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Foreword

Welcome to the Summer edition of the Journal for 2006.

This edition of the Journal

It is curious how little academic attention has been focussed on issues of assessment and grading in clinical programmes. It is almost as if the struggle to establish clinical learning and teaching as a valid part of the law curriculum - even in jurisdictions such as the United States where clinical teaching is arguably most embedded in legal education - has meant that clinicians have tended to focus their energies on defending learning outcomes and student engagement rather than on the vexed issue of whether we should be seeking to assess clinical learning.

A clinician once made the point to me that perhaps one reason that our students seem reluctant to challenge the potential lack of transparency in our clinical assessments is because the closeness of the supervisor/student relationship in clinics often means that our students trust us in a way which is uncommon in other learning contexts. If this is right, then it arguably makes it even more imperative that we ensure that our assessment practices meet the gold standard of being transparent, rigorous and fair - since if we do not do this, it seems that our students may be reluctant to challenge us.

Clinic clearly has the potential to pose enormously difficult assessment issues. Do we assess the core practical skills that we observe - or, as Georgina Ledvinka addresses in her article, are we also looking for the element of self-analysis by way of reflective skills, which will satisfy us that students know what it is that they are doing well, and are able to take the habit of reflection into practice with them, so that they are able to become life long learners? Where does the balance lie between the assessment of reflection and the assessment of practice? Do we need to shift the assessment away from the live client context - with all its unpredictability and lack of comparability - and towards high level simulation, such as the standardised client model described by Larry Grosberg in his article?

Roy Stuckey in his article addresses most broadly the key issues around assessment, asking what it is that we seek to achieve with assessment and with clinic, and how this fits with the general expectations of higher education in the different jurisdictions of the United States and the United Kingdom. Not only does he remind us that when we talk about assessment it is a term that may encompass a huge variety of different functions, but he also addresses the distinctions between formative and summative assessment which may often become so blurred in the clinical context where supervision and mentoring blur into an assessment function.

Georgina Ledvinka's article starts with an analysis of what we are looking for when we require our students to reflect on their clinical practice, and how the practice of reflection fits with educational theories of learning generally. From this Ledvinka moves into a detailed analysis of the strengths and weaknesses of the assessment of reflection in the context of her own clinical programme at Northumbria, and analyses whether there is the sort of level of consistency across markers that meets the requirements for assessment processes to be rigorous and fair.

Finally, Larry Grosberg focuses on assessment in the context of interviewing and counselling, looking at the skill both within its clinical and non-clinical teaching contexts, and asking the critical question of how we can avoid subjectivity in our assessment of lawyering skills. Starting with an analysis of why the teaching of core interviewing and counselling skills is so important given the relative lack of practical experience prior to qualification for many lawyers in jurisdictions in the United States, he then valuably draws on the clinical assessment experiences of the medical educators, and outlines different assessment strategies which might be brought to bear within the assessment of legal skills.

While the three articles in this issue of the Journal each take a different route towards the issue of assessment, the issue of whether our clinical assessment practices stand up to close scrutiny is at the heart of each of the papers. It is a theme that I hope we will continue to address in later editions of the Journal. The development of robust assessment methodologies is surely a necessary precondition for the promotion of clinical learning to the heart of learning and teaching in Law. Or, at the risk of extreme heresy, should we be challenging the entire assessment emphasis of the Academy, and celebrating the fact that within the clinical field we have the potential to achieve much more than a traditional grading-based assessment, with the ability to describe our students, their strengths and weaknesses, so much more fully than a mere grade would normally capture.

The Summer 2006 conference - and plans for 2007.

The Summer 2006 IJCLE conference took place in London, and was extremely well-attended, with delegates from almost all the major jurisdictions. (The Journal still has relatively little reach with the important clinical developments in the countries of South America - something which I am keen to redress.) Papers ranged across a huge range of topics, clustering around the theme of emancipation through clinical learning. As at previous conferences, delegates commented not just on the quality of the papers, but also the supportiveness of the conference environment. I have to say that I have always taken it for granted that clinicians are a uniquely generous group of educators - always willing to share experience, and eager to learn from one another's different experiences - but it is an aspect of the conference that I think deserves to be celebrated. Delegates arrive from an ever-widening group of different jurisdictions - and from clinical programmes of all kinds, and in all different stages of development. It is a huge strength of the conference that it is able to provide a welcoming environment for all different models of clinical activity.

Plans for 2007?

I can take this opportunity to confirm that the 2007 conference will take place in Johannesburg, South Africa. The conference is scheduled for 9th and 10th July 2007, although it is likely that there will be a range of activities taking place both before and after the formal conference. I am delighted that the conference will take place alongside the South African clinical conference - a model that worked extremely well when we joined with the Australian clinical conference in Melbourne in 2005.

This model of joint conferences will ensure we have a continuing focus on international clinical activities within the Journal conference streams, but will also offer delegates the opportunity to learn more about the hugely important South African clinical context, with its range of clinical teaching methodologies and community legal projects. The theme of the conference will be: Unity

in diversity. It is a theme which not only has clear relevance for our hosts, but also enables us to celebrate the huge range of different clinical programmes and activities which I hope are addressed by this Journal.

Details about the conference will soon be available on our new website: www.ijcle.com - a development which has been needed for some time now and which I hope will be up and running in the near future.

In the meantime, I am more than happy to field any questions about the conference - and any early proposals for papers - and indeed any suggestions for articles for this Journal. I can as ever be contacted at philip.plowden@unn.ac.uk

Philip Plowden
Editor

Can We Assess What We Purport to Teach In Clinical Law Courses?

*Roy Stuckey**

"Assessment - evaluation: A judgment about something based on an understanding of the situation."[1]

"Assess: to judge . . . the . . . quality . . . of something."[2]

Many claims are made about the educational value of clinical education in law schools. Unfortunately, the first generation of clinical law teachers did not clearly articulate our educational goals nor did we fully explore how to assess the effectiveness of our instruction. Subsequent generations of clinical teachers adopted the practices of their predecessors and mentors. Consequently, many issues related to assessments of clinical students remain unexplored, and current practices tend to be neither valid nor reliable. While clinical teachers in the United Kingdom have made more progress than those in the United States,[3] all clinical teachers need to work together to improve our understanding of assessments and to develop improved methods for finding out whether our students are learning what we purport to teach.

This article explains the importance and nature of assessments, illustrates some of the issues presented by current practices, and proposes some new directions to consider. It concludes that much work remains to be done to clarify the goals of clinical legal education and to develop valid and reliable assessment tools.[4]

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1 Encarta Dictionary, http://encarta.msn.com/encnet/dictionary (last visited May 22, 2006).

2 Cambridge Advanced Learners Dictionary, http://dictionary.cambridge.org (last visited May 22, 2006).

3 Evidence of this includes multiple assessment-related projects in the U.K., some of which are accessible via the webpage titled "Resources on Assessment in Legal Education" maintained by the UK Centre for Legal Education, http://www.ukcle.ac.uk/resources/assessment/index.html (last visited August 15, 2006). There is no equivalent resource in the United States.

4 Portions of this paper were adapted from Roy Stuckey, Best Practices for Legal Education: A Project of the *Clinical Legal Education Association* (March 31, 2006, draft). The most current draft is posted on-line at http://professionalism.law.sc.edu (look in the "news" section on the main page). The drafting phase of the project should be completed in September 2006.

The Purpose and Importance of Assessments

The main purpose of assessments in educational institutions is to discover if students have achieved the learning outcomes of the course studied.[5] In other words, we use assessments to find out whether our students are learning what we want them to learn.

In law schools, as in medical schools, one purpose of assessment is to determine which students should receive degrees, but other purposes of assessment are more important.

> Aside from the need to protect the public by denying graduation to those few trainees who are not expected to overcome their deficiencies, the outcomes of assessment should be to foster learning, inspire confidence in the learner, enhance the learner's ability to self-monitor, and drive institutional self-assessment and curricular change.[6]

The goals and methods we select for assessment are important. "Assessment methods and requirements probably have a greater influence on how and what students learn than any other single factor. This influence may well be of greater importance than the impact of teaching materials."[7]

> [C]hanging the assessment procedure is one of the most effective ways of changing how and what students learn. Surface approaches are induced by excessive workloads, a narrow band of assessment techniques and undue emphasis upon knowledge reproduction. Deep approaches are influenced by choice, a variety of assessment methods, project work and an emphasis upon tasks that demand demonstration of understanding.[8]

Thus, legal educators, including clinical teachers, should consider carefully what we are trying to assess and how we are doing it.

Types of Assessments in Clinical Courses

There are at least three types of assessments in clinical courses: evaluating overall competency, helping students understand what they learn from individual, unique experiences, and determining whether students are learning what we are trying to teach. Consider the differences in the following questions that a clinical teacher might ask: "How competent is the student?," "What did the student learn?," and "Did the student learn what I intended?"

The first question focuses on how well a student performs as a lawyer. This is a natural and important question to ask, because clinical courses, especially those involving actual client representation, present opportunities for students to test for the first time on a personal level a number of abilities that are essential for lawyers. Perhaps the most important of these is whether a student is able to engage in appropriate behaviors and integrity in a range of situations.

5 Alison Bone, *Ensuring Successful Assessment* 3 National Centre for Legal Education Guidance Note (Burridge & Varnava: series eds., 1999), available at www.ukcle.ac.uk/resources/assessment/bone.pdf

6 Ronald M. Epstein, MD, & Edward M. Hundert, MD, "Defining and Assessing Professional Competence", 287 JAMA 226, 226 (Jan. 9, 2002).

7 Bone, supra note 5 at 2 (quoting D.Boud, *Enhancing Learning Through Self-Assessment* (1995)).

8 Id. at 4 (citing G. Brown, *Assessment of Learning: Its Implications for Quality,* Paper Delivered at Open University Conference on Changing Patterns of Student Assessment and Examination (Jan. 1994)).

That is, students in client representation courses are beginning to learn the extent to which they are able to conduct themselves professionally and provide competent legal services. The assessment of students' professional strengths and weaknesses is an important function of clinical teachers, and it occurs to some degree or another in every type of clinical course.

These "holistic" assessments begin with the very first task that a student undertakes in a clinical course. Some of the knowledge, skills, and values that are reflected in each performance were acquired before students enrolled in the clinical course. Thus, when we ask "How competent is the student?," we are potentially assessing everything that a student has learned during law school, or for that matter, during their lives, not just what a student is learning in the clinical course. This is an important reality for clinical teachers to keep in mind, especially in the United States where it is common practice for clinical teachers to mark or grade everything a student does from the very first day in the course.

"Holistic" assessments are not addressed in this article. Ross Hyams discusses issues related to overall competence assessments of students in the article that he submitted to the Journal.[9]

Now consider the second question, "What did the student learn?" In clinical courses students might learn what we intend for them to learn, but they also frequently learn lessons that are unexpected, unplanned by the instructor, and unique to the particular student. These lessons may be quite valuable to the student, and clinical teachers can play a role in maximizing the educational value of these experiences. One would not, however, necessarily want to assess whether or how well a student learns such lessons or use such assessments for assigning grades or advancement decisions, because they are not educational objectives of the course or lessons that the student needs to learn to earn credit for the course. On the other hand, we might want to assess the student's self-reflection skills and ability to learn from practice, if developing these skills are educational goals of the course.

The third question, "Did the student learn what I intended?," is the focus of this article - how do we tell whether our students are learning what we intend for them to learn? I begin with the assumption that a clinical course has clear educational objectives, the instructors and students are aware of these goals, and they are interested in employing assessment tools to find out whether those objectives are being accomplished.

Basic Principles of Assessment

The purpose of this section is to establish a shared vocabulary about assessments.

An assessment may take the form of a final exam, a test administered after a unit of instruction is covered, a paper, observation of performance, a discussion between student and teacher, portfolio (profile) reviews, or some other method of determining what a student has learned. Before selecting an assessment tool, we should be clear about the goals of the assessment and the purposes for which it will be used.

9 Ross Hyams, *Student Assessment in the Clinical Movement - What Can We Learn From the U.S. Experience?*, Paper Presented at the Fourth International Journal of Clinical Legal Education Conference in London (July 12-13, 2006) (copy on file with Roy Stuckey).

The goals of a particular assessment may be to evaluate a student's knowledge, behavior (what a student does before and after a learning experience), performance (ability to perform a task), attitudes/values, or a combination of these.[10]

The purpose of an assessment can be formative, summative, or both. Formative assessments are used to provide feedback to students and faculty. Their purpose is purely educational, and while they may be scored, they are not used to assign grades or rank students. A summative assessment is one that is used for assigning a grade or otherwise indicating a student's level of achievement. "Summative assessment occurs at the end of a course of study and is primarily used for the purpose of making a final judgement of the student alongside his or her peers - final in the sense that (unless there are mitigating circumstances) it is how a student performs in this assessment that will be used to decide whether a student can proceed, e.g., to the next level of the course or be admitted to a vocational course."[11]

An assessment tool should be valid. An assessment tool is valid if it allows the teacher to draw inferences about a student's acquisition of the skills, values, and knowledge that the tool purports to assess.[12] Congruence is a necessary aspect of validity, that is, the goals of the assessment must agree with the goals of the instruction.[13] For example, a professor who seeks to build students' ability to apply and distinguish cases might administer an essay question that raises issues that test the outer limits of a set of precedents. On its face, the assessment appears to be a valid test of the skill. If, however, students must take the test in a closed-book setting or without sufficient time to review the relevant authorities while taking the test, students who have developed the ability to apply and distinguish cases but possess poor memorization skills would likely perform poorly. Thus, the assessment tool would not be valid.

An assessment tool should also be reliable; that is, it should accurately rate those who have learned as having learned and those who have not learned as having not learned.[14] It should not matter whether a student is being assessed first or last or whether one teacher or another is conducting the assessment.

Assessments can be norm-referenced or criteria-referenced. Assessments in the United States tend to be norm-referenced; assessments in the United Kingdom are typically criteria-referenced. Norm-referenced assessments are based on how students perform in relation to other students in a course rather than how well they achieve the educational objectives of the course. Normative assessment is often done to ensure that certain grade curves can be achieved. This approach allows law schools to sort students for legal employers.

Norm-referenced evaluations inform students how their performance relates to other students, but they do not help students understand the degree to which they achieved the educational objectives of the course. This can have a negative effect on student motivation and learning.

10 See Gregory S. Munro, *Outcomes Assessment for Law Schools* 111-17 (2000).

11 Bone, *supra* note 5, at 4.

12 Gerald Hess and Steve Friedland, *Techniques for Teaching Law* 289 (1999). See also Patricia L. Smith and Tillman J. Ragan, *Instructional Design* 95 (2d ed. 1999).

13 Smith and Ragan, *supra* note 12, at 95.

14 Id. at 97.

> [S]tudents . . . perceive that something different is going on in the current circumstance, and wonder whether the "sorting" process reflects an artificial or arbitrary allocation of rewards. In the absence of a clearly stated explanation of the actual standards to be achieved, it is easy to become frustrated, then angry, wasting energy that might otherwise be invested in meaningful efforts to learn.
>
> Students also powerfully articulate their hunger to link assessment and learning. They want to learn to take exams, and they want feedback so they can improve.[15]

Norm-referenced assessment allows grades to be distributed along a bell curve, but this should be neither a goal nor an expectation of assessments. What matters is whether students adequately achieve the learning outcomes of the course. A bell curve outcome actually reflects a failure of instruction. Our goal should be for every student to achieve the learning outcomes we establish for each course, whether those are to learn certain information, understand key concepts, or develop skills to a specified level of proficiency. Some students may get there faster or easier, but if our teaching is effective and successful, all students should learn what we want them to learn and earn high marks on assessments. If a student is incapable of learning what we are trying to teach, the student should not be allowed to become a lawyer.

