

**Transcription of 2013 *Chapman Law Review*
Symposium: “The Future of Law, Business,
and Legal Education: How to Prepare
Students to Meet Corporate Needs”**

Panel 2: “Finding a Better Way to Teach”*

Friday, February 1, 2013

Moderator:

*Dean Tom Campbell***

Panelists:

*David M. Moss****

*Clark D. Cunningham*****

* This transcript has been edited and excerpted. For the full video presentation, visit www.chapmanlawreview.com.

** Dr. Tom Campbell is the Dean of Chapman University School of Law and Donald P. Kennedy Chair in Law and Professor of Economics. He has served as the dean since February 2011. Prior to joining Chapman, Dean Campbell served as Dean of the Haas School of Business at the University of California, Berkeley. He was a professor of law at Stanford University from 1987 to 2002 and an associate professor from 1983 to 1987. Dean Campbell was a member of the United States Congress from 1989 to 1993 and again from 1995 to 2001. Additionally, he was a member of the California State Senate from 1993 to 1995 and the director of the California Department of Finance from 2004 to 2005. He has a BA, MA, and a PhD in economics from the University of Chicago and a JD, magna cum laude, from Harvard Law School where he served as a member of the Harvard Law Review. Dean Campbell clerked for United States Supreme Court Justice Byron White as well as United States Court of Appeals Judge George E. MacKinnon. His principal area of academic work is in the application of economics to legal questions, and he has published a number of articles in the nation's top legal journals.

*** Professor David M. Moss is an Associate Professor at the University of Connecticut Neag School of Education specializing in curriculum studies and teacher education. His research interests are in the areas of global education, culturally responsive teaching, and environmental literacy. Professor Moss has published numerous articles and books promoting educational reform. He was named a Teaching Fellow at the university, the highest honor awarded for instructional excellence and leadership. Additionally, he has extensive curriculum development and assessment experience and directs the Neag School of Education London Study Abroad program.

**** Professor Clark D. Cunningham is a W. Lee Burge Professor of Law & Ethics at Georgia State University College of Law. He is the director of the National Institute for Teaching Ethics & Professionalism and is a member of the Chief Justice of Georgia's Commission on Professionalism. He has published articles on a variety of topics with an emphasis on interdisciplinary and comparative scholarship. His *Yale Law Journal* article,

Neil J. Dilloff^{*****}

Campbell: One should try to learn from comparative professional schools, and here are the quick lessons that I would just offer. First, the case method is not the only way that business schools teach; although, that is the reputation, that they have pioneered the case method. Just as in law, there is a certain amount of substance that has to be conveyed and then there are skills, which are developed in a different format. But one does not use the case method to decide whether the marginal product of labor is the first derivative of the production function with respect to labor. So, this doctrinal conveying of information doesn't lend itself, at least in my view, to the case method. You are going to learn microeconomics, you are going to learn accounting, and I am not particularly interested in having your views on whether the value of the marginal product equals marginal cost.

Secondly, there is a fundamental problem in law that is not present in business—we are a regulated profession. You can get an MBA, go out and practice business, and no state agency will test what you've learned. We, by contrast, can't avoid the bar. So, when you think in the law school curriculum how much opportunity we have for doctrinal learning and how much for skills training and case method, we are constrained in a way that business schools are not to teach the subjects that are on the bar. A very relevant point that was raised in the last panel is: Can we do something about this constraint? That it exists, perhaps not. But what is tested, perhaps. And where like Susan Myers, I also have not had occasion to use the rule against perpetuities, but I did for the bar. I was ready for the rule in Shelley's case or the fertile octogenarian. But, we do have to communicate that substantive law, and I don't think you learn that in the skills courses. So, if you are going to graduate people to become law professors, as was originally described as the purpose of law

"Plain Meaning and Hard Cases," co-authored with three linguists, has been cited by the United States Supreme Court in three different cases.

^{*****} Neil J. Dilloff is a partner at DLA Piper and his litigation practice includes significant experience, as well as roles as lead counsel, in many large insurance, professional malpractice, construction, and complex commercial litigation matters. He has tried to verdict more than 100 cases in state and federal courts and has won two of the largest plaintiffs' verdicts in Maryland history. Mr. Dilloff also has achieved over a dozen recoveries in excess of \$1 million. In addition to writing more than forty articles and books on a variety of subjects in various legal journals, Mr. Dilloff has taught civil trial practice, trial advocacy, settlement negotiations, and deposition practice for the Maryland Institute for Continuing Professional Education of Lawyers since 1983. He is also an adjunct faculty member at the University of Maryland School of Law and the University of Baltimore School of Law.

schools, no. But if you want to graduate lawyers, you do.

