

1986 WATERMAN LECTURE

HEALING THE BREACH: HARMONIZING LEGAL PRACTICE AND EDUCATION

Michael Meltsner*

A lawyer's life, even a quiet lawyer's life, is full of conflict and the emotional turmoil that goes with it. Our primary method of dispute resolution is called the adversary system and with reason. But even calmer methods—negotiation, mediation, or arbitration—are characterized by conflict between individuals, groups, and government. When the media portrays lawyers at work it inevitably presents a universe of put downs and abrasions, anger and trickery, harassment and harangue—a world where morality, immorality, and amorality compete and where the loser is predictable.¹ If this does not seem enough for the lawyer to cope with, especially the young lawyer, the very roles that members of the bar play are so varied as to contain contradiction and inconsistency: the advocate is also a planner, the litigator is also a negotiator, the champion of the client also has duties to the public interest, and the member of the bar is a citizen, a political player and a person with lusts, doubts, and messy feelings.

My talk today is about how we best encourage learning these conflicting and conflict-filled roles. More particularly, I will address a program initiated by Vermont Law School to ensure that graduates who practice in small cities and towns or for small firms will be prepared for the challenges that await them.

It is fitting that the program I will discuss is the subject of a lecture series named after Sterry R. Waterman.² As memorials published by Judge James L. Oakes and Thomas Debevoise in the Law Review³ make clear, Judge Waterman cared deeply about le-

* Professor of Law, Northeastern University, School of Law, A.B., 1957, Oberlin College; J.D., 1960, Yale Law School.

1. R. Adler, *RECKLESS DISREGARD* (1986).

2. Judge Sterry R. Waterman; President Board of Trustees, Vermont Law School 1974-83; Senior Judge, United States Court of Appeals for the Second Circuit, 1970-72; Associate Judge, United States Court of Appeals for the Second Circuit, 1955-70.

3. Oakes, *Tributes, Judge Sterry R. Waterman*, 9 Vt. L. Rev. 1 (1984); Debevoise, *Tributes, Sterry R. Waterman—An Appreciation*, 9 Vt. L. Rev. 6 (1984).

gal education. He was a rare commodity, a lawyer equally at home in a law office, a law school, or a courtroom. He brought excellence to the practice of law, to his role as Chair of the Board of Trustees of Vermont Law School and to the appellate bench.

I knew Judge Waterman in a lawyer's way. I argued before him and closely followed the court he was a member of for many years. On the bench he symbolized, better than any individual I can think of, the virtues that men and women claim when they proudly call themselves country lawyers: a commitment to community service and a combination of accessibility, concreteness, fair play, and deep personal meditation on the nature of things legal. Like the distinguished speakers who have preceded me on this platform including Judge Oakes, as to whom my admiration is as large as the Vermont sky, and Harry Jones and Telford Taylor, my former colleagues at Columbia, I am honored to present these ideas at a forum named for Sterry Waterman.

I want to recapture two important pieces of our legal culture that have partially slipped from view and to connect them with the General Practice Program on which Vermont Law School is about to embark. But first, the Program needs some introduction.

It is an experiment that Vermont Law School will initiate next year to train students in the skills and perspectives that make for excellence in providing legal services to clients in small and mid-size communities. While the faculty is still refining the form and direction of the program, it will probably begin with a first year lawyering course, required of all Vermont Law School students and integrated into the first year curriculum. In the second year, a limited enrollment module of 16 students (to be expanded as experience dictates) will enter the program and become general practice majors. These students will take a core course of general practice perspectives and a business planning course keyed to typical business lawyering tasks.⁴ General Practice majors will spend several months working in the field under the supervision of experienced practitioners and thereafter receive an opportunity for reflection involving research, writing and/or supplementary practice.⁵ Those who have successfully completed the Program will receive a degree

4. The law school may require of majors a distribution requirement of "traditional" courses dealing with subjects of great importance to the work of general practitioners.

5. The program will also engage in an agenda for research into the general practice of law, set with the cooperation of the organized bar.

which recognizes their achievement.