Criteria-referenced assessments rely on detailed, explicit criteria that identify the abilities students should be demonstrating (e.g., applying and distinguishing cases) and the bases on which the instructor will distinguish among excellent, good, competent, or incompetent performances.[16] The use of criteria minimizes the risk of unreliability in assigning grades.[17] Criteria-referenced assessment enables teachers to "judge whether certain criteria have been satisfied and normally operates on a pass/fail basis: an example would be the driving test. It is not important to establish whether more or less drivers pass this test in any one year (or at any one centre) but only to ensure that the national pass standard is maintained."[18]

The use of clear criteria helps students understand what is expected of them as well as why they receive the grades/marks they receive and, even more importantly, it increases the reliability of the teacher's assessment by tethering the assessment to explicit criteria rather than the instructor's gestalt sense of the correct answer or performance.[19] The criteria should be explained to students long before the students undergo an assessment. This enhances learning and encourages students to become reflective, empowered, self-regulated learners.[20]

In creating assessment criteria, teachers should recognize that the development of professional expertise takes time and there are stages with discernable differences, for example, novice, advanced beginner, competent, proficient, and expert.[21] Therefore, our assessments should communicate to students where their development of professional expertise stands. Defining the level of proficiency that we want law students to achieve at each stage of their professional development is a task that warrants the attention of clinical teachers.

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15 Judith Wegner, *Thinking Like a Lawyer About Law School Assessment* (Draft 2003) (unpublished manuscript on file with Roy Stuckey) (hereinafter Wegner, Assessment).

16 Sophie Sparrow, "Describing the Ball: Improve Teaching by Using Rubrics-Explicit Grading Criteria", 2004 *Mich.* St. L. Rev. 1, 6-15.

17 See N. R. Madhava Menon, "Designing a Simulation-Based Clinical Course: Trial Advocacy" in *A Handbook on Clinical Legal Education* 177, 181 (N. R. Madhava Menon ed., Eastern Book Company, India 1998) ("Students and evaluators need a clear understanding of the criteria on which performances will be graded.").

18 Bone, *supra* note 5, at 4.

19 Sparrow, *supra* note 16, at 28-29.

20 *Id.* at 22-25.

21 Wegner, Assessments, *supra* note 15, at 11.

Clinical Courses

Clinical courses are courses that use experiential education as the primary method of instruction. Experiential education can occur in many contexts in U.S. law school courses and in U.K. law school courses, vocational courses, and law firm training. There are three primary types of clinical courses: simulation-based courses, in-house clinics, and externships.[22] These courses differ from each other in the following ways:

> -in **simulation-based courses,** students assume the roles of lawyers and perform law-related tasks in hypothetical situations;
>
> -in **in-house clinics**, students represent clients or perform other professional roles[23] under the supervision of members of the faculty; and
>
> -in **externships**, students represent clients or perform other professional roles under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges at their work.

Experiential education integrates theory and practice by combining academic inquiry with actual experience.

Learning is not education, and experiential learning differs from experiential education.[24] Learning happens with or without teachers and institutions.[25] For example, eavesdroppers learn about the things they hear,[26] yet they are not educated simply by the fact of eavesdropping because the activity is not accompanied by a teacher's or institution's participation in the learning process. Education, in contrast to a learning opportunity, consists of a designed, managed, and guided experience.[27] [28]

Thus, while part-time work experiences of law students in legal settings can be valuable learning experiences, they are not considered experiential education because the learning in such environments is not necessarily accompanied by academic inquiry.

Optimal learning from experience involves a continuous, circular, four stage sequence of experience, reflection, theory, and application.

> Experience is the immersing of one's self in a task or similar event - the doing. Reflection involves stepping back and reflecting on both the cognitive and affective aspects of what happened or was done. Theory entails interpreting the task or event, making generalizations, or seeing the experience in a larger context. Application enables one to plan for or make predictions about encountering the event or task a second time.[29]

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22 Some people define experiential education as involving "real life," not simulated, experience. See, e.g., Hess and Friedland, *supra* note 12, at 105.

23 Other professional roles include, for example, serving as mediators or teaching street law.

24 See Lewis Jackson and Doug MacIsaac, "Introduction to a New Approach to Experiential Learning" in 62 *New Directions for Adult & Continuing Educ.* 17, 22-23 (1994).

25 Ronald Barnett, "What Effects? What Outcomes?", in *Learning to Effect* 3, 4 (Ronald Barnett ed., 1992).

26 *Id.*

27 Robert Stevens, Law School: *Legal Education in America from the 1850s to the 1980s* 24 (1983).

28 James E. Moliterno, "Legal Education, Experiential Education, and Professional Responsibility", 38 *WM. & Mary L. Rev.* 71, 78 (1996).

29 Steven Hartwell, "Six Easy Pieces: Teaching Experientially", 41 *San Diego L. Rev.* 1011, 1013 (2004).

There are three domains of learning, and students who are being educated experientially are involved in all three:

> -the cognitive domain (increasingly complex sorts of understandings and analytical processes),
>
> -the psychomotor or performance domain (complex patterns of physical or motor activity such as lawyering activities), and
>
> -the affective or feeling domain (values, attitudes, and beliefs).[30]

Jay Feinman further describes the cognitive, performative, and affective skills that law students need to develop:

> Cognitive skills range from simple recall of facts, through the ability to apply prior knowledge to solve new problems, up to the ability to evaluate the use and implications of one's knowledge. In law school, these skills involve the understanding of substantive law, legal process, and related matters such as professional responsibility. Performative skills in law are increasingly defined by the MacCrate Report's catalog of skills beyond legal analysis and reasoning, including legal research, factual investigation, counseling and the management of legal work. Affective skills include personal and professional issues: how students feel about their competency as lawyers, how they relate to the client, how they respond to problems of professional responsibility, and how their values inform their role.[31]

Experiential education is especially beneficial to students because it gives them opportunities to be actively involved in their own education, and it has positive effects on their motivation, attitudes toward the course, willingness to participate in class, ability to ask insightful questions, and acquisition of knowledge and skills.

Any subject can be taught using experiential methodology. The challenge is to determine what lessons can be taught more effectively and efficiently using experiential education than through other methods of instruction and to focus our time and energy on accomplishing those learning objectives.

Once we select our desired outcomes and decide how we will try to achieve them, we need to find out if our students are learning what we purport to be teaching. This requires valid, reliable assessment tools. It would not be fair to grant credit for course work or to base decisions about marks or grades on anything other than solid evidence showing which students are learning and which are not. Unfortunately, as we will see in the following section, this can be a difficult, sometimes impossible, task.

30 Kenneth R. Kreiling, "Clinical Education and Lawyer Competency: The Process of Learning To Learn From Experience Through Properly Structured Clinical Supervision", 40 *Md. L. Rev.* 284, 287, n.10 (1981).

31 Jay M. Feinman, "Simulations: An Introduction", 45 *J. Legal Educ.* 469, 472 (1995).

Specific Examples

The remainder of the article will examine four outcomes that might be among the educational objectives of a clinical course to illustrate some of the issues related to the assessment of clinical students:

1. Understanding litigation and alternative dispute resolution.
2. Autonomy and ability to learn.
3. Ability to establish rapport in an initial client interview.
4. A commitment to seeking justice.

I do not mean to imply that these goals would necessarily exist in a given clinical course. They are presented here to provide a context for discussing assessment issues.

1. Understanding litigation and alternative dispute resolution.

It is easier to set and control educational goals in simulation courses than in client representation courses. Some of the educational goals of client representation courses are predetermined and unavoidable. We have to teach students about office procedures, including the central importance of avoiding conflicts of interests and maintaining confidences. We have to teach students about their relationships with us and the restrictions we are placing on their freedom to engage in client representation. We often have to teach the rules of evidence and professional conduct and basic lessons about lawyering skills and how to act as lawyers. We also have to teach students about the law, procedures, systems, and protocols of the various practice settings they will encounter in our courses.

A common objective of clinical courses is to teach students about litigation and alternative dispute resolution. These are topics that both the MacCrate Report[32] and the Law Society of England and Wales indicate that all lawyers should understand before beginning practice.

The MacCrate Report includes a description of the "fundamental lawyering skills essential for competent representation" for all lawyers graduating from law school in the United States, no matter what practice settings they are entering. Among the items on the MacCrate list is that a lawyer should understand the potential functions and consequences of litigation and alternative dispute resolution processes and should have a working knowledge of the fundamentals of litigation at the trial-court level, including, *inter alia*:

(a) An understanding of the litigative process, including:

(I) The functions and general organization of the trial courts;

(ii) Basic concepts of jurisdiction;

(iii) The availability of alternative forums and the importance of choice of forum;

(iv) The basic procedural rules and principles governing jurisdiction in a trial court of general jurisdiction;

(v) The basic rules and principles of evidence;

32 *American Bar Association, Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development- An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) (the MacCrate Report).

> (vi) Knowledge of the means by which additional pertinent rules of procedure and evidence may be efficiently ascertained (including legal research).[33]

The Law Society is more ambitious than the MacCrate Report in describing the knowledge and skills related to litigation and advocacy that new lawyers should have on day one in practice. The Law Society expects that, "[o]n completion of this compulsory area [litigation and advocacy] the student should have an appreciation of the nature of civil and criminal litigation, be able to identify the critical steps in the process of litigation and have gained experience through practice of some or all of the stages of litigation."[34] The Law Society also includes a list of the specific abilities related to dispute resolution that students should be able to demonstrate, including various skills and an appreciation of the range of methods available to resolve disputes.

It is common for client representation clinical courses, and even simulation courses, to teach many of the topics on the MacCrate and Law Society lists by involving students in specific litigation contexts, such as criminal prosecution and defense, domestic violence, divorce, landlord-tenant, and consumer disputes. The educational objectives of such courses almost necessarily include helping students acquire knowledge of the fundamentals of litigation at the trial level in those specialized contexts. When I taught an in-house divorce clinic, I expected my students to learn how divorce cases are processed in South Carolina, the relevant rules of the Family Court, and the requirements for drafting and serving various types of court documents. This was not knowledge they had before enrolling in my course.

It would be fairly easy to conduct a summative assessment to determine whether we are achieving the educational objectives described above as well as other items on the MacCrate and Law Society lists. After all, they refer to "legal knowledge," "understanding," and "ability to identify" which can be demonstrated on traditional written tests.

Although I could have conducted summative assessments of knowledge and understanding that I was purporting to teach my clinical students, I did not. I am unaware of any clinical teachers who conduct summative assessments of such subjects. Why do clinical teachers not make greater use of written instruments for summative assessments? The main reason is probably that the use of written tests to find out what clinical students are learning was not, and still is not, part of the tradition of clinical teachers in the United States - or anywhere else that I am aware of.

Another reason may be that clinical teachers feel they are adequately assessing their students' knowledge and understanding of these topics by working with them on cases. This is certainly true to a degree, but it is not clear how much of this assessment should be considered formative. Evaluating knowledge and understanding by observing students' case work is also somewhat subjective and not uniform from student to student. This reason still does not explain why clinical teachers do not also administer end of the term summative assessments to find out if these educational goals are being achieved.

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33 *Id*. at 191.

34 Education and Training Unit of the Law Society of England and Wales, Legal Practice Course: Written Standards 11 (Version 10, September 2004), http://www.lawsociety.org.uk/documents/downloads/becominglpcstandards.pdf. The Legal Practice Course is the year long vocational training course that aspirant solicitors are required to take following their undergraduate law degrees and before beginning their training contacts (articles).

One also might speculate that the absence of formal assessments in clinical courses reflects our insecurity. The fact that we do not administer final exams is popular with students. Would students' interest in clinical courses drop if we gave final exams?

2. Autonomy and ability to learn.

In 1982, Tony Amsterdam said "the most significant contribution of the clinical method to legal education" is giving students an opportunity to learn how to learn from experience.[35]

The importance of helping students become independent learners with the ability to engage in effective self-reflection has long been recognized by legal educators in the United Kingdom. The current benchmark standards as well as the draft statement of benchmark standards for Law in England, Wales, N. Ireland[36] and in Scotland[37] include "autonomy" and "ability to learn" among the abilities that all undergraduate law students must demonstrate before graduation.

> 5. Autonomy and ability to learn: A student should demonstrate a basic ability, with limited guidance
>
> • to act independently in planning and undertaking tasks in areas of law which he or she has already studied;
>
> • to be able to undertake independent research in areas of law which she or he has not previously studied starting from standard legal information sources;
>
> • to reflect on his or her own learning, and to seek and make use of feedback.
>
> 18. Autonomy and ability to learn: **This is perhaps the key feature of graduateness.** The ability to learn and make use of learning in an independent fashion is generally taken to distinguish the final year student from the first year student. The learning activities required by a Law School should be such that students should be required to demonstrate what they can do independently, rather than just demonstrating that they have learnt what they have been told. This can be demonstrated by the structure of a particular module. For example, all students may be required to study a module without lectures and which requires them to prepare material for individual seminars, not all of which is directed by the teacher. This could provide a basis of evidence on whether individual students are able to learn on their own with minimal guidance. (emphasis added)
>
> Minimal Guidance: Obviously, an independent learner will need some support and some broad structure within which to operate. The extent of guidance required will depend on a student's stage of development in the field and the complexity of the material. However, by the honours stage the

35 Anthony Amsterdam, Professor, New York University School of Law, address at the Deans' Workshop conducted by the ABA Section of Legal Education and Admissions to the Bar (January 23, 1982) (unpublished).

36 Quality Assurance Agency for Higher Education, Draft Statement Benchmark Standards for Law (England, Wales, N. Ireland), http://www.qaa.ac.uk/academicinfrastructure/benchmark/evaluation/law.asp (last visited July 12, 2006).

37 Quality Assurance Agency for Higher Education, Draft Statement Benchmark Standards for Law (Scotland), http://www.qaa.ac.uk/academicinfrastructure/benchmark/evaluation/law.asp (last visited July 12, 2006).

> teacher input should indeed be small. The independent undergraduate should be able to take the initiative to seek support and feedback.
>
> Ability to reflect critically: A student should be able not only to learn something, but to reflect critically on the extent of her or his learning. At a minimum, a student should have some sense of whether s/he knows something well enough or whether s/he needs to learn more in order to understand a particular aspect of the law.[38]

The draft statements also define the level of performance expected at the vocational level as follows:

> Can act independently in planning and managing complex tasks with limited guidance within a defined framework; able to identify own resources;
>
> Can reflect on own learning; can seek and make use of feedback.[39]

While autonomy and ability to learn are described as "perhaps the key feature of graduateness" for undergraduate law students, it is also important for lawyers to continue developing these attributes at all levels of legal education and throughout their careers.

Autonomy and ability to learn are skills that can be developed in any type of law school course, but experiential education courses are particularly well-suited to this purpose. In his 1982 remarks, Tony Amsterdam said:

> The students who spend three years in law school will next spend 30 or 50 years in practice. These 30 or 50 years will be a learning experience whether we like it or not. It can be, as conventional wisdom has it, merely a hit-or-miss learning experience in the school of hard knocks. Or it can be a mediated and systematic learning experience if the law schools undertake as part of their curricula to teach students techniques of learning from experience. Clinical courses can do this - and should focus on doing it - because their very method is to make the student's experience the subject of critical review and reflection.[40]

As Amsterdam points out, students are unlikely to develop fully their ability to learn from experience during law school, particularly in systems of legal education such as the United States' where legal education only lasts three years before a person can obtain an unrestricted license to practice law. No matter how long it takes to become a lawyer, however, lawyers continue to develop problem-solving expertise throughout their careers. The ability to learn from experience is, therefore, an important life-long skill for lawyers to acquire.

At the outset, therefore, it seems that helping students further develop their autonomy and ability to learn should be an articulated goal of all clinical courses, simulated and real life. One can only speculate about the percentage of clinical courses that articulate this as a goal and consciously pursue it. For our purposes, we will assume it is a goal, and turn our attention to how one might assess our success in achieving it.

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38 Benchmark Standards, England, *supra* note 36, at Guidance Note for Law Schools on the Benchmark Standards for Law Degrees in England, Wales and Northern Ireland, items 5 & 18.

39 *Id.* at app. A (Illustration of Possible Modal Statements, Autonomy).

40 Amsterdam, *supra* note 35.

As mentioned above, the benchmark standards suggest that a basis of evidence on whether individual undergraduate students are able to learn on their own with minimal guidance could be provided by requiring students "to study a module without lectures and to prepare material for individual seminars, not all of which is directed by the teacher." Similar opportunities can be afforded students in clinical courses. Students could be assigned to teach portions of classroom meetings in simulation, in-house, and externship courses.

While this might enable students to demonstrate some skills, it does not enable them to demonstrate an ability to learn from experience, certainly not from the experience of law practice.