Third, and last before I introduce our colleagues on the panel, there is a need to teach those attorneys who wish to practice with business and for business, the language of business. And to this end Chapman Law School has created a business emphasis certificate, just in the last year and a half, wherein students will become familiar with the vocabulary of business as well as have an externship in a business environment. In my first year as dean, the faculty kindly supported my request that we actually give externship credit for placements in corporate counsels' offices. It hadn't been the case before, and it's still not the case in the majority of law schools. You get externship credit if you are working for a 501(c)(3) or the government. But, the quality of that externship credit—just to choose an example, not to be provocative—if you are working on an environmental matter for Weyerhaeuser or an environmental matter for the Sierra Club, the quality of the externship is not determined by whether your client is a 501(c)(3), whatever your views may be.

I will conclude by saying there is an important difference between business training and law training, which I am trying to overcome through the business law emphasis program. We have five other emphasis programs at our law school, and I am proud of all of them. But this is particularly relevant to this subject, since I am comparing MBAs to law students. And here is the difference: the MBA appears before the Supreme Court of the United States by accident, she reads the card that says, "Mr. Chief Justice and may it please the Court," and proceeds as follows: "I have a totally new idea. I really want to excite you on this one. It hasn't occurred before, but I think if we can push the law to the outer edge we have a real potential to dominate the legal market with this new approach, so go with me on this, let's just run it up and see who salutes." The attorney by mistake shows up at Sand Hill Road to make a pitch to venture capitalists. The attorney comes in and says, "Hey, uh, Partners. Good to see you. My idea today is nothing new. It's been well settled; everybody knows about it, and it is really a very straightforward extension." You get my point.

Our first panelist is Professor David Moss, who is a perfect member of this panel as a professor of education.

Moss: I am cut from a different cloth. I have not been to law school and certainly have not practiced law, not legally anyways. I come to your questions through a different lens, so I hope you will indulge me about eight or nine slides, just to give you less of a formal presentation and more of a sense of what my thinking is regarding this area. Hopefully we'll have lots of time to discuss

issues as we move along.

I am a curriculum theorist, and I am interested in embracing complicated conversations. Certainly we have one here in terms of the reform of legal education with lots of stakeholders at both ends. Students seem to be voting with their feet in terms of the number of plummeting applications and the wide range of opportunities that graduates have from law school, in terms of where they might end up professionally. And all of those voices, from my perspective, are very much welcome. And so what I'd like to just briefly address this morning is the idea and notion of a culture of accountability—a culture of assessment, an evidence-driven culture—as we take into consideration all of those stakeholders and the complex and complicated needs that we all bring to this issue.

This seems to be a very fundamental notion that's on the table and not one to ignore, that professional schools face the challenge of balancing the so-called academic aims versus professional ones. And for years in education we avoided this dichotomy—this false dichotomy—of one versus the other. When we set things up in this either-or choice we are bound to leave something on the table. I might argue that what we need to consider is: What is rigorous legal education and how does it involve both of these elements? Redefining rigor beyond the ability to survive a first year and move to a second year. If we operationalize rigor as merely endurance, I think we've missed the point. There's an opportunity to really rethink this idea of rigor as we move towards a culture of accountability. There are essentially two basic barriers.

The first is how we think about curriculum and how law schools move toward reform. We all operate under a curriculum model that was published in the late 1940s; it has all the familiar terminology of objectives and outcomes. I think people are surprised with the publication date of 1949 as one that's driving twenty-first century curriculum development. I will talk less about that, because I am more interested in this idea of assessments. Perhaps one of the few advances in curriculum and curriculum theory and school reform work over the last decades that has been most significant, both positive and negative, has been this idea of assessment as an element of learning, teaching, and curriculum, and not something that comes after the fact. So, a question I might pose is, what are the ways, holistically, that law school students think about and construct ideas about the law and the legal profession? There is an interesting word there and that's "construct." If this were an education audience, right away you would know I am referring to a body of literature that

really explains how people, including adults, learn through what we call a “constructivist model.” When we talk about some of the best practices of legal education, we talk about opportunities for students to experience directly, beyond memorization, rich meaningful experiences in which students interact with ideas and knowledge and people in ways that are enduring. I think we all have a sense of them, but may not know that retention—learning retention—is something we worry about. And, in any given field, we can only expect over an extended period for folks to remember about ten percent of what we teach them through traditional models. That is a lot of money going into, and a lot of effort by a lot of folks, for something that only ten percent is going to be retained long term.

Quickly, some multiple purposes of assessment here—the who, the what, and the why. In terms of our track record for documenting students, in terms of what they do after they graduate as a key and fundamental element of a culture of assessment, that’s where I’d like to focus the next two or three minutes.

[The following discussion refers to images presented via Powerpoint.]

This is the assessment plan for the school of education where I work, and where I am currently the director of teacher education programs. I am sort of dipping my toe into the administrative waters for the first time. It’s cold and icy, and I don’t expect to wade much further in than I have, but I have endless respect for those folks who do it well, and you seem to be blessed with that here.

