

**AMERICAN BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
NEW YORK CITY BAR ASSOCIATION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association, take steps to assure that law schools, law
2 firms, law examiners, CLE providers and others concerned with continued professional
3 development provide the knowledge, skills, values, habits and traits that make up the successful
4 modern lawyer.
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6 FURTHER RESOLVED, That the American Bar Association urges legal education providers to
7 implement curricular programs intended to develop practice ready lawyers including, but not
8 limited to enhanced capstone and clinical courses that include client meetings and court
9 appearances.
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11 FURTHER RESOLVED, That the constituent bodies of the American Bar Association, consider
12 the requirements for the success of future lawyers as they carry out their responsibilities.

REPORT

Earlier this year, the New York State Bar Association approved the report of a Task Force created by former President Stephen Younger that considered the future of the legal profession. It examined in depth such issues as technology, alternative billing and work life balance. One of the major subjects it studied was legal education. Because the American Bar Association plays such an important role in educational matters, the State Bar Association is presenting this resolution based on the findings and conclusions of its Task Force. The following is taken from the Task Force report.

Just as the practice of law is undergoing a “sea change” created by the confluence of factors such as client needs and attitudes, the technological transformation of daily life, the increasing globalization of what used to be national, regional or local concerns, and recent challenging economic conditions, so too has the business of educating and forming new lawyers.

The current educational and structural model for preparing law students and forming new legal professionals is under fire on many fronts. Educational experts criticize law school teaching for its reliance on passive learning in the classroom, its focus on appellate cases and its failure to prepare law students for the real-life experience of representing clients and practicing law. Critics also point to legal education’s failure to focus on “learning outcomes” (evaluating what students can *do* as a result of instruction) and “lawyer competencies” (knowledge, skills, values, habits and traits that make for successful lawyers), as well as the absence of appropriate assessment and evaluative tools to measure such outcomes and competencies. In addition to pedagogical critiques, consumer advocates complain that entering law students do not have a realistic understanding of what a career in the law truly entails, including a realistic perspective on work-life demands and the financial burdens and benefits which come with a legal education and career.

Meanwhile, structural critics of law schools forecast the end of the current business model of law schools.¹ That forecast is based on a combination of economic factors that include the pervasiveness of *U.S. News & World Report* rankings and the need to create scholarly output valued by *U.S. News* reviewers, the tension between directing curriculum at state bar licensing requirements and fully preparing students to represent real clients, and the inconsistency between legal employer hiring criteria and the demand for “practice-ready” lawyers.

Post-law school professional development also is often deficient. Employer-created training programs remain rare and extremely costly, while state CLE transitional programs are often inadequate to bridge the gap between law school and practice. Although mentorship is often cited as a mechanism for providing corrective formation, modeling and support, it remains unclear whether voluntary or mandatory programs are more effective, how to certify such programs, and how to integrate them with previously existing CLE requirements.

We used to think that being a good lawyer simply meant knowing the law. Today, we are more likely to think that good lawyers know how to *do* useful things with the

¹WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 129 (2007). Rachel J. Littman, *Training Lawyers for the Real World: Part 1*, 82 N.Y. ST. B. ASS’N J. 7, 20–24 (Sept. 2010); Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (Or Anyone Else)?*, 82 N.Y. ST. B. ASS’N J. 9, 20–26 (Nov. 2010), available at http://www.nysba.org/AM/Template.cfm?Section=Bar_i_Journal_i_&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43636.

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law to help solve client problems. Society has shifted from a static understanding of professional competence as memorized knowledge to a dynamic conception of lawyers adding value through judgment and their ability to manage and solve complex problems. This dynamic conception of lawyering is both promising and demanding. More is expected of lawyers today, and these heightened expectations are particularly stressful for young lawyers. Too many law students and recent graduates are not as well prepared for the profession as they might be. Law schools, bar examiners, the judiciary and the bar owe more to our young colleagues in these difficult times.

We have not, of course, ignored these problems. Legal education and post-graduate training have changed significantly in the past thirty years. Most law school faculty now include significant numbers of clinical teachers and faculty who combine law degrees with other academic credentials. Mandatory CLE is now common, and many large firms and institutional practice settings have devoted significant resources to training and management of their lawyers' capital. Courses in transactional law, mediation, and arbitration are now mainstays of the law school curriculum. We have become much more intentional and strategic in our efforts to prepare lawyers for practice and to help them continue to develop throughout their careers.

