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# Educating Law Students for the Practice: If I Had My Druthers...

*Solomon Oliver, Jr.*

## I. INTRODUCTION

I have been a United States District Judge for more than 19 years. During that time, I have had the opportunity to observe many lawyers perform in the full range of contexts that litigating before the court presents. While I would rate the overall quality of the lawyering in cases over which I have presided to be good, I have too often noted conduct by lawyers, which suggests a lack of full understanding of what it means to be a lawyer and a lack of preparation for the practice of law. I will briefly reflect on some of the things I believe law schools should be doing to better prepare students to become lawyers, based primarily on my observation of lawyers who have appeared before me as a United States District Court Judge. However, I will also base a few of my observations on what I have learned from—and about—the 25 law clerks that I have had during my more than 19 years on the bench.

While I readily admit I cannot definitively prove that the deficient conduct I have sometimes observed is traceable to an inadequacy in law school curricula, I am confident that these are areas in which law schools should be devoting their efforts and resources. The first area I have identified—an overarching one—is (1) the need to provide students with the opportunity to integrate what they learn about legal doctrine with the teaching of lawyering skills and professional responsibility. The other areas I have identified are related to the first, but are sufficiently distinct that I will also address each of them as discrete issues. They are: (2) the need for enhanced instruction regarding case management; (3) strong emphasis on professional skills courses, clinics and externships; (4) more rigorous writing instruction, especially regarding documents related to the practice; and (5) a continuing commitment to course offerings requiring strong doctrinal analysis.

The importance of preparation in these areas is part of a discussion which has been ongoing in legal education for more than twenty years regarding how law schools and the profession might do a better job of preparing students for the practice of law. The catalyst for this discussion was a report by the ABA's Task Force on Law Schools and the Profession.<sup>1</sup> The Report of the Task Force, entitled "Legal Education and Professional Development—An Educational Continuum," is most often referred to as the MacCrate Report, in recognition of its chair Robert MacCrate.<sup>2</sup> The Report, issued in 1992, concluded, "that the task of educating

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1. A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, (REPORT OF THE A.B.A. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) (1992) [hereinafter "MACCRATE REPORT"]. The task force was appointed in 1989 by the Chair of the Section of Legal Education and Admissions to the Bar, Justice Rosalie Wahl of the Minnesota Supreme Court. *Id.* at xi. For a brief history of the task force, see *id.* at xi—xiv.

2. *Id.* at v.

students to assume the full responsibilities of a lawyer is a continuing process that neither begins nor ends with three years of law school study.”<sup>3</sup> It further concluded that, “[i]t [wa]s the responsibility of law schools and the practicing bar to assist students and lawyers to develop the skills and values required to” become practicing lawyers.<sup>4</sup>

The MacCrate Report sets forth ten fundamental skills that it found necessary for competent representation,<sup>5</sup> and also four fundamental values of the profession to which all lawyers should be committed.<sup>6</sup> The fundamental skills were: 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 solving ethical dilemmas.<sup>7</sup> The fundamental values were provision of competent representation, striving to promote justice, fairness, and morality, striving to improve the profession, and professional self-development.<sup>8</sup> The MacCrate Report was widely influential in causing law schools throughout the nation to modify their curriculums to provide instruction addressing issues of practice and professionalism. Clinical opportunities and skills courses were expanded as well as courses on professionalism.<sup>9</sup>

More recently, two other publications have influenced the approach of law schools in their efforts to prepare students for the practice of law: *Best Practices for Legal Education*—published by the Clinical Legal Education Association (“CLEA”);<sup>10</sup> and *Educating Lawyers*—part of the Carnegie Foundation for the Advancement of Teaching series on preparing students for the profession, including in the fields of law, medicine, and engineering.<sup>11</sup> Published in 2007, *Best Practices* was the culmination of a project, begun in 2001, to develop a “Statement of Best Practices for Legal Education.”<sup>12</sup> According to Robert MacCrate, who wrote the forward to the Report, the central message is that law schools should:

- broaden the range of lessons they teach, reducing doctrinal instruction that uses the Socratic dialogue and the case method;
- integrate the teaching of knowledge, skills and values, and not treat them as separate subjects addressed in separate courses; and

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3. *Id.* at 8.

4. *Id.*

5. *Id.* at 135–207.

6. *Id.* at 207–232.

7. *Id.* at 135.

8. *Id.* at 136.

9. See discussion *infra* Part III, page 7.

10. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007), available at [http://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf)

11. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

12. STUCKEY ET AL., *supra* note 10, at vii.

- give much greater attention to instruction in professionalism.<sup>13</sup>

*Best Practices* acknowledged the efforts and progress of law schools taken since the MacCrate Report was issued, but viewed them to be “more piecemeal than comprehensive.”<sup>14</sup> A comprehensive report, *Best Practices*, “calls[s] on law schools to make a commitment to improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify methods for delivering instruction, and give more attention to evaluating the success of their programs of instruction.”<sup>15</sup> In an effort to assist law schools in reaching these objectives, the Report offers guidance regarding best practices in seven different categories: setting goals, organizing the program of instruction, delivering instruction, conducting experimental courses, employing non-experimental methods of instruction, assessing student learning, and evaluating the success of the program of instruction.<sup>16</sup>

*Educating Lawyers*, published during the same time frame as *Best Practices*, also acknowledged that law schools had made progress over time in their efforts to prepare students for the practice of law, but likewise felt those efforts had been inadequate.<sup>17</sup> It noted the “increasingly urgent need to bridge the gap between analytical and practical knowledge, as well as the demand for more robust professional integrity.”<sup>18</sup> This gap was largely perceived as being the result of overemphasis on teaching doctrinal analysis at the expense of teaching students about practice and their professional responsibilities as lawyers.<sup>19</sup> *Educating Lawyers* proposed an integration of these three areas.<sup>20</sup> Such an integration would cause law schools, especially their law professors, to make significant changes in the way they think about educating students and in the way they teach. In order to illustrate how their suggestions might play out, the authors cited examples from several law schools that demonstrated how the three areas of what the authors called “apprenticeship” could be combined in a holistic way—in a manner which allowed students to learn what it means to practice as a member of an ethical public profession.<sup>21</sup> *Educating Lawyers* has become widely influential as law schools undertake further efforts to prepare students to practice law, with a full understanding of all of its dimensions. It has served as a catalyst for schools to integrate the so-called three apprenticeships in a range of courses across the curriculum, not just in clinical or skills courses.<sup>22</sup>

So much is already underway. Some law schools have begun to enhance their program of instruction to better prepare students for the practice of law.<sup>23</sup> If these

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13. *Id.* at viii.