Using a simulated case or case(s) the first year course envisioned by the General Practice Program will introduce students to: (1) legal research; (2) problem solving with case and statutory materials; (3) fact gathering and fact analysis; (4) writing and drafting; (5) preparing for and conducting negotiations; (6) brief writing and oral advocacy; (7) planning; and (8) a critical approach to lawyer activity. This course is different from substantive first year courses and from traditional first year legal writing and research courses offered at many law schools in at least four respects: (1) the course uses on-going case simulations to put students in a vivid and concrete client-centered, problem solving context; (2) it is skill-oriented; (3) it is premised on a set of articulated competencies that each student must achieve; and (4) it places emphasis on integrating how one thinks and what one does. Second year courses will build on this foundation to offer exposure to a deeper, more focused experience of lawyering values and competencies.

Supervised field work is a central part of the Program. No matter how carefully planned the conceptual base of the Program is, how integrated the curriculum is, how well crafted the simulations are, and how gifted the teaching is, the Program must provide students with an opportunity to try out their learning in the field. Generalizations reached in the classroom must be tested in practice. Simulation is a valuable preparatory technique but it inevitably distorts crucial variables that come into play when a lawyer seeks to employ skills in a practice setting. Students must make mistakes and learn from them, and learn how to handle the personal and interpersonal pressures that only a practice setting can provide. Finally, because the Program is an experiment, it will be necessary to learn if it is successful in conveying specific competencies and to consider whether student learning is translated into high levels of performance in settings external to the school, settings dominated by the norms and activities of experienced practitioners.

In recent years the legal profession has grown and changed. Firms are larger, doctrine has become more complex and the roles practicing attorneys play now vary considerably. These developments present a challenge to legal education, as well as to small and mid-size firms that do their work far from Wall Street and Capitol Hill, to provide a setting where young lawyers can obtain the skills, knowledge, and experience necessary to serve clients

competently. The purpose of the General Practice Program is to give training, now only available at the largest firms, to those young lawyers who prefer the life of cities where it is still possible to find a parking place or to be on a first name basis with other members of the bar or even try a case against the same lawyer twice.

I mentioned recapturing two pieces of legal culture. The first is a book, one which few in the audience have ever heard, and fewer read its 1128 pages. You will not find it on the best seller list and might have difficulty in purchasing it, much less reading it, even if you found yourself in a store specializing in legal texts. I refer to *The Lawyering Process* by Gary Bellow and Beatrice Moulton.⁶ *The Lawyering Process* was an attempt to bring between hard covers an organized set of materials inquiring into the activity of lawyers. The materials grew out of years of work by the authors at Harvard, Arizona, and other law schools, with teaching fellows and students who were both representing clients in legal service settings and engaging in simulated exercises in various lawyering skills. Preliminary drafts were used as classroom readings, segments were presented for comment at conferences and seminars, and others were the subject of educational video tapes.

While the publisher marketed the book to students taking clinical or legal process courses and sections of the book were sold to students taking courses in professional responsibility, negotiating, and other skills, I doubt whether the publisher expected to make a profit from underwriting the project. The wealth of detail, the precision with which *The Lawyering Process* identifies a range of difficult questions—philosophical, ethical, behavioral, even mathematical—renders it imposing even for the most intelligent, knowledgeable and motivated audience. As a result, *The Lawyering Process* has only been reviewed in a single periodical.⁷ Perhaps, the range of interdisciplinary material brought to bear on the activities of lawyers was too imposing.⁸ Practitioners may feel that

6. Bellow & Moulton, *THE LAWYERING PROCESS* (1978).

7. Smithburn, Book Review, *ARIZ. ST. L.J.* 237-44 (1980).

8. The readings presented range across law and life. *THE LAWYERING PROCESS* includes selections from the legal profession, Abe Blumberg on criminal justice, Jerome Carlin on ethics, Charles Fried on the lawyer-client relationship, Roger Fisher on negotiation, Marvin Frankel on the search for truth, Robert Keeton on trial tactics, Andrew Watson and Thomas Shaffer on counseling; as well as poetry and fiction from Marge Piercy ("The People I Love The Best/Jump Into Work Head First"); Agatha Christie (the client interview in *Witness for the Prosecution*); and Solzhenitsyn (counseling a cancer patient from *The Can-*

the book is too dense and demanding; academics may feel out of their element in evaluating models of what it is practicing lawyers do, and why. Prospective reviewers may have been put off by finding too many theories explaining lawyer thinking and conduct, rather than a single point of view of the sort that can readily be stated and critiqued.

