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CRITERIA FOR THE DESIGN OF LEGAL TRAINING PROGRAMMES

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INTRODUCTION

This article is concerned with the design of programmes of legal instruction which aim to teach legal competence. Most frequently, these programmes are offered through continuing legal education courses and bar admission programmes. The overall goal of both continuing legal education programmes and bar admission programmes is to enhance competence of practising lawyers and future lawyers. Unfortunately, most of the debate and discussion about these programmes focuses on their content with little, if any, attention being paid to the more fundamental questions of what is legal competence and what method of training or education will best bring about the goal of legal competence.

In the result, many continuing legal education programmes continue to employ outmoded and unsophisticated educational methods to achieve their purposes. This is not to say that these programmes are not "high-tech", many of them are. However, in many instances, the use of new technologies serves only to present the same content in new packaging. The use of video-tapes and computers and audio-conferencing does not change the nature of instruction. Instead of lectures in personam there are now lectures on video-tape! Instead of observing the principal in court the articulated student now watches a videotaped demonstration of a courtroom technique. The criteria for successful performance are seldom made explicit and the structure of the learning enterprise remains subject oriented.

LACK OF SOPHISTICATION

This lack of educational sophistication in legal education programming, to which I have made reference, is evidenced in several ways. Firstly, in the failure of legal education programmes to identify those kinds of educational activities which are appropriate for adults engaged in professional work. Secondly, in their failure to examine the fundamental, but false, assumptions upon which the design of these programmes are predicated. The first of these assumptions is that performance depends upon knowledge. The second of these assumptions is that knowledge for performance can be delivered through traditional lecture methods. In other words, much of professional legal education proceeds on the simple, but false, equation that education (the case method and lectures) equals competence. Let us begin our analysis by a brief examination of each of these issues.

ANDRAGOGY VERSUS PEDAGOGY

The failure of professional legal education programmes to distinguish between those kinds of educational activities which are best directed towards non-adults as opposed

to adults is what Knowles (1970) refers to as the difference between pedagogy, the art and science of teaching children, and andragogy, the art and science of helping adults learn. Knowles points out, what skillful adult educators have known for a long time, and seems so obvious, that adults cannot effectively be taught as children have traditionally been taught. The teaching of students differs little in methodology throughout the formal school years, including university. One of the major differences, however, between students and professionals-in-training is that on the one hand the application of knowledge is postponed, perhaps for years, whereas on the other hand the professional-in-training is concerned about the immediate application of this knowledge in his or her professional practice. The orientation of the professional in training is on being able to DO as opposed to simply knowing!

Knowles identifies four assumptions about the characteristics of adult learners which are different from the assumptions about non-adult learners on which traditional pedagogy is premised. These assumptions have to be the starting point for the legal educator concerned about the design of programmes to train adults in the legal profession. These assumptions are as follows:

1. That as a person matures, his or her self concept moves from one of being a dependent personality towards one of being a self-directing human being.
2. That the adult accumulates a growing reservoir of experience that becomes an increasing resource for learning.
3. That the adult's readiness to learn becomes increasingly oriented to the development of his or her social role.
4. The adult's time perspective changes from one of postponed application of knowledge to immediacy of application of knowledge.
5. Accordingly, the adult's orientation towards learning shifts from one of subject-centredness to one of problem-centredness.

From these assumptions one can develop several corresponding implications for the design of legal education programmes. I suggest that at least some of these implications, affecting professional legal education programme design and delivery, are as follows:

1. INDEPENDENT AND SELF-DIRECTING

1.1 Diagnosis of the learning needs of the adult learner

To be fully responsive to the adult learner the programme of instruction has to build upon what the adult learner already knows. To do less is to treat the adult as a non-adult and to assume a parental and condescending role as an instructor. This only serves to generate resentment and a disrespect for the programme itself. However, this diagnosis of learning needs is clearly in relation to the learning objectives of the programme. The diagnosis does not have to be made in relation to the entire programme but rather in relation to each component of it. This learning needs assessment should take the form of a pre-test in relation to specific competencies. The adult learner, as a result of this diagnosis, will be able to identify those particular aspects of the competency which require practice and concentration for his or her eventual

mastery. What each adult learner has to accomplish in relation to each learning objective then becomes a function of his or her own state of readiness and entry-level competence.