14. *Id.* at 3.

15. *Id.* at 7.

16. *Id.*

17. SULLIVAN ET AL., *supra* note 11, at 12

18. *Id.*

19. *Id.*

20. *Id.* at 13.

21. *Id.* at 34–43.

22. See discussion *infra* page 10.

23. While my main focus in this article is on the areas in which law schools might better prepare students for practicing law before the courts, there is a growing recognition that law schools must similarly prepare students in non-litigation areas as well. For example, Washington and Lee School of

efforts continue at the current pace, it may be that the values and skills I identify as needing improvement are being, or will be, addressed as legal education continues to take to heart the lessons taught by the MacCrate Report, *Best Practices*, and *Educating Lawyers*.

I address below those areas which I believe deserve some added attention from law schools, based on my experience with the lawyers who have appeared before me and my law clerks over more than nineteen years.

## II. EDUCATING STUDENTS FOR THEIR ROLE AS LAWYERS

I agree with the MacCrate Report, *Educating Lawyers*, and *Best Practices*, that law students should receive more contextual instruction on what it means to be a professional. Stand-alone courses on ethics and professional responsibility are a great start, but students should have the opportunity to see how the rules relating to professional conduct work—not just in theory, but in practice. They need to understand how these rules work from the time a client comes into the office seeking advice and/or representation to the point in which the attorney-client relationship ends. While only a portion of this exposure may be possible through clinical programs and externships, there are substantial opportunities to address these issues through simulation exercises in ethics and responsibility courses as well as substantive courses.

I strongly feel that more of this kind of instruction is needed based on my observations of lawyers during my time on the bench. I agree with the authors of *Best Practices* that, in the past, legal education has mainly focused on teaching

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Law initiated a new third-year curriculum in 2008 that is entirely experiential. Washington and Lee School of Law Announces Dramatic Third Year Reform (MAR. 10, 2008), <http://law.wlu.edu/news/storydetail.asp?id=376>. Courses are offered across a broad range of areas through clinics, externships and practicums, including in transactional areas, such as banking and corporate finance. *Id.* Harvard Law School has revamped its curriculum, requiring a complex problem-solving course and courses on legislation and regulation for students in their first year. Elaine McArdle, *A Curriculum of New Realities*, HARV. L. BULL. (Winter 2008), available at [http://www.law.harvard.edu/news/bulletin/2008/winter/feature\\_1.php](http://www.law.harvard.edu/news/bulletin/2008/winter/feature_1.php).

For students in their second and third year, the school has provided new courses of study in the areas of law and business and international and comparative law, and has broadened its clinical offerings. *Id.* Stanford Law School recently completed changes to its third-year curriculum to provide enhanced opportunities for preparation in a broad range of areas, including clinical study, international study, interdisciplinary study, and public service. Joan O'C. Hamilton, *The New J.D.*, 86 STAN. L. 15, (June 11, 2012), available at <http://stanfordlawyer.law.stanford.edu/2012/06/the-new-jd/>. New York University School of Law has also recently overhauled its third-year curriculum providing for foreign study, specialized concentrations and the opportunity to combine study in Washington, DC with an internship, such as at the U.S. Environmental Protection Agency or at the Federal Trade Commission. Alexandra Tilsley, *Law Schools Get a New Look*, INSIDE HIGHER ED (Oct. 18, 2012), <http://www.insidehighered.com/news/2012/10/18/nyu-announces-changes-its-law-school-curriculum>. See also Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 103, 21-25 (2013) (describing the University of Dayton's program for preparing students for the practice, including the opportunity to take capstone courses). A recently issued report by the Committee on the Professional Educational Continuum of the American Bar Association, Section on Legal Education and Admissions to the Bar details various efforts by law schools since the issuance of the Carnegie Report to share their efforts at curriculum reform aimed at addressing the issues raised by the Report. Twenty Years After the MacCrate Report: a Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar and Judiciary, 2013 A.B.A. SEC. LEGAL ADMISSIONS B. 16-18.

students “how to think like a lawyer,” this coming at the expense of teaching them how to perform or practice and how to conduct themselves professionally. How does this reflect itself in conduct observed by the court? Sometimes it is reflected in conduct by lawyers suggesting that they think their only professional responsibility is to be zealous advocates for their client.<sup>24</sup> As a result, other obligations to the client, to the opposing parties, and to the court are ignored or neglected.<sup>25</sup>

One obligation that is sometimes ignored is the duty to the client to exercise independent judgment and render candid advice.<sup>26</sup> Indeed, a lawyer may variously function as an advisor, advocate, negotiator, and evaluator. While I respect the fact that a lawyer must abide by a client’s decision regarding the objectives of representation, it is apparent in some settlement conferences that I have conducted that at least one of the lawyers has not advised the client at all about the strength and weaknesses of his case, or the positives and negatives of going to trial versus trying to reach a reasonable settlement. While I do not believe every case should be settled, and I respect the right of a party to go to trial if there are material issues of fact to be tried, it is the lawyer’s responsibility to intelligently advise the client regarding their options.<sup>27</sup> Some of the worse cases I have seen, where in my view lawyers have acted only as an advocate and not as an advisor, have occurred in the settlement context. Indeed, I have seen lawyers move full force ahead without advising their clients of their options and without making their clients fully aware of the weaknesses of their case. Sometimes it is in a plaintiff’s best interest to accept a sizable monetary settlement or an offer to be returned to his job. I have seen the same with defendants paying out substantial sums, sometimes amounting to seven figures after trial, when they could have settled the case for a fraction of that amount.<sup>28</sup>