Two preliminary issues are presented. The first is that students at every level of professional training will have a range of skill levels. This means that some students will probably exceed the level of proficiency required at a given level of professional training and others will not. Some students will, therefore, require more opportunities and assistance to reach an acceptable level. The second issue is how to define the desired level of proficiency at each level of professional training. These are issues beyond the scope of this paper, but critical for assessment.

Clinical courses, especially courses in which students represent actual clients, are well-suited for giving students opportunities to demonstrate and develop the ability to work autonomously. Students who are ready or nearly ready for law practice will take charge of their cases, and show up in their supervising lawyers' offices after accomplishing what they can do on their own and with clear ideas about what help they need before going forward. Their files will be organized, and tasks will be completed before they are due. Other students will need more help figuring out what needs to be done, what they should do on their own, and when and how to seek assistance. Instructors must monitor their work carefully and spend time helping students understand the level of autonomy they should exercise in professional settings.

How might one conduct a summative assessment of autonomy at the end of a course of study? It may not be possible, even if we had the resources to assign similar legal problems to all students and observe them at work. One might consider giving students a set of facts from an initial interview, then asking the students to describe the initial steps they would take toward resolving the problem (or even to perform the tasks they would undertake on their own), and they could be asked to describe what more they would need before going forward and how they would try to obtain it.

Turning now to assessment issues related to the ability to learn from experience, it is once again difficult to conceptualize how to describe the level of skill expected at each stage of professional training, and it is clear that students' skill levels will vary.

If we assume that an instructor is consciously trying to assess a students' ability to learn from experience, one might begin by applying Ken Kreiling's methodology. Kreiling was among the first to help us understand that the most effective way to learn from experience is to use "theories of practice" to develop and articulate "espoused theories of action."[41] "Theories of practice" provide a basis upon which students can evaluate behaviors they observe and their own performances. These theories may involve information about how lawyers should conduct themselves, how certain aspects of the judicial system should work, or whatever else is relevant to the educational objectives of the course. "Theories of action" explain how a student hopes to perform in a

41 Kreiling, *supra* note 30, at 286.

lawyering situation, for example, to build a close and trusting relationship in an initial client interview, to use only leading questions during a cross examination, to be flexible about means and rigid about goals in negotiation. Following a performance, the espoused theory of action can be compared to the behavior actually exhibited, the "theory in use."[42] If the comparison discloses that the student was ineffective in applying the espoused theory of action, the student and the teacher can analyze what caused the ineffectiveness - the quality of the espoused theory; the student's skills, values, or knowledge; or some other factor.

Thus, we should first help the student learn theories of practice, that is, how a particular task should be done. Then, make sure the student has articulated a plan for how the student intends to perform a particular skill. After the performance is finished, discuss with the student how the actual performance related to the planned performance. Finally, analyze why any differences existed and what the student would try to do differently the next time. These discussions would not be limited to the technical aspects of performances. They could also include ethical, moral, and affective issues.

The conversations with students might occur in one-on-one or group meetings. Once students understand the method of analysis expected, the instructor might simply ask, "What did you learn from your [trial, interview, phone conversation, meeting with opposing counsel, and so forth]?" Instructors could also ask students to write reflective journals in which they organize their thoughts about their experiences and describe what they learned from them.

The quality of the information produced by such approaches may be affected by a student's reluctance to discuss certain lessons learned, even if the student in fact is aware of them and benefitted from them. To reduce this risk, it is important to ensure that students understand that a goal of the course is to help them learn from experience, the instructor will be evaluating their skill level, and the kinds of information that will demonstrate whether the student is or is not demonstrating a sufficient level of skill. Even then, such assessments may not be reliable or valid. Perhaps the only valid and reliable method to evaluate their abilities to learn from experience would be to follow our students into practice for a period of time. Perhaps even that would not work.

It may not be possible to develop valid and reliable summative assessments of some of our desired outcomes, and autonomy and ability to learn may be among these. We can, however, determine whether our students understand how to apply theories of practice to concrete situations. There are a variety of ways we could do this. A simple test would be to describe a task to be performed and ask the student to articulate several "espoused theories" of how the task should be performed. Another way would be to show a videotape of a lawyer's performance and ask the student to evaluate it in light of theories of practice that were studied during the course. Or both of these techniques could be combined. While success on these tests would not conclusively establish a student's ability to learn from experience, failing these tests would indicate that the student has not yet developed these skills.

Assessing a student's autonomy and ability to learn is problematic in clinical courses that assign letter grades, which is common practice in the United States. Unless a valid summative assessment can be devised and administered, one is forced to decide whether to give the highest grades to

42 *Id.* at 291-97.

students who come into the course with highly developed skills and perform better throughout the course or to give the highest grades to the students who demonstrate the greatest improvement during the course. In criteria-referenced courses, on the other hand, the question is whether the student passes or fails, or perhaps deserves honours. Theoretically, improvement should be irrelevant, although as a practical matter it is difficult to ignore.

3. The ability to establish rapport in an initial client interview.

One of the most common tasks that lawyers perform is the initial meeting with a potential client. This is an important meeting because it is the basis upon which the lawyer and client decide whether to form an attorney-client relationship and it sets the stage for the lawyer's initial work on the case.

Assessment criteria for evaluating lawyer-client communication skills, beginning with client interviewing, are being developed in an on-going project by faculty at Georgia State University School of Law, the Glasgow Graduate School of Law, and the Dundee Medical School.[43] The project is taking the components of effective client interviewing skills and breaking them down into discrete segments with descriptions of various levels of proficiency. Hopefully, more collaborations like the Glasgow/Georgia State project will lead to the development of additional rubrics and a growing consensus about what we should be teaching students and how we can measure our success.

Establishing rapport with a potential client is an important goal of a lawyer conducting an initial client interview. If a lawyer cannot establish rapport with a potential client, the client may decide to hire another lawyer, the client may not feel comfortable being open and honest with the lawyer, and fee collection might become difficult. "'[R]apport' means mutual trust. Clients must trust you in order to open up and be candid."[44] "Rapport" also "connotes a certain personal regard between you and the client, though this regard is not necessarily the same as friendship. Rather, the rapport one seeks is one of genuineness and respect, the client knows you care about and respect the client as a person and the client returns those feelings."[45]

Establishing rapport seems to come more naturally for some people than for others. How might clinical teachers assess the ability of a student to establish rapport with a client? The most common method is to observe a student conducting a real or simulated interview. We form our own opinions of the student's success, and we can seek the student's and client's opinions.

The use of "standardized clients" is a key part of the methodology being used in the Georgia State/Glasgow project.[46] The clients are trained to provide consistent information in interviews, and they play the role of the client for multiple students. Following the interview, the simulated clients are asked, among other things, to evaluate the degree to which the students achieved the goal of establishing rapport.

43 Karen Barton et al., *Do We Value What Clients Think About Their Lawyers? If So, Why Don't We Measure It?*, Paper Presented at the UCLA Law/University of London Sixth International Clinical Conference (Oct. 28, 2005), available at http://www.law.ucla.edu/docs/barton__cunningham__jones__maharg-_what_clients_think.pdf.

44 Robert M. Bastress and Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating* 67 (1990).

45 *Id.* at 66.

46 The use of standardized clients is modeled after the medical profession's use of the Objective Structured Clinical Examination (OSCE), a timed multistation examination using standardized patients to simulate clinical scenarios. Epstein & Hundert, *supra* note 6, at 230.

Deciding how to describe the level of rapport-building skill that should be achieved at each level of professional training is a difficult problem. In the Georgia State/Glasgow project, points for rapport building were awarded on the following scale:

1-2 points: Lawyer was bored, uninterested, rude, unpleasant, cold, or obviously insincere.

3-4 points: Lawyer was mechanical, distracted, nervous, insincere, or used inappropriate remarks.

5 points: Lawyer was courteous to you and encouraged you to confide in him or her.

6-7 points: Lawyer was generally attentive to and interested in you.

8-9 points: Lawyer showed a genuine and sincere interest in you. There was a sense of connection between you and the lawyer.

These points were added to points awarded for other aspects of the interview to determine if a student passed or failed. Instead of basing the pass/fail decision on the total point score, one could require a minimum level of achievement on each component that is separately scored. For example, one could reasonably argue that a student who scores only 1-2 points for rapport building should not be allowed to pass, no matter how many other points were earned for the overall interview.

People could also have differing opinions about the degree of proficiency that lawyers should be required to demonstrate before being fully licensed, that is, whether the pass mark should be set at the 5, 6-7, or 8-9 point level. And what level of proficiency should we require of a law student who is conducting an initial interview for the first or second time?

Perhaps we should concede at the beginning that we cannot validly or reliably assess a student's ability to establish rapport with a client. Even when we use a hypothetical problem with a well-trained standardized client, it is still a make believe situation. The feelings of trust, etc., between the client and the student may or may not be real feelings, but they are not formed in a true attorney client relationship where the existence or nonexistence of rapport would have real consequences. Thus, the assessment would not be completely valid.

In a real life client clinic, we could try to measure the degree of rapport between students and real life clients, but we could not measure the same client's feelings of trust toward each student, because each student would have a different client. Thus, the results would not be reliable.

Even if we cannot accurately determine the degree of rapport that a student can establish with a client, we can measure whether and how well a student employs techniques that, in theory, will build rapport, and how well a student avoids words and actions that would hinder it. These techniques[47] might include such things as:

-be friendly.

-stand up to greet the client warmly and personally.

47 This list was compiled from the following sources, Robert F. Cochran, Jr., John M.A. DiPippa, and martha M. Peters, *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling* 29-106 (2d ed. 2006); Stefan H. Krieger and Richard J. Neumann, Jr., *Essential Lawyering Skills* (2d ed. 2003); Robert M. Bastress and Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating* 59-232 (1990); David A. Binder and Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* 6-123 (1977).

-engage in appropriate ice-breaking talk before the interview.

-have a comfortable and inviting office.

-give the client your full attention; avoid interruptions during the meeting.

-give the client an immediate opportunity to explain why the client is there and how the lawyer can help.

-attend to any immediate questions or other needs of the client.

-explain the purpose and structure of the meeting, including any costs.

-listen to the client without being judgmental.

-use verbal and nonverbal communication facilitators, such as arranging the office so that there is no physical barrier between the lawyer and the client, employing good body language, and using active listening techniques.[48]

-avoid or adjust for communication inhibitors such as ego threat, case threat, etiquette barriers, trauma, perceived irrelevancy, and greater need.

-employ a structure for organizing the discussion.

-appear confident and competent.

-appear empathetic and concerned about the client's problem.

-ensure before the meeting ends that the client knows when to expect the next contact with the lawyer and what the client and the lawyer are to do before then.

Of course, this raises the question of whether some techniques are more important or effective than others, that is, should a student's success employing certain techniques be weighted more heavily in our assessment of the student's rapport building skills? This is a topic worthy of empirical research by clinical teachers.

The most effective assessment method, of course, would be to observe new lawyers in actual practice over a period of time and with a variety of clients who would be questioned by the assessor throughout their relationships with the lawyers. In an academic setting, the most effective method is probably to observe and record students' meetings with clients, and discuss with them the extent to which they believed rapport was established and how well the student employed rapport building techniques, that is, to compare theories of practice with actual performance. Additional discussions would occur after faculty, students, and clients review the recording of the interview, and perhaps after the student drafts a reflective self-evaluation memo. Due to resource constraints in the real world, clinical teachers use variations on the performance, discussion, reflection method, for example, by using students to play the clients, using people other than the instructor to provide feedback, only having one meeting, not recording the interview, and so forth.

Most of these feedback sessions are formative assessments, though they are often formative and summative in United States schools because some clinical teachers assign grades to every student performance. Although I once did the same thing, I have come to doubt the fairness of this practice and the validity of any grade assigned to a single performance by a single observer. Feedback should be formative until the student has had an opportunity to study and practice the required task. Some students will demonstrate good practice skills in their first performance, but

48 Additional facilitators are discussed in Binder & Price, *supra* note 47, at 14-18.

those who do not should not suffer a grade penalty because other students came into the course with more highly developed skills or knowledge. Instead, students who have not demonstrated an adequate level of proficiency should be required to continue practicing that task until the desired level of proficiency is achieved. Helping all students achieve an appropriate level of rapport building proficiency for that stage of their professional development should be our goal, not simply measuring which students are better at certain tasks than others.

Ideally, we should conduct summative assessments at the end of the unit of study. Very few schools could afford to use actual client interviews for summative assessments. We should therefore consider whether we can create an end-of-the-course summative assessment that does not involve an actual performance of an initial interview. One idea would be to show a videotape of an interview to a student and ask the student to evaluate the skill with which the lawyer on the tape employed effective or ineffective techniques. This would not indicate the ability of the student being evaluated to establish rapport, but it would evaluate the degree to which the student can observe a performance and analyze it in light of theories of practice about establishing rapport.

Asking a student to analyze a transcript of an interview could produce some indication of the student's knowledge about theories of practice as well as his or her ability to analyze the performance of the task. Even multiple choice questions could produce valid and reliable data about a student's knowledge of theories of practice related to rapport building. Of course, even if a student demonstrates knowledge of why rapport building is important and what might impede or enhance rapport building, this does not necessarily predict how the student will actually perform. We assume, however, that students who have this knowledge are more likely to perform adequately than students who do not. Why else are we producing books and videos about rapport building?

4. A commitment to seeking justice.

We may have some educational objectives that cannot be measured or that we do not want to measure. Many clinical teachers believe that an important objective of clinical courses is to teach our students about the values of the legal profession and to instill in them a commitment to conform their law practice to those values.[49] All professional values deserve attention by law schools, but teaching students to strive to seek justice may be the most important goal of all. Andrew Boan concluded that "[t]he integration of skills and knowledge should assist practitioners in achieving the good of legal professions; achieving justice. The development of virtues consistent with this social good must be a central goal of legal education."[50] Richard Burke reached similar conclusions:

49 The Global Alliance for Justice Education (GAJE) was created to promote justice education by law schools and NGOs. Membership in GAJE is free. For more information about GAJE including how to join, visit the GAJE website, http://www.gaje.org (last visited August 4, 2006).

50 Andrew Boon, "History is Past Politics: A Critique of the Legal Skills Movement in England and Wales", in *Transformative Visions of Legal Education* 151, 154-155 (Anthony Bradney & Fiona Cownie eds., 1998), published simultaneously in 25 *J. Law & Soc.* 151 (1998) (citing Ronald Dearing, The National Committee of Inquiry into Higher Education, Report of the National Committee (1997)).

> Truth, justice, and fairness, both in means and ends, are paramount on the scale of legal values, and when those are at stake, the other values must yield.[51]
>
> . . . . .
>
> First, we should say that truth and justice are our goals; that, though we may never find totally objective truth or achieve perfect justice, we will seek and strive for them to the best of our professional ability. Second, we should make clear that this quest for truth and justice is a professional responsibility upon which rests the reliability and integrity of the entire legal system. Hence, an individual client's desires and objectives must be subordinate to that quest. Third, our rules of conduct should specifically prohibit lawyer or lawyer participation in lying, falsification, misrepresentation, or deception in every aspect of practice from courtroom advocacy to office consultation and practice.[52]

Calvin Woodward believed that teaching students to seek justice should be the central focus of legal education. Woodward considered the impact of the centuries-long process of secularization and concluded that this process had undermined the influence of religion and discredited legality as a social sanction, especially in western democratic societies. He also determined, however, that "the course of secularization has been led, almost without exception, by men seeking substantial justice. And therein lies the clue - a straw in the wind - for modern law schools. In a world populated by ultra-rational men, Law must find its strength in Justice, not Legality."[53] Woodward called on law schools to train students to regard themselves as agents of justice as well as officers of the court.

> Law schools must rid themselves of the vestiges of mysticism that, in days past, held laymen in awe of law and legality; and students must be trained to regard themselves as agents of Justice as well as officers of the court. More important, they must be shown precisely what this responsibility entails. And establishing a course of instruction that will serve this purpose should be the great issue with legal education today.[54]

Woodward proposed two governing maxims for law schools. "First, within the House of the Law there are many mansions - in which practitioners of all kinds, counsellors, judges, public servants, scholars and philosophers work in their several ways to further the course of, and to implement, Justice. Second, legal education, as an adjunct of Justice, must start with the proposition that the greater includes the lesser, the higher the lower, and not vice versa. That is, law schools must assume, as their basic premise, that the man who first understands his obligations to Justice will be better able to fulfill his legal 'function,' whatever it might be. Justice, in a word, must take precedence over law."[55]

In light of the importance of instilling a commitment to justice in all law students, it is easy to conclude that every clinical course should make this an explicit educational objective and make every effort to design our courses to accomplish this goal. Having said this, however, we should

51 Richard K. Burke, ""Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law", 38 *Ark. L. Rev.* 1, 22 (1984).

52 *Id.* at 3-4.