This is the first screen shot and what you see is an assessment plan. This is beyond our input assessments in education. There are about 1,200 accredited education programs in the country, I guess about 200 or so at law schools. About 1,000 of those education programs are really not worth discussing and could close tomorrow. And although we’d have less teachers on the market *per se*, I’m not sure it would impact the quality. But there are several hundred schools of education programs in the country that are similar to law schools in the sense that we have input exams, it’s a rigorous three-year model, and we have national exit exams. This may be news to some of you, because I think most of us are familiar with those thousand or so programs where it’s essentially open enrollment and people come through. But for those of us who don’t work in that model, beyond our rigorous assessments that are tied to courses, you should see a screen shot of the assessment plan for the Neag school, beginning with number one which is actually an

assessment of the assessment plan itself. How about that for an accountability culture? Every three years we take a look at the way we're assessing. We currently have in place, beyond our traditional tests and our rigorous assessments as part of our courses, forty-four large, validated data points that we regularly collect as part of our assessment of culture. We know a lot of things about our students before they come in, what they are doing, what they're thinking, how they are performing during our programs, and most importantly we track them mercilessly as they graduate. Most graduates are used to getting a call from the development office: "Can you write us a check? Can you write us a check?" Well, our graduates, they love calls from the development office because usually it's from our assessment offices: "Can you send us data? Can you send us data? Can you send us data?" But we can't imagine engaging in reform, making the kinds of decisions that it seems that you as a profession are poised to make in the coming years—perhaps the coming weeks or months—given the sense of urgency. I can't imagine making that level of decision without comprehensive data about what works and about what doesn't work. I am not suggesting that we shouldn't take risks, particularly in the near-term. I think we need to try things and they need to fail, and we need to try others. But we need to know why they are failing and in what way they are failing, which stakeholders they are not serving, and what we can do to improve those.

The red lines represent graduates from my program. The blue lines represent all the other graduates in the state of Connecticut. Basically, you see red lines above the blue lines. This is a particular measure; this happens to be at the elementary level in mathematics. What this says to stakeholders, to graduates, to parents, to kids, to policy makers, in the state of Connecticut, is that if you've got a kid in a classroom taught by a teacher from our program, your kid's going to do better academically. That's across the board and we've got that evidence. So, turn that around. Imagine a database that says graduates of this program, in whatever profession they go into, are going to be better lawyers. And you get to set those parameters. Imagine what that does for your job placements. Imagine what that does for your efficacy. Imagine what that does for your application numbers. Hard data that says we are preparing better lawyers and this is the data that shows it. I think we are just at the point now where we are beginning to craft what that means.

I might disagree with one of the comments from this morning about practice ready and this idea of preparing lawyers

as they would be four or five years out. I agree that it's unrealistic to expect that we can prepare lawyers with the experiences that are four or five years out, and we say that to our teachers as well. The only way to be an experienced teacher is to get the experience, and the same is true for lawyers. But, what we do have is very calibrated developmental stages, so we know what it means to be practice ready in our particular field as a beginning practitioner. I think we need to think carefully about this idea of practice ready, and it's not an experienced lawyer. I think developmentally we can calibrate and think what practice ready means as a first-year practicing lawyer. I suspect there's still a significant gap between what many law schools are graduating in terms of knowledge, attitudes, behaviors, and skills and that developmentally calibrated line here.

These are just a couple things we are working on now in terms of our continuous model of reform. That's the last point I'd like to make with you this morning: it is an ongoing and continuing culture of reform. Right now we are looking at courses and experiences that help our educators deal better with this issue. Dealing with English language learners, something that Los Angeles has been leading on for many, many years. And of course students with disabilities, which is now a growing, national challenge. As we can better diagnose kids on the autism spectrum, we've got a larger number of students who are receiving special services. We've set those as targets, really rethinking the whole notion of special education. We want to begin to put out teachers in our field who are able to deal with these issues proactively.

That may or may not resonate with you in terms of the field, but it should resonate with you in terms of this idea of looking ahead and knowing absolutely, confidently, and clearly what it is you want your graduates to be able to do differently than previous generations of graduates have done recently. You better have an assessment plan and data that helps you determine whether those graduates are, in fact, doing something differently than graduates from past years. Without those targets, and without that culture of evidence, we're going to spin our wheels much longer—given the very recent data—than we should—given the urgency. I don't think that reform of legal education is structural rather than cyclical, and I think that we should view these changes for the long term moving forward.

Campbell: I look forward to our Q & A particularly, David [Moss], on how we measure the successful lawyer.

Please join me in welcoming our next speaker, Neil Dilloff from DLA Piper.

Dilloff: I come to this topic with three basic perspectives.

First, before I joined DLA Piper, I was a lawyer in the United States Navy JAG Corps. I did criminal defense work. So, I come from a perspective of being a trial lawyer my entire life, whose role is to convince people to do what you want them to do. This is what it's all about, in other words: sales. I also have been training lawyers at our firm for many years. I was the head of our commercial litigation group for many years, so I also know what employers are looking for in people right out of law school. In those days, we actually hired people out of law school!