1.2 Participation by the adult learner in the planning process related to the design of the learning programme

This reference is primarily to the design of the individual learning programme of the adult learner after his or her learning needs have been diagnosed in relation to a specific competency. If the learning programme has a detailed set of learning objectives it then becomes possible for the adult learner to generate his or her own course of learning to meet the objectives. This process of personalising the learning programme by each adult learner calls for a change of role for not only the student but also the instructor, who now functions more as a resource person, an evaluator, consultant and guide as opposed to the "fount of knowledge".

1.3 A programme which is self-pacing and self-directed

The self-pacing aspects of the programme naturally flow from the ability of the adult learner to personalise his or her learning programme. This means that not all the students will be at the same place in the programme all of the time. However, as Grant (1979) has observed one of the major impacts of this competency-based approach is to shift more of an institution's resources from the best to the average and below average students. In principle, and practice, the competent students could challenge for each competency in the programme and complete it successfully by having performed at the required standards in a matter of weeks as opposed to months.

1.4 Redefinition of the teacher's role to that of a manager of the learning process and resource person

The role of the instructor is radically altered. He or she has the primary task of managing the individualised learning processes of students, of ensuring that the necessary learning resources are available and of assessing student mastery of each of the specified competencies. The skills and competencies of the instructors then are different. In addition to those mentioned, the instructor should be able to effectively model or demonstrate the competencies which the students are expected to meet. Like the programme, the instructors cannot be subject-oriented but rather competency oriented. No longer could it be said, at least of these instructors, that those who do do and those who can't teach!

1.5 Redefinition of the student's role from passive recipient of instruction to one of mutual responsibility to teach, to learn and to evaluate

The role of the student also changes. This approach is the first step towards the student's lifelong process of personalised learning. The first step towards professional competence is the ability to diagnose one's own learning needs and

to know the criteria for successful performance of any legal task. The new role requires the adult learner to act as a resource to other learners, particularly in providing them with concrete and specific feedback about their performances. The adult learner is also responsible for self-evaluation and should be able to discriminate between acceptable and unacceptable performance of the various competencies. Indeed, before one can effectively perform or master a competency one has to be able to discriminate between an effective and ineffective performance. This means that the programme has to set out detailed performance criteria at the outset. There can be no hiding the ball in a competency-based programme of learning! The foundation for future competence is to learn how to learn.

2. BASED ON EXPERIENCE

- 2.1 The use of the experiences of the adult learners' as a resource for their learning.

An effective programme will integrate the adult learners' experiences into the learning process. Many adult learners have experiences which they can contribute to enrich the learning environment — unlike law school where everything that has been previously learned is expected to be left at the door on entering.

- 2.2 The structuring of the programme to ensure that the adult learners engage in practical tasks and experiences.

Most classrooms are inappropriate settings for the practising of legal competencies. What is required is that facilities be available for students to practise the legal competencies in such a way that they can receive immediate and accurate feedback about individual performance.

3. IMMEDIATE APPLICATION OF KNOWLEDGE

- 3.1 The structuring of the programme to ensure that new knowledge is tested in a practical way through application to practical problems in contexts which contain most, if not all, of those variables which would be found in the professional practice itself.

The newly acquired knowledge of substantive and procedural law, and the components of the individual competency have to be integrated through the application to a specific problem. If the exercise is simulated it is essential that all aspects of it be carefully thought through so that all of the new learning is tested.

- 3.2 The use of precise and immediate feedback about the level of performance of the adult learner of the learned behaviour.

The ability to provide accurate feedback requires the adult learner to have the necessary knowledge base, that is the criteria for effective performance, coupled with the necessary skill of accurate observation and recording of demonstrated behaviour. Adult learners should not be involved in providing feedback until they have demonstrated their ability to do so effectively in

relation to each legal competency. This factor will affect the sequencing and design of the programme.

4. PROBLEM-CENTREDNESS

- 4.1 The structural design of the learning curriculum or programme will be problem-based and not subject-based. In other words, the programme will be designed to teach specific competencies as opposed to teaching subjects.

It will only be when the profession has been able to identify in specific terms the various legal competencies and their component parts that the fear of moving from a subject-based approach to legal education will be overcome.

