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INCOMPETENCY AND THE RESPONSIBILITY OF COURTS AND LAW SCHOOLS

ROBERT L. CLARE, JR.*

It is difficult to conceive of any function of democratic government more important than rendering justice, swiftly and surely, to those who appear before its courts. This obligation involves much more than providing a fair, competent, and honest judge. Surely, it includes the responsibility of the court to be assured that the lawyers admitted to its forum have at least the minimum qualifications to practice.

The various states admit members to their bars who perform the many and varied services contemplated by the whole spectrum of the law. But, obviously, there is only one valid reason for admission to the bar of the federal courts: the trial of legal disputes committed to their jurisdiction. Not only do federal courts have the power, then, to determine the qualifications for those who seek admission, they have, as well, the obligation to the public to assure themselves that those they admit are adequately trained. Otherwise, they perpetuate a kind of fraudulent misrepresentation.

Courts must have some reason for admission better than the collection of fees and the issuance of impressive certificates to adorn the walls of lawyers' offices. It is the thesis of this Article that there is a deficiency among lawyers applying for admission attributable to lack of training or experience in basic fundamentals of trial advocacy. It is then self-evident that the court has the obligation to require the necessary training.

The courts cannot be deterred by the plaintive cry of the law schools that the freedom of the academic is thereby diminished. Legal education should set as a goal teaching not only how to think like a lawyer, but how to be a lawyer as well. This was the original purpose of legal education and perhaps our present priorities should be reordered toward this end.

The beginnings of legal education in the world of the common law date to the year 1292 when Edward I appointed a Royal Commission to determine how lawyers should be educated. That Commission recommended that applicants for admission should

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observe the courts in action and serve an apprenticeship. The courts of England were, at that time, circuit courts and were held throughout the country. It was impossible, therefore, for applicants to follow them and observe all of their proceedings. Recognizing this, the judges, together with the sergeants, formed groups in London and presented them with problems which the applicant had to plead and argue. These were the first "moots" and the foundation of the Inns of Court, which continue in England to this day. The applicant's training was extremely practical, dealing not only with the substantive, but with the technical approach to the practice of law in the courts as well.

In our own early history, while we did not have the Inns of Court, we followed an apprentice system in which the applicant read law under an established lawyer, observed him in court, and learned the techniques of trial. When in the 19th century Judge Reeves opened our first law school in Connecticut, legal education took the form of a group apprentice system. The law school was able to perform for several students the functions that the individual lawyer had formerly performed for one or two students in his office. It was a highly practical training.

With the advent of Langdell at Harvard, a revolution took place. His teaching philosophy was expressed as follows:

"First that law is a science; second, that all the available materials of that science are contained in printed books." This second proposition, it is said, was "intended to exclude the traditional methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice."

. . . "What qualifies a person to teach law," wrote Langdell, "is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law. . . ."¹

While legal educators no longer openly espouse pure Langdell theory, his philosophy permeates the thinking of many of the incumbent deans of the law schools.

The Advisory Committee on Qualifications to Practice Before the United States Courts in the Second Circuit (Advisory Committee) has recommended rules which would require an applicant seeking admission to the district court to acquire, either in law school or thereafter, experience in evidence, federal procedure, criminal law and procedure, professional conduct, and trial advo-

¹ J. FRANK, COURTS ON TRIAL 226 (1949).

cacy. Requiring such indispensable courses, which are included in the curriculum of almost every law school, was fiercely resisted time and again by the deans on the ground, among others, that this would turn the law schools into trade schools. The dean of Columbia Law School has stated that the proposed rules could lead the "law schools that pride themselves on teaching general principles [into being] reduced to 'technical schools.'"²

This reaction was predictable. When the Advisory Committee was formed, the Association of American Law Schools appointed a special committee, headed by Dean Ehrlich of Stanford Law School, to oppose any educational requirements as a basis for admission to the federal courts. Its then president stated to the chairman of the Advisory Committee: "Even if you recommend that trial lawyers should have only a course in evidence, we will fight you to the death." Dean after dean, either in testimony before the Advisory Committee or in conversations with its members, insisted, in spite of criticism addressed to such philosophy dating back to 1933,³ that the function of the law school was to teach the student to think like a lawyer and that the subject matter of the courses was quite immaterial.