Second, I come from the perspective of a teacher. I've taught lawyers since 1982—continuing legal education in Maryland and other states—and I also teach law school students. They are a little different, as you might expect. The other thing that I do is I teach lawyers in-house. I will tell you that a lot of comments about the waning of in-house training, unfortunately are true. That applies not only to formal programs that we have in-house, but informal training as well. We still have some programs, but we used to have mock trials every year. The days when I could bring an associate with me to sit at a deposition, or sit at trial and get paid for that person's time are gone. So, what do I do? We eat the time. And I would say that's probably anathema to the economic culture of my firm, but I do it. That's the only way we will have people coming up through the ranks who, quite frankly, know what they're doing.

Third, my perspective is as a litigator, with apologies to all of the transactional lawyers. The ability to get up in front of a jury or a judge and sell a point of view is becoming a lost art. When I deal with lawyers in other firms, I'm shocked to find out that partners at other law firms, and some at our firm, have never done certain things. If you think about it in the context of the medical profession, how would you like a doctor operating on your brain who has only done it three times before? That's the situation we have. Therefore, that situation cries out for more experiential learning and trial activities at the law school level. When you get to a law firm like mine, unless you are lucky, you are going to be sitting in a room looking at a bunch of documents for some chunk of your time, as opposed to getting out in the world—unless you find a mentor to take you out of the prison and put you on the street.

I thought it might be helpful to give you an example of one of my courses and what we do at the University of Maryland School of Law. My students tell me that this is the only course they've taken at the law school like this. I'm assuming that's a good thing. In my class entitled "Alternative Methods of Dispute

Resolution,” we basically cover negotiation, mediation, and arbitration over the course of a semester. And from day one, everyday, the students are on their feet. I lecture relatively little.

Usually there is a waiting list for my class, which is theoretically limited to twenty students.

I try to focus on all of the things that lawyers need to know that are not taught in the law school for the most part: judgment, reacting to changing circumstances, dealing with difficult people, dealing with difficult lawyers—notice I distinguished between people and lawyers, they’re not the same, people are better—how to talk to people, etc. All those types of intangibles—some might say are soft skills that were probably looked down upon, a little bit, by academia—we talk about and we practice every day.

Let me start out with what we do. It’s the first day of class. Everybody now knows what they’re in for when they show up; this is not a class for shrinking violets. The first simulation that we do involves bringing two students up to the front of the class: the driver of a car and the driver’s girlfriend who’s about to be engaged to the driver. This is the first exercise in the negotiation portion of the course. Another student comes over and is the police officer. The objective of the exercise is for the driver, the boyfriend, to talk his way out of getting a speeding ticket. So, everybody is always a little nervous the first class, but after the first class it’s really a riot—everybody laughs. The police officer comes over in front of the whole class and says, “I see you were speeding. Let me see your drivers license.” He goes through the questions that a police officer would typically ask a speeding driver. The girlfriend is sitting there being silently supportive. Then I send the boyfriend driver out into the hall and I tell the girlfriend, “You just found out that your boyfriend has been cheating on you and you’re not happy. You want to punish him, got it?” “Got it.” The boyfriend comes in not knowing what’s going to happen and sits down. The cop comes over again and the first thing that comes out of the girlfriend’s mouth is: “He was speeding. He needs a ticket.” And the driver looks at her like, “What’s going on?” She says, “I’ve had it with you.” A big argument takes place and he doesn’t know what to do. Well, he’s got to figure out a way to react to changed circumstances, and we take it from there.

During the course, we have students play the roles of clients and lawyers for the clients. We conduct mock mediations in class. I also bring in guest judges from time to time and other speakers. The students serve as mediators. We have an arbitration panel where we select the arbitrators, and the students get together and select three people. The arbitrators are interviewed before

they are hired. All the different steps that would take place in the negotiation context, in the mediation context, and in the formal arbitration context, we do in class. And then at the end of the semester, we end up with a meeting of the United Nations. Everybody is a different country. Actually, some people came as “terrorists” one time, which was difficult in terms of how to organize everything because they kept throwing paper during the entire process and trying to disrupt everything, which was their assignment. The goal of the UN officials (students) is to try to come up with a nuclear non-perforation treaty where everybody has different interests. This forces the students to form separate coalitions and agreements and come together. Meanwhile, the people running the UN are trying to keep the meeting organized because by design, we create chaos. Everyone is screaming at each other. For example, Israel is screaming at Iraq, the terrorists are throwing paper wads at everybody, etc. Notwithstanding all of this, the class is to reach a treaty. And that’s the end of the course except for oral presentations of final papers.

Let me give you a couple of examples of why learning by doing can also be fun. One exercise that we do every year is a take off of on an actual matter about the advent of casino gambling in Maryland. Recently, there’s been a big brouhaha about whether or not there ought to be casinos in various places in Maryland. (By the way, we also did the Tiger Woods divorce case, a Toyota recall, and baseball arbitrations.) Before each class problem, the students receive an email from me with the roles. Certain students receive secret emails about how they’re supposed to act, what they’re supposed to do, and what their interests are. They are not supposed to share them with anybody. Everybody knows his or her role in advance. We also give out academy awards at the end of class.