53 Calvin Woodward, "The Limits of Legal Realism: An Historical Perspective", in Herbert L. Packer and Thomas Ehrlich, *New Directions in Legal Education* 329, 380 (1972).

54 *Id.*

55 *Id.* at 381.

recognize that it is difficult to define justice much less to know with any certainty what is and is not justice in real world situations.

Assuming we can resolve these issues satisfactorily, is it possible to tell if our efforts are having the desired impact? Can we assess our students' commitment to justice without following them into practice and tracking what they do with their careers?

Lawyers have different degrees of commitment to justice. Is there a way to describe the minimal level of commitment that all lawyers should have before being fully admitted to practice? Can we describe levels of commitment to justice that students should have at each stage of their professional development? This is probably unlikely.

What assessment tools might produce any information about a student's commitment to justice? I concede that I do not have very good answers. In clinical courses, especially real life clinics, we can observe students working on cases and listen to what they say about justice-related issues. This may be the best indicator of a student's feelings and beliefs about justice.

We could assess our students' knowledge and understanding of justice-related topics. This could produce valuable data. One could reasonably conclude that a student who has never considered what "justice" is, how injustices can destroy people and societies, or why it is important for lawyers to have a commitment to justice, are less likely to have or develop a commitment to justice than students who have these understandings. We could acquire valid and reliable information about our students' "justice knowledge" through written tests, including essays by students demonstrating their understanding of the importance of seeking justice and role of each individual lawyer in providing access to justice.

We could also provide students with scenarios based on our clinics' or other cases and ask them to identify injustices in those scenarios and to discuss how lawyers contributed to the injustices or might contribute to resolving them. It might provide useful information about the effectiveness of our instruction to conduct such assessments at the beginning and end of clinical courses that seek to instill a commitment to justice in their students.

In the final analysis, it is difficult to imagine that we would ever refuse to pass a student for not developing a commitment to justice or an "adequate" level of commitment. Would we assign grades/marks to students on the basis of their commitment to justice or is this a desirable educational outcome that should have a formative, but not a summative, assessment? We may not even want to share our conclusions about a student's commitment to justice with the student, even if we could acquire valid and reliable data. Perhaps, we should only use it to evaluate the effectiveness of our instruction.

My only point in this section is that if clinical teachers continue to claim that our educational objectives include instilling a commitment to justice or otherwise developing our students' professional values, we need to think very carefully about what we intend to teach about these matters and how or whether we will try to measure our success.

Conclusion

This article raises more questions than it answers. Some things are clear, however:

- assessments are important to students and institutions.
- assessments should be as reliable, valid, and fair as possible.
- we need to be very precise about our educational objectives.
- we need to articulate our assessment criteria and communicate them to our students.
- we should not profess that students will learn something in our courses if we cannot assess whether such learning occurs.

There are probably some outcomes that legal education would like to accomplish that cannot be assessed adequately. We may need to distinguish between desired outcomes and measurable outcomes. The conclusions on this issue in the report of the project to map best practice in clinical legal education in the United Kingdom are very insightful.

> For anyone reading this report thinking of setting up a program and despairing at the difficulty of identifying the objectives that really matter to them personally - changing people, planting a lifelong interest in justice, etc. - our experience (personal and through this research) is that you will never succeed but do not need to try. It is perhaps legitimate to settle for more mundane objectives which are recognizable within the normal academic structures or programmes. Then you will not fail. This does not prevent you achieving the higher order objectives, but if you defined them and claimed to assess your achievement of them, you would face potential disappointment and a range of challenges in terms of actual assessment of students' work.[56]

The ultimate question we would like to answer is whether a student will practice law effectively and responsibly. Unfortunately, the question is enormously complex - what is "law practice" and what do "effectively" and "responsibly" mean? A student's performance in practice will depend on future circumstances that we cannot predict or control.

Perhaps the best that legal educators and licensing authorities can hope to achieve is to identify certain aspects of the legal knowledge, skills, and values that we believe are associated with competent law practice, and evaluate as many of these as we can evaluate with valid and reliable tools.

Clinical educators should be leading the way in developing innovative methods for assessing legal competence, but so far the assessment topic has not received much attention by clinical teachers in our scholarship or conferences. Hopefully the next generation of clinical teachers will develop the theories and tools to make progress on this issue that my generation has largely chosen to ignore.

56 Richard Grimes & Hugh Brayne, *Mapping Best Practice in Clinical Legal Education* 14 (2004), http://www.ukcle.ac.uk/research/projects/clinic.html.

Reflection and assessment in clinical legal education: Do you see what I see?

Georgina Ledvinka[1]

Introduction

This paper discusses issues surrounding reflection, and assessment of reflection, in clinical legal education. The first section of the paper examines what reflection is and why it plays an important role in learning. It considers the educational theory underlying reflection and how this can help to inform the way in which reflection is employed in individual programmes. Suggestions are noted for how to encourage students to reflect. There is discussion of issues concerning assessment of reflection including whether it is acceptable to assess reflection at all, and if so, how fair and consistent assessment might be achieved given its inherently subjective nature.

The second section of the paper discusses a case study on assessment of reflective work within the clinical law programme at Northumbria University. The study considers the implications of current assessment methods and whether they achieve acceptable levels of consistency between markers.

SECTIONI: Reflection and Assessment

What is reflection and why is it important?

In clinical legal education students learn by engaging in some form of hands-on legal experience such as simulated case work, work-based placement or live client environment.[2] The experience gives students an opportunity to apply and enhance the legal knowledge they gain in the lecture theatre and seminar room, and it gives context to such learning.

In addition to the hands-on legal experience there is a second main element of clinical legal education, and that is reflection. Reflection is a vital part of the process; it is the magic ingredient

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2 According to Grimes these are the current main forms of clinical legal work. See "The Theory and Practice of Clinical Legal Education", Grimes, R, in *Effective Learning and Teaching in Law,* Burridge, R, et al (eds) Kogan (1996) at p. 140.

which converts legal experience into education.

Imagine two students, A and B, who are participating in a live client programme. Both students are asked to interview a client for the first time. Student A's interview goes well; she seems to have a natural flair for eliciting information from the client and explaining how the case is likely to progress. Later, however, in discussion with her tutor and peers, when Student A describes the interview she is only able to do so in the most basic, descriptive terms. She has little perception of what made the interview proceed well and cannot express her feelings about the experience. Student B also has a successful first interview with her client. Afterwards she meets with her tutor and peers and discusses the experience in detail, including B's own perception of the strengths and weaknesses of her performance. B relates the interview to previous experiences and explains to the group what she feels she would do differently next time.

There are few who would dispute that B has undergone a higher quality learning experience than A. The difference is due to reflection. A has learned little, if anything, from having had the interview whereas B has actively rationalised the experience and related it to her existing mental framework, resulting in true learning.

But what, exactly, is reflection, and why is it so important to learning?

Reflection is something which human beings do naturally as part of everyday life. Whilst we tend not to mull over routine, day to day experiences, if something interesting or out of the ordinary occurs it is quite common to think about it afterwards, to replay the experience in our mind's eye and think what we might have done differently. We often indulge in this kind of reflection even if there is no possibility of changing what happened. Sometimes we think about our experiences in order to evaluate our performance, and identify what we could have done better. On other occasions we may be confronted with some complicated or difficult scenario for which there is no immediate solution. By reflecting on the problem, even at times when we might be engaged in another activity, we can sometimes find a solution or way forward.

This is good news for clinical law teachers because it means that students come to us with an innate ability to reflect. However, reflection in a clinical law context is generally not the same as the informal mulling over described above. Programmes have (or ought to have) a clear vision of the way in which students must reflect in order to meet the requirements of the course, and this often involves something more formal than students may be used to. One of the challenges for clinical law teachers is to get students to recognise they already have reflective skills, which they can harness and develop in order to maximise the learning opportunity offered by clinic.

Dewey was one of the earliest theoreticians to appreciate the importance of reflection in learning. In 1933 he described reflection as:

> '... active, persistent and careful consideration of any belief or supposed form of knowledge in the light of the grounds that support it, and further conclusions to which it leads...it includes a conscious and voluntary effort to establish belief upon a firm basis of evidence and rationality.'[3]

3 *How We Think*, Dewey, J, D C Heath and Co (1933)

Boud, Keogh and Walker have said that:

> 'Reflection is an important human activity in which people recapture their experience, think about it, mull it over and evaluate it. It is this working with experience that is important in learning.'[4]

Moon has defined reflection in the following terms:

> 'Reflection is a form of mental processing - like a form of thinking - that we use to fulfil a purpose or to achieve some anticipated outcome. It is applied to relatively complicated or unstructured ideas for which there is not an obvious solution and is largely based on the further processing of knowledge and understanding and possibly emotions that we already possess.'[5]

Race says that:

> 'The act of reflecting is one which causes us to make sense of what we've learned, why we've learned it, and how that particular increment of learning took place. Moreover, reflection is about linking one increment of learning to the wider perspective of learning - heading towards seeing the bigger picture. Most of all, however, it is increasingly recognised that reflection is an important transferable skill, and is much valued by all around us, in employment, as well as life in general.'[6]

What emerges from these definitions, and from the educational theory discussed below, is that reflection is a method of learning and teaching. Moon makes the point that if we can encourage students to be reflective we are helping them to develop a habit of processing cognitive material which can lead students to ideas beyond the curriculum, beyond learning outcomes, and beyond their teachers.[7] In other words, we are helping them to develop tools for life long learning.[8]

Reflection is an important aspect of many, if not most, current theories of education and learning. While it may not be necessary for the clinical law teacher to have an intricate appreciation of all of these theories, it can be helpful to have at least a working knowledge of some of the more prominent ones, as they can inform us about how to incorporate and employ reflection as part of

4 *Reflection: Turning Experience into Learning,* Boud, D, Keogh, R, and Walker, D (eds) Kogan Page (1985) at p. 19.

5 See *Reflection in Higher Education Learning,* by Moon, J, PDP Working Paper 4, LTSN (2001). See also *Reflection and Employability,* Moon, J, LTSN (2004) where Moon refers to the work of Goleman (1995) on emotional intelligence and its role in learning.

6 *Evidencing Reflection: Putting the "w" into reflection*, Race, P, ESCALATE Learning Exchange (2002)

7 *Reflection in Higher Education Learning*, Moon, J, op cit.

8 Boon argues that reflective skills are particularly pertinent to students of law as they, especially, need to develop a perspective which enables them to ask why they should act in a particular way. He says this must involve a scholarly inquiry into action, motivation and ethics, laying the foundation of an ability to reflect not only on performance, but on the underlying rationale for action. See "Skills in the initial stage of legal education: theory and practice for transformation" by Boon, A, in *Teaching Lawyers' Skills* Webb, J, and Maughan, C, (eds) Butterworths (1996).

9 There is a considerable repertoire of published material in the area of educational theory which can help to guide clinical law teachers in how to incorporate reflection as part of their own programmes. This paper does not seek to reprise this body of work but rather to discuss a selection of educational theories which may be of particular relevance and application. For a comprehensive literature review of reflection see *Reflection in Teacher Education: Towards Definition and Implementation* by Hatton, N, and Smith, D, of the University of The University of Sydney, Australia (2006) which can be located at http://alex.edfac.usyd.edu.au/LocalResource/Study1/hattonart.html (accessed 18.09.06). An earlier (1995) version of the paper appears in *Teaching and Teacher Education*, 11, (1) 33 - 49.

our clinical programmes.[9] This paper briefly discusses the seminal theories of Kolb and Schön and also relates clinical legal learning to constructivist learning theory.

It is also worth noting that if clinical law teachers have some knowledge of the theoretical background of reflection, we can share it with our students. As discussed below, some students are not natural reflectors.[10] Not everyone finds it easy or comfortable to articulate their innermost thoughts and feelings about an experience. Such students can be quite resistant to giving reflection, and they can find it extremely difficult when they try. If we can share some of the educational theory which underlies reflection, it can aid such students to have a broader understanding of why they are being asked to reflect and why it matters. For a student showing borderline reflecting effort/abilities, this could make all the difference.[11]

Kolb's learning cycle

Kolb's experiential learning cycle can be depicted as follows:[12]

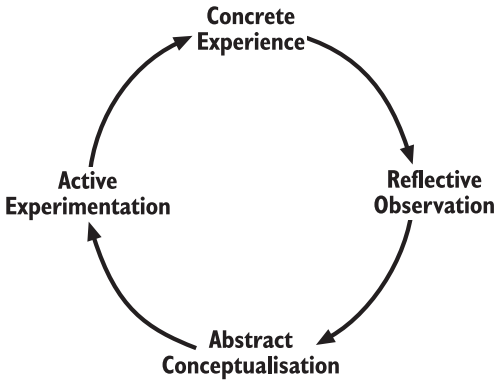

Figure 1: Kolb's experiential learning cycle[13]

This cycle, or spiral, represents the process by which Kolb suggests students engage in learning. It is a cycle of experience, reflection, thinking and acting.[14] The cycle can be entered at any point, but the learner always follows the same sequence, and indeed the learner may 'go round' once or several times as part of a learning process.

10 Moon notes that just as some students find reflection a difficult thing to do, some staff find it hard to understand also. See *supra* note 7 at p. 10.

11 See "Taking reflection seriously: How was it for us?" by Maughan, C and Webb, J in *Teaching Lawyers' Skills* by Webb, J, and Maughan, C (eds) Butterworths (1996), in which the authors discuss using materials on reflection and educational theory as part of their legal process course, to encourage students to have a greater appreciation of the theoretical basis for reflection.

12 *Experiential learning - experience as the source of learning and development* Kolb D A, Prentice-hall (1984).

13 This diagram is reproduced from Gibb's publication *Learning by doing: a guide to teaching and learning methods*, Further Education Unit (1988) which includes examples of the application of Kolb's learning cycle in various teaching scenarios.

14 Or as Moon describes the cycle, there is having an experience, reflecting on the experience, learning from the experience, and then trying out what you have learned. See supra note 7.

Applying Kolb in the context of clinical legal education, we can take the example of a student who is learning how to interview clients. In this example the student will engage in a simulated interview with an actress playing the role of the client and the entire interview is to be video recorded. The cycle might be entered at the conceptualisation stage, with the student having been asked to read a list of materials on effective client interviewing. Having digested the materials the student begins to form generalisations about what makes a successful interview. Next he experiments with these concepts and generalisations as he prepares his plan for the interview. The interview takes place as an active experience, with the student actively testing and exploring his ideas and assumptions.[15]

Following the interview the student engages in reflection. As teachers we can employ any number of methods to assist our students to engage in effective reflection, thus maximising the potential for learning.[16] For example, in this scenario the actress could be asked to give feedback to the student saying how effective the interview was from her point of view. In a group session the student could be asked to report on the interview to his peers and give an assessment of his own performance, and this could be followed by the group watching the video recording and giving peer assessment. Such feedback given in a timely manner can assist the student to elucidate and articulate his thoughts and feelings about the interview, thus facilitating effective reflection, and it can guide him towards developing his concepts about good interview techniques, which can be put into practice next time the student prepares for and carries out another interview, thus going around the cycle again.

Schön's theory of the reflective practitioner

Another theory of relevance is Schön's theory of the reflective practitioner.[17] Schön observed that professional education tended to distinguish between knowledge and action by assuming that professional practice is merely the application of a body of knowledge to a practical situation. However, Schön notes that rarely if ever are things that simple in practice; that real life tends to involve messy, indeterminate situations which professionals try to sort out by a combination of knowledge, intuition and action. Schön argues that reflection is an integral part of this problem solving process. Whilst we have a body of tacit knowledge which helps us to respond spontaneously and unconsciously to get through every day tasks, to deal with novel situations we need to expand our repertoire of responses. We use reflection to bring our tacit knowledge to the surface so that we can consciously confront and assess its application to the novel problem at hand.[18]

15 Gibb, G, supra note 13 at section 2.

16 These methods are discussed in further detail below. See also Gibb, G, supra note 13. As Gibb says, this kind of experiential learning is not the same as 'discovery' learning where it is hoped that learners will discover things for themselves in a haphazard way through sudden bursts of inspiration. The activity should be carefully designed by the teacher and the experience carefully analysed afterwards for learning to take place. A crucial feature of this kind of experiential learning is the structure devised by the teacher within which learning takes place.

