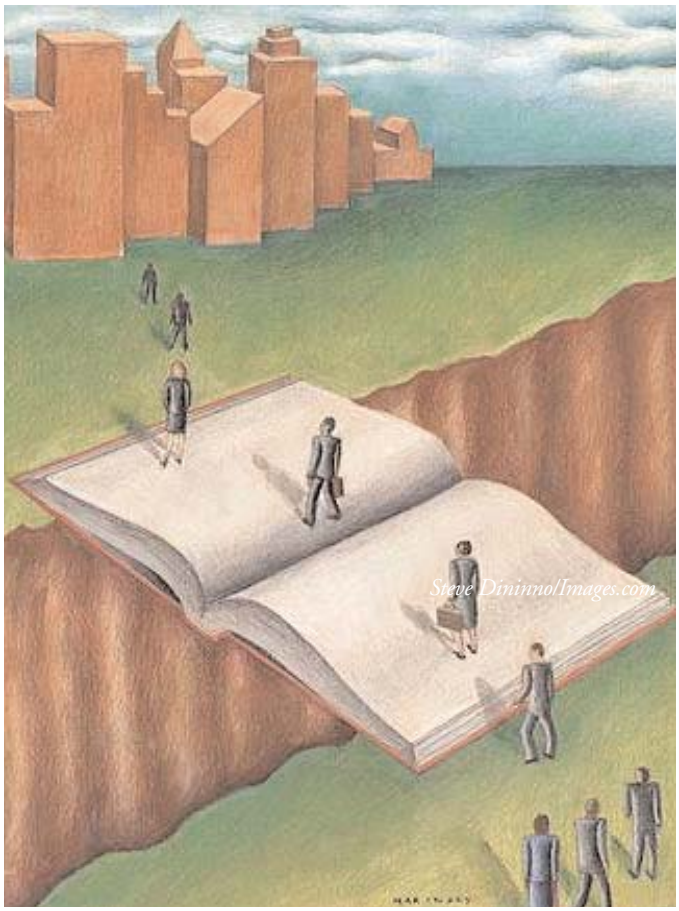
Crossing the Bridge Between Academy and Practice

By Michael E. Tigar

An editor has asked me to share some thoughts about the connection between law teaching and law practice, based on more than 40 years of doing both.



When professors and practitioners are in the same room, they sometimes refer to each other in ways that suggest there is a gap between these parts of the profession. When I hear that sort of thing, I think about being on my sailboat, which is parked down in Oriental. If you sail around the North Carolina waters and listen to the VHF radio, you hear dockmasters talking to boaters. The dockmaster always calls the boater, "captain," as in "Slow it down, Captain, when you make that turn towards the gas dock." The word is "captain," but the tone of voice says "idiot"—or something else that we can't print in this magazine. So it is at these lawyer meetings, when people call each other "professor," which translates into "irrelevant ponderous bloviator," and "counselor," which means "intellect-challenged pettifogger."

Then there is the story that goes around the law schools when recruiting season is upon us: A young fellow was at a bar and struck up conversation with a bearded elderly gent. The young man was bemoaning that his life choices were limited.

"Well," said the gent, "you could have anything you want if you would sell your soul to the devil."

"I don't think so," said the young man. "When I died, I would go to hell and that is not a nice prospect."

"Oh," replied the other, "hell is not so bad. I'll let you in on a secret. I am the devil and I can show you what hell is like. You will be back here without a second having gone by on the earth's clock."

"Well, in that case," said the young man, "I'll give it a try."

So the devil snapped his fingers and the young man found himself transported. The setting was exotic. There were cool breezes, plenty of refreshment, people were nice. The young man took it all in and signed up with the devil. He worked out the remainder of his natural life, had great success as promised, and when he died, he sure enough went to hell. Except this hell was terrible—fires burned and made things unbearably hot, labor was arduous. After a time, the sinner went in search of the devil.

He burst into the main office and there was the man he had met at the bar. The sinner began his litany of complaints.

"Wait a minute," said the devil. "This is hell. What did you expect?"

The sinner recounted their initial meeting and his introduction to the place. Awareness gleamed in the devil's eyes.

"Oh," he said, "you were in our summer

associate program."

Most of this sardonic naming and storytelling is well-intentioned. I believe, however, that if you, as you read these words, think there is a gap between law teaching and law practice, you are either not seeing things correctly or you have walled yourself off from some rewarding professional experience.

First, let me adjust your vision. Think about it: In every one of America's 195 law schools (at last count), judges and practicing lawyers serve as adjunct professors. Every good law school has a clinical program, where law teachers with practice experience help students learn how to represent a client ethically, zealously, and capably. Every good law school offers trial practice, moot court, and other simulation-type learning experiences; lawyers and judges give their time to these efforts. Inns of Court bring lawyers, teachers and students together—or should start doing it if they are not already. Law professors are on CLE programs.

