Looking good on paper is low indicator of effective lawyering

By Marjorie M. Shultz and Sheldon Zedeck

People interested in professional education, preparation and selection are increasingly seeking outcome or performance-oriented measures rather than using input measures or paper credentials alone. For legal employers, that means improved methods for hiring decisions. For professional development managers, that means finding better tools to assess deficiencies and plan for needed training. For those making decisions about compensation and promotion, it means more detailed and targeted measures of actual job performance, as well as better means to predict expected professional growth.

In a 10-year study involving thousands of practicing lawyers and law graduates doing law-related jobs, we (longtime professors at UC Berkeley and UC Berkeley School of Law) empirically developed and validated methods to identify and assess characteristics conducive to effective lawyering. Beginning with interviews of five constituencies (lawyers, law students and faculty, judges, and clients of UC Berkeley School of Law) and continuing through multiple rounds of focus groups in San Francisco, Los Angeles and Washington, D.C., we identified 26 factors important to lawyering effectiveness. (The 26 factors in random order are: analysis and reasoning; creativity; problem solving; practical judgment; writing; interviewing and questioning; listening; managing one's own work; managing work of others; diligence; integrity; stress management; influencing and advocating; self-development; ability to see the world through the eyes of others; negotiation skills; networking and business development; client advising and counseling; building relationships in the profession; passion and engagement; researching the law; speaking; evaluation, development and mentoring; finding and using facts; strategic planning; community involvement and service.)

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Next, we used multiple additional focus groups of lawyers to generate detailed examples of lawyer behavior that they described as illustrations of below average, average and above average lawyer performance on each of the 26 factors. We then asked law graduates (over 2000 responded, from various work settings and subject specialties, from graduates ranging from two years out of law school to those 30 plus years out) to rate from scratch the levels of effectiveness of those same behavioral examples on a 1 ("poor") — 5 ("excellent") scale for a particular factor. The survey gave us validation of the effectiveness levels of the behavioral examples initially produced in focus groups.

Using only those examples whose ratings showed a high degree of agreement among survey respondents, we constructed rating scales for each of the 26 factors that could be used to evaluate an individual attorney's job performance. Behavioral examples were arrayed along the 1-5 scale from high to low on the basis of their mean rating by the survey participants. The different behavioral examples and their mean ratings provide "anchors" for each scale. Behaviorally anchored scales provide a common and concrete frame of reference for raters, reducing the impact of "halo effects" and stereotypes that often influence other types of performance ratings.

Next, we looked for tests that we hypothesized could predict individuals' propensity to display the 26 identified attorney competencies. We examined a wide range of existing tests, chose some, adapted others, and created others from scratch, eventually melding eight types of tests into a new online pilot test. Then, in order to validate the new tests, we recruited law graduates (again from all settings and specialties and from a 30 year range of time who graduated from either UC Berkeley School of Law or UC Hastings College of the Law) who were willing to take the new test battery.

In addition, participants gave us permission to access their academic history (UGPA, LGPA, LSAT score) and provide a self assessment as well as the names of two supervisors and two peers who could evaluate their current performance on the job using the scales and factors described above. Just over 1100 law graduates took the test and over 4000 supervisor, peer and self-appraisals of the job performance of those 1100 law graduates were returned.

After all the numbers were crunched, results suggested that our new tests (particularly two of them) predicted almost all (24) of the 26 factors identified in the first phase of research as being important to lawyer effectiveness. By contrast, LSAT scores, UGPA, and Index Scores predicted fewer than 10 of the job-effectiveness factors, with several of the relationships being negative! Positive correlations between LSAT/Index Scores and job performance factors were mainly with those factors that are most academic in nature (analysis and reasoning, writing, researching, etc.).

Improving the racial and ethnic diversity of law school matriculants or of legal employers' staffs are important additional benefits of new tests like those reported here. As most lawyers are aware, academically-oriented tests like the LSAT produce a substantial adverse impact on under-represented racial and ethnic minorities. By contrast, results on tests that aim to predict effectiveness of professional performance show little practical difference between performance of various racial and ethnic groups. This outcome is congruent with much of the employment research literature. To pass legal scrutiny, hiring tests that create an adverse impact on underrepresented minorities must show job-relatedness. Decades of work in the employment sector shows that conducting a job analysis to identify end points that employers seek to predict, then devising tests of the actual job skills, often significantly reduces differences in race and ethnic group performance. We decided to import some of the theory and practice from employment law into legal selection systems.

Because our research and our tests were initially directed to improving admission decision-making in law schools, their use in that context should improve the representation of minorities in the pool of law school matriculants. That in turn should give legal employers better options to improve the diversity of their professional staffs. In addition to greater numbers of minority graduates included in hiring pools, legal recruiters who themselves adopt standards less tied to the academic rank of a school or student and more aimed at effective professional performance might gain the confidence to search deeper into classes or ranks of law schools to find prospective employees.