In my own use of the book I have found students grateful for the readings but fussy to say the least when it came to discussing them under time constraints of the classroom. In a real sense the glory of *The Lawyering Process* is that it brings together so many of the nondoctrinal questions, though doctrine has a place between its covers, that confront us when we try to make sense of the practice of law. Thus the book may be honored by extensive use as a source—I often use it this way—rather than as the primary basis for class work.

I am, however, more concerned with what *The Lawyering Process* stands for than its fate as a publication. Despite the contribution of Bellow and Moulton in identifying, organizing, and shaping this material, as well as their own penetration into general themes of lawyering, *The Lawyering Process* reflects as much as creates the visions of law that are its subject matter. A book of this sort would be impossible without a number of developments: the arrival of clinical legal education, which brought the process by which lawyers work into the mainstream of legal education; the growing awareness of the profession about the way in which lawyers are trained, and organize their work, which affects the quality and character of the service they render; the sense of obligation of many members of the profession to serve the disadvantaged; the place of lawyering in rendering American democracy just and workable; and the growing attention to lawyer competency, a by-product of the increasingly complex, demanding, and technical work of contemporary lawyering.

As the authors put it, *The Lawyering Process* is "a book about the experience of being a lawyer . . . it asks that lawyers make

cer Ward). It also includes selections from social scientist Thomas Schelling on bargaining, Warren Bennis on group relations, Kenneth Burke on work and play, Erik Erikson on the process of diagnosis, and Ervin Goffman on strategy.

Equally fascinating are excerpts from the plea bargaining of Spiro Agnew, negotiations at Panmunjom between the United States and Korea, The Watergate Investigation, the Rosenberg case, and the Trial of Jack Ruby.

lawyering a subject of inquiry.”⁹ The text and readings move from consideration of the process by which individuals take on lawyering roles, questioning and not questioning choices and social forces, to the implications of the professional norms lawyers adopt. It is surprising but true that before *The Lawyering Process* no systematic efforts to do this had been made.

Both authors fear what the demands of legal practice do to new lawyers and respect the power that these lawyers will exercise. “What sort of person will you become?” they ask. “And how much control will you have over the changes?”¹⁰

How you become a lawyer—the questions you ask, the values you accept and reject, the arrangements you confront and what your reaction to them is—and what you actually do as a lawyer are central themes. “Are the values and attitudes that are embraced in this process of becoming a lawyer,” the authors ask, “satisfying or justifiable?”¹¹ For example, “[b]asic to all of the ethical issues” they confront, the authors conclude, is the lawyer’s “ambiguous moral relationship with clients.”¹² Client loyalty is the justification for everything the lawyer does but this places the lawyer again and again in a situation where lawyering actively produces troubling consequences.¹³ What is our responsibility for the use of our skill and position? When do we legitimately consider the consequences of what we do? How do we make choices that preserve both client loyalty *and* the public interest? How do we think and talk about these issues? How do we balance loyalty to clients with loyalty to the profession, the courts, adversaries, witnesses, the law itself and the public interest? What does managing the tension between loyalty and consequences do to us as people and to our society?

Inevitably, the General Practice Program will confront these questions. It will do so in a setting where rookie lawyers will have to come up with answers if they are going to become big league practitioners and it is in this sense that *The Lawyering Process* is an essential document to ponder. Those whose efforts will make the General Practice Program a reality have to develop a vision of what practitioners actually do, how they can do it better, and, of

9. Bellow & Moulton, *THE LAWYERING PROCESS* xix (1978).

10. *Id.* at 9.

11. *Id.*

12. *Id.* at 1080-81.

13. *Id.*

course, the best means of training and preparation.

Let's face it. Much of lawyers' work is boring, the kind of close detailed labor that nobody except a confirmed bookworm would do unless paid for it. Lawyers must also suffer fools and foolishness. But the practicing lawyer has the fate of clients' lives and families in his or her hands. Beneath the dry and crusty surface of legal documents are hopes and futures. Poverty, homelessness, pollution, dead-end education, liberty, and discrimination are as much issues for the small town or city practitioners as for the lawyers who can buy the *Washington Post* or the *New York Times* the night before.