17 See *The Reflective Practitioner: How Professionals Think in Action* by Schön, D, Arena Publishing (1983) and also *Educating the Reflective Practitioner* by Schön, D, Jossey-Bass (1987).

18 See Maughan and Webb, supra note 11.

The potential for applying Schön to clinical legal education is immediately apparent. In conventional class room teaching legal problems given to students tend to be nicely confined, solvable (without too much difficulty) and limited to the subject area in question. On the other hand, as practitioners and clinicians well know, cases in the 'real world' are nothing like this. Almost any client seeking legal advice will have a problem which encompasses different areas of law, and the facts are never presented neatly on a plate. This means that students dealing with such situations cannot simply fall back on conventional class room teaching. They need to develop new strategies and approaches to problem solving, through the process of reflection.

Constructivism

Constructivist learning theory holds that learning is not something that happens passively, but rather that students participate actively in learning and construct their own knowledge.[19] As Ormrod has put it, "learning involves constructing one's own knowledge from one's own experience."[20] This is done through two processes, known as accommodation and assimilation. When a learner has an experience which aligns with their internal understanding of the world they assimilate that experience into the existing framework. If an experience does not fit the existing framework then the learner re-frames his or her internal understanding of the world to accommodate what has happened. In this way the learner constructs new knowledge.

Constructivist-based pedagogies tend to be founded on a belief that learning is best accomplished by a hands-on approach. The idea is that learning is a personal endeavour where students engage in experimentation and draw their own discoveries and conclusions. Under this model the teacher acts as a facilitator who encourages students to discover principles for themselves and to construct knowledge by working to solve realistic (or indeed, real) problems, often in collaboration with others. DeVries suggests that the teacher ought to engage with students whilst they are undertaking activities, wondering aloud and posing questions to promote students' reasoning.[21] This notion can be applied in a clinical law context. For example, if students are engaged in a negotiation role play exercise, the teacher could be present and ask probing questions of students such as 'What does that disclosure make you think about the strengths and weaknesses of the other side's case?' or 'Why do you think it is appropriate to make the opponent an offer at this stage?' Such contributions by the teacher can encourage the student to reflect more deeply on his approach to the activity, whilst he is doing it, rather than being swept along by momentum and acting without conscious thought.[22] When the exercise is finished the teacher could go over the questions posed during the exercise and ask the students to discuss them again, with the benefit of hindsight. Thus the questions could aid the student to reflect upon the activity and reach a deeper level of learning.

Constructivism can help to explain the distinction between 'surface' learning and 'deep' learning.[23] With 'surface' learning the student is likely to have little interest in what he is learning. His prime motivation is assessment. He will commit topics to memory for regurgitation upon assessment, often to be forgotten as soon as the exam has passed or the essay has been handed in. He does not

19 The theory of constructivism is generally attributed to Piaget. See *The Psychology of Intelligence* by Piaget, J, Routledge (1950).

20 'Educational Psychology: Developing Learners', Ormrod, J E, (4th edn) (2003).

21 *Developing constructivist early childhood curriculum: practical principles and activities,* DeVries et al., Teachers College Press (2002).

22 This tallies with Schön's concept of reflection in action. See supra note 17.

23 Moon also uses the terms 'meaningful' and 'non-meaningful' learning. See *Reflection and Employability,* Moon, J, LTSN (2004).

aim to achieve any real understanding of the subject matter. In constructivist terms, this person is learning in a passive sense; he makes little or no effort either to accommodate or assimilate new learning to past experience and thus he never moves beyond a surface appreciation of the topic. By contrast, the 'deep' learner often has a genuine interest in the topic. He enjoys learning; he wants to understand what he is learning about. The 'deep' learner relates what he is taught to past experience and takes the time to think about feedback in order to improve future performance. In this manner the 'deep' learner constructs new knowledge.[24]

It can be seen that reflection plays an important role in distinguishing between the two learning styles. Whereas a 'surface' approach is marked by unrelatedness, memorisation and unreflectiveness,[25] the 'deep' learner reflects on experience:

> 'Reflection is a way of getting students to realise that learning is about drawing on life experiences, not just something that takes place in a classroom. It enables students to think about what and how they learn and to understand that this impacts on how well they do.'[26]

As wonderful as reflection is, it is not a cure-all which is guaranteed to turn out sensitive, ethical lawyers, or those who have particularly good negotiation/advocacy/interviewing skills, or whatever it is we particularly want our students to achieve. We must remember that reflection is a method of learning which students can employ and teachers can facilitate, but the eventual outcome is in the hands of the students and the teachers. If, for example, we wish to promote ethical awareness amongst students, we must give them concrete experience which gives rise to ethical issues, and then as teachers we must facilitate their reflection in a meaningful way. If we wish to promote technical drafting skills, we need to give students experience of drafting and then we should encourage their reflective attention towards the technical aspects of drafting.[27]

One of the most useful aspects of reflection is its chameleon-like versatility. Reflection can be applied in any number of learning contexts, from professional skills to broader issues of social awareness and justice and even to living a fuller intellectual, emotional and professional life. Indeed, as Macfarlane says,

> 'A reflective model encourages the development of both cognitive and affective theories of moral and ethical behaviour, challenging students to integrate these into their personal belief systems as a result of their experiences instead of (at best) passively absorbing the 'rules' of professional conduct.'[28]

24 See also supra note 7 at p. 5.

25 "Diversifying assessment and developing judgment in legal education" Hinett, K, and Bone, A, in R Burridge et al (eds) *Effective Learning and Teaching in Law,* Kogan Page (1996) at p. 54.

26 *Developing Reflective Practice in Legal Education*, Hinett, K, UKCLE, LTSN, at p. 6.

27 The decision about what kind of lawyers we are, or should be, trying to produce from law clinics is probably down to individual teachers or institutions and is, in any event, outside the scope of this paper.

28 "Pedagogic Principles, Certification Needs and the Assessment of "Reflective Practitioners"", Macfarlane, J, *International Journal of the Legal Profession* 5(1) 1-23 (1998).

> And there is an added benefit of encouraging students to reflect. By engaging in reflection students come to have a better understanding of their own cognitive functioning, making them more aware of how they learn. This increased self-awareness of learning, or metacognition, is correlated with better learning.[29] In other words, by encouraging students to reflect we are helping them build for themselves a self-awareness which will promote more successful learning in the future.[30]

How to promote student reflection

Now that we know what reflection is, and what its potential benefits are, it is useful to consider some practical ways in which clinical law teachers can encourage students to reflect.

a) Course design - at a fundamental level, the ways in which courses are designed can have a significant impact on whether effective reflection is likely to occur. For example, in their legal process course Maughan and Webb took the view that in order to learn, students had to know how they were learning. Accordingly Maughan and Webb devoted a number of workshops to learning theory as part of which students were required to examine ideas such as Schön's concept of reflection, behaviourist and cognitive learning theories and discrepant reasoning.[31] By having this theoretical background it was believed that students would have greater understanding of reflection and why it formed part of their course.

b) Teacher knowledge - it is beneficial if the teacher has knowledge of the educational theory regarding reflection.

c) Arrangement of class rooms - the way in which a class room is arranged can have a significant impact on whether reflection is forthcoming. Compare the conventional set-up with students seated behind rows of desks and the chalk-wielding teacher standing at the front, with a small group setting where students and teacher are ranged equally around a table, or better still, in a circle with no furniture to divide the group. Immediately the latter does away with traditional power props; the teacher is present at the same level as students, and the circle arrangement encourages discourse amongst the group.

d) Teacher to act as facilitator - the role adopted by the teacher should be that of facilitator, rather than playing the master who can give the answers on every issue.[32]

29 Moon refers to two studies, one by Ertmer and Newby in 1996 (evidence that good learners have better metacognitive processes than poor learners) and one by Main in 1985 (study skills programmes that support learners' awareness of their learning processes seem to be more successful than those which focus on techniques). See supra note 7 at p. 7.

30 In addition to these student centred benefits of reflection, there are other wider advantages to be had from encouraging reflection amongst students. Hinett, supra note 26, and Race, supra note 6, both refer to current UK government agendas for widening participating in higher education, which mean that higher education will rapidly have to cater for a wider and more varied population with diverse cultures and differing learning needs and capacities. Hinett argues that in this context reflective practice offers a flexible framework in which students can make sense of their own development, and it can encourage them to become lifelong learners. Race comments that with increased attention to student retention in higher education, reflection can be one of the most powerful vehicles for alerting teaching staff to 'at risk' students, so that appropriate compensations and adjustment may be made to reduce the risk of withdrawal from higher education.

31 See supra note 11.

32 Indeed to be an effective facilitator the teacher should resist the temptation to give answers, and try to guide the students towards finding them for themselves. See Webb's comments on his view of the facilitator's role at p. 268 of Maughan and Webb, supra note 11.

e) Learning environment - reflection can be further encouraged by the creation of a supportive and non-judgmental learning environment. If students know there are no right and wrong answers in reflection, and that they can be free to say things which might otherwise appear stupid or 'un-cool' in another setting, it can be enormously liberating and conducive to quality discussion.[33]

f) Small groups - having students work on problems or cases in small groups can further facilitate reflection. As students become more comfortable working closely with peers there is greater opportunity for peer and self assessment.

Further to these 'background' considerations there are the actual methods which can be employed with students to promote reflection.[34] These include:

g) Self and peer assessment, which Boud describes as the involvement of students in identifying standards and/or criteria which apply to their work, and in making judgments about the extent to which they have met these criteria and standards.[35] With self assessment the student can contemplate not only whether the work he has produced meets the relevant standards and criteria, but also the process of learning involved in producing the work, thereby promoting metacognition as discussed above.

h) Learning journals, logs and diaries, which may be structured or unstructured. Students can be encouraged to use these items to reflect regularly over a period of time with the aim of improving or supporting learning.[36]

i) Oral presentations including some reflective element.

j) Reflective exercises, to encouraging effective reflection.

k) Reflection on work experience, work-based learning, placement learning etc.

l) Portfolios, which generally include a reflective element.

m) Personal development planning, which the Quality Assurance Agency has defined as a structured and supported process undertaken by an individual to reflect upon his or her own learning, performance and/or achievement and to plan for their personal, educational and career development.[37]

Within these structures it can be helpful to give students more detailed guidance about how to reflect. Moon suggests a two stage guidance process may be helpful for students: an initial presentation stage to introduce ideas about reflection, and then a second stage to focus on deepening the process of reflection.[38] The first stage might involve consideration of points such as what reflection is and how it differs from more familiar forms of learning, why reflection is being

33 Although, as Maughan and Webb note, supra note 11, it should be a supportive group, not a support group. The function is to facilitate learning, not just make people feel better.

34 See Hinett, K, supra note 26, and Moon, J, supra note 7.

35 *Enhancing Learning Through Self Assessment*, Boud, J, HERDSA (1995).

36 As Moon observes, learning journals have been used successfully in most disciplines including the sciences and mathematics. See *Learning Journals: A Handbook for Academics*, Moon, J, Kogan Page (1999). If students are required to submit reflective written material later in the course, for example as part of a portfolio, learning journals, logs and diaries can form useful raw material on which students can draw. This would involve second-order reflection, as discussed below.

37 *Guidelines for HE Progress Files*, Quality Assurance Agency (2001)

38 Moon, J, supra note 7 starting at p. 10.

used to facilitate the relevant area of learning, why it is acceptable to write reflective work in the first person, and examples could be given to the group of good and poor reflective writing, in order to generate discussion.[39] The second stage is based on a developing awareness of knowledge and how it is constructed, including the way in which events can be conceived of differently according to emotions and frames of reference. For example, students could be asked to reflect upon a legal dispute from the point of view of both claimant and defendant. Moon also refers to second-order reflection, where a student is asked to look through previous reflective work and write a reflective overview.[40]

Race comments that it is probably unwise to attempt to 'teach' reflection. He suggests that the process can be illustrated but in the final analysis reflection remains an individual act in most circumstances.[41] Race argues that the most efficient way to help people reflect, and to evidence their reflection, is by providing them with questions as devices to help them to focus their thinking, and to direct their thinking towards those areas of work where reflection can pay highest dividends. He suggests that deep reflection can be generated by clusters of questions. These might include past, present and future-tense questions, such as:

1. What worked really well for you? (past tense)
2. Why do you now think that this worked well for you? (present tense)
3. What are you going to do as a result of this having worked well for you? (future tense)

Alternately clusters of questions can comprise a scene-setting starter, and the sub-questions which follow should be probing or clarifying questions, intentionally leading towards deeper or more focussed reflection. Race notes that often such clusters begin with interrogatives such as 'who', 'what', 'when', 'where', why' and 'how'. Some examples given by Race include:

- What was the most boring or tedious part of doing this assignment for me? Can I see the point of doing these things? If not, how could the assignment have been re-designed to be more stimulating and interesting for me?
- What have I got out of doing this assignment? How have I developed my knowledge and skills? How do I see the payoff from doing this assignment helping me in the longer term?
- What are the three most important things that I think I need to do with this topic at this moment in time? Which of these things do I think is the most urgent for me to do? When will I aim to start doing this, and what is a sensible deadline for me to have completed it by?[42]

39 Following the first stage it could be helpful to ask each student in the group to produce a short document setting out his or her views on how to approach reflection and what makes good reflection, or any of the other topics covered in stage one. Rather than the teacher providing a hand-out, this will encourage students to take ownership of the material as well as increasing their understanding of reflection.

40 Moon suggests this can be done by way of a double entry journal. Students write only on one half of a vertically divided page. They leave the other space blank until another time, when they go through the initial material writing further comments that emerge from their more coherent overview of the initial work. See Moon, supra note 7 at p. 14.

41 This accords with the view that reflection is a method of teaching and learning rather than a substantive topic with right and wrong answers. To the extent that it is possible to teach a method of learning, reflection is capable of being taught, however, Race's approach to teaching reflection is in itself facilitative by encouraging students to construct the method for themselves through use of clusters of questions. See supra note 6.

42 Race, P, supra note 6.

In addition to occasions when students are required to engage in reflection as part of their course, we can encourage them to reflect whenever they have a particularly acute learning experience. Say, for example, a student prepared diligently prior to representing a client at an Employment Tribunal hearing but, despite her best efforts, the hearing was a disaster. As soon as possible after the event the student should be encouraged to reflect on the experience. The reflection could take place in a small group setting with the student's peers and tutor, where the student could discuss her perceptions of what went wrong and how she felt about it. Other students could be encouraged to offer constructive comments. In addition, the student could make a written record of her reflection. This method would encompass several of the reflection mechanisms discussed above, with the added benefit that capturing all of this contemporaneously is likely to focus the student's mind and maximise the potential for learning.

Should we assess reflection?

On a traditional undergraduate law degree, assessment of substantive areas of law such as tort or property focuses on what the student knows. The student's knowledge is adjudged against a set of learning outcomes. Assessment on a clinical legal education programme is subtly, but importantly, different. Not only are we assessing the student's substantive knowledge and skills, but also the learning journey he or she has taken from the beginning to the end of the course. In order to assess the learning journey we must have some evidence that it took place and what it encompassed. Reflection, especially written reflection, provides this evidence.

As mentioned earlier in this paper, reflection is a normal human activity but many students find it challenging to engage in the more formalised type of reflection which is often required as part of a clinical law programme. Although reflection need not be structured or formal compared with traditional academic work, there is generally an obligation for students to reflect in a disciplined manner, often at set times or occasions, and there is also a requirement for students to evidence their reflection usually in writing. Some students find it extremely difficult and feel very self-conscious engaging in this kind of writing, and it can be a challenge for clinical law teachers to coax good quality reflection out of such students.