Teaching one to think like a lawyer is for the most part teaching the relatively simple technique of analyzing upper court opinions, distinguishing cases, and construing or criticizing legal doctrines. The law student today complains that his third year is a waste of time. It should not take 3 years to teach the dialectic technique. Its application to 12 to 15 subjects, randomly selected, over a 3-year period, without reference to how to apply what is being learned to a live client, is profligate.

One-half of a report issued jointly by the Special Committee on Professional Education and Admissions and the Committee on Federal Courts of the Association of the Bar of the City of New York⁴ is devoted to the proposition that no showing of incompetence has been made and that the Advisory Committee which proposed the rules should not have relied upon the experience of

² N.Y. Times, Sept. 16, 1975, at 82, cols. 1, 3.

³ See Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A.J. 723 (1933); Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

⁴ See Special Comm. on Professional Education and Admissions & Committee on Federal Courts of the Association of the Bar of the City of New York, *Joint Report on the Proposed Rule for Admission to Practice Before the United States District Courts in the Second Circuit*, 31 RECORD OF N.Y.C.B.A. 95 (1976). The Special Committee on Professional Education and Admissions is chaired by Judge Marvin E. Frankel of the Southern District of New York; the Committee on Federal Courts of the Association of the Bar of the City of New York is chaired by Bernard W. Nussbaum.

the judges of the Southern and Eastern Districts of New York because of the wide disparity—estimates ranged from 15 to 75 percent—in the judges' evaluation of the percentage of lawyers exhibiting incompetence. According to the report, "it does not seem possible to draw . . . clear distinctions between lack of training and lack of preparation."⁵ It is mildly amusing that this selfsame report spent several pages making recommendations for eliminating the incompetence which the joint committee itself, based upon its own experience, found not to exist.

Before discussing the reasons for the disparity among the judges, it should be noted that there was not a single judge among the 40 interviewed by the Advisory Committee who did not agree that there exists incompetence due to a lack of training. Judge Frankel, despite his participation in the joint committee report, conceded that litigants are inadequately represented in 5 to 10 percent of the cases, and he listed as the first significant cause insufficient legal scholarship. Even if we posit his percentage of inadequacy throughout that court, the number of cases bungled is between 250 and 500 and the number of clients affected must be significantly greater.

While some of the divergence of views among the judges can be explained by the different standards they apply based upon their own background and experience, some is also attributable to the judges' conception of their role as "activists." For example, Judge Weinstein of the Eastern District of New York, an outspoken critic of the rules, responded to a member of the Law Student Division of the American Bar Association, at a seminar at New York University held October 25, 1975, that the law student need have no concern in his court about laying a foundation for the introduction of a document in evidence or the formulation of a proper question because he, the judge, would take care of such technical matters for him or her.

Likewise, Judge Frankel's views may be colored by his opposition to the adversary system. As expressed in his Cardozo Lecture in 1974, "our adversary system rates truth too low among the values that institutions of justice are meant to serve."⁶ In this same paper he characterized the advocate in the courtroom as one "not engaged much more than half the time — then only coincidentally — in the search for truth."⁷

⁵ *Id.* at 96.

⁶ Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975).

⁷ *Id.* at 1035.

It bears repeating that if there is incompetency due to lack of training, it is the obligation of the bench and bar to insure that the trial lawyers who hold the liberties and property of clients under their control are properly equipped to discharge their awesome responsibilities, and we cannot dismiss as *de minimis* any incompetence which can be corrected. As far as the client is concerned, the one incompetent lawyer with whom he deals may represent the sum total of his contact with the law, and it may well be doubted that Judge Frankel would excuse a manufacturer for the sale of 5 percent of a shoddy product on the ground that the other 95 percent performed well.

