

A Judge's Perspective on Legal Education

THE HONOURABLE CHIEF JUSTICE
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There has been a strong relationship between the law school and the courts for many years, so I didn't hesitate to say "yes" when Vivian Hilder contacted me some months ago and asked if I would agree to participate in this very interesting program. Then I began to wonder what meaningful things I could say about the education of law students, practical or otherwise. In the result, after discussion with Vivian, I have changed the title of my presentation to "A Judge's Perspective on Legal Education."

I speak as someone who has been an appellate judge for 22 years, a trial judge for five years and 22 years as a litigator. So, this is my background, though, Manitoba being a small province, I have a decent sense, I think, on non-court-related legal work.

I take my inspiration this morning from a quote that appeared in the Saturday, October 6 *Globe and Mail*, the first in a lengthy series of articles about higher education in Canada (and I think this says it all):

A student could read all the books [about the guitar] in the world, and ... not know the most important thing: how to play. If I could change one thing about higher education in Canada, it would be to convince the academy that giving our students effective and repeated practice using their cognitive skills is more important than providing them with knowledge, and that, despite the significant economic and logistic challenges we face, tools are now available that allow us to

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teach these skills more effectively than we have ever been able to in the history of education.¹

Let me start by saying a few words about how we go about training (teaching) judges in this day and age.

Judges are, of course, very different from law students. We are supposed to know something about the law and are assumed to have relevant experience. Judges, especially new judges, are very keen students. Indeed, for most of us, this continues throughout our career. But especially at the beginning, what a newly appointed judge wishes, indeed craves, is for practical, hand-on instruction and training—the “how to” of judging.

As a current example, I’m off to Whistler tomorrow, where, with two other senior judges, we start newly appointed judges’ training with very practical subjects—judicial independence, judicial conduct and ethics.

We are very fortunate in Canada to have the National Judicial Institute, which is one of the preeminent judicial education institutions in the world. (I am not just bragging; this is recognized throughout the judicial world.) They offer a wide variety of programs of substance, usually with a combination of legal principles and practical application.

The usual format consists of an in-person meeting of anywhere from 30 to 60 judges, plus faculty, using modern learning tools, such as PowerPoint and computer-based data. (Most recently, for example, we had a lesson on social media, though it is not recommended that judges actively participate on Facebook, etc.)

There are e-letters every three weeks for criminal and family law, and hands-on, online interactive programs dealing with, for example, the *Youth Criminal Justice Act* and the *Charter*.

But, in the end, I must say, at least for this soon-to-be retired judge, the most “educational” aspect of these seminars is, as always, the opportunity to meet and discuss practical issues person-to-person with colleagues across the country (just as you are doing now) with whom we share so many of the same concerns and values.

I’m uncertain if there are many lessons here for law students and beginning lawyers?

¹ Erin Anderssen, “The Learning Curve: Re-Inventing Higher Education”, *The Globe and Mail* (6 October 2012) F1.

My own early legal education was, to use a polite word, “rustic.” I went to law school in the courthouse under the old concurrent articling system—Manitoba was just about the last province to abandon this approach in 1967-68.

The program consisted, over a four-year period, of going to law school in the morning (September to April), then working in a law office in the afternoons (and week-ends) and during the summer months.

If one was lucky, and I emphasize the word “luck,” you got decent hands-on training. If you weren’t lucky, you pretty well had a steady diet of document services, filings and searches for four years.

In the end, we were decently trained tradesmen, but lacking, in some instances, a broad appreciation of legal principles.

You will be interested in knowing that there were no women in my class and only one in the year to follow. We graduated 23. Unlike today’s law graduates, all of us planned to enter the practice of law in one way or another.

Most of our teachers were practising lawyers. The year I graduated (1963), there were only four full-time professors.

There were no moots, no federation of law societies, no ethics or legal research courses and virtually no intra-provincial ability of lawyers to move from province to province.

The profession today, of course, is very different. I will not attempt to describe the current situation in this country when it comes to teaching at law schools, course curriculum, etc. because, of course, you know so much more about that than I do.

But I do know something about the profession of law, especially the litigation bar, which has changed dramatically from the time when I graduated.

Today, there is more attention to the financial aspect of the practice of law. The “day book” is king. In some firms, lawyers, including very young ones, are given billing targets for the year and are expected to meet them; if necessary, by working outrageously long hours.