On the clinical legal education programme at Northumbria University[43] we try to identify any problems with reflection early in the academic year by requiring students to submit a sample piece of written reflection for formative feedback. The idea is to let students know, early, if they are reflecting in an appropriate manner or if they need to adapt their approach. Clinic staff report that from these early sample pieces of reflection a substantial proportion of students, even good students, perhaps as many as one fifth overall, fundamentally fail to grasp what reflection is and how it can be evidenced. The most common error seems to involve submitting a piece which is purely descriptive of the experience on which the student has chosen to 'reflect', and which contains little or no qualitative analysis. Even where students seem to grasp what is required, an

43 Northumbria University offers a 'combined' law degree which is unique in the UK. It enables students to complete, within four years, their undergraduate law degree as well as their postgraduate professional qualification as solicitor or barrister. At the present time clinic is introduced during the third year of the course, during which students engage in simulated legal cases. During the fourth (final) year of the course all students, currently around 114 in number, participate in a full clinical model with students offering legal advice and representation to members of the public in a wide range of areas including employment, family, criminal appeals, personal injury, consumer, general civil disputes, welfare benefits, education, and construction law.

even higher percentage (perhaps as many as half of them) initially seem not to appreciate why they are being asked to reflect and what benefit reflection is ultimately likely to have in terms of their learning.[44]

Regrettably, for many students learning is driven largely by assessment. If reflection is not to be assessed there must be a risk that some students will view it as less important than assessable work, and therefore potentially expendable.[45] The risk is likely to be more acute amongst students who struggle with reflection, either because they have trouble doing it or cannot see the point. Moon suggests that if we see value in students' reflective work and they will not engage in unassessed work, then reflection will need to be assessed in some way.[46] Accordingly there seem to be good arguments for making reflection assessable.

Not everyone agrees with this view. Bolton refers to a seminar given by Boud at Sheffield University in February 2001, during which he argued that assessment is inappropriate because it will stultify or even destroy 'raw reflection', including students' confidence in expressing themselves freely and exploratively, and that it may lead to unethical levels of disclosure and confession.[47] The UK Centre for Legal Education (UKCLE) notes that assessing reflection is a sensitive issue because it is highly personal and developmental and because it can raise difficulties around parity and validity of assessment.[48]

Whilst recognising the validity of these concerns, it is possible to assess reflection in a manner which does not significantly risk destroying the openness and freedom of students' raw reflection. This can be done by directing assessment towards reflective work which draws upon, but does not necessary include (unless it is a student's wish to do so), raw reflection. This way the student benefits from recording his or her raw reflection initially, revisiting it at a later date to mull over the experience again, and then preparing the reflective piece for assessment.[49]

Winter et al comment that the various difficulties described above are capable of being resolved, and are not in any event so very different from the problems of academic assessment in general. They say that if assessment is based on professional criteria and if examiners spend time sharing and discussing their responses to groups of texts, judgments can be agreed as to whether work fulfils the given criteria and with what degree of success.[50] Moon agrees. She says that technically the issues surrounding assessment of reflection are no more difficult that those involved in the assessment of anything. Although staff may have differing views about reflective practice the potential for unfair diversity of assessment can be minimised by having staff sessions in which understandings, proposed methods, and assessment techniques are explored and approaches

44 This early lack of understanding about why students are being asked to reflect seems to lend weight to the approach of Maughan and Webb, who have tackled the situation by having sessions in their legal process course devoted to the educational theory surrounding reflection. See supra note 11.

45 See further Hinett, supra note 26 at p. 40, and Hinett and Bone, supra note 25 at p. 57.

46 See Moon, supra note 7.

47 *Reflective Practice: Writing and Professional Development*, Bolton, G, Paul Chapman (2001) at p. 83.

48 http://www.ukcle.ac.uk/resources/trns/clinic/nine.html (accessed on 17.09.2006)

49 This is the approach taken by Bolton, supra note 47 at p.83. Similarly at Northumbria University there is no requirement for students to submit raw reflection for assessment. Moon comments that greater learning is likely to result if a student is required to 'secondarily' reflect on their initial reflection. See *Reflection and Employability* Moon, J, Learning & Employability Series, LTSN (2004) and *The Module and Programme Development Handbook* Moon, J, Kogan Page (2002a).

50 See Bolton, supra note 47 at p. 84 and Professional Experience and the Investigative Imagination: *The Art of Reflective Writing,* Winter, R, Buck, A, and Sobiechowska, P, Routledge (1999) at p. 148.

agreed.[51]

The Quality Assurance Agency for Higher Education in the UK has published a code of practice for the assurance of academic quality and standards in higher education.[52] Clearly, if reflection is to be assessed, it must be done so in a way which meets the requirements of the code especially as to clarity and consistency. Amongst other things there must be clearly expressed learning outcomes, which say what is required in terms of reflection, and the criteria for assessment of the reflection should relate to these learning outcomes.[53]

A tension emerges between the need to prescribe clear criteria for assessment, and the inherently subjective nature of reflection which is personal, unique and unboundaried. Boud, who is opposed to assessing reflection in the first place, argues that the unboundaried nature of effective reflective practice renders it inappropriate for an assessed formal learning context, where clear boundaries are necessary.[54] Others acknowledge the tension but do not view it as a bar to assessing reflection.

Maughan and Webb say they have identified guidelines and criteria for assessing their students' reflective work, but not ones which are based on detailed written standards or competencies. They say their approach of not being too prescriptive has led to some extremely innovative work from their students, including a video reconstruction of a case, students presenting their experiences in a quiz show format, and a video diary recording the progress of students' work on a case. Maughan and Webb comment, however, that this enabling approach is difficult to incorporate into assessment criteria which are flexible enough to reflect what are often very diverse presentations from across the same year group.[55]

Burridge raises an interesting point, namely, which part should the student reflect upon when faced with a complex case? He notes the view expressed by Blasi that in guiding students as to what they should be reflective about, the tutor should point out the most critical aspects of a situation or problem. He also notes the alternate view, that the choice should be left to the student to discover from experience.[56] When discussing cases with students on a live client programme, it is inevitable that attention will focus on the most challenging or pressing aspects of the case at the given time. Generally the student perceives importance and urgency in the context of needing to deal with an issue on a practical, case management level. The appropriateness for reflection tends to be perceived afterwards, once the crisis has passed. Thus the most salient aspects of cases tend to present themselves for reflective attention.

If written reflection is to be assessed, what criteria should be applied in terms of structure, grammar and punctuation? Should we expect students to submit a polished piece of work or should we accept something less refined? Although Boud and Walker suggest that reflective writing should be judged "in terms of criteria for the recognition of reflective writing" rather than by standard academic writing conventions,[57] experience on the live client programme at Northumbria

51 See Moon, supra note 23.

52 http://www.qaa.ac.uk/academicinfrastructure/codeOfPractice/section6/default.asp (accessed on 18.09.2006)

53 See Moon, supra note 23.

54 Bolton, supra note 47 at p. 83.

55 Maughan and Webb, supra note 11 at p. 287.

56 "Learning Law and Legal Expertise by Experience" by Burridge, R, in *Effective Learning and Teaching in Law*, R Burridge et al (eds) Kogan Page (2002) at p. 44. Hinett, supra note 26, at p. 42, refers to Boud's observation that it is naïve to expect students to restrict their reflection to matters outlined by the tutor.

57 'Promoting Reflection in Professional Courses: the Challenge of Context', Boud, D, and Walker, D, *Studies in Higher Education* 23(2) 191 - 206 at p. 194.

University suggests there is some degree of parity between reflective work which is clearly expressed and meets normal academic writing standards, and that which shows depth of thought and perception. An abundance of spelling errors, and poor structure and layout, are usually indicative of a student who has rushed his reflection and failed to see the point, and as a result submits a fairly poor piece of work.[58] It may of course turn on what type of reflection is being assessed. If one is assessing 'raw' reflection such as learning diaries or journals, it would make sense to make some allowance for errors of expression and grammar.

Finally, there is the 'old chestnut' of how to assess the student who performs brilliantly with her live client work but turns in a relatively shallow piece of reflection, and conversely, the student who is clueless when it comes to dealing with cases but submits an excellent piece of reflection analysing why it all went wrong.

In the former situation (good performance, poor reflection) it seems appropriate that the poor reflection should warrant a substantial reduction in the student's overall grade. As discussed above, if a student is unable to perceive the reasons for her good performance and cannot extrapolate any lessons for the future, the quality of her learning experience is thereby downgraded. This should be reflected in her assessment. With the converse situation (poor performance, good reflection) it is sometimes more difficult to know how grade a student's work. Obviously, if a student has performed badly he deserves a relatively low grade, but ought not we give some kind of upgrade to take account of excellent reflection? If not, what is the point of assessing the reflective work? Then there are further questions: to what degree should excellent reflection be able to 'remedy' poor performance? Is it fair for this kind of student to score better overall than another whose live client work was much better but whose quality of reflection more average? Inevitably such issues will persist wherever reflection is assessed alongside performance.

What are we assessing, when we assess reflection?

If we make the decision to assess students' reflective work, it is pertinent to consider exactly what we are intending to assess. This depends on the purpose of the reflective work and what it is intended to achieve. As argued above, reflection is a method of teaching and learning which can be employed to great effect in a wide range of educational scenarios. By being clear about the purpose for which students are being asked to reflect in any particular circumstance, we can begin to formulate appropriate assessment criteria.

Moon comments that a crucial decision in the development of assessment criteria for reflective tasks is whether we are assessing the content of the reflective learning or the reflective process itself.[59] Say, for example, clinical law students are being assessed on drafting skills and as part of the course requirements they are required to submit a reflective journal which records the development of those skills over the course. The main focus of this assessment will be students' drafting skills, with the reflective journal forming part of the evidence. On the other hand, learning outcomes may state that students will become proficient in reflective practice, in which case the assessment should focus on the reflective process as well as the content. This raises the question of

58 This can of course be clarified from the outset by making explicit to students the requirements as to use of language, structure and presentation. See Moon, supra note 7 at p. 15.

59 Supra note 23 at p. 13.

how the reflective process ought to be assessed.

It is sometimes said of reflection that 'you know a good one when you see it' but obviously we need to be more rigorous than this if we are to identify fair and consistent standards for assessing reflection. To a certain extent this can be circumvented if a decision is taken to assess reflection on a 'competent' or 'not yet competent' basis. Then all that needs to be established are base-line criteria for a pass, avoiding difficult judgments about degrees of success and awarding of grades.

If, however, we decide to grade reflection then it is necessary to identify clear guidelines for awarding grades. Hatton and Smith, working in the context of teacher education, have developed a system of criteria for the recognition of evidence for different types of reflective writing. They identify four categories as follows, which are applicable to reflective work produced in a clinical law context:[60]

1. Descriptive writing - this is not reflective writing. It may take the form of a description of events that occurred or a report of literature. There is no attempt to provide reasons or consider justifications for events.
2. Descriptive reflection - this has a reflective element. There is a description of events and some attempt to provide reasons and/or justifications but in a reportive or descriptive way. There may be one perspective or rationale identified (for example, 'I chose this problem solving activity because I believe that students should be active rather than passive learners') or there may be some recognition of alternative factors and perspectives (for example, 'Tyler (1949), because of the assumptions on which his approach rests suggests that the curriculum process should begin with objectives. Yinger (1979), on the other hand argues that the 'task' is the starting point').
3. Dialogic reflection - this demonstrates a 'stepping back' from the events or actions being discussed to reveal a different level of mulling over, and the author may engage in discourse with him/herself. Such reflection is analytical and/or integrative of factors and perspectives and may recognise inconsistencies in attempting to provide rationales and critique. For example:

   > 'While I had planned to use mainly written text materials I became aware very quickly that a number of students did not respond to these. Thinking about this now there may have been several reasons for this. A number of the students, while reasonably proficient in English, even though they had been NESB learners, may still have lacked some confidence in handling the level of language in the text. Alternatively a number of students may have been visual and tactile learners. In any case I found that I had to employ more concrete activities in my teaching.'

4. Critical reflection - this demonstrates an awareness that actions and events are not only located in, and explicable by, reference to multiple perspectives but also that they are located in, and influenced by, multiple historical and socio-political contexts. For example:

   > 'What must be recognised, however, is that the issues of student management experienced with this class can only be understood within the wider structural locations of power relationships established between teachers and students in schools as social institutions based upon the principle of control'.

60 See Hatton and Smith, supra note 9.

Moon's work on assessment of reflective writing in a clinical law context builds upon the work of Hatton and Smith. Moon's is a three stage analysis which identifies features that can be indicative of different levels of reflection:[61]

A. A descriptive account which contains little reflection:

- it describes what happened, sometimes mentioning past experiences, sometimes anticipating the future, but all in the context of an account of the event
- there are some references to the author's emotional reactions, but little or no exploration of how these relate to her behaviour
- ideas are taken on without questioning them or considering them in depth
- the account is written only from the author's point of view
- external information is mentioned but its impact on behaviour is not subject to consideration
- generally one point is made at a time and ideas are not linked

B. An account which shows evidence of some reflection:

- there is description of an event, but where there are external ideas or information, the material is subjected to consideration and deliberation
- the account shows some analysis
- there is recognition of the worth of exploring motives for behaviour
- there is a willingness to be critical of action
- relevant and helpful detail is explored where it has value
- there is recognition of the overall effect of the event on self - in other words, there is some 'standing back' from the event
- however, there is no recognition that views can change with time and more reflection, i.e. that that frames of reference affect the manner in which we reflect at a given time.

C. An account which shows quite deep reflection:

- there is evidence of self-questioning, possibly including internal dialogue. There is deliberation between different views of the author's own behaviour
- the author takes account of the views and motives of others and considers them against her own
- the author recognises how prior experience and thoughts interact with the production of her own behaviour
- there is clear evidence of standing back from an event
- the author may indicate a clear divergence between the reflective process and the points she wishes to learn
- there is recognition that the personal frame of reference can change according to the emotional state in which it is written, the acquisition of new information, the review of ideas and the effect of time passing.

61 Supra note 7, appendix 1.

It can be seen that effective reflection in a clinical law setting involves students engaging in an assessment of themselves in their complex new role as lawyers. Inevitably, and quite constructively, much of the focus will be on students' skills and personal performance seeking to identify areas for improvement. However, the best quality reflection will move beyond this with students considering themselves and their actions in a wider holistic sense encompassing their role in the legal profession and society at large.

An important thing to note is that there is no universally accepted set of criteria for assessment of reflective work. Reflective tasks are set in order to achieve different purposes, and therefore assessment criteria need to be tailored accordingly.[62] If the purpose of reflection is to become adept at the reflective process itself, then the valuable analysis of Hatton and Smith, and Moon, discussed above can lend assistance to clinical law teachers in formulating criteria which are applicable to their own particular circumstances.

Can assessment of reflection ever be fair?

So far we have discussed the personal and subjective nature of reflective work. It has been argued that despite its nature, reflective work is capable of assessment provided that staff are clear about the purpose for which the reflective task has been set, and they develop assessment criteria accordingly. If the reflective process itself is to be assessed, the work of Hatton and Smith, and Moon, above, provides a useful starting point for developing assessment criteria.

Whilst this aims to introduce objectivity into the process of assessing reflection, the question nonetheless arises whether the process can ever be truly objective and fair because the teacher marking the reflection often has a close working relationship with the student which could, consciously or unconsciously, affect the grading of their work. The assessment of clinical work therefore contrasts significantly with the assessment of most university work, where there is a general trend towards anonymous marking.

Reflection in a clinical legal programme usually takes place within a framework where teachers and students develop a close working relationship over a period of time. Students' work is often assessed by those teachers according to the first hand knowledge they have of the students' performance over the programme. Grimes argues that the intensive nature of clinical work gives the supervisor and student a rare opportunity to demonstrate to each other their roles in, and understanding of, the assessment process.[63] However, it could also be argued that the close working relationship between teacher and students gives rise to a possibility of bias and unfairness. Say, for example, a student has annoying personal habits, might these subconsciously influence the teacher towards giving him a lower mark than is warranted? Or if a teacher happens to get on particularly well with another student, might he receive a higher mark than is fair? At the very least the close supervision implicit in clinical programmes makes objective assessment difficult.[64]

One way to try to surmount these subjective difficulties on assessment is to have a system of double marking reflective work, so that if the close relationship between teacher and student has

62 Supra note 7 at p. 15. Moon comments that it is entirely reasonable to engage students in the process of developing or fine-tuning assessment criteria, if not for their own work, for the work of next year's students.

