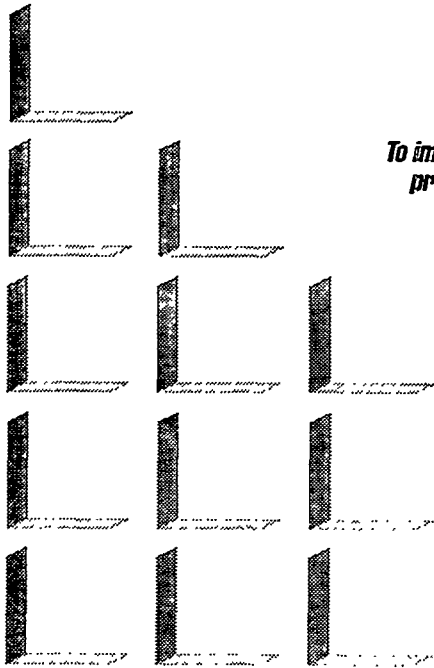


Commission on Legal Education



*To improve the quality of legal services
provided to the citizens of Wisconsin*

Final Report and Recommendations

Introduction

I. THE COMMISSION'S MISSION

The practice of law is dynamic. It develops and changes in response to societal needs and the competitive demands of the marketplace and is influenced by national and international events. Legal education must respond to meet the changing needs of the practice of law. Therefore, the status and effectiveness of legal education periodically needs to be reexamined. In Wisconsin, this task was undertaken by the Commission on Legal Education of the State Bar of Wisconsin.

As its starting point, the commission acknowledged that law is a profession and examined what it means to be a lawyer today. The public perception of lawyers is often colored by dramatic depictions of lawyers in the media as well as high-profile cases that command significant attention. A great number of lawyers, however, devote substantial amounts of time and effort to pro bono work and to community service. The high ideals and sense of responsibility to the greater community exhibited by these lawyers is an important component of the profession of law.

In examining legal education in Wisconsin, the commission recognized that legal education involves not only the learning of substantive law but also the acquisition of a relevant and universal set of skills and values essential to the profession. Legal education is a continuum

beginning in law school and continuing throughout a lawyer's legal career. It is a lifelong undertaking.

The commission acknowledged that the quality of legal education correlates directly with the quality of legal services provided to the public and that the consumers of legal services have the right to expect that lawyers, including recent law school graduates, are competent to practice law. The law schools, the bar, and the courts have a shared responsibility and an obligation to meet that expectation.

To that end, the commission developed a set of recommendations to enhance legal education in Wisconsin and the quality of legal services provided to the public. The commission's work is as much a reaffirmation of the law as a profession with core values as it is an evaluation of the current status of legal education in Wisconsin.

II. THE *MACCRATE REPORT*

The Wisconsin Commission on Legal Education is indebted to the ABA Task Force on Law Schools and the Profession and its 1992 report entitled *Legal Education and Professional Development—An Educational Continuum* (commonly known as the *MacCrate Report*). The *MacCrate Report* makes a compelling argument for comprehensively reevaluating legal education in this country. It also offers a reasoned methodology by which to judge whether current systems of legal education adequately address the needs of the profession. The *MacCrate Report* explicitly challenges the nation's state bar associations and licensing authorities to review legal education in their own jurisdictions. In response to this challenge, the commission set about its work.

What follows is an evaluation of the status of legal education in Wisconsin by selected Wisconsin judges, faculty, practicing lawyers, and private citizens, with recommendations crafted to reflect Wisconsin's unique circumstances. The Wisconsin Commission on Legal Education used the *MacCrate Report* as a basis for discussion and inquiry. In a larger sense, the *MacCrate Report* gave the commission an analytical construct within which to evaluate whether lawyers are being adequately prepared to practice law in Wisconsin.

The commission agreed with two core observations in the *MacCrate Report*: first, the report's implicit assertion that lawyers must and can be taught a common set of professional skills and values; and second, the report's description of legal education as a continuum that begins in law school (or before) and continues throughout a lawyer's career. The commission concluded from these observations that the goal of legal education in Wisconsin should be not only to teach substantive law, but also to foster the acquisition of a relevant and universal set of skills and values. Education in the identified set of skills and values, however, must be ongoing. The commission also recognized that some learning is best suited to the law school environment; while some develops through a lawyer's years of practice. Significant learning also takes place informally through a lawyer's observations of and interactions with others in the legal community.

Although the *MacCrate Report* provided a starting point for the commission's work, this report is the result of the commission's own independent analysis of the role of lawyers in Wisconsin, the economics of legal practice, the curricula of the two Wisconsin law schools, and the CLE programs currently offered by the State Bar of Wisconsin and other providers.

III. THE COMMISSION'S WORK IN THE CONTEXT OF PROFESSIONAL EDUCATION

The Wisconsin Commission on Legal Education is mindful of the larger issues that confront professional education. Many professions recognize the need to change fundamentally the ways new members are admitted to the profession; thus, educators have begun to rethink aspects of both formal schooling and the professional continuing education. Three issues seem to characterize common concerns in professional education: (1) the need to understand new demands on the profession along with changes in the context in which professional services are rendered; (2) the need to integrate new knowledge and procedures in curricula and to better implement them into actual practice; and (3) the need to engender continuous self-critique, defined as a process of self-assessment that enables professionals to better respond to evolving demands for competence and accountability. See, e.g., Lynn Curry and Jon Wergin, *Educating Professionals* (1993); ABA Section of Legal Education and Admission to the Bar, *Legal Education and Professional Development—An Educational Continuum*, at 225-26 (1992) (hereinafter *MacCrate Report*).

In particular, the commission recognizes that many professions struggle with what has been called the “education-practice discontinuity.” See, e.g., Sally Hixon Cavanaugh, *Connecting Education and Practice* (1993). Technical skills that are learned and honed in day-to-day practice must not overwhelm theoretical teaching in either the professional school class or the continuing education seminar. On the other hand, theoretical teaching loses much of its value when it is divorced from skills and values. The commission believes, however, that the education-practice discontinuity, to the extent that it exists, can be bridged by early and consistent experiential learning. Experiential learning is learning by doing and by reflecting on experience.

Many professional-school educators use experiential learning to teach professionals how to think, analyze, reason, and engage in ongoing self-critique. Experiential learning requires the student to make a connection between the underlying theory and the practice of a particular skill. The commission approached its inquiry into legal education in Wisconsin with the hope that its work would be valuable both to lawyers and to the broader community of those interested in professional education.

IV. THE EVOLVING ROLE OF THE LAWYER IN WISCONSIN

In Wisconsin, as in the rest of the country, social issues are increasingly seen as having legal solutions. The result of this trend has been to expand the influence of law in our society. The evolution of the role that law plays in our society inspires a corresponding evolution in the role of the lawyer. Lawyers today must be conversant with a vast array of legal subjects, many of which did not exist until recent decades. Lawyers are also more likely to specialize today than to practice as generalists.

These trends have evolved in conjunction with an increasing demand for legal services in Wisconsin and the nation. The expansion of state and local government bureaucracy creates a need for lawyers to serve as intermediaries between citizens and the government. The right to counsel in various contexts has been defined and amplified by the courts. In addition, the general business environment has become more legalistic than it was in the past. For many in our state, being a consumer of legal services has become a cost of doing business. Unfortunately, for other segments of the population, the increasing need for legal services has not been met by an increasing supply of affordable or no-cost representation.

The makeup of the practicing bar in Wisconsin has also evolved, mirroring nationwide trends. More lawyers have entered the profession in recent years, increasing the percentage of lawyers as a proportion of the overall population. Increasing numbers of women and minorities have entered the profession. In addition, a significant percentage of Wisconsin bar members practice law outside the state. Thus, the membership of the State Bar of Wisconsin is larger, and less homogeneous, than ever before.

These demographic changes in the profession are relevant to legal education. There is continuing debate concerning whether women and men approach learning in different ways, whether traditional law-school teaching methods inadvertently disadvantage women and minority students, and whether informal mentoring by experienced practitioners is as available to women and minority lawyers as it traditionally has been to white male lawyers. These concerns underscore the need to reexamine the status and effectiveness of legal education in light of recent changes in the profession.

V. THE EVOLVING ECONOMICS OF LAW PRACTICE IN WISCONSIN

The economics of the practice of law, nationally and in Wisconsin, are evolving in ways that significantly affect the profession. The number of lawyers in the state has increased and continues to do so. Although the market for legal services has also increased, the greater number of lawyers means that those entering the profession face greater competition. The increased population of lawyers has also translated into more solo and small-firm practitioners in the state, notwithstanding an increase in specialization.

Increased competition for clients and clients' concerns about the cost of legal services create strong pressure for lawyers to keep costs down. For some clients, keeping legal costs down takes priority over maintaining a long-term relationship with a lawyer or law firm. Business clients not only engage in more "shopping around" for lawyers but also rely more on in-house counsel than in the past. Some clients have challenged the traditional billable-hours method of charging for legal services preferring alternative-fee arrangements for some transactions. A number of law firms have responded to competition by requiring more hours of work from their members and associates so that profits can be maintained. In 1994, the State Bar's Committee of Solo and Small Firm Practice noted these and other changes in legal practice in Wisconsin and reported the perception that lawyer education needs to be improved so that solo and small-firm lawyers can better adapt to these changes.

The discussion thus far addresses problems of lawyers in the private sector. Government lawyers today, however, also live in a different world from that of their predecessors. Funding cutbacks at all levels of government have reduced not only the prospects of public-sector employment for lawyers but also the resources available to public agencies for continuing education for their lawyer-employees.

The large debt burden many law students must assume also affects the economics of law practice. According to nationwide statistics, average law-student indebtedness upon graduation has been increasing at a rate of 20% per year. Ann Davis, *Graduate Debt Burden Grows*, Nat'l L.J., May 22, 1995, at A1. One can assume that loan-repayment obligations have some effect on a law graduate's career decisions as well as on a practitioner's decisions about which clients, cases, and types of legal work to accept.

Other economic changes in law practice have benefitted Wisconsin lawyers, especially solo and small-firm practitioners. The increased use of technology in legal research and office management, for example, appears to be cost-effective. Online legal research and CD-ROM information storage can be a less expensive alternative to maintaining the traditional library of law books. Voice mail and word processing can reduce reliance on legal secretaries and support staff.

The changed economics of the profession, however, have created a state of malaise among a significant minority of practitioners. An unusually large number leave the profession in their early years of practice, citing dissatisfaction with a lifestyle so geared to working the maximum number of billable hours that there is little time for a personal life. Although this situation may be more common in states with many large firms in large cities, it certainly exists in Wisconsin.

VI. THE CURRENT ORGANIZATION, REGULATION, AND EDUCATION OF THE LEGAL PROFESSION

A. The Wisconsin Supreme Court and the Regulation of the Legal Profession

The regulation of the legal profession is vested in the Supreme Court of Wisconsin. Within this authority is the power to determine the fitness of those who want to practice law, to determine the kind and level of competence needed to perform legal tasks, to decide whether special training is appropriate, and to discipline those practitioners who fail to represent their clients competently. *See Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94, 454 N.W.2d 770 (1990).

To help carry out its regulation of the legal profession, the Wisconsin Supreme Court has established three entities: the Board of Bar Examiners, the State Bar of Wisconsin, and the Board of Attorneys Professional Responsibility. Each entity plays a different role in regulating and, in the case of the first two, educating the legal profession.

The **Board of Bar Examiners (BBE)** implements the supreme court rules regarding admission to the bar (SCR ch. 40). The board's responsibility includes processing requests for admission by examination and on motion, overseeing the investigation of the character and fitness of bar applicants, and administering the bar examination. The board is also charged with administering and enforcing the supreme court rules regarding mandatory continuing legal education (SCR ch. 31). This charge includes approving continuing legal education activities and determining compliance with attendance and reporting requirements.