So, getting back to the casino. We have a New York developer who wants to come down to Easton Maryland—which is a provincial town on the eastern shore of Maryland, very quaint, very insular—and open up a casino. Of course we have various factions in the town: we have the chamber of commerce; we have the women’s club who hates this idea; we have a couple of men who are very wealthy who have yachts who think this is all fine (instead of going up to Atlantic City, or going to Las Vegas, they can have a casino right at home); we’ve got the union workers who want the job to build this casino; and we’ve got various other constituencies. The casino operator wants to have a gentlemen’s club attached to the casino, and the town counsel of Easton—three students—has to decide what to do: whether to try

to stop the casino entirely, or agree to the gentlemen's club. Also, I've told the town counsel they are up for election. We also have bribes from some of the people to the council in an effort to get the council members to vote for their position. It's very much like a soap opera.

So, the first time we did it, we had all the students involved. This problem is near the end of the course and, for better or worse, most of the students are typecast in terms of how outgoing they are and what they do. There were two women in the class who have been very outgoing, and I told them that their roles were to be "ladies of the night." They fly in on their private jet from their penthouse at Mandalay Bay in Las Vegas. They have fifty-nine gentlemen's clubs all over the world. They've just written a book about their exploits. A movie is in the works. They are going to fly in on their private jet and appear in front of the town council. Their goal is to "wow" the council into permitting the casino to go forward along with the gentlemen's club.

The council conducts a town hall meeting. Everyone has a couple of minutes to talk. The "ladies of the night" are dressed in short black dresses with boots on—dressed the part. When the council committee chairperson says, "We're going to let you have a couple minutes," they both got up from their seats and went to the front of the class to a witness table. They put their feet up on the table in front of them, crossed their legs, and simultaneously put on dark glasses before they addressed the council. The class exploded in laughter. Part of the issue here is: What are you going to do when you are head of the town council and two people walk in and start doing this?

So, the head of the town council asks the ladies "to please put your feet down. You only have a couple minutes. Please remove your glasses." A lot of these things have a purpose. Although they are very funny, there's a purpose, there's a method to the madness: how to deal with unexpected circumstances, how to keep control, etc. We also have people change personalities during problems. We have bad things happen during the course of the mediation. The landscape is constantly changing so that students not only must prepare for the problem, but have to react to changed circumstances, just like they would in the real world (e.g., when someone is on the witness stand and you think the witness is going to say X and they say Y).

Campbell: Thank you very much. Won't you join me in welcoming Professor Cunningham.

Cunningham: My topic is developing professional judgment. Neil [Dilloff] just a moment ago was talking about

things that you need that aren't taught at law school, and judgment was the first thing he mentioned.

The Carnegie Foundation for the Advancement of Teaching, which was founded in 1905 by Andrew Carnegie, has prompted a lot of important changes in higher education. In 1910, they did a report on medical education called the Flexner Report, which actually became the blueprint for modern medical education. There will be a fair amount of talk today on what's generally called the "Carnegie Report," for short. The actual title of the book is *Educating Lawyers: Preparation for the Profession of Law*, and it was published in 2007. There have been other reports on legal education, but this one, I think almost all of us would agree, has had significantly more impact than its predecessors.

What's special about the methodology of the report? It provides an independent outside perspective because only one of the five authors is a lawyer or law teacher. All of the other earlier reports were almost entirely authored by lawyers, or law professors, or both. In contrast, one of the authors of the Carnegie Report is a moral philosopher; three are social scientists.

The Carnegie Report uses comparisons with other kinds of professional education. The Carnegie Foundation was actually engaged in a comparative study of professional education, so there are other books about educating physicians, nurses, engineers, ministers, and rabbis. They were able to draw from that comparative study, and apply current research on teaching and learning. The Report was based on visits to sixteen law schools to see how teaching and learning really happen at law schools, rather than what we say we do—classroom observations, and interviews with teachers and students.

The Carnegie Report says that the goal of professional education can't be just knowledge, or even knowledge plus skills, because in real life knowledge, skill, and ethical behavior are interdependent. An actual practitioner cannot engage in professional activity without simultaneously applying knowledge, skills, and ethical decision-making.

What did the Carnegie Foundation find when they looked at law schools? It found that law schools provide inadequate support for developing the ethical and social dimensions of the profession. Empirical studies of the capacity for moral reasoning show that, for most students, legal education did not in any way improve their moral judgment. Approaches to teaching ethics that are purely theoretical—that perhaps draw a lot from philosophy—the Report says are unlikely to deeply affect the

learner. The Report calls the most common approaches to teaching professional responsibility “courses on the law of lawyering.” This kind of professional responsibility course in many ways looks like other courses in the law school curriculum, but it teaches from the rules of professional conduct; it teaches what’s the law of lawyering. In effect, it teaches you how to avoid punishment for unethical conduct, how not to be disciplined, how not to be sued for malpractice, and how not to lose a motion for disqualification. The Carnegie Report states that courses like this could actually do more harm than good (which is pretty sad because it’s often the only required course after the first year). Why? Because it limits what graduates of law schools perceive as ethical issues. If it isn’t the kind of thing that will get you punished, it’s not an issue of legal ethics. My favorite line from the book is, “Law schools create people who are smart without a purpose.” And that’s an actual quote from a student they interviewed. Well, what is the purpose of being a lawyer?