The second aspect of our legal culture that I want to mention as we celebrate the initiation of a General Practice Program is the relationship between legal practice and legal education, specifically our legacy of apprenticeship training. Vermont, of course, still requires a period of clerkship before bar membership.¹⁴ I am not referring solely to this controversial practice, however, but to the history and folklore of the time when lawyers learned their trade by reading law in law offices.

Bellamy Partridge described how this practice worked in his memoir about his father's mid-nineteenth century practice in the upstate town of Phelps, New York:

At the time my father was admitted to the bar his knowledge of the law was entirely theoretical. He had never drawn a deed, he had never framed a complaint or an answer; indeed, he had never even filled out a summons or a subpoena. He realized, of course, that although he was a member of the bar he was not yet equipped to render very valuable legal services to the public, and to make up for his deficiency he spent a few intensive weeks in one of the business offices in Rochester trying to grasp something of the practical machinery of the law business. Here he learned to draw simple wills as well as contracts and conveyances, how to start actions and serve papers. He sat in on trials and arguments, but at the time when he hung out his shingle and opened his office in Phelps he had tried only one case in his life—a little skirmish in police court in which he defended a janitor who was facing a charge of petty larceny.

14. VT. STAT. ANN. tit. 12, App. 1, Pt. 11, § 6(i)(1) (1986).

Preparation for the bar in the sixties was much simpler than it is today. Academic requirements were practically nil. Nor were there formal examiners who made it a business to tangle up and trip, if possible, any youth who fondly imagined that he wanted to be a lawyer. Some local jurists were told to examine a group of candidates, and he examined them according to his own fitness and his own ideas. If he happened to be a probate lawyer they were in for a severe quizzing on the law of wills, whereas if he was a criminal lawyer the questions were more likely to veer toward the distinction between manslaughter and murder, or the theory of reasonable doubt. And there were oral as well as written questions to test the candidate's fitness.

There was little or no supervision of the reading of a law clerk in those old days. The student was expected to read the commentaries of Kent and Blackstone and to familiarize himself with the works of Coke, Chitty, and Story, but there was no prescribed course of study such as is furnished by the law schools of today.

If my father had done a little less reading and a little more of the actual work of a going law office he would have had much less grief over some of the early clients who came to him with questions which puzzled him and which really should have been matters of ordinary routine. For example, the proper way to describe a cow in a chattel mortgage caused him no end of trouble, and the effect of hortatory words written on the outside of a will after it had been properly signed and witnessed had him digging into his books for half the night.¹⁵

This is not the place to review the tangled history of professionalization that finally led to the never universal requirement that conditioned entry to the bar on a law school education and later a university undergraduate preparation. To be sure, much of this movement had goals other than educational ones. Still no one would suggest today that training for the range of demands on the profession would be best left to apprenticeship training, even if that training was more complete than that received by Samuel Partridge. But something was lost when legal education left the law office, though much was gained.

When lawyers learned their trade in the law office, the gap be-

15. Partridge, *COUNTRY LAWYER* 21, 22 (1939).

tween theory and practice was smaller than it is today. The new lawyer's training was not sequential but simultaneous and thus doctrine and desire, money and ethics, words and music, had to be sorted, balanced and resolved in a single process of professional commitment. The perspective of clients was part of the very fabric of discovering and analyzing doctrine. The neophyte received prompt feedback about his performance from the environment in which he worked. Lessons in human relations, fact gathering, interviewing, counseling and negotiation, in blood and guts if you will, were among the first rather than the last they learned by the new practitioner and they were learned when the young lawyer was on the line.

A result of the shift to academic preparation is that young lawyers and their seniors lost the apprentice-master relationship that was the key to the way law was learned in the law office. The teacher-student relation hardly compares in intensity. Recognition of the importance of this relationship has resulted in current interest in how lawyers properly supervise and learn from supervision.

I emphasize the importance of the concept of supervision because it is when working with a supervisor that the young lawyer gathers the experience and knowledge that complete the development of professional skills begun in law school. So long as the critical role of practice-based learning is allowed to remain invisible and unplanned, the learning that comes out of this relationship will be ad hoc and capricious. It is in supervision that doctrine, behavior, values, training, aspirations, and community service come together.