Lawyers must fully comprehend that carrying out the advocate role does not mean they must engage in offensive tactics, discourteous behavior, or disagree

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24. In fact, none of the ABA’s Model Rules of Professional Conduct even mention zealous advocacy. Rule 1.3 states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” MODEL RULES OF PROF’L CONDUCT R. 1.3 (2012). The only reference to that term can be found in comment 1 to that Rule, which states that “[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,” but also explains that “[a] lawyer is not bound, however, to press for every advantage that might be realized for a client.” *Id.* cmt. 1.

Prior to adopting the Model Rules in Ohio, Canon 7 of the Ohio Code of Professional Responsibility stated, “a lawyer should represent a client zealously within the bounds of the law . . . .” OHIO CODE OF PROF’L RESPONSIBILITY EC 7-1 (1970). The language from comment 1 to Model Rule 3.1 regarding “zeal in advocacy” was not adopted because, according to the notes of comparison, “[zealous advocacy] is often invoked as an excuse for unprofessional behavior.” OHIO RULES OF PROF. CONDUCT R. 1.3 cmt. comparison to ABA Model Rules (2007). Instead, comment 2 to Rule 3.3 of the Ohio Rules of Professional Conduct states, that a lawyer shall present a “client’s case with persuasive force.” *Id.* R. 3.3 cmt. 2.

25. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 3.3 (“Candor Toward the Tribunal”).

26. Model Rule 2.1 indicates that, “a lawyer [as advisor] shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” *Id.* at R. 2.1 (“Counselor”).

27. *See* MODEL RULES OF PROF’L CONDUCT R. 1.4 (“Communications”).

28. My comments regarding counsel neglect and their role as advisor is equally applicable in the context of mediations or other alternative dispute processes.

with requests of opposing counsel that cause no prejudice to their client.<sup>29</sup> While some lawyers intuitively understand this, there are far too many who do not and who will, for example, oppose a short request for an extension of time, which is likely to be routinely granted by the court. Also, I see many lawyers who do not fully comprehend their obligation as an officer of the court to be candid in their submissions—that is, to never knowingly making a false statement<sup>30</sup> and to affirmatively disclose all legal authority, including that which is contrary to their client’s position if the latter authority has not already been disclosed by opposing counsel.<sup>31</sup> There are still a substantial number of counsel who seem to believe that the object of briefing and argument is to cite and argue only the cases that are favorable to their client and hope that opposing counsel and the court will not find the cases, if any, to the contrary. They do not seem to understand what the authors say in *Educating Lawyers*: that law is a “public profession.”<sup>32</sup>

As an officer of the court, lawyers have a responsibility to uphold the quality of justice in our system and some responsibility for helping to assure equal access to justice.<sup>33</sup> This may include engaging in pro bono representation of clients who cannot afford it.<sup>34</sup> Despite these obligations, I recently had a very experienced lawyer bristle when a lawyer from our court’s pro bono representation program, which partially defrays costs for litigation if the case is not patently frivolous, was appointed to represent a pro se litigant. He clearly asserted that no funds should be used to assist this unrepresented person. As far as he was concerned, he and his client should not lose the advantage they had against this pro se litigant. Clearly, this lawyer had not learned an important lesson regarding the responsibilities of a lawyer.

My main point is this: students need more of an opportunity to see professional conduct modeled and to engage in it themselves. The latter may be accomplished through clinical practice as they work under the supervision of lawyers and professors who consciously discuss various aspects of what it means to be a professional and/or through simulated exercises where they have to explicitly

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29. Rule 1.2, while acknowledging that “a lawyer [should] abide by his client’s decisions concerning the objectives of representation,” clearly indicates that a lawyer does not violate that Rule by being courteous, by avoiding offensive tactics, or going along with requests of opposing counsel that cause no prejudice to his client. MODEL RULES OF PROF’L CONDUCT R. 1.2. Further, comment 5, clarifies that a lawyer’s representation of a client does not constitute approval of the client’s views or activities. *Id.* cmt. 5.

30. *See id.* R. 3.3(a)(1) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).

31. *See id.* R. 3.3(a)(2) (“A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

32. EDUCATING LAWYERS, *supra* note 11; *see also* MODEL RULES OF PROF’L CONDUCT Preamble ¶ 1 (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

33. The Model Rules directs lawyers to “seek improvement of . . . access to the legal system . . .” MODEL RULES OF PROF’L CONDUCT Preamble ¶ 6. Further, the Rules instruct that “[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.” *Id.*

34. *See id.* (“all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice”).

decide how they would handle various practice situations raising professional or ethical concerns.

Law schools should provide this instruction for at least four reasons. First, law schools are that place where students are taught to be lawyers. Being a lawyer means more than learning how to read cases. It means knowing how to utilize research and analytical skills acquired in the doctrinal courses in the practice of the profession. Law schools would not be doing their job if they did not seek to train lawyers to practice.

Second, the legal practice landscape has changed in the last few years as a result of the most recent economic crisis.<sup>35</sup> Many large law firms have downsized, and there are predictions that a substantial number of them will not soon, if ever, return to their former size.<sup>36</sup> There is also evidence that the corporations they serve are requiring greater accountability regarding costs of legal services. As a result, even large firms that may have borne the responsibility in the past for training their lawyers to be professionals are not as likely to do so today.<sup>37</sup>

Third, even when law firms took on the responsibility of training their own new lawyers, there were always a substantial portion of graduates who worked as solo practitioners, for small or medium-sized firms, or for small governmental agencies that did not have the training resources that large firms have.