- 4.2 The competencies would be learned in the order of most simple to most complex. The learning programme would be structured so that competencies which were subordinate or dependent to other competencies would be learned in sequence. Movement through the course of learning would be gauged according to mastery of the various competencies.

When this "learning task analysis" is carried out in successively simpler components of a target skill, the result is a learning hierarchy (Gagné, 1977). The main uses for such a hierarchy are as a guide in the design of the sequence of instruction and as a guide for the adult learner and instructor in the planning of instructional assignments.

EDUCATION AND COMPETENCE

Amazingly, for a profession given to definitions, the legal profession has not been able to define legal competence with any precision nor measure it with any accuracy. The definition of competence provided by the 1978 Conference on Quality of Legal Services says that a lawyer is competent if he has demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question. This type of definition is impossible to operationalise or to translate into any meaningful learning objective let alone base an education programme upon it.

Senior (1976) defines competence as the capability of carrying out an act when the time comes. Competence is not the same as knowledge. Competence is the capability of applying both knowledge and skill to the resolution of problems. Performance is a measure of competence. Knowledge is only a measure of competence to the extent that it can be applied to the successful completion of a task. Education programmes which in practice are designed to transmit knowledge may result in more knowledgeable persons, but not necessarily more competent ones. Professional legal competence is the ability to perform a range of legal tasks and solve a range of legal problems according to measurable standards within the framework of the rules of conduct and ethics of the legal profession.

It is the challenge, and the responsibility, of legal education bodies, to develop measurable standards for legal practice. These measurable standards are not the legal standards one hears referred to in discussion of competence such as "that which lawyers generally would reasonably expect of a lawyer providing the service in

question". This, obviously, is not a measurable standard. (Unless, of course, one undertook an exhaustive study to identify those aspects of legal practice which the majority of lawyers consider to be critical.) It is not a concrete definition. In order to design a programme of instruction to achieve a specified standard of competence one has to be specific about those standards! Any professional legal training programmes, which mean to give more than lip-service to the idea of training for competence, have to build upon andragogical principles and concrete and measurable definitions of legal competence.

COMPETENCY-BASED LEGAL EDUCATION

In a paper written for the World Health Organisation, McGaghie (1978) provides a very useful description of the components of medical education that is competency-based. The result or outcome of a competency-based medical education programme is described as a health professional who can practise medicine at a defined level of proficiency in accordance with local conditions to meet local needs. The difference between this definition and the legal definition of "that which lawyers generally would reasonably expect etc." is the emphasis on a "defined level of proficiency". The task of arriving at an accurate and concrete definition of competence is crucial to the design of the education programme. As McGaghie says, "defining professional competence is the cornerstone upon which a competency-based programme of medical education is built. Unless this task is approached both thoughtfully and systematically the curriculum is more likely to be a reflection of faculty interests than of student and public needs".

The first step in the design of a legal education programme is the formulation of a precise definition of competence. If one accepts the general definition of competency which I have offered, namely, the ability to perform a range of legal tasks and solve a range of legal problems according to measurable standards within the framework of the rules of conduct and ethics of the legal profession, the next issue is the selection of those legal tasks and problems. One of the techniques suggested for collecting behavioural data about the ingredients of competent professional performance is the critical incident technique (Flannigan, 1954). McGaghie reports of such a study carried out by the American Board of Orthopedic Surgery. In that study 1,000 orthopaedic surgeons contributed 1,761 separate critical incidents. These incidents were then classified into nine major categories and 94 sub-categories of behaviour. In this study it was the physicians themselves who were the source of descriptions about physician behaviour.

The use of the critical incidents approach to defining the components of legal competencies would provide a valuable information base for the designers of legal education programmes. Moreover, such information could provide the basis for the establishment of clear standards of competence for the legal profession. Yet another advantage of this approach to identifying the components of competent practice is that it would avoid the objection from the legal profession, and from articulated law students, that important legal tasks had been omitted from practical legal training courses.

The second step is specifying the learning objectives when competence is the goal of the learning programme. The course designer has to find a way to make a clear and precise listing of the components of that competence. Once this list has been

developed, perhaps with the help of a critical incident study, the elements of each component have to be analysed and categorised into a sequence of behaviours. These behaviours in turn form the basis for the identification of learning objectives. The higher the level of specificity of the learning objectives, the higher the probability of success of the educational programme. This is the most important element of course design — the investment in making explicit the learning objectives and how they will be measured. The resulting document which makes explicit what it is that the students are to learn, and at what level of proficiency, becomes a constant reference for all involved in the legal education programme.