In 1905, a very famous account was given by Louis Brandeis, before he was a Justice of the Supreme Court, to the Harvard Ethics Society. He said that the ordinary person thinks of lawyers as people who try cases, but by far the greater work done by lawyers is not done in court but in advising on important matters. This is from someone who was a very successful trial lawyer. The lawyer is more like a statesman than a courtroom advocate. He said that the training of lawyers leads to the development of judgment. Now, put that purpose—as the lawyer is the person who exercises wise judgment for his or her client—with another famous book from the great legal educator Karl Llewellyn, who described the first year as “lopping off your common senses and knocking your ethics into temporary anesthesia. It’s not easy to turn human beings into lawyers this way, neither is it safe. A mere legal machine is a social danger, because it’s not even a good lawyer, because it lacks insight and judgment.”

Well, how can law school after the first year teach or develop professional judgment? A key is performance-based teaching and performance-based assessment. The Carnegie Report says higher education can develop moral thinking, but skills and ethical decision-making must be learned in a role. The student has to move from the role of observer to actor; you have to connect that performance to models of professional judgment in action so that performance can be planned and evaluated. Students then have to reflect on how their own sense of professional identity is affected by this kind of performance-based learning.

The Carnegie Report says that students need the ability to

recognize ethical questions even when they're obscure; they need wise judgment when values conflict, and integrity to keep self-interest from clouding judgment. This is a kind of paraphrase of a very well-developed and tested model for ethical conduct, particularly in the professional setting, called the "Four-Component Model." It has been developed in educational and moral development psychology. This model indicates that if you want to produce effective professional conduct, it's not enough for the person to be a good person, or to be well-intentioned. Professionals engage in misconduct all the time, even though they are good people and they intended to do the right thing. How can that happen?

You could lack moral sensitivity, or you could fail to recognize in a real-life setting that there is an ethical dilemma. The first thing you have to know is the standard—the rules of professional conduct—but you also have to recognize in a professional setting that the rules are implicated.

You also need moral judgment, because the most difficult moments of ethical decision making involve conflicting values. For example, you know your client wants to lie on the witness stand. The only reason you know that is because your client confided in you, so there's a tremendous value to honor client confidentiality. But there's also a value of candor to the court. How do you deal with these competing values in deciding what to do?

You have to have motivation. You recognize there's an ethical dilemma. You come up with, not a rationalization, but a justification for what you're going to do in that situation. And then you have to be motivated to do it, which typically involves acting against self-interest. Studies have shown that professionals who implement good ethical decisions do so because they have internalized the values of the profession and they have a strong professional identity. So, if you ask that lawyer, "Well, why did you do that?" he or she will say, "Well, that's what lawyers do." The same way some might say, "Well, I'm a doctor, that's what I'm supposed to do."

Finally, there has to be implementation. You can identify the ethical dilemma, you can reason through to the right thing to do in that context, and you can be motivated to do it. Yet, you can be ineffective at implementing it and still engage in professional misconduct. I'm going to illustrate this, but if you want more information, a piece is available for free download from www.teachinglegalethics.org called "Developing Professional Judgment."

I have used this exercise in my professional responsibility class, based on a real-life situation involving representing a corporation. This is about a real company called O.P.M. Leasing. It was a private company, not publically traded. Fifty percent was owned by Mordecai Weissman and fifty percent by Myron Goodman. At the time, it was one of the five largest computer-leasing companies in the United States. This was back when people had to rent big mainframes—which you may even not remember. The third character is John Clifton, who’s the chief fiscal officer, but he’s just an employee. Then there’s the law firm, which is the general counsel for O.P.M., which produces sixty percent of their revenue. Andrew Reinhardt is the lead partner on the case; he’s a personal friend of both stockholders, that’s how they got the business. He’s also the third member of the board of directors.

Imagine you are the student assigned to play the role of Reinhardt. Moments before CEO Goodman arrives in your office without an appointment, you’ve just read a confidential memo from the CFO, raising concerns that the CEO has engaged in fraudulent conduct. If it’s true, there can be civil and criminal liability for the law firm as well.¹

So we are going to show just about a minute of this video. I’m just going to show it to you, and then I’m going to tell you what I want you to discuss.

Video:

Goodman: Hello, how are you doing today?

Reinhardt: This is pretty unexpected; I have a meeting to go to in about fifteen minutes, so what’s on your mind?

Goodman: I’m sorry to barge in like this but, since you don’t have much time, I’ll just get right to the point: Did you get a letter from John Clifton lately?

[Video paused.]

Cunningham: Talk to the person sitting next to you, how would you respond if you were this person’s lawyer?

[Crowd discussing.]