To establish the existence of incompetence, it is not enough to rely on the words of Chief Judge Bazelon who referred to many of the young advocates in the criminal law field as "walking violations of the sixth amendment."⁸ Nor would the Advisory Committee, in reaching its major premise that such inadequacy existed, rely on the Sonnett Lecture of Chief Justice Burger⁹ or the admonition of Chief Judge Kaufman in his speech "The Court Needs a Friend in Court."¹⁰ The Advisory Committee interviewed 40 judges in the Second Circuit, and, as has been said, none of them denied the need for improvement. It held hearings in New York, Connecticut, and Vermont, and, with minor exceptions, even those witnesses appearing in opposition conceded the need. The dean of Columbia Law School, an outspoken critic of the rules, testified before the Advisory Committee as follows: "I do start with the assumption that there is a strong need for improvement in the quality of advocacy in the Federal District Courts."¹¹

To eliminate any vestige of doubt about the seriousness and scope of the problem, I quote, without attribution, from a survey made by the American College of Trial Lawyers (ACTL) in all of the circuits of the country other than the Second and Fifth Circuits. The ACTL individually interviewed the federal judges and sought their opinions as to the percentage of incompetence, the age bracket, and the cause, and their suggestions for improvement. A sampling of these opinions confirms the findings of the Advisory Committee.

⁸ Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

⁹ Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

¹⁰ Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974).

¹¹ Transcript of Public Hearing on the Proposed Rules to Practice Before the United States Courts in the Second Circuit, Nov. 20, 1974, at 42-43.

MASSACHUSETTS

"50% of defense counsel in criminal cases less competent than the Judge would like to see them." Suggestion for improvement: "Courses in evidence, civil and criminal procedure, federal practice, legal ethics and trial practice.

These courses will not make a competent trial lawyer but the lack of those will tend to produce an incompetent [one]."

THIRD CIRCUIT

"[A] survey was made of thirty-two judges in Pennsylvania, nine in New Jersey and seven in Delaware."

"While there was some reluctance by a very few judges to admit incompetence in some counsel, this was minimal. Most were quite outspoken and readily admitted such incompetence exists on a broad scale. The consensus [appeared] to be that twenty to twenty-five percent are excellent; fifty to fifty-five percent are fair to acceptable; and the balance are inept."

". . . As to how improvement in this area can be achieved, the judges believe that a trial lawyer, in order to be competent and effective, must have knowledge of (a) Evidence; (b) Civil Procedure (including Federal Jurisdiction, Practice and Procedure); (c) Criminal Law and Procedure; and (d) Trial Advocacy."

". . . If not taken in law school, many believe they should be learned through seminars later." (emphasis omitted).

KENTUCKY

Five to ten percent incompetent. Suggestion: "Seminars involving actual trial demonstrations by competent lawyers."

One Kentucky judge stated that 90 percent of the lawyers in criminal cases, and 80 percent of those in civil cases, were incompetent, but when asked if there was need for improvement responded: "Not such an acute need as to be alarming."

Approximately "50% of [the] trial advocates appear to be competent." The causes of incompetence noted were "lack

of training, lack of experience." Improvement could be accomplished by "[b]etter law school training."

MICHIGAN

Incompetency among trial lawyers, estimated at 15 percent, is "ascribed principally to (a) lack of adequate preparation, and (b) insufficient training."

"Several Judges indicate that the inadequacy of training is observed primarily among young lawyers, and particularly in the criminal and civil rights fields."

"The inadequacy manifests itself in opening statements, direct and cross examination, and final arguments."

"All Judges feel that improvement is possible and desirable, including those whose estimates of the incidence of incompetence are low."

The report from Michigan concludes that "irrespective of the incidence of incompetent trial lawyers, the quality of the trial bar is definitely improvable, and unless law schools can be induced successfully to give considerably greater attention to the development of trial advocacy, the details of the principle of internship should be further explored and, thereupon, infused into our Federal trial practice."

OHIO

"One-third inadequate in civil cases, 50% in criminal."

Suggestion: "More courses, programs and experience in advocacy and related subjects at the law school level."

"75% to 80% are incompetent" caused by "[l]ack of legal training (law school inadequacy); . . . [l]ack of experience; . . . [i]nadequate preparation."

The greater percentage of legal counsel appearing "lack training [in trial advocacy] and in most instances are poorly prepared [for trial]." Although age is not a significant factor, the majority of untrained and unskilled trial counsel appear to be "recent graduates with little or no trial exposure." Incompetency attributable to a "[l]ack of legal training. Many law schools no longer require as mandatory curriculum the basic tools of trial practice."