In other words, it’s becoming more and more like a business (“profit centre”). There is nothing the matter with making money, of course, so long as it does not adversely impact on our professional responsibilities. The impact of this reality on our access to justice deficit is now a matter of anxious debate, but beyond my topic. Let me just say I think it is a significant factor.

Most critically, because of the expense and complexity of modern litigation and commercial practices, the old habit of mentoring has, to a great extent, disappeared. This is a tragedy. I know when I was a young lawyer, and later as a senior lawyer, young lawyers were eased into their professional responsibilities very gradually. The newly minted lawyers used to, as the saying went, “carry their principal’s bag.” We took notes, were part and parcel of the courtroom drama, but given very little responsibility until we had our sea legs. I well remember the day when I was permitted to take a trial in the County Court on my own. It was a \$200 fender-bender. Not to overuse the guitar analogy, even if the student has a guitar, she still needs someone to show her how to play it.

Now we see young lawyers (many with great potential, but still hugely unprepared) arguing in the Court of Appeal and appearing in the trial courts with minimal advocacy skills, and sometimes alone. We try to help, but there are, of course, limits since we must at all times maintain our impartiality.

Then, of course, there are the SRLs (self-represented litigants), who bring special challenges for the bench and the bar.

This naturally leads me to the next topic; namely, our experience today in the courts as “the over-seers of legal services.”

I emphasize again that I am giving you the perspective of an appellate court judge.

Interestingly, when I asked my appellate court chief justice colleagues at the recently held annual meeting of the Canadian Judicial Council, the governing body for all federally appointed judges, their general impression was that young lawyers today were “not any worse” than we were when we were young lawyers, or, indeed, when compared to lawyers who graduated 20 or 30 years ago. There were some exceptions. A few Chief Justices thought that the lawyers were, if anything, a bit better trained, and a few of the smaller provinces were of the opposite view. So, all in all, a wash.

In my province, and a few others, we have a problem with young lawyers who don’t seem to take the court experience or the court very seriously. I am deliberately not using the word “disrespectful” because that’s too strong. Perhaps a bit “cheeky” is a better description. They don’t seem to appreciate that the “majesty of the law” is there for a purpose and that as officers of the court they should therefore be respectful before “the law.” This is especially an issue, I am told, in the Family Division. This problem does not speak particularly well of any of us.

As I mentioned earlier, we in the judiciary have a long history of working with the law school when asked to do so, whether teaching part of a course at the school or on special projects.

But on a practical basis, we in the courts do much more. We have a judge shadowing program that operates in the Court of Queen's Bench and the Provincial Court, where second-year or third-year students actually "shadow" judges as they go about their daily work of sitting in court on trials, motions, summary conviction and Master appeals, and the like. DeLloyd Guth will speak to you later this morning about how it works.

In our court, we participate a little differently because of the way we do our work. In the Court of Appeal, each term we have two students (I gather chosen by lot) who actually work for us doing some preliminary or fairly straightforward research. They are very much treated as if they were a "part of the court team" and sit in on our deliberations both before and after the hearing. I can assure you we have had no problem with breach of confidences.

So, where do we go from here? You know at least as well as I do that huge changes have taken place in our society and in the practise of law, especially since the computer became an ubiquitous tool.

Teaching methods are changing, both in the law schools and the law societies, and also within the judiciary itself, with much programming now being available, as I earlier mentioned, online and through interactive programs. And, of course, there are the myriad of legal databases that we all use.

Access to justice is a huge issue. The twin evils of cost and delay are well known; easy to say, hard to find a solution. My instinct tells me there may be some relationship between this and the lack of training in social advocacy in our legal training, but I'm not aware of any empirical evidence to support this.

The one thing I know for sure is that the students of today (tomorrow's lawyers) must be part of the solution rather than the problem.

I remain convinced that the proper mix of the theoretical and the practical is the way to go. Notwithstanding the comments I made earlier about having a lack of appreciation on the part of some younger lawyers about their role in the justice system, I think in Manitoba we are heading in the right direction. My law school has some great clinical programs in addition to the moot court program and the clerkship programs I have just

described, including Legal Aid Clinics, the Legal Help Centre, a business law clinic, and some basic *pro bono* work.

Lawyers, and other professionals, are ultimately tasked to accomplish something positive for their client or the organization that they represent. In order to do this, they need not only brain power, but practical training, including, most critically, broad experience. I say broad experience because the practice of law in the broadest sense, in my view, cannot be compartmentalized. So long as we offer general purpose, all-around law degrees, some minimal expertise in all basic areas of law should be required. And even in specialties, one size does not fit all, a classic example being family law.