The **State Bar of Wisconsin** is an association organized by the court "in the exercise of the court's inherent authority over members of the legal profession as officers of the court." SCR 10.02(1). Membership in the association is a condition precedent to the right to practice law in Wisconsin. SCR 10.01. The State Bar maintains the membership list of lawyers, collects mandatory assessments for supreme court boards, and performs other administrative services for the court. It also works to raise professional standards, improve the administration of justice, and provide a forum for the discussion of subjects pertaining to the practice of law. The association's list of purposes specifically mentions: "to foster and maintain . . . high levels of integrity, learning, competence and public service and high standards of conduct" and "to conduct a program of continuing legal education." SCR 10.01(2). Although there are many providers of continuing legal education (CLE) in the state, the State Bar of Wisconsin is the largest in terms of number of programs, attendees, and legal publications.

The **Board of Attorneys Professional Responsibility (BAPR)** assists the supreme court in protecting the public from professional misconduct by members of the bar. The BAPR enforces the Rules of Professional Conduct for Attorneys (SCR ch. 20), investigates complaints of lawyer misconduct, and takes disciplinary action, when such action is recommended, ranging from a private reprimand to the filing of a formal complaint with the supreme court. The BAPR is also involved in the reinstatement of lawyers whose licenses have been suspended or revoked.

The Wisconsin Supreme Court also supervises the regulation and education of the judiciary through the Judicial Conference and the Judicial Education Committee. For a description of these entities, see Appendix A, *infra*.

B. Legal Education in Wisconsin

Although the membership of the State Bar of Wisconsin includes graduates of many law schools, a majority graduate from either Marquette University Law School or the University of Wisconsin Law School, the only law schools in the state. A graduate of either of these schools may be admitted to the State Bar under the “diploma privilege,” i.e., without taking a bar examination, if certain course and grade requirements are met. Almost all graduates of these schools meet the requirements and are eligible for admission to the State Bar of Wisconsin, by motion, within one year of graduation. The diploma privilege, set forth in Chapter 40 of the Wisconsin Supreme Court Rules, has been available to University of Wisconsin and Marquette University Law School graduates for the past 60 years. Although Wisconsin now is the only state with a diploma privilege, other states have had it in past years, and some are considering reinstituting it.

Those who wish to join the State Bar of Wisconsin but do not qualify for the diploma privilege must take the Wisconsin bar exam unless, as experienced lawyers in other jurisdictions, they meet the requirement for admission under reciprocity. Essentially, Wisconsin will admit members of another jurisdiction's bar to the Wisconsin bar if that jurisdiction would admit Wisconsin counterparts of those lawyers to *its* bar.

The University of Wisconsin Law School was established by the University of Wisconsin (UW) in 1863 and has been located on the UW campus at Madison since 1892. The school enrolls 285 students in each entering class and in 1995-96 has a total of 900 students, including those seeking advanced degrees, 50 tenured or tenure-track full-time faculty members, and 45 academic staff engaged in teaching, research, and service. A number of joint-degree programs are offered in conjunction with other UW schools and colleges. An extended timetable program that allows students to take evening courses is also available.

Marquette University Law School is affiliated with Marquette University, an urban Jesuit university in Milwaukee, Wisconsin. The history of the law school dates to the autumn of 1892, when students seeking a legal education founded what came to be known as the Milwaukee Law School. In 1908, the Milwaukee Law School became part of Marquette University. Currently, Marquette University Law School offers a three-year juris doctor program, with a day division only, to approximately 500 students. Joint M.B.A. and M.A. degree programs are offered. Plans have been announced to institute a part-time evening program beginning in the 1997-1998 academic year. The number of regular, full-time law faculty was 24 in 1995.

C. Continuing Legal Education in Wisconsin

Pursuant to Chapter 31 of the Supreme Court Rules, Wisconsin lawyers must obtain 30 continuing legal education (CLE) credits every two years in order to remain in good standing. There are exceptions for lawyers in their first year of practice, inactive lawyers, lawyers 70 years of age and older, and judicial officers; those in the last three categories must file a request for the exception with the State Bar. CLE has been required of Wisconsin lawyers since January 1, 1977. The present rules mandate that 3 of the 30 hours must be in the area of legal ethics and professional responsibility.

To satisfy the CLE requirement, continuing legal education activities must be approved by and reported to the Board of Bar Examiners. CLE credits may be obtained for activities that have the primary objective of increasing the participant's professional competence as a lawyer. The activities must deal *primarily* with matters related to the practice of law, professional responsibility, or the ethical obligations of lawyers and must be supported by thorough, well-organized, and readable written materials. Activities that may qualify for CLE credit include attendance or presentations at legal seminars or conferences and authorship of published legal books and articles.

Many providers offer CLE programs to members of the State Bar of Wisconsin. In 1994, the Board of Bar Examiners extended its general program approval to 63 organizations, approved 4,695 activities on a course-by-course basis, and denied approval in 123 cases.

VII. STRUCTURE OF THE COMMISSION'S REPORT

The remainder of this report intentionally tracks the *MacCrate Report*. In Chapter 2 the commission identifies the skills and values that it believes Wisconsin lawyers should strive to achieve in practice. The role of Wisconsin's two law schools in helping students develop these skills and values is examined in Chapter 3. Chapter 4 chronicles the commission's study of the transition from law student to lawyer. Chapter 5 examines the continuing professional development of the Wisconsin lawyer throughout the practice years. In Chapter 6 the commission suggests certain means for implementing its recommendations and also recommends that the State Bar of Wisconsin formally revisit this subject three years from now to evaluate whether the recommendations have been effective. Chapter 7 summarizes the commission's recommendations. Finally, the appendices at the end of the report contain information on the regulation of the legal profession in Wisconsin, a statistical overview of the legal profession in Wisconsin, and a summary of the skills and values identified in the *MacCrate Report*.

Statement of Fundamental Lawyering Skills and Professional Values for Wisconsin

A statement of fundamental lawyering skills and professional values is a central feature of both the *MacCrate Report* and the Wisconsin Commission on Legal Education's report, and provides a foundation for the recommendations that follow. Such a statement identifies the features that make law a coherent, yet developing, profession and also justify uniform ABA accreditation standards designed to ensure that these features receive proper attention in the law school curriculum. In addition, a statement of skills and values is a "necessary predicate" for assigning responsibilities for education. See *MacCrate Report, supra*, at 7. The Wisconsin Commission on Legal Education believes that the statement of skills and values for Wisconsin can guide law advisers and entering law students, law faculties, practicing lawyers, employers, CLE and in-house education providers, and others dedicated to the improvement of the profession.

At the same time, the commission does not hold out the Statement of Fundamental Lawyering Skills and Professional Values for Wisconsin as necessarily exhaustive or all-inclusive; nor does it suggest that the Wisconsin statement be viewed as an absolute standard for law school education, bar admission, or continuing legal education. Instead, the commission envisions the Wisconsin statement as the *MacCrate* task force viewed its own statement, as "a stimulus and starting point for an ongoing exchange within the profession about the skills and values that a legal practitioner should have and about the types of education and training that

lawyers should receive at various stages of their careers.” *MacCrate Report, supra*, at 1. The Wisconsin Commission on Legal Education trusts that the Statement of Fundamental Lawyering Skills and Professional Values for Wisconsin will be considered a work in progress. In that spirit, the commission’s recommendations are offered to the Wisconsin legal profession for discussion and debate.

Recommendation No. 1

The State Bar of Wisconsin should adopt the *MacCrate Report's* fundamental lawyering skills and professional values with the addition of the values of professionalism, judgment, civility, and conservation of the resources of the justice system.

Commentary

The Wisconsin Commission on Legal Education accepts the principle that the practice of law is built around a set of skills and values that can be identified, analyzed, and taught. The commission also concurs in the Statement of Fundamental Lawyering Skills and Professional Values described in the *MacCrate Report*, as supplemented, however, with four additional recommendations.

The *MacCrate Report* sets forth ten skills and four values with accompanying commentary. The word "value" as used in the *MacCrate Report* and as used in the Report of the Wisconsin Commission on Legal Education incorporates value frameworks that are fundamental to the profession. The commission views the skills and the values as being of equal weight. A synopsis of the commentary appears in Appendix B of this report. In summary, the skills are as follows:

1. Problem Solving
2. Legal Analysis and Reasoning
3. Legal Research
4. Factual Investigation
5. Communication

6. Counseling
7. Negotiation
8. Litigation and Alternative Dispute Resolution Procedures
9. Organization and Management of Legal Work
10. Recognizing and Resolving Ethical Dilemmas

In summary, the values are as follows:

1. *Provision of Competent Representation:* Attaining and maintaining a level of competence in one's own field of practice, and representing clients in a competent manner
2. *Striving to Promote Justice, Fairness, and Morality:* Promoting justice, fairness, and morality in one's own daily practice; contributing to the profession's fulfillment of its responsibility to provide adequate legal services to those who cannot afford to pay for them; and contributing to the profession's fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice

3. *Striving to Improve the Profession:* Participating in activities designed to improve the profession; assisting in the training and preparation of new lawyers and the continuing education of the Bar; and striving to rid the profession of bias based on race, religion, ethnic origin, gender, sexual orientation, age, or disability and to rectify the effects of these biases
4. *Professional Self-Development:* Seeking out and taking advantage of opportunities to increase one's own knowledge and improve one's own skills; and selecting and maintaining employment that will allow the lawyer to develop as a professional and to pursue his or her professional and personal goals

The four additional recommendations adopted by the Wisconsin Commission are professionalism, judgment, civility, and conservation of the resources of the judicial system.

Judgment

The commission emphasizes the importance of judgment in problem solving. Judgment is central to lawyers' work. It permeates legal vocations in all fields: the judiciary, private practice, government, business, military, and education. Law-trained people use it in most of their tasks: decision-making, interviewing, counseling, negotiating, litigating, drafting, policy-making, and legislating.

While the problems that lawyers see usually have a legal element, clients seek solutions for their problems without regard for the boundaries of the law. They want more than

advice parroted from law books. They require resolutions of their quandaries based upon their lawyer's good judgment. Dean Paul Brest and Professor Linda Krieger of Stanford University Law School explain that

most clients do not want lawyers to confine themselves to "the law," but rather expect them to integrate legal considerations with the other components of the matter. Thus, much of a lawyer's work involves assisting clients in solving non-legal problems. The solutions may be constrained, facilitated, or even driven by the law, but they often call for judgment, common sense, and even expertise not of a particularly legal nature.

On Teaching Professional Judgment, 69 Wash. L. Rev. 527, 529 (1994).

To exercise good judgment, one needs considerable knowledge about a wide range of subjects. Many lawyers, over time, become broadly informed through learning the context in which numerous and varied legal matters are presented to them. Those who assist their clients in making business, public, or educational policy decisions illustrate the extensive information base that fine lawyers can bring into play. For example, house counsel and private practitioners advise corporate executives about business policies that turn primarily upon marketing, production, and financial factors. Government lawyers participate in public policy decisions that involve citizens' requirements, partisan politics, environmental concerns, and fiscal constraints. Lawyers who serve university administrators add the parameters of the law to educational policy analyses that entail pedagogical, personnel, budget, and sometimes political components.

The recipe for the use of good judgment calls for a generous dose of common sense, sufficient intelligence to assimilate a multitude of concepts, a deliberative nature, the patience to listen, composure under pressure, openness to new ideas, and flexibility of thought. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L.Rev. 63, 86 (1980). Dean Brest and Professor Krieger identify other components:

The qualities necessary to the lawyer's craft lie in character traits and deep knowledge that one would not characterize as "skills" at all—personal integrity, an inner moral compass, and a perception of one's work as embedded in broad social, economic, political, historical, and for some, spiritual contexts.