Cunningham: I use this kind of discussion in class. I’ve also used this exercise with considerable success in continuing legal education events for law firms and other kinds of settings. One of

¹ The instructions for this exercise indicate that it is intended to be a plausible recreation based on the facts of the case, but should not be treated as accurate about the real O.P.M. case nor should any statements in the instructions or role play be attributed to individuals involved in the actual O.P.M. case.

the nice things about it, I find, is people don't want to stop talking. From a teaching methodology, you've just seen that in effect I have a large classroom in front of me here and every one of you has had an opportunity to talk, which is the value of breaking into small groups for discussion.

I've put together an expert panel to do what I'd be asking my students to do. Susan Myers, who is an experienced in-house counsel; Neil Dilloff, who is an experienced private firm lawyer; and Robert Rhee, who was in business himself and teaches business ethics, among many other things, at the University of Maryland. They have, unlike the rest of you, read the two-page instructions that the students get to prepare for the next step. You can use this for a lot of things; you can use this to teach lots of substantive law issues. But, I particularly use it to illustrate the Four-Component Model.

I'm going to ask my expert panel as they watch the next four minutes to be thinking about how well this lawyer is doing in terms of ethical sensitivity. What kinds of ethical dilemmas does it appear that he's aware of and thinking of in the context? And what kind of moral reasoning is he engaging in? Are there conflicting values at work, and how is he balancing those values? What seems to be the role of professional identity? Who does he think he is? Where is he drawing the values that are driving his decision-making, and how effectively is he implementing them?

One thing I want to point out is that it's becoming increasingly common for, particularly law firms, to have an ethics partner. I go to a CLE and people say, "Oh, well, if an ethical problem comes up, I just send it to the ethics partner and they just tell me what to do." Well, this problem walked into your office and you had to decide that instant what you're going to say in response to that CEO. You didn't have any time to ask anyone else. So let's see what this student did:

Video:

Reinhardt: What is it pertaining to?

Goodman: I mean pertaining to the business. It would have been in the last few days if you got one. I was talking to him and he didn't really tell me what he was talking about, but he did make mention that he might send you a letter. I was wondering if he did, because, if he did, I need to talk to you about it. And he wouldn't really talk to me, which kind of irritated me because it has to do with the business.

Reinhardt: Well, I did receive a letter. What was your concern in regards to communications between me and the CFO?

2013]

Finding a Better Way to Teach

189

Goodman: Well, there were some issues that he had briefly alluded to. I'm wondering what was said in that letter. Obviously, if it concerns the company then it's something I need to know about.

Reinhardt: Well, as you know, I am—you guys did contact me to be an attorney for the company.

Goodman: Yeah.

Reinhardt: So, as far as that letter's concerned, I won't be able to divulge to you what's exactly in the letter. It's basically confidential.

Goodman: I know, but Mordy and I are the only two who own the company. He's just an employee.

Reinhardt: Yeah.

Goodman: Obviously, you're on the board too and if there's stuff going on with the company, we need to know about it. I don't really appreciate Clifton going behind my back by sending this letter to you and not even telling me what he wrote to you about.

Reinhardt: I understand that, but at the same time, my representation of the company doesn't necessarily extend to employees or agents of the company unless I get consent.

Goodman: Well, you have my consent as a member of the board, so you can go ahead and reveal to me what that letter said. If there are problems, then we need to work on fixing them and getting to the bottom of it. I can't really do that unless I know—you know. I don't know why I've been excluded here on this information.

Reinhardt: Well, you've been excluded because your interests could be adverse to the company. There are some things that happened that could maybe lead to litigation, and I can't give you the information that's in that letter.

Goodman: How do you know that what's in that letter is accurate? How do you know it's not just mistakes and things that he saw that are incomplete? He didn't have all the information since he wouldn't really talk to me all that much about it. You're my personal attorney, too. We've been friends a long time. I'm here talking to you now as my personal attorney, possibly to ask you for some advice about what I should do now.

Reinhardt: Well, to avoid further conflicts of interests, you should probably get an outside attorney, being as this first communication was given to me from the company. Now you've come in and you could possibly be adverse to the company's

interests, so I can't represent both of you.

Goodman: But we've been friends for so long. The reason why you're at where you are now is because of our company. Now you're telling me that I have to go some place else and get another lawyer after all these years? We've been friends for, what, ten years now?

Reinhardt: Yeah [glumly, laughter from the audience].

Goodman: Can you tell me about the letter? Obviously it's not anything good. It had to do with some leases?

[Video Stop.]

Cunningham: Right now we're using this as a learning methodology; there are at least two ways this can be used for assessment. Obviously, we could be assessing the students themselves and the way they perform. In my course they aren't graded for their performance, but you could do that in a course that's more focused on teaching client communication skills. I would love to see in-house departments and law firms do this kind of thing to assess people who are rising in the ranks—put them in a situation like this videotape. We do it all the time for trial practice. Law firms pay people to go to the National Institute for Trial Advocacy, stand up in front of a video camera, and practice a direct and cross and watch themselves—painful as that is—and they get feedback. We could easily do it for this sort of thing and assess people in a very effective way, before they learn from their mistakes.

