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A Semi-Modest Proposal: Is a Little Business Sense Too Much to Ask?

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A Semi-Modest Proposal: Is a Little Business Sense Too Much to Ask?

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Marjorie Holmes, presently corporate counsel for a large retailer, was formerly associate dean of Golden Gate University School of Law, where she has also taught Community Property. She served as president of California Women Lawyers, 1980-81, and now chairs the board of directors of Equal Rights Advocates.

Having worked for several corporations prior to attending law school, and presently working as in-house counsel for yet another corporation, I have come full circle in my view of lawyers. While traversing that circle, I have worked as an associate dean in a law school, as a civil litigator, and now primarily as a negotiator. In all these areas, lawyers display a common failing: they cannot or, worse, do not know how to solve problems. To a great extent, the fault can be attributed, I believe, to our system of legal education.

Lawyers in practice can be divided into two major categories: A) those who are primarily involved in transactional work, and B) those who are primarily litigators or adversaries. My experience suggests that 85%-90% of practicing lawyers do so on a transactional basis, that is, their primary function is something other than going to court. They may be shepherding business deals, working for corporations, working in government, or representing private parties, attempting to prevent or resolve disputes by methods other than litigation. Let us examine then how and what law students are being taught and whether their legal education prepares them for this transactional business.

When one examines a law school curriculum today, it appears remarkably unchanged from generations past. Courses include Contracts, Real Property, Torts, Constitutional Law, Civil Procedure, Criminal Law and/or Procedure, with various levels of writing and research skills thrown in, usually some type of oral advocacy, and various electives (often determined by one's own state bar exam). Most "practical" courses emphasize litigation skills. Few of the electives, if any, cover important skills such as negotiation, communication, or methods of alternative dispute resolution. Law students graduate from law school with a solid foundation in substantive law, but sadly lacking the tools to

build on that foundation.

The foundation is undisputedly important. Casebooks, which continue to be the primary teaching tools in most law school courses, are comprised almost exclusively of examples of adversarial proceedings — court cases, usually appellate proceedings lacking any human content. While case law may give us precedent, an essential tenet of jurisprudence, and a forum for exhibiting the adversarial talents of lawyers, it does not teach students practical ways to prevent and resolve disputes. I am often told by business people with whom I deal daily that lawyers are not practical and that their greatest failing is not understanding how the business world works, i.e., an executive wants a problem solved in a succinct, practical and quick manner, grounded in law, affecting the economic bottom line as little as possible. Yet the cases one studies in law school, which are the result of expensive time-consuming litigation, do not meet these criteria. Recently a corporate vice president expressed his frustration to me that one of our outside counsel was so left-brain-oriented, such a linear thinker, that he could create nothing but new motions to file.

Statistics tell us that approximately 8% of all lawsuits actually go to trial. Why, then, is the overwhelming emphasis in law school on case law and litigation skills? Law students graduate with a distorted notion of how the law works and with the one-dimensional misperception that the pinnacle of success is to be a well-known litigator. Problem-preventers and problem-solvers need to be added to that pinnacle, and law students need to graduate with some sense of how to fill those roles.



Lacking ability to negotiate

I propose that the law school curriculum be transformed in the following ways:

- 1) Because negotiating a contract or reciprocal easement agreement is as important as knowing the underlying law, the teaching of negotiation skills should be incorporated into basic substantive courses, such as Contracts and Real Property. In addition, a separate course in general negotiation should be offered.
- 2) Knowing how to structure settlements and to analyze the risk involved in each element of a settlement is of crucial importance to transactional lawyers and litigators alike. A course in which these skills are taught would enable law students to think (as lawyers should constantly) in settlement terms.
- 3) As lawyers, we need to develop our right-brain way of thinking. We need to be more creative in the ways in which we approach problems, especially in devising and structuring settlements. Creativity, which recent studies suggest can be taught, needs to permeate the law school as a whole.
- 4) Law schools should teach the full range of alternative dispute resolution processes, e.g., mediation, arbitration, "mini-trials" and how each can best be utilized. At a minimum, mediation should be taught as a class unto itself with the other alternatives being combined into a second class.
- 5) All law students should be required to take a course in communication and interpersonal skills. Lawyers who don't listen are destined to failure. Problem solving means being able to elicit the appropriate information from a client and to communicate back to that client effectively. Not surprisingly, much of this communication is by telephone and the course should include — as mundane as this may sound — proper use of the telephone. Many lawyers are abrupt or constantly interrupt a telephone conversation with a client in order to take another call, speak to the secretary, or sign letters.

Communicating effectively also means writing in plain English, not "legalese." Although we all may have learned to write that mythical legal memorandum to a senior partner, lawyer-client communication is a very different animal, and law students need to be skilled in both types of writing.

- 6) Law schools should establish dispute resolution centers, perhaps modeled along the lines of some neighborhood centers, which presently exist to resolve disputes among neighbors,

small businesses, landlords and tenants, and which avoid the cumbersome aspects of government involvement and legal representation. Students would participate for clinic credit under close faculty and community supervision.

- 7) Certain substantive courses, especially those in the family law area, should no longer be taught by the casebook method, but rather, should emphasize non-adversarial resolutions. (Other substantive courses might still use the casebook method, but not as the sole focus.)

By implementing the above suggestions, law schools will respond to the real needs of our profession and our society. The time has come for law schools to acknowledge what lawyers actually do and then begin to adequately prepare law students for their role as problem solvers.