Id. at 530.

Counsel who make wise decisions need the strength to be as independent as statespersons. William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 Harv. J.L. & Pub. Pol'y 537 (1986); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1988). They should resist the normal inclination to agree for the sake of being agreeable. They must withstand their clients' desires to seek vengeance or to pursue improprieties. They may carefully consider the views of their superiors, but cannot be inhibited by them.

Sound judgment appears to be a partly intuitive and partly learned trait. It is a mixture of art and experience. Most likely, the learned increment can be partially taught in the classroom. We do not really know to what extent that may be true, however, because such courses are in their infancy.

Perhaps we will find that formal training cannot shorten the judgment learning curve. The commission, however, believes that the subject is so pivotal to the profession's role that attempts to teach it merit particular attention throughout the continuum of legal education.

The *MacCrate Report*, on pages 150-51, includes judgment as an element of the skill of problem solving. While we agree that it can be so classified, we elect to designate it as a distinct skill to give it the greater significance we think it deserves.

Professionalism

Professionalism is an interlocking set of responsibilities that is borne out of a respect for the rule of law, a respect for other lawyers and the courts, and an ethic of integrity. The commission believes it is critically important that students learn how to practice as professionals and that lawyers bring a sense of professionalism to their daily practice.

In 1986, the American Bar Association (ABA) published its first report on professionalism. The ABA reported that despite the rise of lawyers' observance of the rules of ethics governing their conduct, lawyers' professionalism was in decline:

[Although] lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits, . . . [they] have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.

American Bar Association Commission on Professionalism, . . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 259 (1986).

The State Bar of Wisconsin convened a professionalism committee in the autumn of 1987. After its 10-month study, the committee indicated its belief that

lawyers may be losing sight of their basic commitment. Present times are more materialistic than in the past. In this setting it is easy for persons to fail to perceive their responsibility, to become confused about their professional goals and to believe that the production of money is the primary goal of lawyering. The goal of simply producing money can be inconsistent with the duties that are assumed on becoming a lawyer.

Professionalism: Committee Issues Recommendations, Wis. Bar Bull., July 1988, at 19.

The committee recommended that law school curricula teach students the professional responsibility they would be assuming upon admission to the bar, including pro bono responsibilities; that clinical and internship programs be expanded; that mandatory practical training be required for lawyers during their first year of practice; and that the bar expand its efforts to educate the public about the true role of the lawyer, the function of the legal system in our society, and the procedures by which lawyers and judges are disciplined. Since that time, the professionalism committee has remained active in advocating a mandatory ethics requirement as part of CLE credits and in

presenting CLE programs on quality of practice issues.

The sentiment about the need for further attention to professionalism was repeated more recently by Judge Harry Edwards in his controversial 1992 article, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 72-73. Speaking of his experience in a large law firm over 20 years ago, Judge Edwards observed,

We enjoyed our work, because we felt the work was valuable: valuable to society, and to ourselves. The billing of clients was not the single, overriding goal that it has now become—a compulsion that drains pleasure and honor from the practice of law.

The Wisconsin Commission on Legal Education believes that the subject of professionalism remains in need of attention today. The commission believes that the perception continues that the profession has devolved into a business—nothing more and nothing less. This perception has contributed to the loss of esteem lawyers have suffered in the public eye. Moreover, the day-to-day realities of competition and economics make it difficult for many lawyers to think of their practice as a higher calling.

To encourage professionalism, the commission recommends that the study of professional responsibility be set in the larger context of professionalism. Discussions of legal principles should include considerations of equity and fairness: "learning to think like a lawyer" should not be divorced from a student's social conscience. The study should include respect for the justice system and a heightened sense of personal

accountability and responsibility, especially given that legal work often has a profound impact on clients' lives. It should also include a sense that simply meeting the minimal standards of compliance with the Rules of Professional Conduct is not enough; law students and practicing lawyers should be encouraged to aspire to the highest level of professional self-development.

Civility

The Wisconsin Commission on Legal Education believes civility is also an important and fundamental value that needs to be recognized and supported in the practice of law in Wisconsin. New lawyers in Wisconsin pledge to "maintain the respect due to courts of justice and judicial officers," "employ . . . such means only as are consistent with truth and honor," and "abstain from all offensive personality." SCR 40.15. This conduct is further defined by the Rules of Professional Conduct for Attorneys adopted by the Wisconsin Supreme Court, which prescribe a lawyer's professional responsibilities and "provide a framework for the ethical practice of law." SCR ch. 20. The preamble and scope note accompanying the rules recognize that "the lawyer is also guided by personal conscience and the approbation of professional peers" and that "no worthwhile human activity can be completely defined by legal rules." *Id.* Civility represents conduct that cannot be completely defined by such rules.

Although civility is often synonymous with politeness and accepted social behavior, civility in a professional context means more than good manners. Lawyers must have an appreciation and respect for the need for civility in the bar if they are to understand their relationship to the legal system and the

vital role they play in the preservation of society. Walter Lippmann described the traditions of civility as springing from what he identified as the wisdom of society over generations, as it was absorbed by lawyers, applied in the courts, and from time to time written down in such documents as the Magna Carta, the Declaration of Independence, and the Constitution of the United States. "[T]he traditions of civility provided a standard of public and private action which promoted, facilitated and protected the institution of freedom and the growth of democracy." W. Lippmann, *Essays in the Public Philosophy* 99 (1955).

Civility as a standard of conduct is critical to promoting an ordered and humane society. It is essential to maintaining the forum in which lawyers and judges practice and in which they serve society. Civility is a distinguishing characteristic of our legal system. It facilitates the interaction of citizens with each other, with their community, and with their government in a manner that promotes the common good.

Groups representing various segments of the bar have from time to time addressed the need to raise the level of civility in the bar. The American College of Trial Lawyers recognized such a need in its *Code of Trial Conduct*, which stated that the duty of a trial lawyer is to encourage "an honest and proper respect for the law, its institutions and ministers." The Committee on Civility of the Seventh Federal Judicial Circuit recommended standards that were adopted by both the Eastern and Western Federal District Courts in Wisconsin (*Standards for Professional Conduct Within the Seventh Federal Circuit*). In addition, the committee recommended civility training and discussion of the Seventh Circuit's standards among lawyers and law students. The executive com-

mittee of the Wisconsin Judicial Conference created a decorum study committee, which drafted the *Code of Professional Responsibility, Courtesy and Decorum for the Courts of the State of Wisconsin*. The code, which was described as setting forth "aspirational guidelines for behavior," has been submitted to the Wisconsin Supreme Court and is awaiting a public hearing as of this writing.

The focus of the American College of Trial Lawyers and the Wisconsin and Seventh Circuit committees was on conduct in the courtroom and civility in litigation. Although such a focus is important, the Wisconsin Commission on Legal Education is of the opinion that the issue of civility, as it relates to standards of professional conduct, extends beyond the courtroom and applies to every aspect of professional activity—to commerce, legislation, and all areas of human intercourse affected by the legal profession. Civility remains indispensable to providing standards by which free institutions exist and grow. The commission recommends that the discussion of the need for civility should extend to all aspects of a lawyer's daily practice. The commission believes that civility is a value that deserves to be discussed, pondered, and nurtured, both in the law schools and throughout the profession.

Conservation of the Resources of the Justice System

The perception persists within certain segments of the profession that in order to be good, a lawyer must be aggressive, and that to be aggressive, a lawyer must engage in dilatory tactics and oppressive discovery and must in general undertake a contentious, hypertechnical approach in dealing with opposing counsel. As a consequence, legal disputes are protracted and exaggerated,

clients' resources are overtaxed, and the resources of the legal system are consumed in attending to matters that are only tangentially related to dispute resolution. This applies in transactional as well as litigation settings and equally in judicial and administrative settings.

The commission believes that this approach to the practice of law is often destructive rather than constructive in advancing matters to a reasonable conclusion and unnecessarily drains the limited resources of an already burdened justice system. Legal forums should be places where the law is employed to help people resolve their differences in a relatively expeditious and fair manner. Lawyers' work should likewise be so directed.

The commission believes that in law school and throughout the course of professional training, lawyers should be taught to be mindful of the dangers of overtaxing the resources of the justice system and to affirmatively take responsibility to limit this overuse. This includes not just the avoidance of the use of excessive tactics in legal matters, but also a sensitivity to the need for preparedness when interacting with one's client, opposing counsel, and the legal tribunal. Although this concern should be a part of a lawyer's overall sense of professionalism, the commission has chosen to highlight it as a separate matter in order to emphasize the critical need for a return to a rule of reason in the consumption of already overtaxed justice system resources.

Conclusion

The individual skills and values listed here should not be treated as discrete activities or functions that lawyers deploy one at a time and without regard to the others. It is the commission's view that these skills and

values are best understood together as a set of broad "abilities," integrated in practice. The abilities of an effective lawyer are complex combinations of motivations, dispositions, attitudes, values, knowledge of concepts and of procedure, strategies, and behaviors. These abilities are not separate from "values" or from "substance" (as in "substantive law"); to the contrary, values and substance are embedded in abilities. Being able to perform as a lawyer means having at hand not only a "skill" in the sense of a technical function one is trained to repeat, but also the essential values, knowledge of the law, attitudes, and other components listed above.

Further, the commission firmly believes that abilities can be acquired and developed through both education and experience—in other words, they are teachable, as will be discussed in the next chapter. Indeed, they continue to build and to be refined in practice, as lawyers apply the abilities they have learned to novel situations and settings.

The Role of the Law Schools

To understand the commission's recommendations regarding the role Wisconsin's law schools play on the legal education continuum, one must appreciate the context in which these recommendations are made. There are contours to the landscape of legal education in Wisconsin that must be appreciated before one can make sense of the commission's recommendations. Not all of these contours are obvious; indeed, some are profoundly misunderstood. The commission wishes to make these contours explicit at the outset:

1. *Our law schools meet multiple goals.* Our law schools are expected to graduate lawyers who can do what lawyers do. Clients (a term that this report uses in its broadest sense to mean any person served by any kind of lawyer, including, for example, government and in-house corporate lawyers) and employers alike expect their needs to be competently and effectively served by their lawyers, including ones who are newly graduated. The public has a definite expectation that all lawyers, including those recently graduated, will know the law. Perhaps more important, students who choose law as a profession expect to graduate with a certain ability to practice law. These expectations are valid, and if they are not being met, the profession and the law schools must work together to meet them.

Teaching law students how to practice law is not the only purpose law schools serve, however. Law schools must meet other expectations of the profession, of society, and of the universities that sponsor them: they are expected to help research and develop the law and the

social policy that shapes it; to explore and refine new areas of law; to train scholars of the law; to train graduate students in the mental discipline of legal reasoning, which is often put to work by graduates who never even practice law; to comprehend the knowledge explosion in the field of law that is concomitant with the explosion of knowledge in other technological and professional fields with which law intertwines; to make that knowledge comprehensible to students, to practicing professionals, and to society; and to preserve and enhance the prestige they have earned within the academic, professional, and civic communities. In all of these ways law schools add tremendous value to society. These expectations are valid, and they cannot be subordinated to the other expectations law schools must meet.

2. *Law school is not the only place lawyers learn skills and values.* Learning the skills and values that the commission has endorsed (hereinafter “the skills and values” or, collectively, “the abilities”) is a lifelong venture. The commission fully recognizes that upon graduation, law students will not be able to perform the skills and values with superior ability. The commission recognizes that lawyers are expected, as their careers develop, to become more and more proficient in skills and act with a deeper understanding of and embrace values. By the same token, however, law school is the point of entry to the profession, and there is much that law students need to learn in law school before they begin to serve the public.

