIEDLER, A THEORY OF LEADERSHIP EFFECTIVENESS 254–55 (1967). 149. Id. at 12–13 (1967). Fiedler used a least-preferred co-worker (LPC) scale to determine whether leaders were task or relationship oriented. Respondents were asked to think of the one person with whom they worked least well, then respond to a survey with eight-point scales describing attributes of that person. For a single item the scale would assign one point to unfriendly and eight points to friendly, and the leader would select a descriptive number on the scale. Id. at

The second critical factor is the degree of situational favorability. The favorability of situations can be very high, very low, or intermediately favorable. Fiedler found that a leader's secondary motivator determines behavior only in very high favorability situations. This means task-oriented leaders are more effective in very high favorability situations, where they will attend to relationships (their secondary motivator), and very low favorability situations, where they will focus on tasks. Fiedler's research indicated high relationship leaders were more effective in intermediate favorability situations. He concluded that it is easier to change leaders or aspects of the situation than it is for leaders to change themselves.

# 3. Vroom and Yetton

Like Hersey and Blanchard, Victor Vroom and Philip Yetton believe that it is efficient to train leaders to learn new behaviors and develop flexibility in responding to situations. Their normative decision-making model identifies seven decision-making behaviors ranging from a completely autocratic decision to delegation of the decision to others. They identify situational and follower factors that

37–44. High LPC scores were deemed relationship oriented and low scores task oriented. *Id.* at 44–46.

150. *Id.* at 22–35. Situational favorability is composed of three elements. The most important is Leader-member relations, good if cooperative and friendly but poor if uncooperative and hostile. Second most important is Task structure, the extent to which there exist detailed and objective criteria for determining the quality of task performance, ranging from Structured to Unstructured. The least important is high or low Position Power, the legitimate authority the leader has to reward and punish by virtue of the leader's position in the organization.

151. Combinations of the three factors produce eight octants. Fiedler assigned the number I position to Good Leader-member relations, Structured, High Position power situations at the High end of the situation favorability continuum. He assigned the number VIII position to Poor Leader-member relations, Unstructured, Low Position power situations at the Low end of the situation favorability continuum. *Id.* at 31–34.

152. Fred E. Fiedler & Martin M. Chemers, Leadership and Effective Management 103–05 (1974).

- 153. Id.
- 154. Id. FIEDLER, supra note 148, at 183-84.
- 155. FIEDLER & CHEMERS, supra note 152, at 140-49.
- 156. VICTOR H. VROOM & PHILIP W. YETTON, LEADERSHIP AND DECISION-MAKING 204-08 (1973).
  - 157. The leader behaviors are Autocratic, AI (makes decision alone on basis

are relevant in determining which behaviors are appropriate, including: quality (whether the decision makes a strategic difference in affecting the future of the organization), information and its structure, commitment (acceptance) of subordinates, the probability of gaining follower commitment without their participation in decision-making, goal congruity among followers, congruity concerning means to achieve goals, and time available. They specify rules and a line of reasoning for applying the rules to determine appropriateness of decision-making. For instance, if quality is involved, behaviors that would take the final decision out of the leader's hands are eliminated. Autocratic behaviors are eliminated if commitment of subordinates is needed and can be gained only with their participation.

In their concluding statement Vroom and Yetton acknowledge similarities but differentiate their model from Fiedler's in two significant ways. First, while Fiedler's situational variables were relatively stable properties, their variables are properties of unpredictable and immediate problems in need of solution. Second, while Fiedler saw little utility in attempting to change behaviors, they saw leadership development as the principal application of their work. 161

# I. A Situational Lawyering Model

To repeat, when Hollander's three determinants of situationally appropriate leadership behavior, the leader, followers and situation, are recast as the lawyer, other relevant persons, and the situation, his leadership model becomes a lawyering model, visualized as three partially overlapping circles. Strategies for self-management and dealing with others are generated by the interplay of the

on information possessed) and AII (makes decision alone after getting additional information); Consultative, CI (makes decision after consulting with others individually and sharing problem) and CII (makes decision after consulting with others as a group and sharing problem); Group, GI (makes decision jointly with group) and GII (accepts groups decision, perhaps within defined limits); and Delegated, DI (decision delegated to subordinates). *Id.* at 17.

<sup>158.</sup> Id. 20-31.

<sup>159.</sup> Id. 32-37.

<sup>160.</sup> Id. at 207.

<sup>161.</sup> Id. at 208.

three determinants where they overlap. When there is not a good fit between the situation and the lawyer, the model suggests the same three strategies as the situational leadership model. All three are sanctioned by the Rules of Professional Conduct. The lawyer may become competent to handle the situation, <sup>162</sup> change the situation by associating a competent lawyer. <sup>163</sup> or agreeing with the client to limit the scope of representation, <sup>164</sup> or refer the matter to a competent lawyer. <sup>165</sup>

Lawyers can also change the situation by switching to areas of practice that better fit their personal attributes. Implementation of that strategy is often desirable. Fiedler's research showed that leaders whose attributes do not match the leadership situation tend to experience stress as well as physiological symptoms. The same holds true for lawyers whose skills and attributes do not match their practice settings. In other situations the most common and rewarding strategy is to become more competent. It is worthwhile to examine bridges and barriers to attaining that goal.

### IV. BRIDGES AND BARRIERS TO COMPETENCE

Just as the stories of Gary Bellow and Tony Amsterdam illustrated difficulties in and rewards of enhancing selfawareness, a story posed in the form of a leadership ethics problem by David Campbell alerts us to other potential

<sup>162.</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 4.