Yet there is much more we can do. Interesting and useful suggestions have been made recently in the related areas of understanding, assessing and certifying lawyers' readiness to meet the demands of contemporary practice. The basic impulse is two-fold: to sharpen both our understanding of the competencies, skills, knowledge, practices and values of a good lawyer and our ability to measure progress toward those goals. If we can align systemic incentives of the bar exam with the practices best aimed at achieving our goals, then we will improve our system for launching the careers of young lawyers. Several different organizations recently have begun or proposed significant initiatives in each of these areas.

For example, the Model Competencies Project recommended by the recent ALI-ABA ACLEA Critical Issues Summit is an opportunity to continue important work which was pioneered by the MacCrate Commission and which continues today.² As contemporary practice grows more complex and demanding, law schools, law firms, law examiners, CLE providers and others concerned with the continued professional development of lawyers have ever greater needs for a deeper and more useful understanding of the knowledge, skills, values, habits and traits that make up the successful modern lawyer. It is not enough to say a lawyer must know the law and seek justice. Those in the business of developing professionals need more precise assessment tools that reflect our best current understanding of the skills, aptitudes, values and habits a contemporary lawyer should optimally possess.

The model of the lawyer as an expert problem solver began to emerge in the legal academic literature in the 1980s.³ Academics and others began to conceptualize professional development as a complex process involving an ongoing cycle of abstract learning and engagement with professional practice. That cycle permits each professional to develop individualized cognitive structures which enable the rapid problem solving that characterizes

² ALI-ABA, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century—Final Report* (Charles C. Bingaman, ed. 2009), http://www.equippingourlawyers.org/documents/final_report.pdf.

³ See DAVID BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991) (noting that lawyers solve clients' problems in the world using the law); Anthony G. Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (invoking the language and models of Newell & Simon).

expertise. Experts do not just know more than novices—they are able to *do more* with the knowledge they possess.⁴

As this conceptual framework began to emerge, lawyers both inside and outside the academy began to ask about the particular nature of lawyers' expertise. Although it has long been clear that the lawyers who are admired by most members of the profession know something much more than just the law as a body of doctrine,⁵ the emergence of the professional expertise model, along with the profession's renewed commitment to ethics in the aftermath of the Watergate scandal, fueled the drive to understand better what it is that lawyers know and the distinctive things they can or should be able to do with that knowledge.

Developing useful assessment tools in connection with this new paradigm is a similarly complex matter. Understanding the process of developing and exercising judgment has challenged thinkers since Aristotle.⁶ We have learned that aspiring lawyers develop expert judgment by acquiring knowledge and skills as they join a community of practice that is distinguished by its shared commitments to a set of values, traditions and practices. Those shared commitments are often contested at the margins and may sometimes be quite diffuse, but they have a well recognized core. While learning the law is indispensable, the process of becoming an American lawyer requires something more complex than just learning to recite rules. The process of developing judgment is individualized, difficult and time consuming. Contemporary research suggests that, although the development of expertise has a steep initial learning curve, lawyers and other professionals continue to develop as experts for as many as ten years.⁷

The key contemporary effort to describe what a lawyer should know and be able to do was the ABA's groundbreaking Statement of Skills and Values by the MacCrate Commission in 1992.⁸ The MacCrate Report was important in many ways and focused all of

⁴ One of the best and earliest applications of the general model to lawyering is Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 318 (1995). For a more theoretical application, see Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1 (1998). For other work on lawyering as judgment, see Alex Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002).

⁵ A number of works can be understood as efforts to capture how lawyers add value and solve problems by doing something more than just applying legal doctrine and resolving legal disputes. See, e.g., L. BRANDEIS, *Business—A Profession, in BUSINESS—A PROFESSION* (1914); L. BRANDEIS, *The Opportunity in the Law, in BUSINESS—A PROFESSION* (1914); KARL LLEWELYN, *THE BRAMBLE BUSH: ON LAW AND ITS STUDY* (1960); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

⁶ Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 258–61 (1998).

⁷ The modern conception of the professional as expert grows from the groundbreaking work of Allen Newell and Nobel Prize-winning economist Herbert A. Simon. ALLEN NEWELL & HERBERT A. SIMON, *HUMAN PROBLEM SOLVING* (1972). Another important voice is DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983). For work in the process and length of time to develop expertise, see *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* (K. Anders Ericsson, et al., eds., 2006). Perhaps the best-known contemporary popular treatment of these issues is MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007).