Look around you at the leading law schools in North Carolina. UNC dean Jack Boger practiced with Paul Weiss in New York and then was a star litigator at the NAACP Legal Defense & Education Fund for many years before joining the UNC faculty. Ken Broun, a UNC former dean (and my friend for more than 30 years) has been a real trial lawyer for all of his career as well as a brilliant teacher and writer.

At Duke, where I have just been appointed professor of the practice of law, Dean David Levi has taken the reins. He was a line prosecutor in California, United States attorney and then a federal trial judge. On the roster of Duke faculty you will find many others with substantial practice credentials. Already, Dean Levi has reached out to all parts of the legal profession and his leadership promises to enhance those relationships to the benefit of the community, the profession, and Duke itself.

In short, the parts of the profession are joined together in many different settings. Every law teacher has the opportunity to learn about what is happening in the world of law that his or her students will soon join. Every practicing lawyer can gain and regain insight into the kinds of issues that professors address as teachers and writers. When lawyers and teachers seize those opportunities, they and the profession gain.

My second point—that some people in our profession are depriving themselves from rewarding experiences—speaks more critically to all of you: practitioners, policy-makers, professors, and students. I am worried about this profession of ours. I think that we have a great deal to learn from one another.

One way to address these issues is to see the relationship between law schools and the practicing profession as a bridge and not a gap. I like the image. A bridge does not, itself, take you anywhere. It is simply there, and if you want to benefit from it you have to take the risk of crossing it to see what is on the other side. And when you get there, you should treat the people and ideas you find with respect, as you would when traveling to a foreign country where language and customs are different.

I fear that many in the profession and in law schools do not have a clear picture of what the "other side" is doing. Most law teachers spent some time in practice, but that experience may not serve them well. I know from having kept up a trial practice that the profession has changed in the past 40 years and is changing even more rapidly now. During that time, law schools have changed dramatically, as well. So our first task is to discard any assumptions we have, based on incomplete data, about what lies on the other side of the bridge.

Let me summarize some of the concerns that beset the younger generation of lawyers. Young people graduating from law school carry debt obligations that were unthinkable to those of us who entered the profession four decades ago. I read of young lawyer dissatisfaction with the profession, of poor people not having access to justice, of partner salaries heading towards the stratosphere while their firms ignore the obligation to do community service. I read of young lawyer disenchantment and older lawyer burnout.

To give substance to these thoughts, I quote at length from an essay I contributed to the recent ABA book, *Raise the Bar: Real World Solutions for a Troubled Profession*:

"Median law student educational debt increased by 59% between 1997 and 2000. In 2000, median law school debt was $84,400. In a survey of over 1,000 law school graduates, 50% reported graduating from law school with $75,000 of debt while 20% carried debts of over $105,000. More than half of the survey participants had additional debt from their undergraduate education.

"Among those respondents entering government work, 58% carried debts between $55,000 and $105,000. Lawyers entering public service positions were even more likely to carry high debt burdens: 64% of entering legal service attorneys; 61% of future public defenders and 67% of future state or district attorneys completed law school with debts between $55,000 and $105,000. With a median debt amount of $84,400 for law school, the typical young attorney will spend approximately $950 per month to repay loans. A lawyer graduating with more than $100,000 in debt will make monthly payments of more than $1,000 per month. High debt loads compared to low salaries prevent many young attorneys from entering public service. Sixty-six percent of survey participants stated that law school debt kept them from considering a job in the public or government sector.

"The median salary for first-year associates working in private practice ranged from $67,500 in firms of 2-25 attorneys to $125,000 in firms of more than 500 attorneys. The median first-year salary for survey participants was $100,000. In large urban areas, the median starting salary for first-year associates in large firms (over 251 attorneys) was $125,000.

"In sharp contrast, the median starting salary in 2001 for attorneys entering public interest jobs was $35,000. Attorneys entering federal government jobs made a median salary of $45,000 while those working in state or local government earned a median income of $41,000."

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"The ABA Litigation Section conducted two informal polls in 2005. In one survey, 48% of lawyers reported that, in their firms, they are encouraged to take on *pro bono* work and are given credit for it. Twelve percent say they are encouraged to do *pro bono* work but are not given credit for it. Forty percent say they are neither encouraged nor given credit. In another survey, 79% said that their current practice did not match the expectations they had in law school, while 21% said that it did. Apparently, most of the 79% felt tyrannized by the billable hour and chagrined that the ideals that led them to enter the profession had escaped them."

Law students learn from teachers and

scholars who devote their careers to study of the most significant issues that confront the legal profession and society as a whole. They can take advantage of clinical programs, internships, externships, and the other links to the profession that law school can provide. Many of them have done significant amounts of *pro bono* work, which both serves the community and sharpens their sense of what it means to seek justice for a client. We who teach have preached the values of ethical behavior, intellectual discipline, imaginative approaches to problems, and social responsibility.