<sup>163.</sup> Model Rules of Prof'l Conduct R. 1.1 cmt. 1.

<sup>164.</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt 6.

<sup>165.</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1. In making the decision to refer to or associate another lawyer, the information factor in the Vroom-Yetton line of reasoning is important. Is the structure of information such that the lawyer knows what information is needed, where to get it, and what to do with it within the time frame available? If not, the lawyer needs to decline representation or engage in a consultative decision-making process with someone who does have that information.

<sup>166.</sup> F. E. Fiedler, *Reflections by an Accidental Theorist*, 6 LEADERSHIP Q., No. 4, 453, 455 (1996). Fiedler's continuing work with the model and with cognitive resource theory indicates that in stress-free situations lawyers' intelligence can lead to creative solutions, but often that same high level of intelligence will generate inappropriate solutions under stress. On the other hand, in stressful situations the automaticity derived from experience tends to lead to better performance, but might hamper creativity in stress-free situations. *Id.* at 455–56. A combination of intelligence, experience and the self-awareness to rely appropriately on each attribute should maximize competence.

bridges and barriers to competence. The problem<sup>167</sup> is one in which a military lawyer might be called upon for advice. In summary, it said:

An Army colonel commanded a garrison. In response to drug related incidents on and off base he instituted and widely publicized a zero tolerance policy, for which he was praised. One afternoon he observed Sgt. Rodriguez, an exemplary non-commissioned officer and member of his staff, exit a hotel room off base, followed shortly by Private Smith, an attractive female member of his unit. He inspected the room they had left, suspected marijuana use, returned to base and ordered a drug test for Sgt. Rodriguez. That night Sgt. Rodriguez came upon a wreck and risked his life in an act of heroism, saving the life of the colonel's daughter, who otherwise would have remained trapped in a burning car. The next morning the colonel receives a positive drug test report for Sgt. Rodriguez. What should he do?<sup>168</sup>

Dr. Campbell related that he had used the problem for a few years at the Center for Creative Leadership (CCL) before receiving two noteworthy responses. First, a woman asked why the colonel had not ordered a drug test for Private Smith, the female soldier. Second, an Army general said his solution would be to remove Sgt. Rodriguez from the base immediately and transfer him to another post, after insuring that his own commanding officer would support his decision and informing the commander of Sgt. Rodriguez's new base of all the facts related to the transfer, emphasizing that Sgt. Rodriguez's performance on the job was extremely high, that he was a valuable staff member and had often "exceeded expectations."169

Because the general's proposed solution seemed more elegant than those of other CCL participants in a way that raised questions of competence and professional development, the problem was shared with several military veterans, all male, none of them general officers, to ascertain their

<sup>167.</sup> David Campbell,  $\it The\ Colonel's\ Daughter$ ,  $\it the\ Hero\ and\ the\ Drug\ Test$  (on file with author).

<sup>168.</sup> *Id.* The problem is one in a series of five that Dr. Campbell utilizes in programs at the Center for Creative Leadership to explore ethical issues.

<sup>169.</sup> Conversation with David Campbell, Colorado Springs, Colorado, March 27, 2011.

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reactions.<sup>170</sup> They responded to the problem with solutions ranging from unit-level discipline following stern counseling to separation from the Army, many recommending some acknowledgement of Sgt. Rodriguez's heroism. The general's solution occurred to none of them, but almost all raised the issue of the need to test Private Smith. When informed of the general's proposal and asked their responses to it, they were unanimous in acknowledging the importance of experience in the development of competence. They uniformly responded that their experience, unlike the general's experience, would not have led them even to assume that such a solution was possible. Their analyses ranged broadly and touched upon several bridges and barriers to competence, including the of "satisficing" decisions. stereotyping. assignments, mentoring, collaboration, self-management, and other lessons of experience.

# A. "Satisficing" Solutions

Army Reserve with the rank of major.

When judgment is involved in decision-making, the scope of situationally appropriate conduct can be wide. It is difficult to tell which if any of the solutions proffered to the colonel's problem would prove optimal. While the general's solution had not occurred to any of the veterans of lesser rank, it would not necessarily have proved superior in practice, and its primary value was in expanding their range of alternative solutions. Though differing in the degree of discipline to be administered, all of the solutions appeared to be situationally appropriate.

170. Those surveyed held ranks from first lieutenant to colonel and included Trey Davis, a former Airborne Ranger; Ben Davis, a former Army lawyer with the Office of the Army General Counsel; Air Force major Oliver Johnson, currently stationed at the United States Air Force Academy; Barrie Davis, a WWII fighter pilot ace and later National Guard company and battalion commander; Ted Davis, a former infantry officer and Army Aviator; Col. Aubrey Wood, referenced in the text, presently Army Central Command Commander at Dill Air Force Base; Douglas Perry, a former artillery officer and Army Aviator; Walter Jones, a former Army JAG officer and Vietnam veteran; and former Chief Judge of the North Carolina Court of Appeals Sid Eagles, an Air Force JAG officer who remained in the reserves after returning to civilian life, retiring as a JAG colonel; and Leary Davis, a former artillery officer and Army Aviator. David Campbell, Smith-Richardson Senior Fellow Emeritus at the Center for

Creative Leadership and a vital force in its establishment, retired from the

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Like other decision-makers, lawyers must often act despite having limited information, cognitive ability, and time. Even if additional information could be obtained, the expense incurred and time lost in obtaining that information might make what would otherwise have been an optimal decision sub-optimal. Herbert Simon referred to rational decisions made under constraints of information, intellect, and time as "bounded rationality." He contended that in such situations "satisficing" solutions, those good enough but not necessarily perfect, are often appropriate.<sup>171</sup>

In law, some decisions can be determined to be exactly correct, such as an opinion as to the state of a title or the applicability of a statute in stable, unambiguous situations. In dynamic, more complex situations that require strategic judgments, such as negotiations and litigation, a broad range of decisions and behaviors may fall within the scope of competence.<sup>172</sup>

# B. Gender and Ethnic Stereotypes

That the issue of Private Smith not being tested went unrecognized for so long may reflect, at least in part, stereotypical thinking about women. Just as Private Smith was overlooked in the problem, women in law firms may be

Id. at 90.