⁸ ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *Legal Educ. and Profession Dev.—An Educational Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Jul. 1992) [hereinafter “MacCrate Report”].

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us—the profession, the academy, the bench and all lawyers—on the ways lawyering requires the integration of multiple dimensions of knowledge and skills, a process that begins in law school and continues throughout one’s professional life. Lawyers need substantive knowledge. They must be able to use that substantive knowledge, and they must be able to communicate, persuade, advise, draft and collaborate, all the while keeping track of their ethical obligations to clients, others and society.⁹ It is a complex process. But it is one that American lawyers have accomplished, with more or less success, since they laid the foundations for our extraordinary nation.

The MacCrate Report’s Statement of Skills and Values had real and important impact on law schools, lawyers and our understanding of the process of professional development. While many other thinkers contributed, it is safe to say that the MacCrate Report played a key role in moving law schools¹⁰ to act on the new conception of what lawyers need to know, taking us from a more static view of lawyers as repositories of legal knowledge to a contemporary dynamic view of lawyers as skillful agents who exercise judgment in several related realms to get things done. Indeed, in contemporary society, many have easy access to information that used to be expensive and almost impossible to gain by nonprofessionals. So lawyers must do something more than state what the law is if they are to add value for clients and society.

The effort to understand what lawyers should know and be able to do did not end with the MacCrate Report. Within the academy, others continued to refine the picture.¹¹ Two recent documents—the “Carnegie Report” and “Best Practices”—have transformed the current conversation within law schools. Meanwhile, many law firms have developed their own inventories of competencies, seeking to understand better how they can maximize value for clients and best develop their human capital.¹² Some of the most significant current efforts to refine our understanding of what lawyers know and do are occurring as part of the ongoing review of the ABA Accreditation Standards for Law Schools.¹³

⁹ For an intriguing recent discussion of the range of lawyering competencies, see Marjorie M. Shultz and Sheldon Zedeck, *Final Report—Identification, Development and Validation of Predictors for Successful Lawyering*, Shultz & Zedeck, September 2008, available at <http://ssrn.com/abstract=1353554> (last visited Feb. 11, 2011).

¹⁰ The MacCrate Report contemplates a continuum of life-long learning and urged continued focus on professional growth through enhanced CLE and other measures. The Report seems to have had more impact among law schools than among others involved in professional development.

¹¹ See, e.g., ROY STUCKEY, ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* 176–78 (2007). To combat these critiques, some law schools have redesigned their curricula. Posting of Justin Myers, *Golden Gate University’s New 1L Curriculum* to BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 18, 2009), <http://bestpracticeslegaled.albanylawblogs.org/2009/12/18/golden-gate-universitys-new-1l-curriculum/>; posting of Justin Myers, *Washington & Lee’s New 3rd Year Curriculum*, BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 21, 2009), http://bestpracticeslegaled.albanylawblogs.org/2009/12/21/washington-lees-new-3rd-year-curriculum; Scherr, *supra* note 16; Aaronson, *supra* note 13.

¹² ROY STUCKEY, ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP* 176–78 (2007); WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *THE CARNEGIE REPORT*].

¹² HEATHER BOCK & ROBERT RUYACK, *CONSTRUCTING CORE COMPETENCIES: USING COMPETENCY MODELS TO MANAGE FIRM TALENT* (ABA-CLE Career Resource Center 2007).

¹³ The Special Report on Outcome Measures and the ongoing work of the Outcome Measures Subcommittee of the Standards Review Committee of the ABA Section on Legal Education are two important efforts in this area.

The recent ALI-ABA Critical Issues Summit issued a call for a collaborative effort among representatives from law schools, the practicing bar, legal employers, bar associations, bar admissions boards, MCLE regulators, CLE providers and in-house professional development specialists to design a model approach to lawyer competencies. This important initiative, in many ways, continues the valuable work of the MacCrate Commission, building upon that foundation to refine further our understanding of what lawyers need to know and be able to do. Developing a more broadly shared understanding of competencies would be a key step toward strengthening the continuum of legal education and professional development. That stronger system, in turn, would help law students and lawyers better meet the evolving challenges of our profession and our society.