Legal employers know that grades and test scores don't tell them all that they need to know. Nor do informal interviews yield a significant amount of information for hiring. While those are indicators of certain job-related strengths, they are incomplete at best. Use of some form of job effectiveness evaluation, or of behavioral interviewing based on needed lawyer competencies, are emerging as better methods to assess candidates for jobs that are becoming scarce. Legal organizations can no longer afford to hire based on paper academic credentials and wait to see who emerges as useful and who should be let go months or years down the road.

You may be interested in learning more about the study discussed here. Under the sponsorship of the State Bar's Council on Access and Fairness, we are going to be doing focus groups up and down the state in October in order to talk with representatives of legal organizations (including representatives from law firms, in house corporate counsel, government/public sector offices and public interest organizations) about how our research on lawyer effectiveness can be helpful to legal employers, particularly in connection with their efforts to diversify and retain their professional staffs. Later in the fall, we will be convening symposia both in the northern and the southern parts of California based on the input from the focus groups and to discuss our research. We hope as many of you as possible will participate as invitees in the focus groups and in the symposia as they are scheduled.

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Number of Sitting Judges on the Federal Bench

	Number		% of All Judges
White	1071		82.70%
Black	120		9.27%
Hispanic	78		6.02%
Asian	16		1.24%
American Indian	1		0.08%
Other	9		0.69%
All Judges	1295		
Male	**Number**	**% of Gender**	**% of All Judges**
White	863	84.77%	66.64%
Black	82	8.06%	6.33%
Hispanic	56	5.50%	4.32%
Asian	10	0.98%	0.77%
American Indian	1	0.10%	0.07%
Other	6	0.59%	0.46%
All Men	1018		78.61%
Female			
White	208	75.09%	16.06%
Black	38	13.72%	2.93%
Hispanic	22	7.94%	1.70%
Asian	6	2.17%	0.46%
American Indian	0	0.00%	0.00%
Other	3	1.08%	0.23%
All Women	277		21.39%
All Judges	1295		

Source: Federal Judicial Center as of July 27, 2011, and the Daily Journal

Retirement brings up diversity in judiciary

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he said.

Other sources said San Francisco deputy city attorney Vince Chhabria, whose father is Indian and mother is Canadian, has applied as well. Chhabria declined through a city attorney's office spokesman to comment.

Some legal observers say the trick to building diversity at the federal level is to have diverse judicial advisory committees, which vet and recommend candidates, and to ensure that the committee members are connected to minority lawyers.

"That's the main hurdle," Raymond C. Marshall, a partner at Bingham McCutchen in San Francisco who has counseled minority lawyers on advancing in the profession, said. "Nominating committees need to be diverse and have the ability to find the diverse candidates."Edwin K. Prather, a San Francisco lawyer who chairs the Northern District's magistrate judge merit selection committee, said there's been a great rise in diversity in the Northern District in the last couple years.

"But it's really not enough," Prather said. "I would say that the senators are doing their very best at vetting candidates and making sure that the very best are getting nominated to the president."

The key with achieving diversity, Henderson said, is to have it always be part of the selection process, not an episodic gesture or occasional initiative.

"Diversity ought to contain a measure of consistency," he said. "The overall guide should be that consistency overcomes what I've seen in my lifetime, which is 'We've appointed Thurgood Marshall. What more do you want?'"

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Race/Ethnicity of California Judges

Court	American Indian or Native American only	Asian only	Black or African American only	Hispanic or Latino only	Pacific Islander only	White only	Some Other Race Only	More Than One Race	Information not provided	Total
Court of Appeal	0 - 0.0%	3 - 2.9%	5 - 4.8%	4 - 3.8%	0 - 0.0%	83 - 79.8%	0 - 0.0%	7- 6.7%	2 - 1.9%	104 -100%
Trial Court	6 - 0.4%	88 - 5.5%	90- 5.7%	134 -8.4%	4 - 0.3%	1,142- 71.9%	15 - 0.9%	52 - 3.3%	57 - 3.6%	1,588 - 100%

*Number of justices and judges on the bench as of December 31, 2010. Source: Judicial Council of California/Administrative Office of the Courts

Court officials drop plan for cameras

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Former Justice Carlos R. Moreno, who chaired the committee, said his group didn't anticipate such strong and universal opposition from the bench when it sought public comment on the camera proposal. He pointed out that the proposal still would have given trial judges the final say on what happened in their courtrooms.

"I think it was basically just a difference on the importance of transparency in the courtrooms as well as how much deference to give to trial judges," he said. "Either way, I had complete trust in trial judges being able to use their discretion."

The rule was modeled after one that has worked well in the state of Washington for many years, he said.

At the committee's final meeting in December, members unanimously decided to withdraw the recommendation from their final report to the Judicial Council, which they plan to submit in October.

The report will reflect other recommendations from the committee, said Peter Allen, communications manager for the Administrative Office of the Courts. One proposal, for example, would make it easier to identify whether court records have been sealed. Right now, records can be sealed without a trace.