<sup>171.</sup> HERBERT SIMON, REASON IN HUMAN AFFAIRS 19–23 (1983).

In the face of even moderate uncertainty, it seems almost hopeless to strive for "optimal" courses of action. When conflicts in values exist, as they almost always do, it is not even clear how "optimal" is to be defined. But all is not lost. Reconciling alternative points of view and different weightings of values becomes somewhat easier if we adopt a *satisficing* point of view: if we look for *good enough* solutions rather than insisting that only the best solutions will do. It may be possible—and it often is possible—to find courses of action that almost everyone in a society will tolerate, and that many people will even like, provided we aren't perfectionists who demand an optimum.

Id. at 85.

<sup>172.</sup> Of the judicial system, Simon says,

Adversary proceedings are another way of strengthening rationality . . . . [W]e use the adversary process most extensively in our judicial system, where the criterion for rationality is a most interesting one. The basic criterion of justice, which surely aims at satisficing rather than optimizing, is that specific procedures be followed. The underlying assumption is that if these procedures are followed, then, in some long-run sense, the decisions will be tolerable, or even desirable. Hence in legal institutions we tend to evaluate outcomes not so much directly as in terms of procedural fairness.

overlooked when promising assignments are made. Though opportunities for women and minorities have expanded greatly since the term "glass ceiling" was coined in the 1980s, they still face stereotypical barriers to the opportunities that would allow them to develop and enhance competence. While the behavior of women in business and the professions is no longer as limited as it was a generation ago, 173 women still have to work within a more narrow range of acceptable behaviors than men and can find that their paths to advancement resemble a labyrinth.<sup>174</sup> That difference in treatment is unwarranted. The original glass ceiling study found that stereotypes of women in business when compared with men were false. Women in business were not, for instance, less self-disciplined or rational or better able to reduce interpersonal friction than men. 175

<sup>173.</sup> Women in business were restricted to a narrow band of behavior represented as the overlap of two adjoining hoops representing stereotypically masculine and feminine behaviors, respectively, i.e., behavior that would be expected of both men and women but not any other behavior traditionally thought of as either "masculine" or "feminine." ANN M. MORRISON ET AL., Breaking the Glass Ceiling: Can Women Reach the Top of America's LARGEST CORPORATIONS? 55 (1992).

<sup>174.</sup> Center for Creative Leadership, A New Conversation: The Narrow Band, the Balance Beam and the Labyrinth, LEADING EFFECTIVELY (May 2008), http://www.ccl.org/leadership/enewsletter/2008/MAYissue.aspx.

<sup>175.</sup> MORRISON ET AL., supra note 173, at 51. With respect to behavior stereotypically attributed more to women than to men, executive women "were not better able to reduce interpersonal friction[,] . . . more impulsive[,] . . . understanding or humanitarian[,] . . . concerned with presentation of self[,] . . . [or] more suspicious or touchy" than men. Id. With respect to behavior stereotypically attributed more to men than to women, "executive women were not less dominant in leadership situations[,] . . . self-confident or secure[,] . . . able to define and attain goals[,] . . . optimistic about success[,] . . . outgoing or sociable[,] . . . self-disciplined or rational[,] . . . intellectual or able to apply their intelligence[,] . . . insightful[,] . . . flexible and adaptable[,] . . . [or] eventempered." Id. at 51-52. "In addition . . . executive women are just as able as executive men to lead, influence, and motivate other group members, to analyze problems, and to be task oriented and verbally effective." Id. at 52. These data tend to confirm that individuals, male and female, are drawn to discrete professions by shared needs, values, attitudes, interests and other personal attributes. Five statistically significant gender differences did emerge. When compared with executive women, "executive men [were] more likely to feel equal to the demands for time and energy encountered in their daily lives" (The study found that men had fewer demands on their time and energy than women; and top female executives retained primary responsibility for home and family, a responsibility top male executives did not share) and "[felt] more in tune with their surroundings and [were] more likely to perceive things as their peers [did]," and felt more comfortable in environments where conformity to intellectual authority is desirable and the criteria for excellence are clearly

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The same appears to be true in other professions. Peter Zeldow and his associates at Northwestern University followed a class of medical students throughout their medical school careers. In a preliminary paper at the end of the first year of their study Dr. Zeldow reported that students found most successful and happy had scored high on both stereotypically feminine attributes such as tenderness or empathy and stereotypically masculine traits such as independence or assertiveness. <sup>176</sup> In a later paper the authors postulated that people high in both masculinity and femininity could be advantaged, that "Two orthogonal sets of skills are potentially better than one."177 In law as in medicine, it appears better to think of many behaviors and traits as professional attributes, tools in a toolbox that can be utilized when appropriate, rather than labeling them as masculine or feminine.