TENNESSEE

"Well above 50% incompetent. Shocking number of cases being tried by incompetent lawyers."

INDIANA

"5% or less in civil cases, higher in criminal cases. . . . Law schools not doing their part in providing practical trial experience."

"25% are being tried by incompetent lawyers. . . . The young incompetent generally comes without adequate training." Judge suggests "[m]ore practical training in law school."

ILLINOIS

"[A] substantial problem" with the competence of attorneys trying cases in his court. Incompetence in trying lawsuits could be reduced by an "[e]xtension program for law students to acquaint them with all offices and functions of [the] federal court system."

NORTH DAKOTA

"[V]ery much in favor of a qualification program for the Federal Courts." Judge suggested that "the qualification should include as much as 30 court room days as a condition to admission."

COLORADO

"Greatly concerned by the inadequate level of competency of many attorneys appearing in Federal Court."

NEW MEXICO

"10% completely incompetent—25% should be more competent. . . . Young lawyers evidence lack of training in law school."

UTAH

"Exceptionally competent"—Lack of competence due to "failure of law schools to prepare graduates for trial work."

DISTRICT OF COLUMBIA

A "[d]earth of good trial lawyers."

There is much more of the same; there are also opinions that there is no problem or that 10 to 20 percent inadequacy is not worth worrying about.

A judge from time to time may be wrong, but we cannot ignore the pervasive theme that incompetency exists due to lack of training. If there is lack of training, it is incumbent on the courts to take steps to remedy the situation. The law schools, even though they admit the problem exists, contend that it is unfair to put the burden on them. They argue that it interferes with the students' freedom of choice, that it is expensive to give the courses, and that the courses will not produce good trial advocates if the students take the courses only because they are required. They suggest postgraduate training by the courts and the bar.

The students are anxious to know what courses will help them be better lawyers. In most schools the trial advocacy courses are oversubscribed and the law schools themselves deny the students freedom of choice by limiting the number that can take the courses. While it is true that trial advocacy courses require a higher faculty ratio than other courses, the volunteer services of members of the bar have universally been available to assist the law school professor. Professor, now Judge, Prentice Marshall, with 1 teaching fellow and the free services of trial lawyers, taught 180 students during the last academic year prior to his going on the bench. This was done in Champaign, Illinois, hardly a metropolitan area.

The demonstrated need should require a reordering of priorities and, if necessary, even the sacrifice of a course such as that given at Yale entitled "Psychoanalysis and Law,"¹² a study of the theories of psychoanalysis and their relevance (if any) to the law. It is not claimed that the suggested courses will make a good trial lawyer, but no one has ever argued that knowledge of these subject matters will not help everyone engaged in the trial of a lawsuit. In fact, the law schools themselves recognize the relevancy of the suggested courses by requiring some or all of them before permitting a student to take a course in trial advocacy. If the courses are essential to a mock trial, how much more essential are they to a real trial?

The law schools do not worry about the students' freedom of choice when they set prerequisites for advanced courses. It is a

¹² 71 BULL. OF YALE U. 10, at 51 (July 30, 1975).

question of motivation. If students want to be trial lawyers they are anxious to take the course that will help them achieve that goal. One black lawyer testified before the Advisory Committee that black lawyers who went into ghetto areas immediately found themselves in the thick of litigation on behalf of their clients.¹³ This witness urged that anything we could do to force the law schools to provide students with the tools necessary to meet this challenge would be helpful to minorities.

Postgraduate training can, if necessary, supply the basics, *i.e.* teach the lawyer the fundamentals of the language of the courtroom. This alternative favors those who can afford it. It ill behooves the law school, with the present-day costs of legal education, to suggest to the student that he take courses after graduation to learn to be a lawyer. The right of the law schools to academic freedom, the law students' right to study what they want, even the courts' right to have counsel who are able to speak the language of the law — all of these rights pale into insignificance before the clients' right to adequate representation in the fight for justice.

¹³ Transcript of Public Hearing on the Proposed Rules to Practice Before the United States Courts in the Second Circuit, Nov. 20, 1974, at 231, 232, 236.