Finally, it has been argued that the large firms have been somewhat responsible for the limited way in which some lawyers view their role as no more than zealous advocates, disregarding some of their other roles and responsibilities.<sup>38</sup> To the extent that there is any truth to the thought that law firms have contributed to the notion of lawyers as “hired guns,”<sup>39</sup> there is every reason to conclude that those who have served as teachers may not have learned the lesson of what it means to be lawyers themselves.<sup>40</sup>

One of the big payoffs in the training of lawyers regarding their proper role in resolving disputes could be more satisfaction generally among lawyers with the work they are doing.<sup>41</sup> As we come to understand that not every lawsuit should be viewed as a winner-take-all contest, success for a lawyer will be defined by a number of other factors. Those factors would include the goals and objectives of the client as developed with the advice of counsel, the obstacles to the client in achieving those objectives—including contrary evidence—as well as the lawyers’ obligation to the court to be honest and forthright in their presentations. This point is especially telling in a criminal case, as nearly ninety-six percent of defendants plead guilty.<sup>42</sup> As I have spoken to people from the Federal Public Defender’s

35. Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341 (2011).

36. See, e.g., William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. MAGAZINE, July 1, 2011, at 40, available at [http://www.abajournal.com/magazine/article/paradigm\\_shift/](http://www.abajournal.com/magazine/article/paradigm_shift/).

37. Dilloff, *supra* note 24, at 346.

38. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 38 (1992).

39. *Id.* at 38, 57.

40. *Id.* at 38.

41. See, e.g., EDUCATING LAWYERS, *supra* note 11, at 136–138 (discussing literature regarding lawyer dissatisfaction).

42. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T. OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 at 59 (2006), available at

Office of the Northern District of Ohio over the years—which is, by the way, a very good office—I have said to them that you have to define winning in a way that is different than counting the number of convictions prevented; though, I think they knew that already. They have to consider the circumstances in which they found the defendant, the options available to him, and the outcome for the defendant given the circumstances. This is how the success of all lawyers should be evaluated regardless for whom they work. Evaluations of this sort are much more likely to reduce the lack of job satisfaction that many lawyers feel.

### III. CASE MANAGEMENT

One crucial area where lawyers too often fail to perform their roles as advisors, negotiators, or even advocates is during the initial case management conference held in most civil cases.<sup>43</sup> The parties are tasked with conferring beforehand to discuss a range of issues, including the amount of time needed for discovery, whether the pleadings should be amended, the amount of time needed to file dispositive motions, whether settlement is possible, and whether Alternative Dispute Resolution (“ADR”) should be pursued. All too often, lawyers do not take this obligation seriously and thus spend far too little time discussing these critical issues in preparation for the conference. As a result, counsel are often unprepared for the conference. Indeed, I consider the case management conference so important that I require parties to be present unless they have a compelling reason not to.

It has always been my view that clients must be confronted with the tensions and realities associated with litigation in the same way that the court and the lawyers must. They should not be able to sit back and have their lawyers charge forward without a full understanding of the importance of what is at stake. There are also too many lawyers who would like to have their client excused in cases where there is no legitimate hardship because, in their view, the initial conference will only be used to set a schedule. Counsel seem to have no appreciation for the fact that the time leading up to the conference, including their meeting with opposing counsel and the conference itself, is an opportunity to learn about the opposing party’s case and to educate opposing counsel about their client’s version of the case. They do not seem to understand that sometimes the case management con-

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<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=564> (noting that the 96% of federal defendants pleaded guilty in 2004); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2004, BUREAU OF JUSTICE STATISTICS BULL. 1 (2007), available at <http://www.bjs.gov/content/pub/pdf/fssc04.pdf> (finding that 95% of felons convicted in state court pleaded guilty).

43. The Federal Rules of Civil Procedure provide that counsel for the parties should confer regarding a range of issues in advance of a scheduling order or conference. FED. R. CIV. P. 26(f) (2007). However, in the absence of a local rule to the contrary, the Rules do not require the judge to hold a case management conference in every case. *Id.* at R. 16; see also N.D. OHIO R. 16.1(b)(2) (requiring a case management conference in most cases). Therefore, a lawyer’s ability to take advantage of my suggestions may turn on the rules of local practice or the judge before whom the lawyer appears. As a matter of policy, I do suggest that the holding of a case management conference before a judicial officer of the type I have discussed would better serve the goals I have discussed herein and are likely to serve the Rules’ overarching goal of ensuring the “just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

ference can be used as a means to educate the client, as well as an opportunity to provide advice and counsel.

Counsel should be aware of the nature of their clients' litigation, the strengths and weaknesses of their client's case, and the information they need to make a determination regarding whether it makes sense to attempt to resolve the case right away—that is, whether resolution makes sense at the case management conference with the court's assistance or whether resolution should be attempted through other means before or after some discovery and/or pretrial motions. Counsel should have assessed, to the extent possible, whether there will be triable issues or whether there is a substantial possibility that the case will be resolved by the court's ruling on a dispositive motion, such as a motion to dismiss or a motion for summary judgment. If counsel is prepared in this manner, they will be able to discuss all of these issues knowledgeably with the court and opposing counsel and will be in a position to advocate for the kind of pretrial schedule that will best serve their client's needs. The schedule could include, for example, opportunities for pretrial resolution through ADR.