Committee member Kelli L. Sager, a media lawyer with Davis Wright Tremaine LLP, said she was disappointed that more than two years of work did not yield any change to the status quo when it comes to cameras.

"I was personally shocked and disappointed to see how negative the opposition was," she said. "We've had cameras in the courtrooms in California for almost 50 years."

Unlike California's state courts, the federal trial courts have never allowed cameras in courtrooms. But that is changing. San Francisco's Northern District is one of 14 nationwide participating in a three-year pilot that's restricted to civil proceedings with the consent of both parties and the judge.

Sager argued that certain trials will garner media attention whether they are being broadcast or not, expressing her view that the default should be for public access.

Committee member Peter Scheer of the First Amendment Coalition said the committee tried to take reasonable steps to make the judicial branch more effective and responsive to media requests.

"The Tea Party wing of the California judiciary managed to veto all of these proposals," he said.

But White argued that opponents' main concern was the financial cost to the judiciary. He envisioned that witnesses would be left waiting while judges held last-minute hearings on whether to exclude cameras.

Judges who served on the committee said the dialog was valuable even though the committee couldn't resolve the deep divisions between the public's interest in access to the courts and the need to ensure the proceedings are fair.

"I thought it was run well and participants were of the highest quality," said former Santa Clara County Superior Court Presiding Judge Jamie Jacobs-May, who is now with JAMS. "It's not that we didn't understand each other's position — it's just that you have competing values."

Jacobs-May, who was opposed to the idea from the outset, said the presence of television cameras changes the nature of a trial. All you need to do is watch baseball fans when they realize they are on the stadium camera, she said.

"They mug for the camera," she said. "Knowing that your face is being publicized to the world changes how we act and feel."

Ultimately, the committee didn't want to put another burden on the trial courts at a time when they are already under pressure in light of budget cuts, said member Judith McConnell, a justice on the 4th District Court of Appeal.

McConnell said the committee's objectives were good, she said.

"I think the public has a better understanding of what goes on in court when they have access, but how to go about that is tricky," she said.

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Solar companies settle environmental claims

By Fiona Smith
Daily Journal Staff Writer

Two major solar power companies announced Tuesday they had reached a settlement with environmental groups over plans to build solar farms in San Luis Obispo County.

The agreement, negotiated with the help of Gov. Jerry Brown's office, headed off potential litigation after conservationists raised concerns over the projects' impacts on wildlife.

SunPower Corp, based in San Jose, and First Solar, Inc., out of Arizona, are each proposing to build solar facilities a few miles apart on the Carrizo Plain, a vast, largely undeveloped grassland dotted with farms. Nonprofits Defenders of Wildlife, the Sierra Club and the Center for Biological Diversity are concerned the projects could seriously harm the San Joaquin kit fox and giant kangaroo rat, both protected under the federal Endangered Species Act.

In the settlement, the companies will buy 9,000 acres of land near the projects, on top of the 17,000 they had already agreed to buy, to set aside for conservation. The companies will also refrain from using rodent poison in the area and remove 30 miles of existing fencing to allow animals to better move through the area. Each project will be built on roughly 4,000 acres of land, with the SunPower project creating 250 megawatts of power and the First Solar project creating 550 megawatts.

The agreement comes as solar power developers and environmental groups have clashed over the location of several solar farms in the California desert. In recent years, solar developers have feverishly snapped up land to meet the state's growing demand for renewable power. Conservation groups have criticized developers for picking prime wildlife habitats. They have managed to gain concessions with the threat of litigation.

"I think everyone agrees if we were starting the process from scratch, [the projects] would be sited somewhere outside the Carrizo Plain," said Brendan Cummings, senior counsel and public lands director at the Center for Biological Diversity. "Solar companies and environmental groups shouldn't be fighting each other, threatening litigation or signing settlement agreements. With better planning, we can be the natural allies we should be."

A joint statement from the companies and environmental groups said that more, and earlier, communication between companies and environmental groups could minimize future challenges to projects.

"Our organizations strongly support the development of renewable energy in California to reduce carbon emissions and transition away from fossil fuels, and believe that renewable energy projects must be located and designed in the most sustainable manner possible to ensure that projects move forward expeditiously and avoid, minimize, and mitigate their impacts on our native wildlife and natural landscapes," the companies and groups said.

But Tuesday's settlement does not put to rest challenges to the projects. Two local advocacy groups, Carrizo Commons and North County Watch, continue to sue San Luis Obispo County for approving the SunPower project earlier this year. The suit claims officials violated the California Environmental Quality Act by approving a flawed environment review for the project, *Carrizo Commons v. County of San Luis Obispo, CV-110314* (San Luis Obispo Super. Ct., filed May 20, 2011). The groups will likely file a similar challenge against the First Solar project, said Susan Harvey, president of North County Watch.

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