# C. Challenging Work Assignments

The difference between emerging lawyers who flourish and those who languish in practice is in large part a function of the development opportunities presented to or seized by the lawyers. Stereotypical thinking may limit the availability of these assignments to women and minorities in some organizations. Interestingly, as the Bell Labs program described in Part V indicates, when female and minority professionals are provided these opportunities, they tend to progress rapidly, at a greater rate than white males. It is likely they make greater progress because they had previously been excluded  $\mathbf{from}$ talent development opportunities and can begin to catch up once those

specified (called "achievement through conformance"). MORRISON ET AL., supra note 173, at 50. When compared with executive men, "executive women [were] more likely to move in new and original directions" ("Moving in new and original directions" appears to constitute a sound strategy, perhaps the only viable one, to differentiate oneself in an environment that precludes women from advancing along traditional paths) and "[were] more likely to behave as individuals and to personalize their experiences." These findings were first reported by Catalyst, the consulting firm. *Id.* at 50-52.

<sup>176.</sup> Peter Zeldow, Masculinity and Femininity as Predictors of Psychosocial Adjustment in Medical Students (paper presented at American Psychological Association Convention, Toronto, Canada, August 22, 1984).

<sup>177.</sup> Peter B. Zeldow, David Clark and Steven R. Daugherty, Masculinity, Femininity, Type A Behavior, and Psychosocial Adjustment in Medical Students, 48 J. PERSONALITY SOC. PSYCHOL., No. 2, 481 (1985).

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opportunities are provided. The Bell Lab results suggest that female and minority lawyers and others with great latent ability may never attain their full potential because they lack mentors or others who perform discrete talent development functions, including provision of challenging work assignments.<sup>178</sup>

# D. Mentors and Colleagues as Bridges to Competence

The respondents were uniform in noting that the general's experience, being broader and at a higher level than theirs, provided him with a wider range of possible solutions than they possessed. They also stated that one in their position of lesser information and experience could often overcome those limitations by conferring with mentors who had experience similar to the general's or otherwise resorting to networks of friends and allies. Lessons of experience can be vicarious as well as personal, and mentors and colleagues provide bridges to competence by sharing their experience and advice. Reverse mentoring is also valuable. Generals who propose elegant solutions may lose touch with some of the practical consequences of implementing their solution if they do not consult with those affected by their proposals, such as Colonel Aubrey Wood.

# E. Collaboration

Colonel Aubrey Wood analyzed the problem on the same day he assumed a command similar to that of the colonel in the problem.<sup>179</sup> He described how he typically handles such matters. He convenes his staff, enlisted and commissioned. Starting with the lowest ranking enlisted member, he asks their opinions of what he should do. After considering their opinions, he exercises his independent judgment. The process he describes essentially adopts Vroom and Yetton's CII behavior (make decision after consulting and sharing the

<sup>178.</sup> Leary Davis, *Building Legal Talent: Mentors, Coaches, Preceptors and Gurus in the Legal Profession*, 20 PROF. LAW., no. 4, 2011 at 12, 13. Seven functions of mentors are Developing and managing the mentoring relationship, Sponsoring, Guiding and counseling, Protecting, Teaching, Modeling, and Motivating and inspiring. *Id.* at 13.

<sup>179.</sup> On August 10, 2011, Colonel Wood became commanding officer of the Defense Information Systems Agency (DISA) Central Field Command at MacDill Air Force Base. Ceremony Program from the Change of Command, DISA Central Field Command (Aug. 10, 2011) (on file with author).

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problem with others as a group). He retains final decision-making authority because of the importance of the quality component of the problem. He involves others because of the importance of having the commitment of subordinates and the benefits of diverse perspectives in decision-making. When discipline is taken, Colonel Wood immediately posts the action taken on the unit bulletin board so that troops are fully informed and inaccurate rumors are forestalled.

# F. Self-Management

Colonel Wood concluded that the colonel in the problem had limited his own discretion unduly by adopting and publicizing a zero tolerance policy. As a consequence Colonel Wood believed that the sergeant would have to leave the military. He opined that a better policy would have outlined the seriousness of the drug situation in the unit and stated that "appropriate action would be taken" in the event of an offense. Like the colonel whose no tolerance policy limited his discretion, knowledgeable and otherwise skillful lawyers can make bad choices that preclude subsequent competent behavior. The most common may be the choice to over-In 2002 North Carolina lawyers were asked to commit. estimate the percentage of opposing lawyers who engaged in behaviors generally considered unprofessional.<sup>181</sup> The two most frequent behaviors reported were taking on more work than they could handle (thirty-six percent) and not doing what they said they would do (twentysix percent). 182 The second unprofessional behavior flows inevitably from the first. Lawyers who take on more work than they can handle will not be able to do all they say they will do; knowledge, skill, and commitment allocated to one client has to be at the expense of another.

<sup>180.</sup> VROOM & YETTON, supra note 156, at 136.

<sup>181.</sup> N.C. C.J. Comm'n on Professionalism, State of the Profession Survey for 2002, Acceptable Behavior item, 3. Respondents were asked about the behavior of other lawyers rather than their own behavior to avoid social desirability bias.

<sup>182.</sup> Leary Davis & Melvin F. Wright, Jr., *The State of the Legal Profession in North Carolina*, 9 N.C. St. B.J. 24, 25 (2004). Barriers to competence induced by inadequate self-management hinder the strategy and initiative elements of competence.