Mager (1975) has pointed out that instruction is effective to the degree that it succeeds in changing students in desired directions. He maintains that objectives are useful tools in the design, implementation and evaluation of instruction in that they point to the content and procedures which will lead to successful instruction, and help to manage the instructional process itself. For Mager, a usefully stated objective is one that "succeeds in communicating an instructional intent to the reader". There are three characteristics which he identifies which help to make an objective communicate an intent. The characteristics are these:

1. *Performance* An objective always says what a learner is expected to be able to DO.
2. *Conditions* An objective always describes important conditions (if any) under which the performance is to occur.
3. *Criterion* Wherever possible, an objective describes the criterion for acceptable performance by describing how the learner must perform in order to be considered acceptable.

If we have defined the competencies, and the learning objectives which relate to them, and arranged them in a learning hierarchy, what more is needed? At least one other aspect of the design of legal education programmes has to be considered, and it is to this that we now turn.

THE NEED FOR AN OVERALL MODEL FOR LEGAL PRACTICE

The central issue in the design of a course of practical legal training is how to integrate knowledge with action, theory with practice. Argyris (1974) provides what I consider to be a brilliant analysis of this issue while describing it as one which has plagued philosophers, frustrated social scientists and eluded professional practitioners for years. It is such a difficult task, he suggests, because scholars rarely cross disciplines, and it is necessary to do so in order to analyse the problem of integrating thought with action. In order to be brief I will also oversimplify.

The gist of Argyris' analysis is that professional practice is a sequence of actions undertaken by a person to serve others, who are considered clients. A theory of practice consists of a set of inter-related theories of action that specify for the various situation of practice the actions which will, under the relevant assumptions, yield intended consequences. He further suggests that there is a difference between a person's espoused theory of action and a theory in use. A person's espoused theory is the answer a person gives when asked how he or she would behave under certain circumstances. However, the theory which actually governs a person's actions is his

or her theory-in-use which is based on what a person believes. Thus one's practice, what one does as a professional, is based on what one believes. Virtually no attention is given to this issue in professional legal training.

Professional educators speak of practising and learning skills as though they were entirely different sorts of activities from theory learning or learning to apply theory. Thus it is that theory learning takes place at school whereas skill learning is assigned to the workplace. Skills, says Argyris, are dimensions of ability to behave effectively in situations of action. Thus learning to put a theory into practice and learning a skill are similar processes. Therefore, in the teaching of skills and competencies the implication for the designer of legal education programmes is that the theory which underlies the skills and competencies has to be made explicit, thus giving the adult learner the basis for the development of positive theories-in-use. He suggests that the present theory-in-use of professionals is governed by values of rationality, goal achievement, winning and the suppression of negative feelings. The actions which result from these values focus on control, protection and competition. Argyris argues for a new model. He proposes a model for theories-in-use which is characterised by openness, collaboration, and minimally defensive interpersonal relations resulting in effective problem solving and new learning.

The professional must be able to develop theories of action which, when organised into a pattern, represent an effective theory of practice. The professional must be able to act according to these theories, reflect on them and relate them to his or her own professional behaviour and determine their impact on himself or herself, on clients, the client system, on learning and on effectiveness. There are two general areas to which theories of professional practice apply — the technical and the interpersonal. The inter-personal theories state how the professional will interact with clients and others in the course of his or her practice. The technical theories are those which state which techniques the practitioner will use in the substantive tasks of his or her practice. Professional competence requires the development of one's own continuing theory of practice which must consist of both a technical and an interpersonal theory if it is to be effective. This theory building for professional practice requires practitioners to have special competencies related to diagnosis, to the generation of testing and to solution. The technical and interpersonal theories interpenetrate. Inability to act competently in the interpersonal area constrains the professional's development and use of effective technical theories of professional practice. To ignore explicit theory building in legal education programmes causes practice to be taught at best as informed speculation and at worst in the form of war stories. To ignore the development of an overall theory of the practice of law, but to do the rest, is to allow students to flounder in a sea of sub-objectives for legal learning without ever knowing the real reasons why!