The commission also recognizes that the skills and values are dynamic. With changes in society and in the profession, the importance of certain skills may increase or diminish, and it may become necessary to add certain skills to those the commission has endorsed. The values are less likely to fluctuate in relative importance, but from era to era some may become acutely important as circumstances in the profession and society demand. Further, as law schools

improve the education lawyers receive in law school, the kind of learning that must be done in the transitional years and later in one's career will need to be modified.

3. *Discussing how legal education might be improved is difficult because of certain artificial dichotomies.* When the missions of our law schools are discussed, the current of the conversation often flows in unhelpful directions around a number of widely held dichotomous beliefs about professional education. For example, law school is either a trade school or a graduate school. Faculty members either teach the law or teach lawyering. Law is either “substance” or “procedure.” The *MacCrate Report* is assailed for promoting skills and values “at the expense of” substantive law. Indeed, there is an apparent dichotomy between “skills” and “values” that can mislead a constructive evaluation of how law students learn to become outstanding lawyers.

The commission rejects these dichotomies. The overriding goal of improving professional education is to achieve an integration of these opposed positions. Professionals (including doctors, lawyers, and others) are not either thinkers or doers; they are both. A professional cannot learn “the law” in the abstract, divorced from how lawyers use the law, apply the law, research the law, advise clients about the law, and look to the law to solve problems. Likewise, one cannot function as a competent lawyer having learned merely the discrete tasks of lawyering (such as drafting a will or preparing a deed) without understanding the law that underlies those functions.

Knowing the law implies that one knows what to do with the law. The knowledge that law students seek in law school (and that the public and the profession expect them to acquire in law school) is not just knowledge of the *subject* of law, but also knowledge of the *performance* of law as a profession. In order for students to be lawyers upon graduation, they must know more than just what the law is or how the law works—they must know how to

perform certain tasks, deploy certain strategies, and attain certain outcomes on behalf of their clients. Doing so requires students to acquire certain *abilities*—which include not only substantive (or conceptual) knowledge, but also procedural knowledge, dispositions, motivations, experience, attitudes, values, strategies, and behaviors. As a previous chapter of this report explains, skills and values are best understood together as abilities, not as separate domains. *See also* Brest & Krieger, *supra*, at 530-31.

Nor should the learning process be dichotomized. The commission has observed many who hold a two-tiered concept of legal education where “content” is “covered” at the start of school and performance is left to “later.” The commission rejects this fractured approach to teaching law students. Instead, as is developed in the recommendations that follow, the commission holds that the curriculum of law school must be designed with a conscious awareness of how substance and performance coalesce in what students need to *be able to do* when they graduate. In short, the commission does not propose a mere “how to” component to be added discretely to the last week of class or to a separate course squeezed in at the beginning or end of the three years of law school. Our approach is to course work as a whole.

Recommendation No. 2

The State Bar of Wisconsin should endorse the findings of the *MacCrate Report* regarding professional development during law school.

Commentary

The commission endorses generally the vision of the law school's role in professional development that underlies Chapter 7 of the *MacCrate Report* (see especially pp. 233-36). *MacCrate* expresses well the expectations that citizens of Wisconsin, practitioners in Wisconsin, and students at Wisconsin's law schools have regarding the abilities that law students need to learn by the time of graduation.

However, the commission singles out the following few points for added emphasis:

First, Wisconsin's law schools were teaching skills and values even before the *MacCrate* task force began its work. The general practice course at the University of Wisconsin has long been admired across the country as a sterling example of skills-based education.

Second, Wisconsin's law schools have engaged the *MacCrate Report* and are taking concrete steps to incorporate the learning of skills and values in the curriculum. Marquette's curriculum committee, for example, has undertaken to rebuild course descriptions and the overall course work structure around a statement of skills and values that is derived from the *MacCrate Report*. Faculty and students from both schools interviewed by the commission frequently commented that, in certain courses currently taught at the schools, certain

skills and values are highly integrated in the "substantive law" that is the subject of the course. These courses include hands-on exercises by students, student performances in the classroom, presentations by practitioners, and simulations. See also *MacCrate Report, supra*, at 242-54. Wisconsin's law schools, like those profiled in the *MacCrate Report*, also have increased the use of clinic-based education in order to enhance skills education.

Third, recognizing that law schools have a responsibility beyond the education of law students to the development of the law itself, the commission supports the efforts of Wisconsin's law schools to strike the proper balance between their dedication to students, their dedication to the profession, and their dedication to thinking about, discussing, researching, and advocating improvements in the laws that govern society.

Fourth, law school faculty are entitled to academic freedom that is consistent with their professional responsibility to law students and to the development of the law. The commission reiterates the *MacCrate Report's* caution that "externally imposed requirements . . . may stifle experimentation" in improving the way that law students learn. See *id.* at 259-60. The commission further recognizes that law schools face a practical challenge in regulating what is taught in any

given classroom by any given faculty member. Accordingly, the focus of the commission's recommendations is not on the methodologies employed by law faculty, but rather on what students know and are able to do as a result of their years of learning while in law school.

Recommendation No. 3

The Wisconsin law schools should take primary responsibility for (a) explicitly identifying fundamental skills and values to students, (b) giving students basic proficiency in the five specific skills identified in the commentary to this recommendation, and (c) graduating students who know they should act according to the eight fundamental values adopted by Recommendation No. 1.

Commentary

The commission has endorsed 10 skills in which all lawyers in Wisconsin should be proficient and 8 values by which all lawyers in Wisconsin should abide. The law schools should take primary responsibility for making explicit to students the skills and values so that all students are aware of them as they study in law school and when they begin to practice. Further, the law schools should take primary responsibility for graduating students with a basic proficiency in the skills that have been singled out below. With regard to the remaining skills, law schools should offer an array of electives whereby students can learn those skills to the degree they deem necessary to their own individual careers, with the guidance of their mentors at the law schools. Finally, the law schools should take primary responsibility for graduating students who know the values and know that they should act according to the values.

Why Assign These Responsibilities to the Law Schools?

The law schools should take on these responsibilities for two reasons. First, they hold certain comparative advantages over employers, CLE providers, and others along

the legal education continuum, because they have the concentrated time and attention of students and the faculty necessary to convey these skills and values. Second, law schools are best able to organize a legal education for lawyers that *coherently* integrates the learning of "substantive" knowledge with the learning of "practical" knowledge. (Indeed, enhancing the coherence of the law school curriculum may be the most productive response to the dilemma facing our law schools: how to do more for their students when additional resources are difficult to obtain.) Third, law school graduates cannot afford to wait until later in their careers to learn these skills and values. Law school is at the entry point to the profession, and immediately upon graduation new lawyers will be serving a public that expects the talents of a competent lawyer.

These responsibilities must be understood in context, of course. The commission readily acknowledges that graduating law students will continue to learn and develop their abilities as they proceed along the legal education continuum.

Further, the commission recognizes that law schools face daunting fiscal constraints.

Teaching the skills and values may require the law schools to devote additional resources at a time when all educational resources, including faculty and tuition resources, are strained. The commission shares with the law schools an aspiration to succeed despite these constraints and an appreciation for how difficult that may be.

Finally, the commission recognizes that students must be sufficiently mature for certain learning to take place; thus, for some students, some learning may be delayed beyond law school.

Making Skills and Values Explicit

The commission recommends that law schools make the skills and values explicit and make students aware of them. What the commission means by this objective is not that skills and values be treated superficially—for example, merely by putting students “on notice” of them. Rather, the law schools might tell students what the skills and values are when they enter law school, explain why the skills and values are important to the profession, to the public, and to the student, and promise the students that their course work will enable them to learn the skills and values. In this way, the schools can give the students a means for evaluating, as their education proceeds, whether they have in fact learned the skills and values. Those who guide law students in structuring their course work should be prepared to advise accordingly.

Making skills and values explicit is essential to helping law students discharge their responsibilities as students. Students are responsible for their own learning and for evaluating their own work. Thus, demonstrating the values of the profession while in law school means that students show responsibility as learners, as part of their develop-

ing professional responsibility as future lawyers. Law school faculty assist students by making the skills and values explicit and expecting that students meet them.

Learning Values

The commission expects that law schools teach law students the following eight values:

- ▶ Provision of Competent Representation
- ▶ Striving to Promote Justice, Fairness, and Morality
- ▶ Striving to Improve the Profession
- ▶ Professional Self-Development
 - Professionalism
 - Judgment
 - Civility
 - Conservation of the resources of the justice system

To be more precise, the commission expects that, upon graduation, law students will be able to incorporate all of the values into their practices, their attitudes, and their dispositions and act accordingly.

Learning Skills

With regard to skills, the commission expects all graduating law students to be able to perform the following skills with basic proficiency:

- ▶ Problem Solving
- ▶ Legal Analysis and Reasoning
- ▶ Legal Research
- ▶ Communication
- ▶ Recognizing and Resolving Ethical Dilemmas

These skills are best understood as a series of *performances*. In other words, they are not merely a series of subjects that law students should be able to recite, or a series of practical arts that law faculty can assume students will know how to perform if only they read the cases in the textbook and attend class. No, these skills require a knowledge of performance—a knowledge of concepts (such as concepts of good written communication) married to a knowledge of how to put the concepts to work for a client (such as writing an effective demand letter or writing a brief). To learn these skills, it is not enough for law students to *know what the skills are*—they must be able to *do* them.

In singling out these five skills, the commission does not mean to reduce to second-class status the other skills it endorses. The five skills that have been highlighted are skills that must be employed by just about all lawyers just about all of the time. Further, the commission believes that the highest expectations of the public and the profession are that law schools teach in the areas of legal analysis and reasoning and problem solving. In addition, the commission is influenced by the decision of the National Conference of Bar Examiners to consider having the new multistate performance test focus on just four skills, three of which are listed here. See Robert L. Potts, *Letter from the Chair*, 64 Bar Examiner 2, 3 (1995); Jane Peterson Smith, *The July 1993 Performance Test Research Project*, 64 Bar Examiner 36–37, 41 (1995).

With regard to the remaining skills, the commission recognizes that others along the legal education continuum also have the ability and the resources necessary to teach these skills. Thus, it may not be necessary for law students to learn these skills in law school if they will not need to make imme-

diately use of them upon graduating and if the students will be in a position to learn the skills at some point after graduation. Law students should decide for themselves how they will concentrate their efforts in law school, but they should expect guidance from the law schools in structuring their course work to ensure they learn the skills they will need to practice upon graduation. Further, to the extent that a law student wishes to become more than simply familiar with these skills, the student has the right to expect that the school will offer courses or other alternatives whereby the student may learn to perform those skills.

Commentary on Specific Skills

Problem Solving. Problem solving is a function that crosses the lines of traditional subject matter areas of a legal education (i.e., a client's problem often implicates more than one of the traditional law school subjects—contract disputes, for instance, can implicate civil procedure, tort, real estate, and other issues). Accordingly, problem solving is best taught in a context where students learn to blend various substantive subjects in order to address client problems.

Further, of the variety of problem-solving skills that should be learned in law school, it is particularly important for law students to learn *coping skills*—knowing what to do when one does not know what to do. A lawyer will have in his or her career many, many occasions to face a client problem for which he or she does not have at hand an answer or even a strategy for solving. Successful lawyers—those whom other lawyers esteem and clients praise—are not stymied in these instances. Successful lawyers know how to learn how to render the service even though they have not rendered it before. For

example, they draw analogies from their previous experiences, they figure out where to find the applicable law, and they figure out whom to call to get an answer. The strategies they rely upon need to be conveyed to new lawyers, who may have even greater need for them than lawyers with more years of experience.