While we try to do our own little bit in the courts, and, of course, the law firms and Law Society do theirs through the articling program, this is not enough. By the way, I was recently told that in Ontario, 30 per cent of new grads are not yet placed for articles. I also note the Ontario *Articling Task Force Final Report* (October 25, 2012). Its conclusion was that the profession cannot meet the need for articles in the foreseeable future.

The majority would allow traditional articling (10 months) and a new Law Practice Program (L.P.P.) to operate side-by-side for five years as a pilot project; L.P.P. will be delivered through an innovative third party provider and will be about eight months long, divided between course work and co-op work placement.²

The minority would truncate articling to a two- to three-month comprehensive transitional pre-licensing program, with special provisions for sole practitioners.

Why am I telling you this? Because if the Law Societies won't do it, you and the profession are it.

In my view, it must start in the law schools, with focussed, practical courses—to foster an understanding through experience of what can be done with their highly developed theoretical knowledge.

² The Law Society of Upper Canada, News Release, "Law Society approves new alternative to traditional articling requirement", (22 October 2012) online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147490069>>; See also: Kirk Makin, "The End of Forced Articling for Lawyers on the Table", *The Globe and Mail* (22 October 2012) online: <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/the-end-of-forced-articling-for-lawyers-on-the-table/article4630369/>>

I refer to a paper released today entitled “Educating Law Students for the Practice: If I had My Druthers...” by Solomon Oliver, Jr., 18 years Federal District Court judge.³

I’m not able to quote it because of copyright, but the thrust of his paper is that we must educate students better by integrating legal doctrine with the teaching of lawyering skills and professional responsibility—not just how to think like a lawyer, but how to be one. This can best be done through clinical practice, simulated exercises and internships (apprenticeship).

Being a judge like myself, Judge Oliver placed special emphasis on persuasive legal writing skills, doctrinal thinking and negotiation, and case management conferences.

As Harry Edwards (former Chief Judge of the US Court of Appeals for the District of Columbia and a prior tenured professor at the University of Michigan Law School and Harvard Law School) put it:

[T]he law student should acquire the capacity to use cases, statutes and other legal texts. The person who has this capacity knows the full range of legal concepts: the concepts of property, the procedural law, and constitutional law, and so on. This person is skilled at interpretation: the reading of a case, or a complex regulatory scheme. Finally this person can communicate the interpretive understanding, both orally and in writing.⁴

He also noted: “The ‘impractical scholar’ addresses concrete issues in a wholly theoretical manner.”⁵

In this respect, I had the opportunity to read Shin Imai’s paper, now 10 years old, on core skills for community-based lawyering and his experience with the two clinical programs offered at Osgoode Hall.⁶ You will, of course, hear from him directly on Saturday morning. While a

³ Judge Solomon Oliver, Jr, “Educating Law Students for the Practice: If I had My Druthers...” (Paper delivered at the Missouri School of Law Center for the Study of Dispute Resolution Symposium “Overcoming Barriers in Preparing Law Students for Real-World Practice”, 19 October 2012), [unpublished]. This paper will be published in 2013 by Journal of Dispute resolution. More information can be found online here: <<http://law.missouri.edu/csdr/journal/>>.

⁴ Harry T Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 Mich L Rev 34 at 57.

⁵ *Ibid* at 35.

⁶ Shin Amai, “Counter-Pedagogy for Social Justice: Core Skills for Community Lawyering” (2002) 9 Clinical L Rev 195.

particularly intense example of what I am talking about, I think it is programs like these that may be the wave of the future. I note in particular his sense that students can be encouraged to act collaboratively and proactively (as opposed to adversarially) by the way in which a clinical course is taught.

I hope these remarks have been of some assistance to you. If I leave one message with you, it is this—that we are all in this together. In the end, it is not a law school/law society/profession of law/courts problem, it is a problem for all of us. If I didn't make this plain at the beginning, let me do so now. I would not for an instant suggest we ever go back to the system that was in place when I was in law school and concurrently articling. There can be no doubt that the lawyers of today “know more law,” are better thinkers, with greater analytical skills. The one—and the only one—advantage that the old system had was that we had a much better sense of how to use what (little) legal knowledge we had. I think this gap is something that we are on the way to resolving in many jurisdictions; I believe we are in Manitoba.