In essence, this is the point at which the lawyer's plan to help solve his client's problem should manifest. The case management conference not only provides an opportunity for counsel to educate the opposing party and the court about their clients' case, but is also clearly an opportunity to educate the clients about the legal process and the fact that their hopes and dreams must be tempered by the realities of the process. This is the place where, ideally, legal doctrine would meet the realities and circumstances of practice and the professional obligations of counsel. But all too often, as indicated above, the opportunity is not seized and it becomes—in the view of some lawyers—simply a scheduling conference. That translates into parties not having considered whether they would benefit from ADR, for example, some saying, "May I talk to my client and get back to you on that" and others saying, "I am always open to talking," with no real commitment to pursuing the process. In reality, they should have assessed the various outcomes and determined whether they are likely to serve their client's interests. Consequently, I think it is imperative that law schools teach students, as a part of a pretrial course or elsewhere, the importance of this process in expeditiously resolving conflicts.

#### IV. PROFESSIONAL SKILLS, INCLUDING ALTERNATIVE DISPUTE RESOLUTION (ADR)

I believe law students are more likely to be prepared to practice law if they have had some experience in clinical programs, have taken professional skills courses, or have engaged in externship opportunities. This is, in large part, why I have provided externships to students every year that I have served on the bench. I am convinced that engaging in such opportunities will likely address some of the issues regarding lawyer performance that I have identified in the previous section regarding lawyers' inadequate perception of their role.

Law schools have offered trial advocacy for many years as a way of giving students some practical experience regarding that aspect of the practice of law. Over the years, schools have added offerings in other areas, such as pretrial practice and clinical programs. A recently published study by the Section of Legal Education and Admissions to the Bar, entitled "A Survey of Law School Curricu-

la: 2002-2010,” indicates that law schools have increased their offerings in these areas as well as other forms of dispute resolution, such as arbitration and mediation.<sup>44</sup> That survey, undertaken under the auspices of the Curriculum Committee of the Section and the Consultant’s Office, reports on the curricular offerings of one hundred sixty-six of the two hundred ABA approved schools responding to the survey.<sup>45</sup> According to the report, “law school faculties are engaged in efforts to review and revise their curriculum to produce practice ready professionals.”<sup>46</sup> It attributes what is viewed as an increased commitment to do this to the changing job market, to the MacCrate Report published in 1992, and to *Educating Lawyers* and *Best Practices* published more recently.<sup>47</sup> They all urge law schools to take greater responsibility for training students to understand what it means to practice as a lawyer in the legal profession.

This survey, which concluded in 2010, followed a similar survey that covered a ten-year period from 1992 to 2002. The 2002 Survey was conducted about ten years after the MacCrate Report, which had urged the teaching of a range of legal skills as well as the “four fundamental values of the profession,” which included “striving to promote justice, fairness, and morality.”<sup>48</sup> The 2002 survey of law schools found that there was an increased commitment to clinical legal education and to professionalism.<sup>49</sup> The 2010 survey found, among other things, an increase in all aspects of skills instruction—including clinical, simulation, and externships—partly to meet the relatively recent adoption of ABA Standard 302(a)(4), which requires that students receive “other professional skills instruction.”<sup>50</sup> That survey also found that 85% of respondents offered in-house, live clinical opportunities on a regular basis and 30% offered off-site live opportunities.<sup>51</sup> Those law school offering clinical opportunities provided an average of three clinics.<sup>52</sup> Most responding law schools offered at least one externship opportunity.<sup>53</sup>

Examples of the kinds of professional skills courses offered are Basic Trial Advocacy, Alternate Dispute Resolution, Appellate Advocacy, Mediation, Transactional Skills, Advanced Trial Advocacy, Pretrial Advocacy, Interviewing and Counseling, Negotiation, and Discovery Practice.<sup>54</sup> The course offered more than any other by responding law schools was Basic Trial Advocacy (98%), followed

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44. SEC. OF LEGAL EDUC. ADMISSIONS TO THE BAR, A.B.A., A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 (Catherine L. Carpenter ed., 2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2012\\_survey\\_of\\_law\\_school\\_curricula\\_2002\\_2010\\_executive\\_summary.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf) (hereinafter “2010 Survey”).

45. *Id.* at 21.

46. *Id.* at 14.

47. *Id.* at 13-14.

48. MACCRATE REPORT, *supra* note 1, at 140-41; SEC. OF LEGAL EDUC. ADMISSIONS TO THE BAR, A.B.A., A SURVEY OF LAW SCHOOL CURRICULA: 1992-2002 (2004), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/curriculum\\_survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/curriculum_survey.authcheckdam.pdf) (hereinafter “2002 Survey”).

49. 2002 Survey, *supra* note 47, at 6-7.

50. 2010 Survey, *supra* note 43, at 15, 40.

51. *Id.* at 63.

52. *Id.* at 76.

53. *Id.* at 77.

54. *Id.* at 75.

by Alternate Dispute Resolution (89%), Appellate Advocacy (88%), and Mediation (85%).<sup>55</sup>

I am pleased to see a good menu of courses in addition to trial advocacy, since very few civil cases are being brought to trial.<sup>56</sup> From my vantage point as a judge sitting on the U.S. District Court, exposure to ADR and its various devices would be useful. All federal trial courts offer one form of ADR and most have more, including arbitration, mediation, early neutral evaluation, and summary jury trial.<sup>57</sup> Initially, the Civil Justice Reform Act of 1990, which required all judicial districts to develop a plan to reduce cost and delay in the judicial system, also required all districts to consider utilizing court-annexed mechanisms, including mediation, mini-trial, and summary jury trial.<sup>58</sup> Eight years later, Congress passed the Alternate Dispute Resolution Act of 1998.<sup>59</sup> It stated that ADR “has the potential to provide . . . greater satisfaction [for] the parties, innovative methods for resolving disputes, and greater efficiency in achieving settlements.”<sup>60</sup> That Act required every district court to provide at least one ADR option by local rule and that parties consider using ADR when appropriate.<sup>61</sup>

It is important that lawyers understand the differences between the various ADR devices, as well as whether their utilization will reduce costs and/or delay in their client’s particular case. In this regard, they need to understand the suitability of their case for settlement—is it a matter of economics or is there a principle involved that cannot be compromised? Assuming ADR is appropriate, a question arises as to when it would be most appropriate to engage in the process. Do the parties have sufficient information to do so right after the case management conference, or does some discovery need to be done first? There may be other critical issues of timing, such as whether ADR should be pursued before the parties file dispositive motions or after. Sometimes the determination of these matters will be exclusively in the party’s control and other times clearly not. However, since cases are so often resolved through settlement, and typically through one of the ADR processes, a lawyer who does not fully understand these processes, including their positives and negatives, will be less effective as both a counselor and advocate.