Legal Analysis and Reasoning. The importance of this skill and the public's high expectations of lawyers in this area have been universally acknowledged. See *MacCrate Report, supra*, at 156. This skill is best expressed in the adage "to think like a lawyer," an expression that does not mean nitpicking or splitting hairs, but instead refers to the deep, critical, disciplined thinking that lawyers do best.

Legal Research. The commission recognizes that teaching legal research is a time- and resource-consuming endeavor. As a result, legal research is not emphasized in law school to the degree that students or their future employers may desire. The commission wishes to emphasize that law students must have strong research skills upon graduation if they are to adequately serve the public and the profession.

Communication. To be an effective communicator, a lawyer must be educated in both written and oral communication. (Education in oral communication is not complete, of course, without training in the ability to listen.)

The commission recognizes a division of opinion as to whether writing can be improved in law school. Many newly admitted law students lack good writing skills. Further, improvement of student writing may require the law schools to commit additional resources at a time when all resources are

severely strained. Moreover, some evidence suggests that writing habits are formed before a student ever reaches law school, and that law schools cannot do much to improve the writing of someone who lacks the basic skills.

However, the commission's own experience is that lawyers become better and better writers and speakers as their careers progress, which implies that better writing can be learned. The commission recommends the following: (1) Students with inadequate writing skills should be identified as soon as possible—ideally, in the admissions process. The law school could then determine whether to admit such students and to guide them accordingly. If it is impractical or impossible to identify writing weaknesses during the admissions process, students should be guided to assess their skills as soon as possible after admission and, if necessary, to take courses that strengthen their writing skills. Law schools should consider how selective they are in the admission process when it comes to writing skills, and how careful they are to point out the need for improved writing skills to new students. (2) As many law school courses as possible should have a written communication component, and the content as well as the effectiveness of the writing should be assessed.

Although improving oral and written communication is a resource-intensive objective, it is the Commission's view that complex thinking cannot be performed without complex communication, and that graduating law students cannot convey the meaning of the law to their clients without being able to explain it out loud or write about it.

Factual Investigation. The commission recognizes a division of opinion about the priority to be placed on this skill. A lawyer

must be able to determine where the relevant facts are to be found, to elicit those facts from the people or entities who know them, and to cull through the facts to determine whether further investigation is necessary. Many believe that this ability cannot be learned in law school but must be gained through experience. On the other hand, this is the fourth of the four skills that the National Conference of Bar Examiners intends to include on the proposed reformatted bar examination, which implies that this skill can be learned in law school.

Recognizing and Resolving Ethical Dilemmas. In the past 20 years the public and the profession have become more concerned with the ethical performance of lawyers. Consequently, law schools have paid more attention to this skill in designing their curricula. Professional ethics is now a full-fledged part of the curriculum at both of Wisconsin's law schools, taught both as a separate course and as an integrated element of such "substantive" courses as corporate and criminal law. The commission hopes that the evolving experience of the law schools in incorporating ethics into the law school curriculum will serve as a model for incorporating other skills and values.

Recommendation No. 4

The Wisconsin law schools and their faculties should commit to graduating students who have learned the skills and incorporated the values listed in the commentary to Recommendation No. 3.

Commentary

Outcome vs. Methodology

The commission agrees with the *MacCrate Report* that effective teaching should consist of some mix of at least the three components identified in that report (development of concepts and theories, performance by students and feedback, and reflective evaluation; see *MacCrate Report, supra*, at 243). It is the sense of the commission that all of these components are part of the current teaching at Wisconsin's law schools, and further that the law schools should determine the best mix of these three components.

The law schools and their teaching professionals are better equipped than this Commission to determine just *how* the law is to be taught so that law students learn to perform the skills and incorporate the values outlined in the previous recommendation. The profession, however, on its own behalf and that of the public, has a right to establish *what* abilities lawyers should have upon graduating and before they are permitted to practice. In other words, while the commission should not dictate the *methodologies* that law schools employ to help students learn a lawyer's skills and values, the commission has a duty to spell out what the profession ultimately believes a law student should be *able to do* upon graduation.

The Commitment the Commission Asks of the Law Schools and Their Faculties

The commission asks the law schools and their faculties to make a commitment about what students will have learned by the time they graduate from law school. Law schools should commit that students will have learned to perform the five skills and to act according to the values as outlined in Recommendation No. 3, to at least be aware of the remaining skills, and to have learned those remaining skills necessary for their chosen practice, again as outlined in Recommendation No. 3. In other words, the law schools should commit that students who graduate will be able to perform or be aware of, respectively, the skills the commission has identified and know how to act according to the values the commission has endorsed.

The commitment the commission seeks from the law school faculties is a collective one. It is not possible or advisable to teach every skill and every value in every course in law school. The teaching of these skills and values should be organized across the curriculum, a goal that will require the collective cooperation and dedication of a predominant portion of the faculty.

Considering the Existing Curriculum in Light of This Commitment

In considering whether the commitment will require any change to the existing curriculum, the law faculties should examine what students presently learn in their classes and clinics. Do they learn what lawyers *do* when called on to use their knowledge of the subject matter being studied? One basic building block of every course might be this question: What does a client problem in this area in the law look like, and how does a lawyer address such a problem?

There are faculty members at both of Wisconsin's law schools who teach with this objective in mind. Their teaching continues to make an impact on their students' practices long after those students have graduated. The commission recommends that the law schools foster ways for their faculties to emulate these faculty members.

Considering Existing Methods of Assessment in Light of This Commitment

It is not enough for a law school to teach students; the commission asks for a commitment that law students learn. To judge whether they have been faithful to their commitment, law schools must determine whether indeed students have learned to perform the skills and to incorporate the values cited in Recommendation No. 3 and to integrate substantive knowledge in their performance of these skills and values. The commission asks the law schools to examine whether current methods of evaluating law students will give the law schools and their students a valid answer to this question.

Whether to Add Courses to the Existing Curriculum to Meet the Commitment

The commission commends to the discretion of the law schools whether the skills and values should be taught in separate courses or infused in the "content" of courses already offered. Indeed, the commission is aware that the law schools already successfully teach some of the skills and values in separate classes and also within certain "substantive" classes.

The commission acknowledges that many who have studied this issue recommend adding new courses to the curriculum and providing additional funding so that the new courses will not displace the funding of existing courses. The commission is aware of the tradeoffs that are sometimes made to incorporate change in a curriculum. But the commission has not studied the curricula of Wisconsin's law schools with a view toward recommending any tradeoffs or suggesting that certain courses might justify additional funding for the law schools. In order to defer fully to the expertise of the law schools on how to meet the commitment the commission has endorsed, the commission leaves to the good discretion of the law schools and their faculties how to direct available resources.

The commission offers these two observations to guide the law schools in their curriculum planning. First, there is evidence that when law schools elsewhere have attempted to teach skills and values in a set of separate courses, those courses—and the faculty who teach them—have unintentionally been treated as second-class citizens. Care should be taken to give these courses, the faculty who teach them, and the students who take them the regard given other, more traditional courses within the curriculum.

Second, whether skills and values are taught in separate courses or not, care should be taken to teach students how those skills and values are woven into the overall fabric of performing as a lawyer. The *abilities* that we expect law students to have upon graduation do not consist of a tool kit of discrete functions such as negotiation, counseling, or communication.

Whether to Enlarge Clinical Programs to Satisfy the Recommendations of This Commission

Excellent teaching and learning take place in the clinics operated and supervised by Wisconsin's law schools. Clinics also play a key role in fulfilling each law school's service mandate and in conveying to students the value of promoting justice and fairness (and in particular the responsibility of the profession to ensure that adequate legal services are provided to those who cannot afford them). In addition, clinics may be the best place for students to learn some of the abilities the commission endorses. Certainly there is fertile ground within clinical education for experimenting with innovative ways of learning the abilities.

Indeed, some would say that performance-oriented skills should only be taught in clinics. The commission does not accept this notion, however. Teachers in classrooms successfully teach knowledge of performance through other methodologies, including simulation, exercises, presentation from practicing professionals, and the other means outlined in the *MacCrate Report* on page 244. See also Brest & Krieger, *supra*, at 558-59. (The commission came across many examples of such teaching. For instance, a professor of civil procedure teaches the concept of personal jurisdiction with a

writing exercise that asks students to draft contractual forum selection clauses, thereby teaching them how personal jurisdiction makes a difference as well as how the concept is applied in the real world.)

Further, clinics are more expensive to operate than are large classes taught in a lecture format. Clinics also are limited in the numbers of students who may participate in them, and, at least as currently structured, do not teach legal concepts across the broad scope that a lawyer must understand in order to meet client needs. (Perhaps the day will arrive when law schools can offer clinical courses in corporate law, real estate law, and the like.) Clearly, law schools should employ both clinics and classrooms to facilitate the learning that the commission endorses.

The commission recognizes the possibility that law school clinic programs might be expanded at lower cost to the schools if the clinics were operated through "externships" sponsored by private firms or government agencies. The commission also recognizes the existence of a genuine dispute, however, about whether the law schools can ensure the quality of instruction in such programs. The decision whether to expand such programs is properly left to the judgment and discretion of the law schools.

Recommendation No. 5

Wisconsin lawyers and judges should support the law schools and their faculties in teaching the skills and values listed in the commentary to Recommendation No. 3.

Commentary

The law profession in Wisconsin—and by that term the commission means all lawyers and all judges who practice or preside in Wisconsin or are nonresident members of the State Bar—owes a commitment parallel to the commitment the commission expects of the law schools. The law profession should commit to providing law schools with all the resources necessary to support the education of law students in the skills and values identified in Recommendation No. 3.

The profession assumes—and rightly so—that lawyers joining the profession have a full complement of the skills necessary to practice—for instance, that they can conduct effective research, analyze a client's problem, and communicate with a client to learn facts and convey answers. This level of faith in new lawyers may be optimistic, however.

The commission views it necessary for lawyers to make the commitment stated above for three reasons. *First*, if new lawyers are not equipped to practice competently, the profession suffers the blame. Whether fairly or not, the public often blames the profession as a whole for the inadequacies of some of its members.

Second, the law profession has the resources and ability to provide some of the person-power and experience necessary to support the law schools in their commitment. Lower

teacher-student ratios are conducive to improving writing, to honing advocacy skills, and to training students in negotiation, counseling, and the like. Further, practitioners can lend valuable experience from their many years of solving client problems. Practicing lawyers can help law schools teach students to think and perform more like lawyers.

Third, practicing lawyers and their firms, agencies, and corporate employers are beneficiaries of Wisconsin's law schools. Practicing lawyers depend heavily on the law schools to train the lawyers who will be employed to meet future client needs. The commission believes that the interests of these beneficiaries are best served when lawyers take an active role in the preparation of future lawyers.

Among the kinds of support the law profession can give the law schools is volunteer labor. Through the State Bar and other avenues, lawyers and judges should volunteer to address law school classes on the finer points of practice in a given subject matter area, for instance, real estate law or criminal law; to guide out-of-classroom exercises or critique written work; to provide individual feedback on students' performance based on criteria set by faculty and practitioners; or to organize field work. As a model for the difference that motivated lawyers can make to the education of prospective law-

yers, the commission offers the general practice course at the University of Wisconsin Law School.

Lawyers and judges who volunteer to assist the law school faculties should be mindful of the teacher's responsibility for ensuring the quality of the education that the students receive while in his or her company.

This admonishment holds true as well for law firms and government agencies that hire students as law clerks. Those firms should structure programs that ensure a genuine learning experience for the student, that incorporate the three components identified in the *MacCrate Report* (development of concepts and theories, performance by students and feedback, and reflective evaluation; see *MacCrate Report, supra*, at 243), and that can be measured against the same list of skills and values that the commission asks the law schools to adopt as their measure of performance. If students earn academic credit in such a program, a faculty member should be designated to supervise the program and the students' performance.