63 Supra note 2 at p. 159.

64 Supra note 2 at p. 152.

in some way unfairly influenced the assessment of the student's work, this can be neutralised upon appraisal by an unconnected second marker. As discussed below, a double marking system can also have the added benefit of ensuring consistency in assessment of reflective work between different teachers on the programme.[65]

SECTION II: Assessment Case Study

The first part of this paper has considered the nature of reflection, concluding that reflection is a valuable method of teaching and learning which can be employed in numerous educational contexts. The first part has also considered issues relevant to assessment of reflective work.

The remainder of this paper focuses on a case study within the context of the clinical law programme at Northumbria University. The study considers issues surrounding double marking and asks whether current methods for assessment of the programme's reflective essay achieve acceptable levels of marking consistency.

Reflection within the live client programme at Northumbria University

All students undertaking the final year of the 'combined' law degree at Northumbria University participate in the live client programme known as the Student Law Office (SLO), where students provide legal advice and representation to members of the public in a wide range of legal cases.[66] Students are divided into 'firms' of four to six individuals and each firm is supervised by a practising solicitor/barrister or welfare benefits officer. Currently there are around 114 students and 16 supervisors involved in the programme.

Reflection, both formal and informal, occurs at many points during the SLO programme.

Each firm meets weekly with its supervisor, to discuss and share progress of the firm's cases and to talk about any problems or challenges the students have encountered. So as well as providing a forum for deciding on how to proceed with cases, firm meetings are designed to give students an opportunity to reflect with their peers and supervisor on anything they wish to discuss. The format of firm meetings is deliberately unstructured in order to promote reflection. Because the students are not pressured to raise or disclose anything they are not comfortable with, they tend to open up quite naturally to share and reflect upon their experiences.[67] None of this informal reflection is assessed.

Students are required to submit a portfolio of their work for assessment at the end of the year. The portfolio must contain evidence of certain key areas of practical work over the course of the year, together with reflection on those areas. For example, one key area of practical work is written communications. Students must include copies of all substantive written communications they have produced, and a reflective commentary which refers to three specific items (such as a letter of

65 Hinett and Bone, supra note 25 at p. 66, discuss consistency in assessment and they say that with planning, it ought to be possible to achieve intra-reliability of assessment within a single faculty. They refer to a need for law teachers to discuss assessment and what is valued in their teaching. The UKCLE has funded research into consistency of marking across law schools, further details of which can be located at http://www.ukcle.ac.uk/research/projects/mitchell.html (accessed 18.09.06).

66 See supra note 43.

67 In addition to weekly firm meetings, students often meet with each other and/or with their supervisor during the week to discuss cases and this provides a further opportunity for informal reflection.

advice, a witness statement and a letter to an opposing party setting out a case) and which: (1) compares the different approaches the student took when preparing each of the three items, and (2) discusses the development of the student's drafting and writing skills throughout the year and his or her strengths and weaknesses in this area.

Seventy percent of students' overall grade for the SLO comes from assessment of their practical work, as evidenced by their portfolios. The remaining thirty percent comes from a 3,500 word reflective essay based upon students' experience of live client work. Assessment criteria for the essay say:

> 'There is no set title for the essay element of the SLO assessment. This is to allow you scope to select a subject area that has affected your own particular experience within the SLO. The essay should lead you to consider the work you have done in the SLO in its wider context. It is not a summary of your work through the year. You should pick a subject area and relate it to your SLO experiences. For example you may wish to look at the practical effect of an area of academic law on the conduct or outcome of a case or you may wish to look at the role of the SLO in the wider context of provision of legal services.
>
> Your discussions in firm meetings may have raised a number of appropriate issues. Like any other essay it should be structured and informed.'

Although there is no set structure for the essay, by far the most common approach taken by students is to talk about a case they were involved in, describing the way the case progressed and the outcome, and how this affected them. Most students discuss their feelings about the case and some consider wider social and political issues such as potential areas for law reform.

What is not wanted is a dry piece of academic writing. While there may be some discussion of substantive law, the idea is for students to use their personal experiences in the SLO and the reflective skills they have developed over the course of the year to facilitate discussion of wider issues concerning the legal system.

Criteria for assessing the essay

The essay is assessed by the student's own supervisor and is given a grade out of 100. To promote a consistent approach between supervisors, grading criteria have been discussed and it has been agreed that essays are often characterised as follows:

- First class (70 or more) - an outstanding piece of work which stimulates the marker's interest in the topic. Draws on the student's experience in the SLO but goes considerably beyond. Presentation, structure, spelling and grammar immaculate or very good. Exciting, new ideas raised and analysed in a cohesive and persuasive manner. Student's emotions often not referred to, or only in passing. Mature appreciation of time frames, points of reference and wider socio-political issues. Workable law reform proposals often identified and discussed.
- High pass (60 to 69) - an interesting and stimulating essay which draws upon the student's SLO experiences and transcends them. Well structured and well argued, usually with a central theme linking discussion of cases. Student stands back from the events described to see the bigger picture/wider ramifications. Emotions may be referred to but are not the focus. Descriptive element is present, but minor, with analysis being the focus of the essay. Links are

made between the student's SLO experiences and the world at large. Appreciation of different frames of reference and standpoints.

- Low pass (50 to 59) - the essay focuses entirely on the student's experiences in the SLO. Content is largely descriptive with only a small amount of analysis and reflection. Some identifiable structure but not very good. The student's emotions are discussed, quite often as the focus of the piece, however there is only minimal understanding of effect of emotions upon the student's behaviour. Makes links between different cases or ideas but in a rudimentary way. Analysis is simplistic and uninformed. Little or no consideration of wider ramifications. No awareness of frames of reference and the impact of time upon qualify of reflection.
- Fail (50 or less) - exceeds or falls significantly short of the word limit. Little or no structure. May be unconnected with the student's experience in the SLO. Content is merely descriptive, e.g. a report of all the cases the student worked on. May be some reference to the student's emotions but no discussion of how they influenced his or her behaviour. No attempt to make links. No attempt to consider or analyse events or to draw conclusions. No awareness of alternative viewpoints or wider issues. Often characterised by sloppy presentation with little or no attention to spelling, grammar, use of language. No central theme or argument.

It can be seen that these criteria for assessment of the SLO essay are broadly reflective of the analysis of Hatton and Smith, and Moon, as discussed above.[68]

Method of assessing the essay

With large numbers of students and staff involved in the SLO programme it is important to aim for consistency in assessment, so that a student can be confident her essay will receive a fair grade regardless of the identity of her supervisor.

Accordingly once students' essays have been graded by their own supervisors, some are selected for double marking by a different supervisor. These include all first class essays, all fails, any bare passes, any essays that supervisors have asked to have double marked, and one or two essays from each supervisor.[69]

When an essay is marked for the first time by the student's supervisor, the supervisor completes a brief report which includes the names of the student and supervisor, the grade given for the essay and the supervisor's written comments. Some supervisors also annotate written comments on the essay itself while they are marking.

68 There is one interesting observation involving the emotional content of the essay. Moon, supra note 7 at pp. 13 - 14 and supra note 23 at p. 5 suggests that it is an important aspect of reflection to encourage students to refer to their emotional reactions and to perceive how this can influence their behaviour. Looking at the SLO essay overall there tends to be a great deal of reference to students' emotional reactions to cases, but often students do not analyse this or seek to draw any conclusions such as whether emotion had any effect on their conduct of the case. For this reason many of the essays which spend a significant amount of time discussing the student's emotions tend to be awarded relatively low grades. If the student refers to emotion with some degree of perception about how it has influenced his or her behaviour, that tends to be indicative of a better quality essay, but the first class papers rarely seem to refer to emotion much at all focussing instead of wider issues.

69 These tend to include essays which have been marked at the border of a grading band (i.e. given a grade of around 60 or around 70), or any right in the middle of a band (i.e. given a grade of around 55 or 65).

If an essay is selected for double marking, the double marker is given the essay together with the first marker's report. Based on their own assessment of the essay, and the first marker's report, the double marker can retain the grade given by the first marker or substitute their own grade.

Whilst this process aims to promote consistency and fairness in assessment of the essay, there may be some potential shortcomings. Earlier in this paper it was discussed how the intensive nature of clinical work can make objective assessment difficult. This could be true of the SLO essay, which is marked in the first instance by the student's supervisor. Although having some essays double marked is designed to further objectivity in the assessment process, might the reverse in fact be true? The double marker knows not only the student's identity, but also the grade given by the first marker and his or her written comments on the work. This could make it difficult for the double marker to carry out his function objectively. For example, if the double marker is a new member of staff, he might lack the confidence to change a grade given by an experienced, senior colleague.

It was decided to design and carry out a case study based on assessment of the SLO reflective essay in order to examine this issue in greater detail.

The case study

The case study was initially designed to consider one main question: whether double markers are influenced in their assessment of SLO essays by information available to them at the time of double marking. At discussed above, the double marker knows the name of the student and the identity of the first marker, and also has an assessment report showing the grade given by the first marker and his or her comments on the essay. If this information was not available on double marking an essay, would the grade given by the double marker be more or less consistent with the grade given by the first marker?

It was decided to look at this issue by taking a group of essays which had been double marked under usual SLO procedures, and then re-marking them under blind marking conditions, and then comparing the two sets of results.

At the end of the 2003/04 academic year, 101 reflective essays were submitted for assessment in the SLO, of which 35 were selected for double marking based on the usual SLO criteria discussed above. Under the case study conditions, all 35 of the essays were subjected to a further round of blind marking, which took place towards the end of 2004.

The method for getting the essays ready for blind marking was as follows. Each of the essays was typewritten, so there was no potential problem of students being identified by their handwriting. The essays were photocopied, then 'white out' was applied to the copies where required to obliterate any handwritten comments or other markings which had been made by the first markers. Care was taken, where possible, to delete the markings in a manner which concealed that they had been made at all. In addition, 'white out' was used to conceal students' names, first markers' names, and the grades given by first markers where these had been written on the essay. After this, the essays were photocopied again to hide the use of 'white out'. At this point the essays were considered to be ready for blind marking.

Of the five supervisors who had been involved in the double marking, the author excluded herself, which left four markers. It was ensured that none of the four was given an essay they had previously seen or discussed, and then the 35 papers were randomly assigned between them. Markers were

given instructions which asked them to assess and grade the essays in exactly the same way as they would ordinarily double mark a SLO essay. They were also asked to provide brief written comments giving their views about the current marking procedure.

Results

In this results section, comparison is made between the grades given in respect of the essay papers when they were double marked at the end of the 2003/04 academic year, and the grades which were given when the same papers were later blind marked under the case study conditions.

First, results were analysed to see whether grades tended to go up or down as a result of blind marking. It was found that of the 35 papers, grades went up in 18 cases (51%) and down in 14 cases (40%), and there was no change of grade in the remaining 3 cases (9%).

The next question was, to what degree did the grades given upon blind marking vary from the grades given upon double marking. The following results were found:

0 to 5% variation	22 essays
6 to 10% variation	8 essays
11 to 15% variation	5 essays

Tribe states that 5% is the percentage variation which is generally accepted by commentators as being the norm between staff markers.[70] Adopting this figure, the results show there was an acceptable degree of variation in the case of 22 essays (63%), and a higher than acceptable degree of variation for 13 essays (37%). This means that for more than one third of essays, the degree of variation was higher than the acceptable norm of 5%.

Looking at the papers where there was more than 5% variation, it was asked whether there was a correlation between the degree of variation and the marker's subject knowledge of the essay topic. Put another way, would the grade given by the blind marker be more likely to match the grade given by the double marker, where the blind marker had knowledge of the subject area of the essay (i.e. where there was a 'subject match')?

It was found that where there was a subject match, only two out of 13 papers had a degree of variation above 5%. However, where there was no subject match, 11 out of 13 papers had more than 5% variation. This suggests (unsurprisingly) that the subject knowledge of the marker is important when marking an essay: that it is much better for an essay to be double marked by a supervisor who has subject knowledge of the essay topic.

The next question which was asked, was whether the variation in marks would have made a difference to the student's grade for the essay (assuming the blind marker's grade was substituted for the grade given on double marking). It was found that the variation would not have made a

70 "DIY Learning: Self and Peer Assessment", Tribe, D, in *Teaching Lawyers' Skills*, Webb, J, and Maughan, C, Butterworths (1996) at p. 365.

difference in 20 cases (57%) but it would have made a difference in 15 cases (43%). In those 15 cases (43%), would it have made a difference to the student's overall grade for his or her SLO work (given the 30% weighting for the essay)? It was calculated that in 4 cases (11%) there would have been such a difference.[71]

Looking at the general comments made by the markers engaged in the case study, the following remarks were observed:

- The factors most likely to influence double markers are the grade given by the first marker and his or her comments on the work, but having this information to hand makes the process of double marking less time consuming.
- The student's identity is the factor least likely to influence double markers.
- Where the first marker is a long-standing member of staff with a high level of experience in assessing students' work, a double marker who is less experienced may be reluctant to alter the first marker's grades.
- Supervisors would prefer to double mark essays in an area of law where they have at least a comfortable degree of subject knowledge.

Potential limitations of the case study design

Certain potential limitations of the case study design were perceived.

In numerous cases the removal of the first marker's name from the essay was ineffective because it was easy to infer his or her identity in other ways. The SLO handles some high profile cases and staff generally know which of their colleagues, and often which students, are involved in them. Accordingly if an essay refers to one of these cases it is easy to infer the identity of the first marker and sometimes also the student. In addition, although there are currently around 16 supervisors in the SLO, and some of them share areas of expertise such as family or employment law, other supervisors have their own unique areas of expertise. For example, there is only one supervisor who specialises in construction litigation and another supervisor with expertise in welfare benefits. If a student essay refers to a case in this area, the first marker can therefore be identified.

In reality this means that many of the papers were not completely 'anonymised'. Although the first marker's name was deleted from the essay, in many cases the blind marker would have known who the first marker was and could therefore have been influenced by this (see above).

Another issue relates to a potential skewing of one of the results of the case study. It was reported, above, that in 13 out of 35 cases the degree of variation between the grade given by the blind marker and the double marker exceeded 5%. Of these 13 cases, 11 occurred where the blind marker had little or no subject knowledge of the essay topic while only two occurred when the blind marker had the relevant subject knowledge. It is possible that there is some skewing of this result. One of the supervisors who was involved in the case study has expertise in one particular area of law, and limited knowledge of other subject areas. If this staff member is excluded from the calculation, however, the result is still significant. The figures would then be six cases of more

71 For three students their grade would have increased from a 2:2 to a 2:1, and for one student the grade would have increased from a 2:1 to a first.

than 5% variation where the blind marker has little or no subject knowledge of the essay topic, compared with two cases where the blind marker as such knowledge. From this it can still be concluded that the grade given by a blind marker is far more likely to resemble the first marker's grade, where the blind marker has subject knowledge of the essay topic.

A further issue is raised by the nature of the essay itself. The essay is not a dry piece of academic writing which is intended to describe the current state of substantive areas of law. As discussed above previously, it is a piece of reflective work drawing upon students' practical experience of their live client work. To the extent that an essay may say, "I worked on the Jones case, I did *x* and *y*, *x* went really well but y didn't and this is what I would change..." the student's own supervisor is in a position to assess the veracity of the factual content, whereas another marker who was not involved in the student's supervision would not be able to do so. To that extent, at least, the second marker must necessarily rely on the first marker's comments about the factual content.

When the first marker's comments were removed under the blind marking conditions, the blind marker had no way to judge the veracity of the factual statements made in each essay; the blind marker was obliged to take them at face value. This means, potentially, that a well written, well structured paper that was nevertheless full of factual misrepresentations could have received a high grade upon blind marking.

Further, it is occasionally the case that a student will insert into their essay material which they have recycled from earlier SLO work, such as a research report on a particular case. The student's supervisor will be able to spot this whereas the blind marker would not know whether an essay contained recycled material or not.

In the case of a blind marker who does not have subject knowledge of the essay topic, he would not be in a position to judge any statements of law contained in the essay. He would be obliged to take them at face value, and could potentially give an essay a high grade even when it contained errors of law (which would ordinarily result in a significant reduction in the essay grade).

A final observation relates to the relatively small numbers involved in the case study. Only 35 papers were involved, and perhaps even more significantly, only four supervisors were involved in the blind marking exercise. It would be interesting to see whether similar results were obtained by repeating the study in subsequent years.