How we understand the relationships among different realms is a complex question. Are skills and values separate or must skills always be understood within the context of values? Are the affective and social components of lawyering to be treated independently or as subparts of skills such as communication and collaboration? Is abstract knowledge more important or just another of many co-equal ingredients? Level of specificity, organization and what to leave out are always difficult questions in a mission like this. Yet it is clear that prior efforts to answer these questions have yielded real and important gains. If we do not know what we are trying to accomplish, we cannot plan intelligently. Nor can we measure our successes and failures.

These complex questions also pose more practical ones about both the approach and the process of moving forward. What is “practice-ready” in a profession where there is a myriad of practice types in the law firm setting and an apparent preference in the legal marketplace for specialist practitioners? What will be needed to bring together academicians and the practitioners who are in the business of teaching, training and employing lawyers and encourage agreement on the values, skills and knowledge that make a lawyer “practice-ready”? What is the role of law schools, employers, and CLE providers in preparing attorneys for practice in an era of change? What are the sources that will provide exposure to project management skills; training in evolving information technologies; and training in efficient work processes? What will be needed to develop an integrated plan to educate, train and develop lawyers who can practice effectively and with a measurable standard of excellence that is based on a model competencies approach? What will be needed to reach agreement on how the education and training responsibilities should be allocated among the schools, firms, CLE providers, and bar associations?

Once students graduate from law school, the picture does not improve. The bar exam does not claim to assess readiness for practice, and CLE providers are quite ill positioned to provide meaningful, useful feedback. There is much that should be done to improve assessment so that law students and young lawyers better prepare themselves to be lifelong learners and ever improving professionals.

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Of course assessment, even when done well cannot address all the challenges of professional development.¹⁴ And we must be careful to find efficient, valid modes of assessment. Not everything that is important can be measured, and not everything that can be measured is important. But law schools, bar examiners, CLE providers and others concerned with professional development have already begun to experiment with new modes of assessment.¹⁵

Accreditation rules should emphasize how to apply theory and doctrine to actual practice, as well as encourage the process of developing professional judgment. These are critical skills that all newly admitted lawyers should have as they embark on their legal careers.

This is not to suggest abandonment of the traditional classroom or a return to the apprenticeship model but rather a more sophisticated model. For example, as a matter of policy, law schools should avoid providing academic credit to students used as unpaid labor by for-profit entities with no serious feedback, assessment and/or training on lawyering skills. There should be carefully crafted rules to provide for expanded clinical programs and rigorous certification processes for supervisors in clinic or field-placement programs, analogous to what is done in social work programs. The over-arching goal is to encourage students to participate in clinical and other courses that will provide them with the necessary skills to apply their knowledge in practical settings.

In addition to clinical experiences, capstone courses should be encouraged. Capstone courses are designed to reflect real-world scenarios that integrate doctrine, skills, and theory into legal education. They “build on previous learning, require students to be responsible for their learning, and encourage reflection on legal ethics, professionalism, and what they learned.”¹⁶ Capstone curricula “require students to produce manifestations of their learning, including written briefs, contracts, papers, or a videotaped trial or negotiation”¹⁷ and allow students many opportunities to receive individual assessment and feedback. They also require students to manage more complex tasks than those presented in the classroom.

In capstone classes, “[s]tudents will develop an expertise as a result of a systematic and progressively sophisticated study of a discrete area of practice Substance and method can be taught and learned in a thoroughly harmonious and complimentary fashion. Capstone courses with significant writing, clinics and other practical exercise will ease the student’s transition to practice.”¹⁸ These courses are used in the third year of law school as a culmination of legal education and to provide a new attorney with the skills to “self-direct” his or her learning in the future.¹⁹ Required capstones in the third year will ensure maximization of learning as law students transition into novice professionals.

¹⁴ For a spirited discussion of the national debate on the role of assessment in education see, DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010).

¹⁵ See, e.g., Clark D. Cunningham, *Legal Education After Law School: Lessons from Scotland and England*, 33 *FORDHAM URB. L.J.* 193, 196–99 (describing Scottish advances in assessing readiness for practice).

¹⁶ John O. Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 *WILLIAM MITCHELL L. REV.* 1, 104 (2007).

¹⁷ *Id.*

¹⁸ Jeffrey E. Lewis, “Advanced” *Legal Education in the Twenty-First Century, A Prediction of Change*, 31 *U. TOL. L. REV.* 655, 658–59 (2000).