Recommendation No. 6

The diploma privilege should not be changed as a result of this report.

Commentary

Wisconsin currently grants students who graduate from Wisconsin law schools the privilege of practicing in Wisconsin without taking the bar examination. *See* SCR 40.03. The merits of retaining, modifying, or eliminating the diploma privilege have been reviewed and debated on frequent occasions.

The commission recognizes that whether or not the diploma privilege is continued, modified, or eliminated, the need remains for substantial skills and values training for law students and lawyers in the transition years of practice.

Transition to Practice

This chapter addresses the professional development of lawyers engaged in law practice in Wisconsin during the transition from law school to practice, which is defined as the first four years of practice.

Recommendation No. 7

Newly admitted lawyers should receive additional education in the skills and values adopted by Recommendation No. 1.

Commentary

Lawyers, like other professionals, need facility with the essential skills and understanding of the highest values of their profession soon after they are on the job. The commission, like the *MacCrate* task force, agrees that a gap exists between law school education and the competent practice of law. In the early years of their careers, many lawyers feel they lack either proficiency in lawyering skills or an understanding of the values of the profession. The acquisition and refinement of these skills and values over the course of a lawyer's career should not be left to happenstance. The commission recognizes the legitimate public expectation that lawyers licensed to practice law actually possess the skills and values necessary to competently and ethically meet the public's legal needs.

The commission considered whether the existing vehicles of professional education, during and after law school, adequately meet the needs and expectations of the public and found that they do not. Law schools have responsibility, but not exclusive responsibility, to impart practical education and teach professional values. The legal profession shares that responsibility and must assume a greater commitment to the development of skilled and value-sensitive lawyers.

Some law school graduates have access to excellent education programs. But for most new lawyers, education is haphazard, systematic programs are not widely available, and the commitment of senior lawyers to the development of new lawyers seems to be in decline. As law practice becomes

more driven by market competition, many firms are less willing than they once were to make the initial teaching and education investment in newly hired associates. In addition, a significant percentage of law graduates are choosing (voluntarily or involuntarily) solo practice as a means of entering the legal profession. In many settings, new lawyers do not receive satisfactory oversight and education. The education of many is essentially "to sink or swim." The result is often underserved legal consumers.

Mentoring programs are an encouraging supplement to education in skills and values, but they are not a whole answer. They cannot meet the needs of the entire population of newly admitted lawyers.

Conventional continuing legal education programs also do not meet the need for skills and values education among newly admitted lawyers. Current CLE offerings mirror law school curriculums in form and substance—like many law school courses, they offer instruction predominantly on substantive law through a lecture format. They are rarely keyed to the specific learning needs of new lawyers. CLE programs that are interactive and that emphasize skills and values taught by trained faculty are currently insufficient to meet the needs of all newly admitted lawyers in Wisconsin.

The commission carefully weighed the merits of mandatory and voluntary CLE programs for new lawyers. It determined that a mandatory program could succeed, but a voluntary program would not. To expect new lawyers voluntarily to undertake education is unrealistic. A voluntary program will result in no meaningful program to meet the needs of new lawyers.

In surveying other professions and occupations, it is apparent that the legal profession (at least in Wisconsin and in other American states) stands virtually alone in requiring no postgraduate skills education. Doctors are required to have three to five years of internship. Certified public accountants must spend three years in supervised practice as junior-level accountants. Pharmacists must complete 1500 hours of professional experience (at least 500 hours of which post-dates graduation). Audiologists must complete nine months of supervised clinical experience. A licensed journeyman electrician must complete a four-year supervised electrical construction apprenticeship. Emergency medical technicians must complete 100 hours of a detailed curriculum of classes, clinical experience, and supervised education. Wisconsin requires that juvenile intake workers complete a 30-hour education program within the first six months of employment. The list could go on and on. The standard for bars of other common-law countries (most notably Australia, Canada, New Zealand, and Ireland) requires new lawyers to undertake rigorous programs of three to six months of full-time skills education.

The commission recommends that supreme court approval be sought for mandatory skills and values education for all lawyers admitted to practice under SCR 40.03 (diploma privilege), but not to lawyers admitted under SCR 40.05 (proof of practice elsewhere). Lawyers admitted in Wisconsin under SCR 40.04 (the bar exam) would be required to complete the required skills education unless they could demonstrate that they had engaged in the active practice of law in their prior jurisdiction for at least four years. The skills and values requirement set forth here is not a bar admission requirement

but a continuing education requirement. The commission does not intend this requirement to be so construed, however, as to place a hardship on Wisconsin lawyers seeking admission in another jurisdiction under rules of reciprocity.

The commission recognizes that some lawyers are licensed in Wisconsin but do not practice here. Some reside out of state; others, while residing in Wisconsin, do not engage in the practice of law. The purpose of skills and values education is to protect the Wisconsin public and to ensure that lawyers who practice in Wisconsin meet appropriate standards of competence. Lawyers who are not engaged in practice in Wisconsin and who do not intend to engage in practice during their normal CLE reporting period (two years) should be permitted to "opt out" of the skills and values education requirement by so designating on their CLE reports. If and when they undertake to enter into practice in Wisconsin, they would then be required to fulfill the skills and values requirement unless they demonstrate that they have obtained comparable education in another jurisdiction or that they have engaged in the active practice of law in their prior jurisdiction for at least four years.

We encourage the expansion of skills and values education in law school, but the requirement of transition training is separate and thus cannot be satisfied by evidence of having taken law school courses or programs. One does not supplant the other. Further, to permit students to meet their transition education requirement while still in law school—through internships or otherwise—might encourage those students to become specialized too soon. Although specialization is increasingly common in the practice of law, a broad legal education allows students greater choices upon gradua-

tion and remains the best foundation on which to begin a practice.

Though a judicial clerkship following law school certainly provides the opportunity to hone the skills of legal research, analysis, and writing, there are several reasons that such a clerkship is unlikely to provide an acceptable means of meeting the skills and values education requirement. Because of the limited focus of the law clerk's employment, many skills and values are never addressed. The level of instruction that law clerks receive is not consistent. Some judges have the time, ability, and inclination to provide excellent education; others do not. It would not be feasible to certify a clerkship with one judge as meeting the education requirements while denying certification to another.

Recommendation No. 8

Lawyers should be required to complete 60 hours of skills and values education within the first four years of practice, consistent with the time and hour requirements in SCR 31.02.

Commentary

The commission believes that the skills and values instruction should occur before the fourth anniversary after graduation from law school. With up to four years in which to complete transition education, the new lawyer will have a better opportunity to choose education useful to his or her area of practice. It often takes some time for new practitioners to settle upon an area of professional concentration.

In law school, students focus primarily on learning and analyzing the law. The newly graduated practitioner focuses on the exigencies just ahead. There is nothing like the anticipatory terror of facing an opposing lawyer for the first time in court, of dealing with the first frightened or overwhelmed client, of participating for the first time in the deposition of an expert witness, or of presiding at a multi-party real estate closing to impress upon the new graduate what he or she does not know about practicing law. The change from student to practitioner requires a different educational approach from that needed in law school. Although clinical courses and internships are superb learning experiences while one is in law school and do prepare the law student to survive better the transition to practice, the commission believes that the postgraduate education that occurs while the neophyte practitioner is struggling is vital.

A four-year term for transition education will allow even the busiest of graduates to meet the required hours of education in a variety of ways, including on weekends or in installments. The term also gives the geographically isolated practitioner the opportunity to schedule education when he or she is in a large population center or also attending a State Bar convention or other event.

The 60 hours of skills and values instruction coincides with the current 30-hour CLE requirement Wisconsin lawyers must meet every two years. The commission believes that 60 hours spread over the course of four years is a realistic and not an unduly burdensome requirement. In review of those jurisdictions that currently mandate (or propose) programs of transition education, the *MacCrate Report* expressed "grave concerns about the effectiveness of the small numbers of hours allocated for professional skills instruction." The task force determined 9 or 10 hours "woefully inadequate" and even 36 hours spread over three years "meager compared with a typical law school clinical course." *MacCrate Report, supra*, at 299. Sixty hours strikes a balance between providing minimal skills education and placing too heavy a burden on new lawyers. Nonetheless, the commission recognizes that many lawyers may want and/or need more than the minimum to develop their abilities

to a point that meets reasonable consumer expectations.

Reporting to the Board of Bar Examiners should be on the same two-year schedule that currently exists. The sanction for failure to complete the 60 hours of skills and values instruction would be suspension of one's license to practice, just as with the current CLE requirement.

The commission further recommends that the 60 hours of skills and values instruction replace the otherwise required 60 hours of continuing legal education courses during the first four years of practice. This does not mean that substantive legal education will be ignored. Skills education is almost universally taught in the context of substantive law. Any course of instruction is likely to reference principles of substantive law. Again, the 60-hour rule defines only the minimum requirement of CLE education. Lawyers who wish to improve their understanding of substantive law can, as many lawyers do, undertake CLE education in excess of the 60-hour minimum or develop their understanding by reading and other methods that lawyers have come to employ.

At least six hours of the education over the four-year transition period should meet the criteria of the three hours of Ethics and Professional Responsibility currently required every two years of all Wisconsin lawyers. We believe that specific units of instruction in the values identified in this report will meet a significant part of that requirement. However, we urge that the values identified in this report also be integrated throughout the skills education curriculum. As a condition of certification, skills and values education providers should be required to demonstrate that their programs address at least some of the values that the commission has identified.

Virtually all current CLE programs emphasize substantive legal topics, and the commission recognizes that it is desirable to promote competency within the profession through substantive law updates and refresher courses. The commission, however, views skills and values instruction as more essential for newly admitted lawyers. It is true that all lawyers, even new ones, must not neglect their responsibility to keep abreast with developments in the law. But the commission feels comfortable in letting new practitioners have the freedom to educate themselves about substantive legal topics without having an additional requirement placed upon them. Such a redirection of Wisconsin's mandatory CLE would not detract from its central objective to enhance lawyer competence.

Recommendation No. 9

Skills and values education should be taught by trained faculty, use an interactive format, and provide feedback on the participant's performance.

Commentary

^aThe commission recommends that the skills and values instruction focus on the skills and values articulated in Chapter 2 of this report. The levels of proficiency attained in the targeted skills and values should depend on how these skills and values are currently being used by the graduate in his or her everyday practice. Our profession strives for high-level proficiency; lawyers use many if not most of the targeted skills and values at some point in their careers. A foundation from which all lawyers can build should be established.

The commission has recommended the following skills and values:

<u>Skills</u>	<u>Values</u>
Problem Solving Legal Analysis and Reasoning Legal Research Factual Investigation Communications Counseling Negotiations Litigation and Alternative Dispute Resolution Organization and Management of Legal Work Recognizing and Resolving Ethical Dilemmas	Provision of Competent Representation Promoting Justice, Fairness, and Morality Striving to Improve the Profession Professional Self-Development —Professionalism —Judgment —Civility —Conservation of Judicial System Resources

Law schools take responsibility to initiate law students on the learning path to developing basic proficiency in these skills and knowing how to act according to the identified values. Each student's legal education, through course and clinical selection and through other experiences, will undoubtedly focus more heavily on some rather than other of these skills. The transition-to-practice phase of the lawyer's learning continuum is a rich opportunity to experience accelerated, enduring, and transformative learning

of core skills and values. Transition education provides a unique setting in which to practice and refine these skills and revisit the values from the perspective of newly acquired experiences in serving clients.