These students are ready to go to work. They know that some of the most important lessons about law practice can only be learned in the world beyond law school. They are the next generation of the profession's leaders. How can we enlist them as allies for progress and change?

Several times in the past few months, in conversations with friends, I have noted that work in law firms is increasingly divided up and done in cubicles. Lawyers e-mail drafts back and forth. This sort of thing is particularly prevalent in multi-city firms. The young lawyers on a matter do not see the case as a whole. They are not personally mentored by senior lawyers. There are fewer meetings of the project team as a whole where everybody can see how their work fits into the pattern.

Just last week, I raised this issue with a lawyer who was visiting Duke. He reminded me that clients often balk at paying for lawyer time spent in meetings to discuss the case. The answer seems clear to me. Either convince the client that those meetings in fact enhance productivity and the quality of work, or accept the fact that good quality professional law practice is not entirely about maximizing profits.

The alienation and burnout that we are seeing, in younger as well as older lawyers, squanders the valuable resource that is coming into the profession from law schools. The law firm that takes in associates, gives them unrealistic billable hour expectations, and isolates them in their work is being wasteful. It is denying itself access to the thoughtful insights and challenging questions that today's graduates bring to the process. On a long-term perspective, the firm that behaves this way is like the farmer who slaughters all the stock and eats all the crops. He or she may have a banner year, but has nothing to plant for next season, and no flock with which to carry on.

A second way in which the profession is failing its new generation is suggested by the salary statistics. The system for providing legal services to poor people is broken. Private lawyer *pro bono* work can take up some of the slack. At Duke, under the leadership of Associate Dean Carol Spruill, students have spent thousands of hours in many settings helping to provide legal services. Clinical programs serve a similar purpose. The students who do this work become better lawyers, able to see the trajectory from learning basic theory, to learning basic skills, to listening to client stories, to seeking justice. They learn lessons that classroom teaching cannot give: they learn to exercise judgment and to see the consequences of decisions. Every law firm should encourage and support *pro bono* work by young lawyers because it makes good business sense.

Of course, we should expect law students entering the profession to bear their fair share of the costs of doing business in an ethical, professional way. From my conversations with students, I think the great majority would willingly do so. How about a law firm recruitment ad that says:

LITIGATION LAW FIRM

- The salaries at our firm are lower than at our competitors, but you will still make enough money to have a good life and pay off your loans;
- Every lawyer at our firm must do 200 hours of *pro bono* work every year;
- We work in teams and as a team member you have responsibility to understand the whole case and to contribute your ideas;
- We do not worship the billable hour;
- We understand that you need time to have meaningful family and other personal relationships.

There are law firms that say these things, though not quite so bluntly. Good law students respond.

Beyond private initiative, the profession must be an articulate and strong voice for better funding of public defender and legal services programs. It should encourage loan forgiveness programs for lawyers who enter public service. Among the reasons for doing so is that our advocacy keeps faith with this new generation.

For those in practice, there are practical insights on the other side of the bridge. Let me tempt you with some examples from Duke. Professor Neil Vidmar is a social psychologist. If you have not read his work on jury behavior, your jury selection approach probably needs attention. Do you have a high-profile case? Professors Tom Metzloff, Kathy Bradley, Chris Schroeder, and others have done work that will interest you. You probably know the work of Bob Mosteller on the law of evidence. In the fields of international law, intellectual property, and many others, Duke's resources are open to the profession.

Why should you take the time to hear from and read the work of law professors when commercial publishers offer pre-packaged versions of "what you need to know?" The reason is simple, but perhaps not obvious: many modern legal research mechanisms give you a narrow and perhaps misleading view of important legal principles. Computer-driven legal research is based on your knowing what questions to ask, and in what databases. Taking time to see changes in the law in broader perspective makes your directed research more productive.

I can think of many instances from my own practice that support what I have just said. I speak from the perspective of someone who commutes across that bridge between teaching and practice. I was appointed counsel in a federal capital case. We wanted a separate trial for our client. The federal severance law is, on the whole, tilted towards joint trials for those jointly indicted. On the other hand, that law was developed almost entirely in non-capital cases. So we set out to consider why and how our capital case was different, requiring a different approach. We found two arguments that ultimately convinced the judge, one rooted in the broad constitutional principles of death penalty law and the other in legal history. The first argument was in a capital case, with jury sentencing. The Supreme Court has mandated a deep inquiry into the defendant's background and character, as well as into the circumstances of the offense. A joint trial makes this process immeasurably more difficult. The second argument was based on my having remembered a phrase from Blackstone's influential 18th century treatise on the laws of England. He had written that principles of law in capital cases were often interpreted *in favorem vitae*—in

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in the course of representation of a matter. It may be more unusual for the partner who may be assigned to the case, but, particularly if the matter is one lasting years, as in litigation, changes in associates, paralegals, and legal assistants are not uncommon. Because they are expected and usual, the client will likely not be surprised when a staff change on a matter is required. The problem arises when the change is made without notice.