# G. Lessons of Experience

The veterans readily acknowledged the advantages of the general's broad experience. In cataloging 1547 development experiences related by 191 successful executives, researchers at the Center for Creative Leadership concluded that they fell within three categories, what was learned from job assignments, bosses, and hardship. The job assignments followed predictable patterns: first job, first supervisory job, switch from line to staff or staff to line, start-ups, turnarounds, and assignments of such broader scope and complexity that reliance upon others was essential. 184

While there has been no study of lawyers' developmental experiences similar in scope to CCL's study of executives, the parallels are obvious. Lawyers often talk of good professional development as "practicing law for twenty years instead of practicing law one year twenty times." Lawyers who practice one year twenty times may gain expertise at a particular level of practice, but they will not have the developmental experiences needed to achieve broader competence. Likewise, the argument that the third year at most law schools is superfluous rests upon its redundancy and lack of new developmental opportunities. The absence of strategies to seize development opportunities that are available in law schools is a deficiency shared by law students and law faculty. William Henderson writes of the impact of lack of development opportunities experienced by many associates at large law firms:

If these redundant tasks, however, are not interspersed with additional assignments that augment a young lawyer's skill set, the internal labor market for an associate's services can dry up as rapidly as one's billing rate rises with seniority. So, ironically, a 160,000 dollar per year position can become a dead-end job as early as the second year at the firm. <sup>185</sup>

Professional Development, LAW FIRMS PARTNERSHIP & BENEFITS REP., Feb.

<sup>183.</sup> MORGAN W. MCCALL ET AL., LESSONS OF EXPERIENCE: HOW SUCCESSFUL EXECUTIVES DEVELOP ON THE JOB 11-13 (1985).

<sup>184.</sup> *Id.* at 15–65.

<sup>185.</sup> William D. Henderson, Are We Selling Results or Résumés?: The Underexplored Linkage between Human Resource Strategies and Firm-Specific Capital 8 (Indiana University School of Law Legal Studies, Research Paper No. 105, 2008), available at firms.law.indiana.edu/events/futurefirm/doc/SSRN-id1121238.pdf (citing Christine White, Improving Associate Retention Through

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Underlying and supporting the progression of executives in the CCL study is the dialectic between the concrete and abstract in Kolb's cycle of development. More complex concrete experiences generated implicit and explicit theories at higher levels of abstraction capable of generating more efficacious strategies that garnered more challenging development opportunities.

# V. JUSTIFICATION FOR ADDING STRATEGY AND INITIATIVE AS ELEMENTS OF LAWYER COMPETENCE

A theme of this essay is that competence is not mere capability; it is the transformation of capability into situationally appropriate conduct. It takes action to cross bridges and overcome barriers, including bridges and barriers to competence. The discussion in Part III stated that personal attributes constitute the catalyst that translates knowledge and skill into competent representation. Catalysts, however, remain inert until mixed with other ingredients. So we must add *strategies* for interweaving knowledge, skills, and attributes as the fourth element of competence, and *initiative* to take action to test and implement those strategies as the fifth and final element.

Again, the leadership literature, this time in the form of a Bell Labs study led by Robert Kelley, 186 is relevant to an examination of lawyer competence. It discusses the nature of key strategies for achieving excellence and that they can be taught. 187 Kelley's work at Bell Labs began with Bell's idea that if the attributes of its most highly productive workers, its stars, were discovered, Bell could recruit and hire others with those same attributes and increase productivity substantially. As is true of lawyers generally, Bell Lab's employees were

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<sup>1999,</sup> at 1 (noting that one of the worst scenarios for a new associate is "get[ting] stuck on huge cases, with little opportunity for skills enhancement, that impede their ability to progress toward partnership.").

<sup>186.</sup> Robert Kelley & Janet Caplan, *How Bell Labs Creates Star Performers*, HARV. BUS. REV. July 1993, at 128.

<sup>187.</sup> In an important working paper William Henderson addresses unsustainable trends in the legal profession. He summarizes and relies upon the findings of the Bell Labs study in recommending development of a high quality/fixed cost law firm model that would charge fixed fees for high quality work produced in less time by development of business processes, lawyer development programs and knowledge management systems. Henderson, *supra* note 185.

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uniformly strong academically and possessed research skills. Still, it was assumed that its stars would have differentiating attributes that average performers did not. A list of forty-five theoretically differentiating attributes was divided into four aspects: cognitive (intelligence, logic, etc.), personal-psychological (self-confidence, ambition, etc.), social (interpersonal skill, etc.), and environmental (job satisfaction, relationships with bosses, etc.). Star and average performers were assessed on the forty-five attributes. Star

After analyzing the data for four months, Kelley and his team were surprised to find no statistically significant differences in the star and average performers with respect to the attributes measured. Disappointed, the team then looked at assessment scores that they had thought would have predicted performance for discrete individuals. Having observed the individuals for two years, they found that they were able to say why particular individuals were or were not top performers in spite of scores that they thought would have predicted otherwise. Their conclusion? "It wasn't what these stars had in their heads that made them standouts from the pack, it was how they used what they had."

This finding helps explain why lawyers who possess good knowledge and skill, even with positive personal attributes thrown in for good measure, often do not rise to the star level, and might even fall short of competence. They lack sound strategies or the initiative to implement those strategies.

After closely following stars and talking with supervisors and both star and average performers at Bell Labs, Kelley identified nine key strategies responsible for the stars' outstanding productivity. As would be expected from the leadership literature, all nine strategies, <sup>192</sup> as Kelley

with those who need it.

Initiative: Blazing Trails in the Organization's White Spaces. Going above and beyond job descriptions for the benefit of coworkers or the firm and following through diligently, including some risk taking. Networking: Knowing Who Knows by Plugging into the Knowledge Network. Minimizing knowledge deficits by proactively developing dependable pathways to knowledge experts and sharing knowledge

<sup>188.</sup> ROBERT E. KELLEY, HOW TO BE A STAR AT WORK: NINE BREAKTHROUGH STRATEGIES YOU NEED TO SUCCEED 295 (1998).