But, I actually do use it for assessment in a different way, because the students watch the video, analyze what happened, and talk about what happened. That's what I'm going to briefly ask our expert panel to do. Susan [Myers], you really can say anything that you like, but if it was my class, I would be encouraging people to try this model in terms of linking it to their evaluation of how the lawyer is doing. What would be the first couple of things that you'd say to this lawyer if this were somebody you were supervising?

Myers: He obviously knew that there were several layers of ethical issues. He was thinking about the fact that his client is the corporation, not any particular officer or director on the board. He also recognized that he himself is a board member, but I thought he said too much to the president based on his own role as being a board member.

Cunningham: What did he say that he perhaps should not have said?

Myers: He acknowledged that he had gotten the letter and

that he had communicated with the CFO about the letter, and that the president's own interests were possibly against the interests of the company.

Cunningham: He perhaps should not have said that?

Myers: I think no. Because of his role as a board member and as the attorney for the corporation, he probably should have told the president as soon as he came in that he could not speak to him and that he would recommend that he get outside counsel to advise on the matter.

Cunningham: It sounds like you're saying that, as to ethical sensitivity at least, there were some things that the lawyer picked up. He picked up that his duty was to the corporate entity, not to its owners or officers. He also picked up a conflict of interest between his relationship to that individual and that of the corporation. It's not as clear that he picked up the conflict of him being a member of the board of directors. There do seem to be some implementation problems, though, with how he's dealing with the one that he's aware of.

Rhee: Obviously, this lawyer really is in a pretty tough spot, and the reason why he is in a tough spot is there are so many different layers of conflict. He's a lawyer in the firm itself, he's a personal attorney to this individual who he owes a certain degree of career success, he's a lawyer for the corporation, and he's an outside director. He's got his personal interests as well. These are all of the different tugs and pulls on this person, in this spot. Furthermore, I think that he's got two separate institutions that he needs to think about. One is the company itself that he represents, and the other is his own firm. So, I think this is a very, very difficult situation that requires instantaneous decisions.

I also picked up on something that Susan [Myers] said, which was, "Wait a minute, there are issues about disclosing information as well." In light of the circumstance in this case, which is an unannounced visit, I wonder whether the quickest—the best—thing to do is to simply delay the decision points and maybe regroup and resettle.

Cunningham: Neil [Dilloff], are there things that you would suggest to the lawyer, that he perhaps could have done differently that haven't already been mentioned?

Dilloff: First thing is to shut up. In this situation you are damned if you do, damned if you don't. He's got conflicts coming from every single way. Here's what I would do: I'd say to the CEO, "Look because things have come to my attention, I cannot represent you in any capacity at this stage, so you've got to get

your own lawyer.” I would take the letter and I would call the guy that wrote the letter to say, “I think you need your own counsel, or else the company needs to appoint counsel for you.” I would keep a copy of the letter to make sure it doesn’t get destroyed. If you turn the letter over to the CEO to let him look at it and you don’t have a copy, you could have spoliation of the evidence problem—big time—which could be criminal in nature. So, get out of the situation as quickly as possible. Making sure that all of your now former clients have independent counsel is the quickest, safest answer to all this. Anything you do, you are violating the attorney-client relationship with one client or the other, or maybe doing something that can cause this guy to get fired. You’re a member of the board, you’re representing individual officers, and you represent the company.

Cunningham: You may notice that I direct something called the National Institute for Teaching Ethics and Professionalism. We do annually two workshops where we bring experienced practitioners and academics together to talk about methods of teaching ethics and professionalism. I presented this to the group and got some of the very wise feedback that you got. We basically concluded that there’s no good answer to the question. Because if he says, “No, I didn’t get it,” he’s just lied. If he says, “Yes, I got it,” there are problems. If you evade, you are also saying that you got it. So, probably, the only good option for the lawyer is to jump out the window before the client comes through the door. I’ve created an impossible situation for my students, so I’ve stopped using it as an assessment teaching exercise, but it’s very good for these purposes.

Campbell: Thank you very much. I think you have given material to us way beyond any expectations there might have been. Our panel focused on how we teach and I take away from this a potentially very effective means of teaching.

And I’ll conclude where I started; I met some criminals when I was in MBA education. We had a deal with the office of the United States Attorneys to bring in the most MBA-looking felon that they had. It was a condition of his parole, so he kind of had no choice. But, he came in and he had—I’m not making this up—the blue shirt, the white cuffs, the collar stay. He looked the part; he had an MBA. During the discussion hour before the evening presentation, he would go around and folks would say to him, “What school are you at?” or “What section are you in?” The school was large enough that you didn’t know everybody. Then when he spoke, he scared them straight, because he looked like them. The danger all of us have is saying that the moral dilemmas can only happen to somebody else. In that regard, in

2013]

Finding a Better Way to Teach

193

the education context, you can do something, at least to alert the students and cause them to say, “My gosh, it could be me, maybe I have a problem.” To carry it beyond law school is a life-long learning experience, but we have an obligation to start it in law school—that is overwhelmingly clear.