The commission agrees with the observation of the *MacCrate Report* that a lecture format or the casebook method, widely used in law schools to teach legal concepts and reasoning, cannot effectively impart these skills

and values. See *MacCrate Report, supra*, at 243-44. Effective skills and values instruction must be taught in an interactive format by qualified instructors. To know a skill in theory and understand its conceptual basis is not enough. A skill must be practiced, and its performance evaluated. Instructors trained in skills-based education will ensure quality in skills and values programs.

Just as CLE programs are currently reviewed and certified for an approved number of hours, skills and values programs must be periodically reviewed for content and for compliance with established criteria to ensure that participants receive genuine education in skills and values. The Board of Bar Examiners is the most appropriate body to carry out this function. The commission recognizes that taking on this responsibility will require additional work, and accordingly recommends that one position be added to the BBE's staff and that funding for that position be provided by the BBE assessment.

The commission believes that a certified course of skills and values instruction must satisfy certain criteria: (1) the program must utilize only well-trained instructors or must include training for the instructors; (2) the program must address the targeted skills and values; (3) the program must involve intensive student performance of the targeted abilities with instructor and peer interaction; and (4) the program must provide individualized feedback. The overall goal of such education is to lead new lawyers to engage in lifetime self-assessment of their competency in various essential skills and values.

The commission considered, but rejected, requiring formal grading. As with traditional CLE, students need only certify their completion of the program. Because participants

will be able to choose among programs and providers, there could be no uniformity to any grading process. Participants in the program should "learn by doing," without the distraction and anxiety that would accompany grading.

The instructors will provide feedback based on criteria that define the skills and values being taught. The "learn by doing" method demands active student participation. The emphasis in these programs is not on the completion of units of time, but on the acquisition of particular skills and sub-skills by active learning and critique and by reflection on the learning experience.

The commission also recommends that there be multiple providers of skills and values education. Providers could include in-house education programs, courses sponsored by the State Bar, supervised pro bono programs, and courses offered by private vendors. Many employers currently provide education that is tailored to the skills and values necessary for the substantive areas in which their employees are involved. As long as they impart the critical skills and values and meet the required criteria, these programs should be accredited. A description of two skills-based education programs (a NITA negotiations/mediation program and the Skills Intensive Unit of the UW Law School's General Practice Skills Course) are attached as samples of programs that can be offered. There are many other formats for possible programs (Appendix C).

As with traditional CLE, the State Bar of Wisconsin is well positioned to provide skills and values education. There is a rich tradition among members of the Wisconsin bar of volunteering as instructors. State Bar staff have demonstrated that they are able CLE administrators. State Bar sections and

local bar organizations have more limited resources and may be less likely to provide the comprehensive education required, but as the technology of skills and values education develops, they cannot be discounted as potential sources of education.

Because skills and values education will be mandatory, there will be a demand for affordable, effective, and well-respected programs. For many years private vendors have provided quality CLE to Wisconsin lawyers. Though skills and values education programs will be required to meet more specific criteria, it is certain that many of the same vendors will come forth with quality offerings.

A key element of the recommended skills and values instruction must be flexibility. The commission estimates that approximately 500-600 new law school graduates are admitted to active practice in Wisconsin each year. These lawyers will practice in a wide variety of settings. It is fundamental that skills education programs are accessible to everyone required to participate in them.

Skills and values education programs by their nature require time-intensive involvement by participants. Every participant is given the opportunity to learn by doing and receives individual feedback. Accordingly, it is anticipated that many of the programs may be multi-day programs. The ideal of accessibility would be to have all programs offered in multiple locations throughout the state for the convenience of participants. This has never proven possible for CLE programs other than through satellite programming. The nature of skills and values education is that it is highly interactive and individualized. Such multi-day programs may involve 30-60 participants, 10-20 faculty, and multi-room facilities such as a law school or other university facilities. It is

anticipated that these programs are more likely to be offered in Madison and Milwaukee. In such cases, programs must be designed to take into account the needs of lawyers attending from more remote locations. Such considerations as housing and program scheduling should reflect the needs of such students. Shorter skills and values programs that may meet part of the credit requirements may be developed that can be offered by local bar members in multiple locations throughout the state.

Many of the skills and values that lawyers need to master in practice are universal. For example, the ability to express ideas and present information clearly in oral and written communications is central to all areas of law practice. Some skills, while vital to one area of practice, may be less relevant to others. The ability to cross-examine witnesses or to counsel clients may not be part of the practice experience of some lawyers. The bar is composed of lawyers with a wide range of practices. The essential skills and values needed by transactional general practitioners, public lawyers, and specialized litigators may vary markedly. The design of skills and values education programs must reflect both the commonality and the diversity of skills and values employed by lawyers in a wide range of practice settings. Historically, skills and values education programs for lawyers have been heavily slanted to litigation skills. It is important that the skills education program for Wisconsin lawyers reflect the range of skills that lawyers will actually use in their practice settings.

Facilities selected for skills education should be physically accessible to all. Some program accommodation may be necessary to provide reasonable access and opportunity for all participants.

Recommendation No. 10

Skills and values education should be financed by program fees, and the State Bar should strive to provide this education program on a cost-sensitive basis.

Commentary

The commission explored various options for funding mandatory transition education. One is to require all lawyers to fund the education through either a voluntary dues checkoff or an increase in the Board of Bar Examiners assessment. The commission rejected a voluntary checkoff because that option is better dedicated to funding pro bono legal services. The commission rejects an increased BBE assessment at this time because the revenues of mandatory skills education should provide appropriate and viable funding.

The additional rationale for funding the skills and values training through program fees is twofold. First, this group already pays fees for mandatory CLE programs. The new requirement adds no new funding demand on this group; it just replaces the current CLE expense with a new one. Second, as paying consumers, the new graduates will have a stake in careful selection and evaluation of the programs.

Current CLE requirements have an annual cost for all lawyers in Wisconsin. An average one-day program (usually 7.5 CLE credits) costs from \$150 to \$250. We estimate that required CLE costs lawyers from \$600 to \$1200 over four years. We estimate that tuition for 60 hours of skills and values education over four years will cost from \$750 to \$1500. With good organization, skills programming can be provided relative-

ly economically. For example, in 1993 the State Bar conducted a 7-day skills education program in which students received up to 45 hours of CLE credit at a tuition cost of \$495. The tuition revenues from skills education should provide a sufficient financial base to sustain such education. We note that the diploma privilege saves Wisconsin and Marquette graduates substantial costs of preparing for and taking a bar exam. Expending \$1500 for bar exam fees and a bar review course seems fairly common. Some commission members noted that systematic skills education will be far more effective and less economically burdensome to new lawyers than was the former requirement of a six-month unpaid apprenticeship.

The commission recognizes that skills and values education may be somewhat more costly than traditional lecture-style CLE programs. The State Bar and private providers will incur some start-up costs associated with such new programming. We also note that some current providers of skills education provide a limited number of scholarships to economically disadvantaged students. We recommend that new providers follow this example.

After this program has been in operation for two to four years, it may be appropriate for the supreme court and the bar to restudy other funding models. The bar may consider other funding mechanisms at any time. For

now, however, self-funding seems the better course.

The commission recommends that the State Bar not use the transition programs it sponsors as "profit centers." The State Bar should work diligently to reduce the economic impact of program fees on program participants. In most years the bar makes a profit on its CLE programs and books and uses that profit to fund other Bar programs. The commission believes it would be unfair, however, to ask new lawyers to pay fees for mandatory transition education that would be used to fund the bar's other activities.

Career Continuing Legal Education

This chapter addresses the continuing professional development and career education of lawyers licensed to practice in Wisconsin after completion of their transitional period and continuing throughout their legal careers.

Recommendation No. 11

The current continuing legal education requirements should be maintained because they meet many of the continuing practitioner's needs, but educational offerings should be added to address the skills and values required by more experienced lawyers.

Commentary

If the goals, objectives, and recommendations of the law school and transition periods are met, experienced practitioners will have substantially developed skills and values by the time their careers are in their fifth year and beyond. Fundamental skills such as problem solving, legal analysis and research, communications, and negotiations should be well developed by the conclusion of the transition period. Values such as professionalism, judgment, civility, and the provision of competent representation should be ingrained in the lawyer by the time the career education stage is reached.

Many of the enumerated values can, however, be honed, enhanced, and, in some instances, rejuvenated over a lifetime of prac-

tice. As the lawyer gets further into practice, commercial concerns and business management issues may sometimes mask or even overcome the fundamental values taught during law school and the transition period. The conflict between law as a business and law as a profession may be heightened. On the skills side, rapid developments in the law, a proliferation of regulatory, statutory, and decisional law, the explosion of technology, and the emergence of more sophisticated methods for legal research and information retrieval can result in the experienced practitioner's feeling left behind or isolated much more rapidly than in prior eras. Continuing career legal education focusing on the specific needs of the more experienced lawyer can help address these

issues. Quality career education can provide a reawakening of professionalism and not only rejuvenate the lawyer's own career but also spark the type of mentoring and role modeling that will have a positive influence through the entire system, aiding both the transition and law school phases in their objectives. In the ideal system, the nurturing of professionalism, skills, and values becomes a permanent cycle. As the skills and values of law students and new lawyers improve, those entering into the career stage will have a more solid foundation from which to practice. A career commitment to skills and values by the more experienced practitioner will, in turn, serve as an example to the beginning lawyer as well as to the legal intern or law clerk.

The legal profession in Wisconsin recognized the need for continuing substantive education long before the *MacCrate Report*. As early as 1975, the lawyers of Wisconsin recognized by a vote of almost three to one the desirability of compulsory continuing legal education to enable lawyers to maintain the delivery of quality legal services to the public. SCR ch. 19 (1975). The rationale for the program is still vital today. A continuing legal education requirement of 15 hours every year was put into place in 1977 and changed to 30 hours every two years in 1987. In addition, a one-time three-hour professional responsibility requirement, outside of the normal CLE requirements, was imposed. In 1992, that requirement was changed to three hours every two years.

Over time, the quality of continuing education has improved from the earliest days. Today more than 2700 providers offer approved courses. Topics range from the most technical substantive areas of the law for the most advanced practitioners to introductory courses (and even courses in starting up your

own law firm). In a 1992 survey of Wisconsin lawyers, CLE programs and CLE publications ranked by far the highest in terms of educational value of various options.

Another reason for not overhauling the career continuing legal education system currently in place is that it seems to work. Lawyers who attend CLE programs are generally satisfied with them: more than half the lawyers rated the lectures and written materials excellent or very good, and almost 60% preferred expanded CLE as a method for improving and ensuring lawyer competency. S.H. Unterberger, *The Lawyer's View of Continuing Legal Education*, 22 Prac. Law. 102 (Oct. 1976).

The commission recognizes that in addition to formal career continuing education, the state and local bar associations provide affirmative opportunities for growth and development, particularly in the values area. Participating in formal bar activities, networking with other members of the bar, and serving on bar committees dedicated to the advancement of the practice all provide unique opportunities for group dynamics, which in turn nurture and reemphasize the traditional values of the profession and those specifically identified in Chapter 2. The commission supports and encourages the continuation of these programs and their emphasis on individual professional growth and development throughout every lawyer's entire career.

The commission also recognizes that retired lawyers and judges are a valuable resource that should be more effectively drawn upon in the mentoring of lawyers throughout their careers. Few situations or problems have not been faced before in some context, and retired lawyers and judges can offer reasoning, judgment, and understanding to mem-

bers of the profession throughout their careers. The commission encourages the bar to establish programs to train retired judges and lawyers to participate in educational programs, mentoring programs, hotlines, on-line services, and other programs in which their valuable insights and breadth of knowledge and experience can be tapped.

The commission recommends that continuing legal education remain an integral part of the experienced lawyer's career development and that, consistent with the recommendations made below, providers be encouraged to address the specific needs of the experienced practitioner.

Recommendation No. 12

Technology should be made a more integral part of both the substance of continuing career legal education and the method of delivery.