<sup>189.</sup> *Id.* at 6–7.

<sup>190.</sup> Id. at 8.

<sup>191.</sup> *Id*. at 10.

<sup>192.</sup> See id.

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describes them, blend task, interpersonal, and situational features interactively at the locus of leadership. Nevertheless. the strategies of initiative and management may be viewed as task oriented. The strategies of perspective and organizational savvy reflect situational awareness. The majority of the strategies—networking, teamwork, followership, leadership, and persuasion—have interpersonal foci.

The Bell Labs study is important not only because of its explanation of the strategies, which Kelley contends applies to knowledge workers like lawyers, it also proved that the strategies, when taught, can result in huge gains in productivity for both stars and average performers. Over time, Bell ran more than 600 engineers, both stars and average performers, through an educational program designed to teach the nine strategies. To evaluate the program, after several months 300 participants and a control group of 300 nonparticipants in the program were given two ratings, one by direct managers and a second standard performance rating prepared jointly by all supervisors in a department. Participants had improved productivity at a rate double that of nonparticipants. 193

Whether for basic competence or heightened excellence, situationally appropriate conduct is the product of strategy.

Self-Management: Managing Your Whole Life at Work. Developing a portfolio of talents and work experiences, proactively creating opportunities, insuring performance at a high level, and carving out a career path.

Perspective: Getting the Big Picture. Seeing problems in larger contexts and through the eyes of critical others.

Followership: Checking Your Ego at the Door to Lead in Assists. Working cooperatively with leaders to achieve the firm's goals.

Teamwork: Getting Real About Teams. Taking joint ownership of the firm's work, and being a positive contributor by being inclusive, dealing with conflict, and assisting others with problems.

Leadership: Doing Small-L Leadership in a Big-L World. Employing expertise and influence to convince a group to come together to accomplish a substantial task.

Organizational Savvy: Using Street Smarts in the Corporate Power Zone. Navigating the competing interests in a firm, promoting cooperation, addressing conflicts and getting things done.

Show and Tell: Persuading Your Audience with the Right Message. Selecting information to pass on and developing the most effective, user-friendly format for reaching and persuading a specific audience.

Id. at 14, 31–34, 49–245.

193. Id. at 302-03.

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The keys to gaining lawyer competence are, first, to understand its elements; second, to gain essential knowledge and skill; third, to understand and develop catalytic personal attributes, chief of which are self-awareness, knowledge of others, and situational awareness; and finally, to understand and develop strategies for turning knowledge, skill, and personal attributes into competent representation and to exercise initiative in implementing those strategies. It is important to remember that "[w]ithout knowledge action is useless, and knowledge without action is futile." <sup>194</sup>

# VI. LINKING COMPETENCE TO PROFESSIONALISM AND PURPOSE IN A THEORY OF LAWYERING

Defining competence as situationally appropriate conduct should contribute to an accepted general theory of lawyering. "Appropriate" is a normative term. It requires one to ask the question, competent for what purpose? For what purpose are knowledge, skill, personal attributes, strategy, and initiative aligned?

Joseph Tomain and Michael Solimine have asked the same question with respect to law school skills training, and they have asked it in a way that serves an organizing function for the conclusion of this essay. They argue that law school skills training suffers from three kinds of defects: strategic, intellectual, and normative. They view the strategic defects, which relate to the status and working conditions of skills faculty and the dearth of time and pedagogical theory available to them, as potentially solvable. They see two intellectual defects as more daunting. Their perception is that

- [T]he skills listed in ABA Standard 302 and its interpretations lack a solid intellectual and pedagogical foundation, and
- 2. [S]kills scholarship has not distinguished itself. 197

<sup>194.</sup> This maxim is attributed to Abu Bakr, the first Caliph of Islam. See Abu Bakr Quotes, BRAINY QUOTE, http://www.brainyquote.com/quotes/quotes/a/abubakr219641.html (last visited Apr. 6, 2012).

<sup>195.</sup> Tomain & Solimine, supra note 10, at 312-13.

<sup>196.</sup> Id. at 316-17.

<sup>197.</sup> Id. at 316.

The second intellectual defect flows naturally from the first. Without a substantial intellectual foundation, skills scholarship could not produce the kind of theoretical literature generated by other areas of legal scholarship.

Tomain and Solimine address the normative defect, the absence of moral education, <sup>198</sup> by posing the question, if skills training is intended to make more effective or affective lawyers, to what end? They respond that skills training leaves the question unanswered: "Without a normative theory of lawyering, skills training cannot empower students to make reflective choices about who they are becoming as lawyers or about what lawyers can or ought to contribute to a just and stable society." <sup>199</sup> They conclude that skills education should be "connected with a philosophy of lawyering that has a theory of justice as its object. Legal education should explicitly confront questions about the role and responsibility of lawyers in the search for justice." <sup>200</sup>

Attempts to address the concerns of Tomain and Solimine by developing theories and philosophies of lawyering are hindered by the lack of functional definitions of the legal profession and professionalism. Neil Hamilton has noted that scholars have been unable to agree on a clear definition of professionalism. He argues that this lack of clarity tends to:

- deprive legal educators of guiding principles in preparing students for a public profession
- limit socialization of new lawyers to their exposure to rules of legal ethics
- constrain the professional identity of lawyers to technical compliance with disciplinary rules
- reduce the possibility that the concept of professionalism will actually influence lawyer or law student conduct, and
- undermine the public's trust in the profession.<sup>201</sup>

<sup>198.</sup> Id. at 315.

<sup>199.</sup> Id. at 316.