¹⁹ Sonsteng, *supra* n. 55 at pg. 103.

The resolution presented by the New York State Bar Association is intended to give the House of Delegates the opportunity to formally speak to the issues raised by its Task force on the Future of the Legal Profession and advance legal education in a manner recommended by the Task Force.

Respectfully submitted,
Vincent E. Doyle III, President
New York State Bar Association

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GENERAL INFORMATION FORM

Submitting Entity: New York State Bar Association

Submitted By: Vincent E. Doyle III, President

1. Summary of Recommendation(s).
The Resolution calls for the American Bar Association and its constituent bodies that deal with legal education to promote and support the education and training of future lawyers and young lawyers by providing them with the knowledge, skills, values, habits and traits that make up the successful modern lawyer; and that legal education providers make these lawyers practice ready by enhancing clinical work and certain supervised activities, as well as through development of capstone courses.
2. Approval by Submitting Entity.
The New York State Bar Association has approved this resolution.
3. Has this or a similar resolution been submitted to the House or Board previously?
This resolution updates ABA policies on legal education.
4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
This resolution updates the long standing policies of the ABA regarding modern legal education, which were first raised by the groundbreaking report of the MacCrate Commission in 1992. More recently, these issues were the focus of attention in the Model Competencies Project recommended by the ALI-ABA Critical Issues Summit.
5. What urgency exists which requires action at this meeting of the House?
No urgency, but legal education is undergoing significant change, and this resolution is intended to give policy direction to those involved.
6. Status of Legislation. (If applicable.)
N/A
7. Cost to the Association. (Both direct and indirect costs.)
The resolution does not impose any costs on the Association, although it would require future actions on the part of various constituent bodies of the Association.
8. Disclosure of Interest. (If applicable.)
No individual associated with the resolution will benefit personally from adoption of the resolution.
9. Referrals.
None, as the resolution was only recently submitted.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House)

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EXECUTIVE SUMMARY

SUMMARY OF THE RESOLUTION

The Resolution calls for the American Bar Association and its constituent bodies that deal with legal education to promote and support the education and training of future lawyers and young lawyers by providing them with the knowledge, skills, values, habits and traits that make up the successful modern lawyer; and that legal education providers make these lawyers practice ready by enhancing clinical work and certain supervised activities, as well as through development of capstone courses.

SUMMARY OF THE ISSUE WHICH THE RESOLUTION ADDRESSES

The Resolution would guide those, both within the ABA and outside the Association who are involved in educating future lawyers and young lawyers as they examine, consider and, to the extent possible, resolve questions such as the following: What is “practice-ready” in a profession where there is a myriad of practice types in the law firm setting and an apparent preference in the legal marketplace for specialist practitioners? What will be needed to bring together academicians and the practitioners who are in the business of teaching, training and employing lawyers and encourage agreement on the values, skills and knowledge that make a lawyer “practice-ready? What is the role of law schools, employers, and CLE providers in preparing attorneys for practice in an era of change? What are the sources that will provide exposure to project management skills; training in evolving information technologies; and training in efficient work processes? What will be needed to develop an integrated plan to educate, train and develop lawyers who can practice effectively and with a measurable standard of excellence that is based on a model competencies approach? What will be needed to reach agreement on how the education and training responsibilities should be allocated among the schools, firms, CLE providers, and bar associations?

EXPLANATION OF HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE ISSUE

We used to think that being a good lawyer simply meant knowing the law. Today, we are more likely to think that good lawyers know how to do useful things with the law to help solve client problems. Society has shifted from a static understanding of professional competence as memorized knowledge to a dynamic conception of lawyers adding value through judgment and their ability to manage and solve complex problems. This dynamic conception of lawyering is both promising and demanding. More is expected of lawyers today, and these heightened expectations are particularly stressful for young lawyers. Too many law students and recent graduates are not as well prepared for the profession as they might be. Law schools, bar examiners, the judiciary and the bar owe more to our young colleagues in these difficult times.

This Resolution is intended to cause those involved in legal education to address these issues, find solutions and revise legal education to meet these needs.

SUMMARY OF ANY MINORITY VIEWS OR OPPOSITION WHICH HAVE BEEN IDENTIFIED

The New York State Bar Association is not aware of any objection to the resolution, although it admittedly is a late addition to the agenda and has not been circulated.