## V. WRITING FOR THE PRACTICE

American Bar Association Standard 302(a)(4) “require[s] that each student receive substantial instruction in . . . writing in a legal context, including at least

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55. *Id.*

56. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004), available at <http://www.marcgalanter.net/Documents/papers/thevanishingtrial.pdf> (“In some, perhaps most, forums, the absolute number of trials has undergone a sharp decline.”).

57. COMM. ON COURT ADMIN. AND CASE MGMT., JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL LITIGATION MANAGEMENT MANUAL 69 (2d ed. 2010) available at [http://judicial-discipline-reform.org/docs/Civil\\_Litigation\\_Manual\\_Jud\\_Conf.pdf](http://judicial-discipline-reform.org/docs/Civil_Litigation_Manual_Jud_Conf.pdf).

58. 28 U.S.C. §§ 471-82 (2000).

59. 28 U.S.C. §§ 651-58 (2000).

60. Alternative Dispute Resolution Act of 1998, PL 105–315, October 30, 1998, 112 Stat 2993, § 2(1).

61. 28 U.S.C. § 651(b).

one rigorous experience in the first year and at least one additional rigorous writing experience after the first year . . . .<sup>62</sup> The 2010 Survey of the Curriculum indicated that legal writing had become more prominent since the 2002 Survey. The Report stated:

Once relegated exclusively to the first-year program with few allocated units, legal writing is now the beneficiary of more units across the curriculum in both required and advance legal writing courses. In 2002, we observed these stirrings as law schools added credit hours to first-year legal writing. By 2010, respondents reported that, in addition to providing first-year Legal Writing with more units, the subject matter of the course was broadened to include lawyering skills beyond traditional advocacy.

. . .

Law schools also reported that they added advanced legal writing requirements and electives to the upper division curriculum. And for some schools, this included more emphasis on practice-focused writing as compared to scholarly seminars.<sup>63</sup>

To the extent law schools are placing an increased emphasis on writing, I think they are headed in the right direction. I always tell my law clerks and externs that the most important skill one can possess coming out of law school is the ability to research and write well. For those graduates going into large firms, writing and research will be their primary responsibilities. I advise them that, if they are known as someone who can write well and is willing to take on tough writing assignments, they will be able to distinguish themselves from their peers. It is equally important for those who are not going into a large firm to be able to research and write well from the very beginning, as they may be called upon to handle all aspects of litigation with little or no oversight.

To the extent law schools are providing the opportunity to engage in more practice-focused writing, this is a good thing. I acknowledge that it is important that students have experience drafting law-review-type notes with the oversight of the faculty to enhance the student's ability to do doctrinal analysis and to appropriately cite legal authority. However, a different kind of writing is needed in the litigation context, in which so many matters are decided by the court based on the written submissions of the parties. The clearest examples are motions to dismiss and motions for summary judgment. The outcome of these motions will sometimes resolve the dispute. Therefore, it is critical for students to have a familiarity with how to persuasively present and oppose such motions. Students should be taught that motions should be viewed strategically in the overall context of litigation, not as obligatory steps in the litigation process.

In my experience, summary judgment motions are filed in almost all cases that are not settled or dismissed beforehand. While the briefing in some of them is

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62. SEC. OF LEGAL EDUC. ADMISSIONS TO THE BAR, A.B.A., 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, R. 302(a)(4).

63. 2010 Survey, *supra* note 43, at 101.

extraordinarily well done, there are still too many that do not set out the relevant law, do not point out what facts they maintain are disputed or undisputed, and do not cite to evidentiary support in the record for their assertions. Some counsel routinely file a motion for summary judgment on each claim involving his or her client, often on multiple grounds when the record clearly does not support granting the motion on all grounds.<sup>64</sup> Such an indiscriminate presentation of issues for resolution may be detrimental to the positive resolution of those that might have merit and is also likely to affect the credibility of counsel with the court.<sup>65</sup> Sometimes those opposing motions for summary judgment employ the tactic of filing voluminous depositions with the court—often without proper citations—with the view that the greater the volume of material submitted to the court, the more likely the court will find a disputed issue of material fact.<sup>66</sup> This, of course, may have the opposite effect since judges are not required to search the record when considering such motions.<sup>67</sup>

When properly employed, a summary judgment motion has the ability to save time and expense and also provide a just pretrial resolution of a case or claims in a case. While some such motions are clearly well-taken, the failure to properly oppose such a motion may well lead to an unwarranted outcome. Also, the filing of motions that are clearly unwarranted or are not properly supported can lead to greater costs and delay. Thus, students should be taught how to contextually assess whether the filing of a motion is warranted, and if so, what should be the timing of such a motion—as well as what impact the filing of, or the failure to file, such a motion may have on the course of the litigation. For example, a student might ask, “if I file a motion that is denied rather than first proceeding to mediation, will it still serve to narrow the issues or increase the settlement value of plaintiff’s case?” The student must also determine what evidence is needed to support or oppose such a motion and the form in which that evidence must be presented. Finally, if such a motion is filed, the parties must be prepared to persuasively argue that there are or are not disputed issues of material fact for which the court should or should not grant judgment as a matter of law.