<sup>200.</sup> *Id.* Tomain and Solimine think that skills programs could contribute to the development of theory, but that they are incapable of producing a coherent theory of lawyering by themselves. *Id.* A theme of this essay is that the MacCrate report's well-intentioned concentration on skills, sequestered from knowledge and personal attributes, and in ignorance of interdisciplinary theory being accessed by leadership educators, has impeded development of a general theory of lawyering.

<sup>201.</sup> Neil Hamilton, Professionalism Clearly Defined, 18 PROF. LAW., no. 4,

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In 1953 Roscoe Pound defined a profession as "a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood."202 Subsequent efforts to define lawyer professionalism have generally been incremental additions or other modifications to Pound's definition of professions generally. One distinguished ABA committee modified it as follows: "A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in those pursuits as part of a common calling to promote justice and public good."203 Drawing on a comprehensive review professionalism studies, Hamilton synthesized a definition of professionalism consisting of five principles.<sup>204</sup> previous efforts at defining professionalism are valuable, prompting observation and reflection in the spiral of experience. They are also lawyerlike, starting with precedent and moving incrementally. Nevertheless, lawyers might find another approach to defining professionalism useful for problem solving, as either a measure of or guide to conduct in concrete situations.

In devising a definition of the legal profession for a theory of lawyering, one might approach the task more as a scientist than a lawyer. Scientific definitions have two parts: a genus and a differentia or differentiae. In the definition of competence as situationally appropriate conduct, the genus, or identifying class, is conduct. The differentia, or species of conduct, is "situationally appropriate." A definition of professionalism will be useful in a theory of lawyering if it addresses the concerns of Tomain. Solimine and Hamilton. The following interconnected definitions of the professionalism, unprofessionalprofession, and normative, address conduct, and have justice as their object.

202. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

<sup>2008</sup> at 4, 6.

<sup>203</sup>. Am. Bar Ass'n, Section of Legal Educ. and Admissions to the Bar, Report of the Professionalism Committee: Teaching and Learning Professionalism 6 (1996).

<sup>204.</sup> Hamilton, *supra* note 201, at 8–14. Hamilton summarizes the five components of the principles elaborated as Personal Conscience, the Ethics of Duty, the Ethics of Aspiration, the Duty of Peer Review, and the Duty to Restrain Self-Interest. *Id.* 

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They provide a guide to formation of professional identity, and they should influence lawyer and law student conduct. I define the *legal profession* as "A network of distinctively educated people drawn together by shared needs, values, attitudes and interests to establish, maintain and continuously improve a system of justice, and within the context of that system, to help others solve problems and maximize opportunities within the bounds of equity and civility."

The definition contains a *genus*, or general class, consisting of a network of distinctively educated people drawn together by shared needs, values, attitudes and interests, the primary motivators discussed in Part III. The term *network* is functional, connoting human and other networks in nature. In nature, the hardiest networks are the most diverse; their members compete fiercely yet cooperate intensely.<sup>205</sup> Lawyers compete fiercely on behalf of their clients while cooperating intensely to maintain and improve the system of justice.

The definition also contains *differentiae*, features that distinguish the network of lawyers from other vocations and professions. Justice is the dominant motivating value of the profession. The profession's function and corresponding duties are two-fold, to maintain and improve the justice system and to help people solve problems and maximize opportunities within that system. To be situationally appropriate professional conduct must fall within the bounds of equity. Behaving within the bounds of equity is prudential as well as professional. Since the merger of courts of law and equity, unfair or inequitable results may be set aside on equitable grounds. Professional conduct should also fall within the bounds of civility, adhering to Stephen Carter's three central attributes of civility:

<sup>205</sup>. Dee Hock, Birth of the Chaordic Age 263 (2000).

<sup>206.</sup> Abraham Maslow introduced the concept of "B" or "Being" values that can prioritize what is important in one's life and provide a portal to meaning and fulfillment. He listed 14 B values, including justice, that he viewed as not separate parts of Being but rather facets of it. ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING 93–94 (3d ed. 1968). In a 1966 address at the Esalen Institute, Maslow used the centrality of the B Value of justice to lawyers as a prime example. Audio recording: Abraham Maslow's Address on Self-Actualization, held by Estate of Abraham Maslow (1966), available at www.abrahammaslow.com/audio.html.

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 Civility assumes that we will disagree; it requires us not to mask our differences but to resolve them respectfully.

- Civility requires that we listen to others with knowledge of the possibility that they are right and we are wrong.
- Civility requires that we express ourselves in ways that demonstrate our respect for others.<sup>207</sup>

In developing professional identity, it is constructive for students to realize that the only place in the United States that one can insure that these three attributes are honored is the courtroom. If a disagreement is justiciable, parties can be compelled to listen. One who litigates must consider the possibility that the other is right and might prevail on the basis of evidence presented to an impartial finder of fact. The culture of the profession is that in courtrooms lawyers express themselves respectfully, and judges enforce that culture. Outside of the courtroom, the culture should also encourage lawyers to behave in the same manner, i.e., professionally.

When we think of the presence or absence of professionalism, we do not think of a trait, but of the conduct of lawyers. ALI-ABA, the ABA Task Force on Professional Competence, and the Law Society of Upper Canada measure competence and incompetence by the extent to which a lawyer's behavior meets or fails to meet their functional definitions of competence. Likewise, I consider conduct that is inconsistent with the proffered definition of the legal profession to be *unprofessional*. *Professionalism* is conduct that is consistent with the definition of the legal profession.