In their careful research into the professional development of lawyers, Frances Zeemans and Victor Rosenblum conclude in the typically opaque language of scholarship that there is "a recognizable complementarity between the perceived contribution of law school on the one hand and law practice on the other in the inculcation of competencies and standards important to the responsible practice of law."¹⁶ What Zeemans and Rosenblum mean here is that attorneys value their legal education (and its emphasis on technical, analytical and adversarial concerns) while still recognizing that other skills (such as fact gathering, human relations, negotiation, drafting and professional responsibility) were not so clearly

16. Zeemans & Rosenblum, THE MAKING OF A PUBLIC PROFESSION 203 (1981).

conveyed.

Learning these skills are credited to experiences before law school and while practicing law. No one really disputes that law school fails to train graduates in certain key aspects of practice. Some schools respond to complaints by saying that to train for the profession will detract from their intellectual missions—though why rigorous education in lawyering will do so is not clear. Others say this training *ought* to take place in practice. The large firms do the job tolerably well, in part because it takes so long for young associates to be given heavy responsibility or to deal directly with clients—writing a legal memo is a more important skill than interviewing, negotiating, or fact gathering in the world of the large firm. Large firms also can afford in-house training programs and a very deliberate course of professionalization. But even the firms that take training seriously often forget that the young professional needs time to reflect on what is happening to him or her and an opportunity to make mistakes and learn from them.

The General Practice Program will make this sort of training available to young lawyers who cannot get it in practice because they have chosen general practice for a small firm or in a small community. And the Program promises increased attention to the critical relationship of supervision to learning. According to the America Heritage Dictionary, to supervise is “to direct and inspect the performance of workers and work.”¹⁷ English synonyms include conduct, direct, manage, control, handle and oversee. These terms all contain slightly different connotations concerning the authority of the supervisor in relation to the supervisee but all contain a claim of leadership and imply action by the supervisor that produces a result, often a work-related result, from the supervisee.

But another aspect of effective supervision is less instrumental, less assembly line. American Heritage defines mentor as a “wise and trusted counsel or teacher.”¹⁸ A mentor imparts knowledge or skill, referring often to a more generally applicable and less result-oriented form of education than the transmission of knowledge or skill that flows from supervision. As Daniel Levinson describes the process of mentoring in his evocative book, *The Season of a Man’s Life*, the mentor may act as a teacher to enhance skills and intellectual development, sponsor the young person’s entry

17. AMERICAN HERITAGE DICTIONARY 1292 (1976).

18. *Id.* at 820.

into a profession and initiate him or her into a new occupational culture. "Through his own virtues, achievements and way of living, the mentor may be an exemplar that the protege can admire and seek to emulate. He may provide counsel and moral support in time of stress. . . . He fosters the young adult's development by believing in him," and sharing the young person's dream of achievement.¹⁹

I suggest that the most promising and satisfying learning environment for young lawyers is one where both supervision and mentoring come together in the relationship of the young lawyer and his or her senior. As we in the law rediscover the importance of supervision to learning, we will come to realize that supervision without mentoring becomes mechanical and mentoring without supervision runs the risks of losing sight of the work itself, or even becomes counselling or therapy. In a successful apprenticeship both roles need to be played. Though both have a history and a tendency, both concern themselves with learning in a work-related context.

When supervisors also mentor and mentors also supervise, we will have created an apprenticeship worthy of the demands on today's lawyers. Rather than the supervisor determining the quality and character of what the supervisee receives, for example, the process will be understood as a two-way street. A supervisee must also direct, focus, and organize the supervision from his or her experience for it to be successful. Information, feedback, and rewards must flow from supervisee to supervisor as well as from supervisor to supervisee. Both participants have needs for learning and satisfaction, as well as a need that the work gets done.

When the legal academy split from legal practice we lost the context in which the process of working out the relationship between getting the job done, learning the trade, training for the profession and mentoring took place. Law began its slide from profession to business. It is my hope that the General Practice Program, as conceived by Vermont Law School, will contribute to healing this breach, bringing law practice and professional education together in fruitful collaboration.