There are a range of other motions which counsel for parties are likely to file or have to oppose on a fairly regular basis, including motions for preliminary injunctions. Students should be afforded the opportunity through their law school course to both work through strategic issues and to draft and oppose motions. This is especially important because the resolution of motions, as discussed above, is so essential to the resolution of disputes in federal court.

Apart from the issues discussed above, it is important that students be taught to differentiate between the kind of writing you do with respect to motions and other legal writing, such as that done for law review. Over the years, I have found that, at the beginning of their clerkship, law clerks have difficulty making the distinction. They often draft orders that are longer than they need to be at the ex-

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64. See, e.g., Hon. Solomon Oliver, Jr., *Summary Judgment*, in BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 30:2, 696 (Robert L. Haig ed., 3d ed. 2011).

65. See *id.* (“This approach obfuscates rather than clarifies and is likely to affect a lawyer’s credibility with the court.”).

66. See *id.* at 697 (“Avoid the strategy employed by some lawyers which seems to have as its basic assumption that the more material submitted, the more likely the court is to find a factual dispute.”).

67. FED. R. CIV. P. 56(c)(3).

pense of the detailed factual and legal analysis that may be required by the particular case. In drafting motions or orders regarding summary judgment, for example, it is not important to trace the history of the summary judgment device or the evolution of the standard in great detail, it is more important to set forth what the standard is and why summary judgment is or is not, warranted in the particular case.

I always tell the clerks their task is to write clearly and succinctly. In this regard, I tell them they should use two tests. First, they should seek to write in such a way that counsel for the losing party, though disappointed, can clearly see how the court reached the result and would have serious concerns about the viability of an appeal. Second, I tell them to consider the fact that the matter may, indeed, be reviewed by the court of appeals. If the opinion is not clear, and if the reviewing judges have to continually say to themselves “I do not understand this,” you are inviting the judges to do their own independent review. As a practical matter, this increases the chance that little deference will be given to the opinion of the trial judge, regardless of the applicable standard of review. I also tell my clerks the goal is to have the court of appeals judges read the opinion and say, “that makes sense.” What is the purpose of this instruction? It is not to disrespect opposing parties, their counsel, or the judges on the courts of appeal, but to teach law clerks the importance of clarity and good writing.

The other thing I try to teach them is to understand the variations in the legal standards that apply in different contexts. In reaching the conclusion that summary judgment is, or is not, appropriate in a particular case, law clerks know, but often have difficulty applying, the standard that summary judgment should be rendered only if there is “no genuine dispute as to any material fact.”<sup>68</sup> For example, if the case is very one-sided, but there are factual issues that should preclude the granting of summary judgment, law clerks might be inclined to propose granting it. They lose sight of the fact that a court, in applying the relevant standard, is not free, like a jury, to reach this result. Sometimes you will see the opposite. If there is strong evidence for the plaintiff on one element of his cause of action, summary judgment might be proposed in the face of a record where there is no substantial probative evidence in regard to other elements. This happens, in my view, with law clerks who are generally well-trained and come well-prepared because it takes time to get the feel for how one applies legal standards to real cases. While lawyers in the practice are writing from a different vantage point than clerks who are drafting opinions for judges, I see lawyers having a similar difficulty in persuasively applying the legal standard to the facts. Surely, practice in such writing by a student under the watchful eye of a professor, a clinic or externship supervisor, or a judge who gives feedback would enhance his or her skills in this area.

But to fully understand their responsibility as lawyers, students must not only learn how to persuasively apply the law to the available facts; they must also learn how to develop the factual record that will serve as the basis for making or opposing a motion. This can be accomplished through participation in a clinical program, certain externships, or a simulation-focused course on motion or pretrial practice. Requiring students to learn how to develop a factual record would integrate the three dimensions identified in *Educating Lawyers* as being necessary to

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68. *Id.* at 56(a).

prepare students for practice: the doctrinal, the practical, and the ethical.<sup>69</sup> Students would come to understand that the process for filing a motion starts well before it is actually drafted. Indeed, a good motion starts to be crafted at the very beginning of the case when the lawyer, after researching and understanding the law, determines what kind of testimony, exhibits, and other evidence he will need to make his case. Ultimately, this evidence must be assessed for the purpose of making or opposing a motion. This is important because the likelihood of success in making or opposing a motion will often turn as much on the preparation of the case itself as on the legal writing skills of the person who drafts the motion.

Students should be given the opportunity to learn that good pre trial preparation and good motion practice go hand-in-hand and that the success of the motion may turn on whether a lawyer posed a critical question to a witness or whether a lawyer had a witness clarify his response on cross-examination. The development of the case and the evidence is all done in the shadow of the law and in light of the lawyer's ethical obligations. Indeed, an assessment of the law and evidence may cause a lawyer to decide that he could not file a motion in good faith or that it would not be strategic to do so in face of the strong likelihood that it would be denied.<sup>70</sup>

In sum, it is important that law students come to understand that the filing of a motion is not a singular event, but is part of the overall development and presentation of a case. Armed with such understanding, I am certain students will become more effective writers and advocates as they enter the practice.

## VI. DOCTRINAL ANALYSIS

*Educating Lawyers*, the MacCrate Report, and *Best Practices* all suggested law schools needed to do a better job of integrating the teaching of doctrinal analysis within the practice of law and the responsibilities of lawyers as professionals.<sup>71</sup> None of them suggested that the teaching of doctrinal analysis, “how to think like a lawyer”—was unimportant. Indeed, Judge Harry Edwards, the former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, and a prior tenured professor at the University of Michigan Law School and Harvard Law School, expressed his concern in a law review article published in 1992 that elite law schools were shirking their responsibilities for preparing students for the profession by hiring too many professors who have no commitment to teaching doctrine or engaging in doctrinal scholarship.<sup>72</sup> He refers to what he calls a growing trend of hiring “impractical” scholars.<sup>73</sup> He states, “[i]mpractical scholars often are inept at teaching doctrine, for either lack of any practical experience or lack of interest in the subject matter, or both. Obviously, law students will not

69. Sullivan et al., *supra* note 11, at 12-14.

70. For more on the professional and ethical pitfalls of filing a poorly supported motion, see Oliver, *supra* note 63, at § 30:2..