# CONCLUSION

Competence as situationally appropriate conduct is a concept that applies to lawyering, leadership, and professionalism. When guided by the proffered definition of the legal profession, the harnessing and coordination of knowledge, skill, personal attributes, strategy, and initiative will produce situationally appropriate conduct, if not always the results desired. Leadership theory can inform the development of talent and formation of professional identity

207. STEPHEN CARTER, CIVILITY 132-66, 282-83 (1998).

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in the legal profession. It can also contribute to development of a general theory of lawyering that includes broadly shared conceptions of competence and professionalism.

Law faculty are members of the legal profession. Within each faculty exist the knowledge, skill, and personal attributes to solve problems and maximize opportunities that we leave unaddressed. We are like the lawyer who possesses good knowledge of the law, solid legal skills, and the catalytic personal attributes capable of translating knowledge and skill into competent representation, but who fails to deliver high quality legal services in a timely manner. We lack strategy and initiative. A general theory of lawyering that draws upon leadership theory, clearly defines professionalism, and includes a conception of competence as situationally appropriate conduct can provide legal education a framework for the development of strategies to confront the serious problems the profession is experiencing. Whether we would then exercise initiative to implement those strategies is a matter of character and professionalism.

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# APPENDIX A

# A MODEL OF THE LEGAL

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	SKILLS		
STAGES	TECHNICAL SKILLS	INTERPERSONAL SKILLS	
STAGE I ANALYST Acquisition of Foundation Skills and Knowledge	Analysis of cases Interpretation of legislation Synthesis of cases and of cases and legislation Modes of argument Basic research Drafting legal memoranda	Oral expression Written communication	
STAGE II ADVOCATE	Gathering facts from sources other than people Marshalling facts Trial, administrative, and appellate advocacy Drafting pleadings, briefs, and other advocacy documents	Gathering facts from individuals and organizations Interviewing Counseling Negotiation Persuasive writing	
Development of Advocacy Skills and Knowledge	Discovery Pretrial and motion practice Administrative hearings Jury and nonjury trials Settlement of case on appeal Preparation of record on appeal Argument of appeal Post-appeal practice Application of procedural knowledge	Dispute management and resolution Avoidance Coercion Accommodation Compromise Mediation Conciliation Collaboration	
STAGE III COUNSELOR, PLANNER, AND IMPLEMENTER Development of Ability to Formulate and Implement Sound Strategies in Complex Environments	Systems analysis and design Planning and taking action Collection and management of information Evaluation of situations and environments Formulation of goals and objectives Analysis and allocation of resources Development of situationally appropriat strategies and tactics Implementation of strategic and tactical plans through creation and utilization of effecting mechanisms	Implementation of strategic and tactical plans through leadership of people and organizations Involvement of appropriate persons in decision making and implementation Delegation and subsequent monitoring Establishment of credibility through personal example and development of organizational culture Management of law offices and other organizations	
STAGE IV INTEGRATED PROFESSIONAL Synthesis and Self-Realization	Synthesis of skills and knowledge of Stages I, II, and III with each other, with life experiences, talents, needs, values, attitudes, interests, cognitive and behavioral preferences and other aspects of persoriality; and with general knowledge fields. beneficial to one's effective work in the legal profession, including Economics, History, Political Science, Literature, Accounting, Information Technology, Philosophy, Religion, Sociology, Psychology, Geography, Anthropology, Sciences, Statistics, Languages, Business, Leadership, Public Administration, the Fine Arts, etc.		

# **PROFESSIONALIZATION PROCESS**

CATALYTIC	KNOWLEDGE	
PERSONAL	KNOWLEDGE OF	INTERDISCIPLINARY
ATTRIBUTES	LEGAL DOCTRINE	KNOWLEDGE
Talents, needs, values, attitudes, in erests and other aspects of personality, the utilization of which may be appropriate in differing professional contexts to help transform knowledge and skill into competent representation.	Substantive knowledge of doctrine, rationale and trends in basic theoretical or core fields Knowledge of legal procedure: civil, criminal and administrative	General knowledge needed to generate broad perspectives and to comprehend factual situations and legal doctrine in basic theoretical or core fields
including but not limited to	Knowledge of ideas about what law is and of ideas about the operation of law in society	
self-knowledge general intelligence energy situational awareness self-discipline self-efficacy growth mindset	Operative knowledge in functional fields which are subjects of particular cases and transactions	Knowledge in nonlegal fields and disciplines that are the subject of or relevant to particular cases and transactions; knowledge of clients' organizations, industries and environments and their cultures and of relevant situations
interpersonal intelligence integrity initiative tolerance for ambiguity and complexity optimism	<b>*</b>	
courage assertiveness persuasiveness self-reliance tenacity	Testing and refining, in the contexts of study, practice, action, observation and reflection, ideas about what law is and about the operation of law in society	
resilience achievement orientation dependability openness to new experiences intellectual humility friendliness empathy emotional maturity and stability	Operative knowledge in a large number of interrelated functional fields which may be relevant to the planning process	Khowledge in a large number of nonlegal fields and disciplines that may be relevant to the planning process in general and particularly to individual and organizational behavior and development, leadership, the implementation of plans, and the management of work and personnel; knowledge of clients' organizations, industries and environments and their
expanded by the lessons of experience, and strengthened by action, observation, reflection, discussion, practice and interaction	Testing and refining, in the contexts of stud reflection, ideas about what law is and about	cultures and of relevant situations  ly, practice, action, observation and
Sound judgment  Professional responsibility	Integrated personal and professional lifestyle  Natural, smooth_efficient_and situationally.a	es consistent with other Stage IV elements
Appropriate behavior in differing contexts	Development and continuous refinement of roles of law and the legal profession in present	