Commentary

Most lawyers out of law school for more than five years were not raised on the technology that has become part of the workplace: computers in every office, availability of information on-line and through computerized research, worldwide e-mail, deposition scanning and word recognition, and the capability to retrieve massive numbers of documents on a single laser disc at the push of a button, just to name a few advances. The lawyer unwilling or unable to learn and use the new technology will fall behind competitively and professionally. Every lawyer must be able to use technology, even if just for information retrieval and management. Just as few court reporters still use quill pens and shorthand, few lawyers will be able to manage their practices without some basic knowledge of how to use technology to serve their clients and themselves.

The commission recommends that providers develop courses to teach lawyers the fundamental skills in technology necessary to keep them current. The courses should be offered and geared initially at those lawyers who have not had such training either during law school or during the transitional phase. The courses should be "user friendly" and should offer the lawyers hands-on experience with the computer and its capabilities. A series of connected programs over time, starting with fundamental skills and progressing through sophisticated methods of information retrieval, if well-integrated and clearly pro-

moted, would allow a lawyer to begin the course of instruction at an appropriate point in the lawyer's own learning curve. Advances in technology should be integrated in these courses sooner rather than later so that every lawyer can have the opportunity to attain the levels that others (including clients) have reached. The commission urges the Board of Bar Examiners to be flexible in providing CLE credit for such courses, since these courses facilitate the effective and efficient delivery of legal services.

In addition, the commission recommends that the State Bar take a leadership role in developing methods of presentation that take advantage of technology. Technology can be used for multiple purposes:

1. *To make programs more interesting and useful through the use of interactive technology.* Career legal education has already taken a step toward using technology to make programs more interactive. The use of responder systems that allow individuals to react to specific situations and the use of CD-ROM exercises such as evidence objections in a courtroom setting provide an advanced and adult-oriented method of learning. While "learn-by-doing" programs such as advocacy or negotiation training often require one instructor for every handful of participants, interactive

technology can provide many of the same advantages of involved learning without the intense labor commitment.

2. *To make programs more accessible.* The State Bar of Wisconsin has begun a series of telephone CLE lectures that allow the participant to listen to a lecture while in the privacy of office or home. As more CD-ROM technology becomes available, the options for more accessible education will grow. The Board of Bar Examiners should continue to review its accreditation process as new technologies emerge for the delivery of CLE.
3. *To specifically tailor programs to the individual's needs, schedule, or level of experience.* Through linkups with other states and through customized programs, a lawyer can obtain an appropriate level of education. As technology makes such programs more available, the value of individually tailored education will be advanced.

For a number of reasons, these benefits are of particular significance to the practitioner who has advanced beyond the transitional phase:

1. By the fifth year, most lawyers have settled into a career path. Their paths are extremely diverse, as are their needs. Private practice, government law, and corporate law, for example, each require different skills and talents.
2. As the more experienced lawyer considers a transition into a different mode of practice or substantive area, individualized and broad-based programs can aid in that transition immeasurably.

3. Many lawyers leave practice for a time, and accessible, individually tailored programs would allow them to keep current and refresh their skills.

The commission is mindful of a hazard in individualized and more accessible education. While such programs may well be advantageous from the skills standpoint, the loss of the advantages of group dynamics, particularly in the values area, can be significant. Sole practitioners and those in small firms, who make up the great bulk of Wisconsin lawyers, already complain of isolation. *Sole Practitioner and Small Firm Focus Group Report*, March-May, 1993. Networking in a human environment rather than by computer can often relieve those feelings and give the lawyer both a confidence (that his or her skills are up to or above the level expected in the community) and a commitment (to shared values) that sitting at a computer terminal will never be able to provide. The commission encourages the development of programs that allow lawyers to interact, particularly in the areas of professionalism and judgment.

Experienced practitioners should, through continuing legal education, regularly reassess their commitment to the goals of enhanced judgment, professionalism, and civility.

Commentary

The literature is replete with examples of lawyer burnout, excessive stress, substance abuse problems, and other examples of dysfunction in the legal community. Many of those suffering from these maladies are career practitioners. The bar, through both assistance programs and education programs, is already helping the profession with these issues.

The economic realities and daily pressures of practice, however, constantly strain the professionalism of all lawyers. Continuing career education can alleviate these strains and pressures with candid acknowledgment of their presence and programs designed emphasize professionalism and judgment.

Most lawyers became lawyers at least for partially a noble purpose. As early as 1986, the ABA's Commission on Professionalism called for the profession to return to a common set of institutional values based on Roscoe Pound's definition of a profession as "a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood." Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (1953).

In 1996, a principal concern of lawyers is not how they will perform public service, but whether they will continue to have jobs. Economic pressures for the efficient delivery of legal services at increasingly lower fees and for reduced legal staffing will continue. Such pressures place a strain on traditional standards of professionalism.

Unfortunately, most lawyers' continuing career education on subjects such as professionalism tends to be either from a biannual excursion into the mandatory subjects of the ethics rules—which set the baseline standard of what lawyers may not do—or, for those unfortunate enough to cross the line, from courses designed to aid them in getting their licenses back. Few courses, if any, deal with the aspirational goals of the profession to deliver services to the client and provide service to the profession and the community.

To achieve this recommendation, the commission suggests the following:

1. That providers, including the State Bar, develop courses on professionalism and the practice of law that focus on the aspirational qualities of the profession historically, currently, and prospectively
2. That the supreme court accept such courses as fulfilling not only CLE requirements but also the biennial ethics and professional responsibility requirement

The commission also urges that advanced courses in the appropriate exercise of judgment be developed and be deemed to satisfy the ethics and professional responsibility component of the current CLE requirement. Nowhere is judgment more sought or more critical than from the experienced practitioner.

Judgment involves the ability to take a comprehensive view of the values and concerns at stake, based on one's experience and knowledge of the world. And this involves awareness of the full range of shared experience, beliefs, relations, and expectations within which these values and concerns have significance.

Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L.Rev. 63, 86 (1980).

The ethical rules require a lawyer to bring to the counseling table the full range of available moral, social, economic, and political factors. SCR 20:2.1. To that extent, career training and education can sharpen the lawyer's focus, take the lawyer away from day-to-day practice, and renew a sense of purpose. Programs that offer examples of difficult practice and counseling situations, that require the exercise of judgment (along with, if not solutions, at least a framework for resolution), will greatly benefit the individual lawyer. The profession will also be enhanced as clients, who rely on the lawyer as a professional advisor, reap the benefit of the lawyer's enhanced judgment.

Such programs are a natural complement to existing ethics programs. Whereas the current programs focus primarily on what will constitute a violation of the rules under certain circumstances, the professionalism programs will focus on what a lawyer should do rather than on what he or she must do. The goal of professional programs should be to rededicate the career lawyer to the public-service side of the profession. Thus, the experienced lawyer will again serve as an appropriate role model for those in either law school or the transition to practice.

To complete the cycle, the commission strongly encourages experienced practitioners to share the wealth of their experiences with those in law school and in the transition period by teaching or mentoring and by offering internships or clerkships wherever possible. In addition to aiding the less experienced, the career lawyer will also take from the experience the renewal that only the spirit and enthusiasm of the new lawyer or student can bring.

In 1965, a prescient scholar wrote that

[t]he law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reasons for being.

Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 U.C.L.A. L.Rev. 438, 440 (1965).

Today, those responsibilities remain for the organized bar and the individual lawyer. Lawyers must consistently guard against losing what makes us a profession rather than a business: the sense of responsibility and sound practical judgment that depends on the quality of the lawyer's training and the ability to draw on the resources of a fully developed sense of purpose and service. Career education that focuses on a lifetime commitment to the profession and service is an important first step.

Implementing the Recommendations of the Commission

To ensure follow-through on the foregoing recommendations and discharge the bar's ongoing responsibility for legal education along the entire continuum, the commission makes the following recommendations:

Recommendation No. 14

The Board of Governors should invite the deans of the Wisconsin law schools to report to the board in three years on the actions the law schools have taken in response to this report, and the board should similarly report to the deans on the actions the State Bar and the profession have taken to address the recommendations in this report.

Commentary

To ensure follow-through on the recommendations made in Chapter 3, the State Bar Board of Governors should invite the deans of the law schools to report in detail the actions the law schools and their faculties have taken in response to those recommendations. The deans' report should be presented to the Board of Governors on or about the third anniversary of this Commission report.

Likewise, the Board of Governors should report in detail the actions the State Bar and the profession have taken in response to those recommendations. The board's report should be submitted to each of the deans on or about the third anniversary of this Commission report.

Recommendation No. 15

The Board of Governors should report to the membership in three years on the changes implemented as a result of this report.

Commentary

To ensure follow-through on the recommendations made in Chapters 3, 4, and 5 and to discharge the State Bar's responsibilities to its membership, the commission recommends that on approximately the third anniversary of this report, the Board of Governors provide the following to the membership:

1. A summary of the reports exchanged among the deans of the law schools and the State Bar, as recommended in Recommendation No. 14
2. A report on the effectiveness of the changes to CLE practice and requirements contained in Recommendations 7-13.

Conclusion

The Wisconsin Commission on Legal Education believes that continuing change in the profession of law in Wisconsin—change that includes the demographic makeup of the profession, the tasks that lawyers are expected to perform, and the economic environment in which lawyers practice—requires reevaluation of the current model of legal education in our state. Accordingly, inspired by the *MacCrate Report*, we have looked at legal education in Wisconsin along each segment of the professional continuum: law school, the transition to practice, and continuing legal education for experienced lawyers.

The commission agrees with the drafters of the *MacCrate Report* that legal education must address those skills and values that form the foundation of the modern practice of law. We believe that the educational process in our state should strive to ensure that Wisconsin lawyers are capable of effectively performing the following ten skills set forth in the *MacCrate Report*: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute resolution, (9) organization and management of legal work, and (10) recognizing and resolving ethical dilemmas. Similarly, we believe that the four values identified in the *MacCrate Report* should also be the subject of legal education in our state: (1) provision of competent representation; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession; and (4) professional self-development. Finally, the commission also recommends that Wisconsin

lawyers be educated in the practice of (1) judgment, (2) professionalism, (3) civility, and (4) the conservation of the resources of the justice system.

Education in these skills and values should occur across the professional continuum. The commission recommends that the two law schools in our state make explicit to their students that the above skills and values constitute the foundation of the practice of law so that the students may take responsibility for their own professional development. In addition, we recommend that the law schools and their faculties accept responsibility for graduating law students who know how to act according to all of the above values and who are capable of performing the following skills at a level of basic proficiency: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) communication, and (5) recognizing and resolving ethical dilemmas. The Commission commends to the discretion of the law schools what methodologies and teaching strategies should be used to discharge this responsibility.

During the first four years after graduation, the commission recommends that each newly admitted lawyer engaged in the practice of law in our state be required to complete 60 hours of training in the full range of fundamental skills and professional values. Courses should be reviewed for content by the Board of Bar Examiners and should be certified for this purpose only if they combine student performance of the targeted skills with individualized feedback from trained instructors. Required skills and values training for the newly admitted lawyer should replace current mandatory CLE requirements during the first four years of the lawyer's career. The commission recommends that mandatory CLE requirements remain as they currently are for lawyers in their fifth year of practice and beyond, but that CLE offerings be augmented to address the exercise of the above skills and values by experienced lawyers. In particular, the commission recommends that continuing career legal education in our state address advances in

technology relevant to the practice of law, and that courses be developed that focus on judgment, professionalism, civility, and the conservation of the resources of the justice system.

If the above recommendations are implemented, the commission is confident that Wisconsin lawyers will be better able to meet the challenges of the modern practice of law and that the quality of legal services provided to the public will be enhanced.