71. Sullivan et al., *supra* note 11, at 12; MACCRATE REPORT, *supra* note 1, at 135-207; Stuckey et al., *supra* note 10, at 71.

72. See Edwards, *supra* note 37, at 38-39.

73. *Id.* at 35 (stating that the “‘impractical’ scholar . . . addresses concrete issues in a wholly theoretical manner.”).

receive a full and rich doctrinal education from such teachers.”<sup>74</sup> Judge Edwards saw a doctrinal education as key to a lawyers’ professional development. He states, “a lawyer is by definition skilled in the law, just as a doctor is skilled with the human body.”<sup>75</sup> He explains the importance of doctrinal education as follows:

the 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 law, and procedural law, and constitutional law, and so on. This person is skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally this person can communicate the interpretive understanding, both orally and in writing.<sup>76</sup>

He also saw doctrinal education as part of “the lawyer’s ethical development.” He states:

The ethical lawyer should only advance reasonable interpretations of the authoritative texts—interpretations that are plausible from a public—regarding point of view. The ethical lawyer’s brief should be reasonably true to those texts, and to the public values they embody.<sup>77</sup>

Whether Judge Edwards’s view regarding the proliferation of so-called “impractical” scholars is correct, I think he appropriately captured the critical role that “thinking like a lawyer” has in becoming an effective lawyer. Certainly his concern that students continue to have significant and rigorous instruction in doctrine has merit. As alluded to by Judge Edwards, if a lawyer is to follow his ethical obligation in only arguing legal positions that have some plausible merit, the lawyers must be well trained in knowing what the law is.

From my vantage point, including what I see in the hiring of law clerks, lawyers in the profession are likely to be more well-equipped than others if, in addition to the first-year offerings, they take constitutional law, evidence, and a few statutory courses requiring rigorous analysis. The 2010 Survey of Law School Curricula found that, to the extent law schools require courses beyond the first year, these are the most often required; this makes sense to me.

The rules of evidence are at the very core of our legal system for resolving disputes. While they may not formally apply to alternate dispute proceedings, such proceedings are conducted under the shadow of the rules. If the evidentiary materials a party relies on during those proceedings is not admissible at trial, this may well have an effect on the settlement value of the case, for example. Constitutional law also makes sense to me for many reasons, including the fact that it involves the fundamental document that provides for certain basic rights of citizens but also serves as a limitation on both state and federal governmental institu-

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74. *Id.* at 57.

75. *Id.* at 59.

76. *Id.* at 57.

77. *Id.* at 59.

tions, including their law-making power. Indeed, it delineates the jurisdiction of the courts in our federal system.<sup>78</sup>

The nature of the statutory course a person might take would vary, depending on the person's interests. It could be Securities Regulation or it could be Antitrust Law. The main purpose for taking the course would be not so much for the subject matter, but the experience of having to engage in statute-based analysis regarding a challenging subject. The goal is to enhance the likelihood that a student entering the practice would have the confidence that he or she has the tools to handle complex problems across a wide range of factual circumstances. I would also suggest a course federal courts because it would give students an orientation to the national legal system of federal and state courts, which in some cases have concurrent jurisdiction. Ultimately, a basic understanding of this system of courts will be critical to carrying out the responsibility of lawyers who will serve as litigators.

## VII. CONCLUSION

For more than twenty years, there has been continuous discussion within the legal profession about the need for law schools to better train students for the practice of law. More recently, the book, *Educating Lawyers*, has emphasized this need, suggesting that this might be more effectively done if law schools taught students in a more holistic way, by integrating the teaching of legal doctrine, lawyering skills and professional responsibility. I agree with this assessment. While I surely have seen many good, and sometimes sterling performances by lawyers who have appeared before me in my more than nineteen years as a United States District Judge, law schools to integrate their teaching of knowledge, skills and values, all of which are essential to being an effective lawyer, I have observed conduct by a substantial number of lawyers over this time frame that clearly suggested to me that they did not fully understand their role as a lawyer and/or were not fully prepared. In part this was a result of their not having effectively integrated these three dimensions of practice. Based on these observations, as well those gleaned from working with my 25 law clerks, I have identified five areas in which I think law schools should devote resources in order to prepare students to be ready for the practice of law. The five areas I have highlighted are the overarching ones identified by *Educating Lawyers*: (1) the need to provide students with the opportunity to integrate what they learn about legal doctrine with the teaching of lawyering skills and professional responsibility, as well as (2) the need for enhanced instruction regarding case management; (3) strong emphasis on professional skills training, clinics and externships; (4) more rigorous writing instruction, especially regarding documents related to the practice; and (5) a continuing commitment to course offerings requiring strong doctrinal analysis.

If students are provided training in these critical areas, I am convinced students will be substantially better trained than they have been to begin the practice of law. To the extent that there has been reliance in the past on the fact that new lawyers would obtain the necessary training after they began practice, this reliance has always been misplaced, especially in regards to those graduates who were solo practitioners, who worked for smaller firms or organizations that did not provide

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78. See U.S. CONST. art. III, §§ 1, 2.

such training. Furthermore, today many large firms, in the face of economic pressures and demands for greater accountability by their clients, have eliminated or substantially pared such training. In light of the efforts already under way, I am convinced that law schools are preparing to take on their rightful responsibility to prepare students for the practice of law.