Similar to the requirement of tip #3 to avoid surprises, changes in personnel should be discussed before the change is made. Outside counsel needs to be candid about rates, any required retraining and familiarization with the matter, and who will absorb the cost of that familiarization. I am not suggesting that there is only one approach to the resolution of these issues. I am suggesting only that they all need to be resolved in a mutually acceptable manner, in advance. The last thing outside counsel wants is for the client to first learn of a personnel change when the monthly bill arrives.

9 **Don't "over lawyer" a matter.** We are all taught in law school to zealously represent our client. It is a hallmark of legal training and one of the most practiced tenets of the lawyer's Code of Professional Responsibility. While it may seem like a contradiction, the problem arises when the lawyer gets too zealous.

Unless the client instructs otherwise, outside counsel should not do a lot of posturing or pontificating in the course of the representation. This may occur, for example, during negotiation of a contract with a third party on the client's behalf. While the client expects to have outside counsel's expert legal advice and analysis of the legal risks of the deal, the client also wants to get the deal done and is very attuned to the fact that billing is by the hour. Before pursuing a matter to its logical conclusion, outside counsel should make sure the client is comfortable with the degree of persistence. Counsel does not usually want to be overly aggressive or creative without discussion with the client, especially if he or she is a lawyer.

10 **Talk to your inside lawyer/client as you would to a partner.** If the client representative is not a lawyer, outside counsel will be particularly careful to avoid legalese and to try to explain legal principles in language that will be easily understood. Counsel should always avoid using latin expressions or quoting cases or statutes, and be particularly attuned to the client's level of understanding of the explanation.

But when discussions involve an inside lawyer, those discussions should be conducted as if he or she is outside counsel's law partner. In fact, the relationship should resemble a partnership. Together, outside and inside counsel will be dealing with a matter involving the mutual client and a joint effort is usually called for. Depending on the matter, and the preferences of the inside lawyer, his or her involvement may vary, but regardless of the level of effort, if the lawyer is always considered like a partner, the conversations will be productive.

There's my top ten suggestions for representing the corporate client. If these tips are practiced, the client will appreciate outside counsel's effort. The relationship will prosper, client retention will be likely, and outside counsel will enjoy the representation. These are the elements that make the practice of law a win/win situation for the outside law firm and the corporate client. ■

Marvin D. Genzer (Retired), is the former vice-president, general counsel, and secretary of EDO Corporation; former president of the Westchester Fairfield Corporate Counsel Association; and current treasurer of the Research Triangle Area Chapter of Association of Corporate Counsel America.

Crossing the Bridge Between Academy and Practice (cont.)

favor of life. And sure enough, we found cases from early in American history in which separate trial was granted *in favorem vitae*. Ordinarily, old trial court cases don't carry much weight, besides not being readily retrievable by ordinary search techniques. But here were cases decided by judges who were alive when the Constitution was adopted, and who could be said to have insight into what it was supposed to mean.

It is true that most law students do not have a good sense of what is truly involved in law practice, including the economic structures of small and large firms, and the way lawyers build a client base. They lack many of the insights and lessons that they can only learn on the other side of the bridge. One way to ease their transition, as I noted above, is by opening up Inns of Court to law student participation, in order to encourage informal discussion among those in different areas of the profession. Another is to make law clerks and summer associates part of work teams in ways that let students see the decision-making process.

I know that the North Carolina bar is aware of these concerns. I have known Charles Becton for more than 30 years. His career shows us how many opportunities there are for lawyers: civil rights lawyer, judge, law teacher, scholar, private practice. Bec has done it all, and led the way in doing it.

I was 20 years in the law before I heard the word "holistic," describing the idea that one cannot understand any system—including the human society at a given moment—by seeing its parts. Rather, one must see how the system as a whole determines the behavior of its parts. Judge Jerome Frank reminded us that the law is "not what it says but what it does" and that what it does is determined by "the net operation," "the whole official set-up." The rule of decision in your case is what "trickles through," he wrote, quoting Karl Llewellyn. I tread the bridge between the academy and the profession because I cannot see what law "does" without insight from both sides. It is a worthwhile journey, and the folks you meet add value to any team of people engaged in seeking justice for clients. ■

Michael E. Tigar is professor of the practice of law at Duke Law School, and Professor Emeritus at Washington College of Law. He has been a trial and appellate lawyer, law teacher, and writer on legal subjects for more than 40 years. His books include Persuasion: The Litigator's Art, Examining Witnesses, and Fighting Injustice (a memoir). *His litigation clients have included political activists, major corporations, political leaders, and many lawyers.*