Implications of the case study

In an excellent review paper, Brooks observes that the practice of double marking has flourished in higher education where a growing number of university assessment policies require students' coursework to be double marked. Interestingly, however, Brooks notes that this expansion in use at degree level is set against limited interest in double marking as a research topic, and that it has in fact received very little attention in literature published towards the end of the 20th century.[72] Bone on the other hand states that double marking has had bad press as there is evidence that there is little to be gained from doing it. She states that second markers tend to come up with similar marks regardless of whether they have seen the first marker's marks or not.[73]

72 'Double Marking Revisited', Brooks, V, *British Journal of Educational Studies* 52(1) 29 - 42 (2004) at pp. 30-31.

73 *Ensuring Successful Assessment*, Bone, A, National Centre for Legal Education (1999) at p. 46. However, Bone's comments may refer to double marking of regular academic work, rather than reflective written work.

Brooks refers to an interesting episode in 1949 when a researcher called Wiseman pioneered a radical new approach which embraced inconsistency between markers: multiple marking. Under this system each script was marked independently by teams of four markers so that the final mark for each script was the sum of four independent assessments. Markers were selected for inclusion in the teams by having a high degree of self-consistency, also know as mark re-mark consistency. Wiseman said that provided markers are experienced teachers, lack of high inter-correlation is desirable since it points to a diversity of viewpoints in the judgment of complex material.[74]

Wiseman's comments about diversity of assessment are extremely interesting. One wonders whether multiple marking is a technique which could be helpful in the assessment of reflective work. Regrettably, it seems unlikely in the current academic climate, where constraints of time and money cause staff availability already to be considerably stretched, that one could readily find teams of four markers to assess each student essay.

If multiple marking is not feasible, what alternatives might there be? Baume describes a method for assessing portfolios where, before each round of assessment, each assessor first reads and assesses the same portfolio. They then work together for a day to share their judgments, and try to reach agreement. Two assessors then independently assess each portfolio, and if there are any disagreements a third assessor, a course team member, resolves them.[75] This method appears to be a thorough way of approaching assessment of portfolios, although from the description it seems that many staff may need to be involved and would need to invest a substantial amount of time in the process.

Tribe describes a method where students play a role in the assessment process. Students prepare the objectives to be achieved in a piece of course work and they give a mark, either for themselves or their peers, indicating the extent to which the objectives have been met. The same work is also assessed by staff. Where the student mark and the staff mark are within 5% of each other, the student mark will be retained. If there is greater discrepancy, Tribe says that discussion will take place in which justifications for the mark variance are explained and agreed.[76] One attraction of this method is the way in which students are engaged, participating in both the formulation of learning objectives and the assessment process.

Each of these assessment methods provides interesting food for thought. With more than one third of essays in the case study showing greater than 5% variation on blind marking, one's first reaction may well be to say that a different assessment method is required. This is because, as academics, we have been conditioned to regard variation in assessment as a bad thing, to be avoided at all costs. If the case study had been looking at assessment of a standard academic essay then we might validly have thrown our hands up in horror at the results. However, it is most important to bear in mind the nature of the work which is the subject of the case study. Far from being a standard piece of academic writing, the SLO essay has a strong reflective element and we have seen above the way in which such work is inevitably highly personal and subjective. Although we can attempt to introduce objectivity by devising appropriate assessment criteria for reflective work, it

74 Brooks, supra note 72 at p. 34.

75 A *Briefing on Assessment of Portfolios*, Baume, D, LTSN Generic Centre Assessment Series No. 6, at pp. 10-11, which can be accessed at http://www.heacademy.ac.uk/resources.asp?process=full_record&section=generic&id=6 (accessed 19.09.06)

76 Tribe, supra note 70 at p. 365.

is probably true to note that a subjective vein runs through the entire process, from the student who writes the essay based on his or her unique personal experiences in the clinic, to the marker who has close knowledge of the student's capabilities and exertions. Given the unique and personal aspect of this process, is it so very surprising that a blind marker, who has no knowledge of the student or his or her experiences, may perceive the contents of a reflective essay quite differently? It may therefore be inevitable that assessment of reflective work involves a degree of subjectivity and therefore variation.

Nonetheless the case study has been a worthwhile exercise as it highlights certain alternations which could be made to improve the way in which the SLO essay is assessed. First, the student's name could be left off the paper when an essay is selected for double marking. Although supervisors report that the student's identity does not influence their approach to assessing the student's essay, certain 'difficult' students attract a degree of notoriety each year, and also the brightest students tend to become known. It would therefore make sense to neutralise this factor by deleting the student's name.

For reasons discussed above it is very often not possible to conceal the identity of the first marker. While the first marker's comments on the work could be withheld, it has been seen that the second marker would then be unable to tell whether the student has made untrue factual claims in his or her essay or recycled previously used material. For these reasons it may be better to keep the first markers' names and make their comments available to the second marker.

Is it helpful for the second marker to know what grade the first marker attributed to the essay? This is a difficult question. Supervisors report that having this information makes it quicker for them to double mark an essay but it influences their own assessment of the work. Provided that double markers are willing to make an additional investment of time, it may be better for them not to know the grade given by the first marker so they cannot be influenced by it.

The study suggests that the single greatest improvement which could be made to the current assessment method is for double markers to assess essays which are within their subject specialism or where they have at least a comfortable level of knowledge. Supervisors report that they feel more at ease marking papers where they know the relevant area of law, and this was borne out by the results of the case study which found that second markers were far more likely to grade a paper within a 5% degree of variation if they had the relevant subject knowledge. Practically, however, this has important ramifications.

Currently the clinic offers a diverse range of practice areas, including employment law, family law, crime, public law, personal injury, consumer, construction litigation, welfare benefits and so on. The diversity is regarded as beneficial both for clients and students. Currently around 16 members of academic staff work on the clinic and each brings to bear his or her own personal experience of legal practice. The clinic is able to offer such diversity because of the scale of the operation and the number of staff involved. It also means that in some instances there is only one supervisor in a particular area of law, such as construction litigation or welfare benefits.

Within areas of law such as personal injury and family law, where there are several supervisors with subject expertise, it may be possible to arrange matters so that essays are double marked by other supervisors with subject knowledge. Currently this would not be possible where there is only one supervisor in an area of law. One way it could happen would be to drop areas of practice so that the clinic would be confined to one or two areas of law with many supervisors in each. However,

this would be undesirable from the viewpoint of all concerned: students, clients and staff. Another way would be to greatly increase the numbers of staff involved in the clinic to ensure that each practice area was staffed by at least two or three supervisors. The SLO has strong ambitions for growth over coming years, to greatly increase both staff and student numbers, and if the growth is carefully managed it may be possible to achieve this. It is certainly something to aim for.

It may be possible to ask a non-clinical member of staff with the relevant subject knowledge to double mark the essay, perhaps together with a clinical tutor. Alternately, if there was a web-based database of clinic supervisors and their areas of expertise, it may be possible to find a clinical tutor with subject expertise from another institution who could assist with double marking.[77]

Conclusion

It is widely known that practical experience and reflection form the two main elements of clinical legal education. While clinical staff are usually comfortable with the practical side of clinic, many feel some degree of unease about reflection including what it is, why we ask students to do it, and how to assess it. If we feel such uncertainties as clinicians it is hardly surprising that many of our students struggle with reflection.

The role that reflection plays in clinical legal education mirrors the role that reflection plays in learning, full stop. All human beings have a capacity for reflection; it is something we naturally employ, usually quite subconsciously, on a day to day level when we mull over events in our minds. Numerous educational theories recognise reflection as an integral part of learning including models developed by Kolb and Schön and constructivist learning theory. Clinical staff should have an awareness of these theories so they know what reflection is and why it is important. This can inform staff in the development of programmes which are conducive to the occurrence of good quality reflection.

To encourage reflection in clinic, staff should move away from the traditional 'teacher' role of authority and giving answers, towards a facilitator role which encourages students to open up and share their thoughts about their experiences. We need to think about wider issues of programme design but equally important are considerations such as class size, the way students work together and the arrangement of teaching spaces as all of these can have a significant impact on whether reflection is likely to occur in practice.

While it may not be possible to teach reflection directly, we can provide students with helpful guidance to simulate their interest and their willingness to reflect. One way of doing this is to give students clusters of questions to get them going. For example, questions can challenge students into considering the general and the specific, and to think about how the perspective of time can affect the quality of their reflection.

If we can get students to produce quality reflection there are obvious benefits for them. Not only will they perform better in their clinical course but reflection will make them more aware of how they learn. There is evidence that increased self-awareness of learning is correlated with better learning, so by engaging in reflection students are teaching themselves how to learn better in the future.

77 While this could be a helpful resource for many reasons, not only relating to assessment, it would raise issues of consistency of marking between law schools which would need to be addressed. See also supra note 65.

There are conflicting views about whether reflection ought to be assessed. Some say that reflection is unique and raw, and we risk destroying this if we seek to impose the strictures of an assessment regime. Others say that if reflection matters to us, and if students will not engage in unassessed work, we have little alternative than to assess it. If we decide to assess reflection, this opens a further can of worms given its inherently subjective nature and the close working relationships which often exist between students and the staff who are to assess their work. Can assessment of reflection in such a context ever be fair and objective? Arguably yes, provided that assessment criteria are carefully thought though and made explicit, and that staff meet to discuss and agree assessment methods and approaches.

In particular it is vital to be clear whether the reflection is being assessed as part of the assessment of a wider project or skill (for example, drafting) or whether the focus is the learning journey itself. If the latter, and especially if reflection is to be fully graded rather than merely adjudged competent/not yet competent, carefully considered assessment criteria need to be developed and circulated amongst staff. Valuable work has been done by others in identifying criteria for assessing reflection in clinical teacher education and legal education. These provide a helpful starting point for assessing reflection in our own programmes but we should be wary of a 'one size fits all' approach. Just as we need to give careful thought as to how to employ reflection as part of our clinical programmes, we need to individualise assessment criteria to ensure they are relevant and fair for our own purposes.

If we follow these guidelines it should be possible to arrive at a fair assessment of the reflective work produced by law students in clinic. But is this enough: should we also double mark students' reflective work to check that assessment criteria are being applied consistently by different markers? Experience of doubling marking reflective work in the law clinic at Northumbria University suggests that double marking has a role to play in ensuring consistency between markers. However, care needs to be taken in the design of a double marking scheme. Second markers can be swayed by the grades awarded and comments made by first markers, so consider whether your second markers need this information or not. It is vital to ensure that second markers have the right subject knowledge to mark the reflective work they are given; experience at Northumbria University shows that second markers cannot meaningfully contribute to the process unless they have knowledge of the area of law on which the reflection is based.

How Should We Assess Interviewing and Counseling Skills?[1]

Lawrence M. Grosberg

Introduction.

The need to teach interviewing and counseling skills has long been established among clinical legal educators.[2] Even among our non-clinical colleagues, these skills are recognized as integral to competent lawyering.[3] While there remains considerable difference of opinion within the United States as to whether teaching such skills should be in a required course or simply be available as an elective, there is no doubt that a twenty-first century American law school must include the teaching of these skills in its curricular array.[4]

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1 This essay is derived from a talk given at the Journal's conference at Edinburgh in July, 2004. While it is written from the perspective of an American clinical teacher, the underlying skills concepts increasingly are reflected in clinical education programs around the globe.

2 See Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* (1990); Gary Bellow & Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (1978); David A. Binder, Paul Bergman, Susan C. Price & Paul R. Tremblay, *lawyers as counselors: A Client-Centered Approach* (2d ed. 2004); Stefan H. Krieger & Richard K. Neumann, Jr., *Essential Lawyering Skills* (2nd ed. 2003). Philip G. Schrag & Michael Meltsner, *Public Interest Advocacy: Materials for Clinical Legal Education* (1974).

3 See Jay M. Feinman, "Simulations: An Introduction", 45 J. *Legal Educ.* 469 (1995); *Cf. American Bar Association Section of Legal Education and Admissions to the Bar, Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional development- An Educational Continuum* (1992) [hereinafter *MacCrate Report*] (report on the essential components of competent lawyering).

4 The ABA accreditation standards do not now require that all students take clinics or interpersonal skills courses. They do require, however, that every school have a clinical and skills program. See, e.g., Richard A. Matasar, "Skills and Values Education: Debate About the Continuum Continues", 46 *N.Y.L. Sch. L. Rev.* 395 (2002); Robert MacCrate, "Yesterday, Today and Tomorrow: Building the Continuum of Legal education & Professional Development", 10 *Clinical L. Rev*. 805 (2003). Recent amendments to ABA accreditation standard 302 may add to the pressures on law schools to require such interpersonal skills learning. But it is far from certain whether the changes in the standards will result in any significant increase in skills teaching, or indeed, in any meaningful curricular reform. See John Sebert (June 8, 2004). http://www.abanet.org/legaled/standards/standardsdocuments/standardsreview302305commentmemo.doc.

Accompanying the teaching of these skills has been the challenge of evaluating the student performance of such skills. Clinicians knew from the outset that assessment would be qualitatively different from the evaluation methods used for doctrinal teaching.[5] We also knew there would be two fundamentally different functions of clinical assessments: the traditional grading or sorting purpose and the feedback/constructive learning function. It is the latter which is and always has been at the core of clinical teaching.[6] In the competitive world of law students, however, as with anything that is taught, the formal assessment or grading label remains crucial.[7] If it is not tested and graded, it will be devalued by the students.[8] The question of how best to do that remains the challenge with which we are grappling.[9]

A central aspect of assessment is the learning goal. What are we trying to teach? What is the ideal outcome we would like a student to achieve? It is critical that the method of assessment be directly correlated with those learning objectives. An evaluation is valid if it accurately measures the student in terms of the instructional objectives.[10] To state the obvious, if we want the student to learn how to draft advocacy briefs, we do not assess by conducting an oral exam with the student. And then, there is the level of proficiency. Are we talking about an introductory or very elementary level with respect to the skill involved? Or, is a much more advanced level of learning the desired goal? Thus, in discussing alternative methods of assessing interviewing and counseling skills, we need to be clear about what our objectives are. Different methods of evaluation may be more or less appropriate depending on the desired outcome. Thus, clinical evaluations of interviewing or counseling skills could include assessing the examinee's knowledge of interviewing models or theories, the method of preparation, the actual performance of the skill, a self-critique of her or his performance, the resolution of ethical dilemmas or all of the above.[11]

This paper first briefly describes the structure of legal education in the United States (insofar as clinical and skills teaching is concerned) and the almost total absence of any bar admission training or apprenticeship requirements. If the law schools are not required to fully train all future lawyers

5 Student performance and critique assessment were central to skills teaching. E.g.: "Intellectual mastery is not sufficient .... the goals must include both the student's ability to understand and ability to perform effectively."... "It is essential that each student have at least one opportunity to be critiqued in conducting a full interview". David A. Binder & Susan C. Price, *Instructor's Manual for Legal Interviewing and Counseling,* 4 and 22 (1979).

6 See, e.g.,Robert Dinerstein, "Report of the Committee on the Future of the In-house Clinic", 42 J. *Legal Educ.* 508 (1992); Peter Toll Hoffman, "Clinical Course Design and The Supervisory Process", 1982 Ariz. St. L.J. 277, 292 (1982); David F. Chavkin, "Matchmaker, Matchmaker: Student Collaboration in Clinical Programs", 1 *Clinical L.Rev.* 199, 202 (1994); Kenneth R. Kreiling, "Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision", 40 *Md. L. Rev.* 284, 330-334 (1981).

7 Stacy L. Brustin & David Chavkin, "Testing the Grades: Evaluating Grading Models in Clinical Legal Education", 3 *Clinical L. Rev.* 299 (1997) (a report on a survey of students as to whether they prefer a pass/fail grade or the usual number or letter grades, together with a recommendation for grades with an option for pass/fail).

8 See Steven Friedland, "A Critical Inquiry into the Traditional Uses of Law School Evaluation", 23 *Pace L.Rev.* 147, 171 (2002); Brustin & Chavkin, *supra* note 7, at 306; Lawrence M. Grosberg, "Should We Test for Interpersonal Lawyering Skills?", 2 *Clinical L. Rev.* 349, 351 (1996).

9 The broader subject of law school testing generally, is of course, worthy of re-examination, and as has been observed, "has been widely overlooked", Friedland, supra note 8, at 149.

10 Michael Josephson, *Learning and Evaluation in Law School, Volume 1, Principles of Testing and Grading, Learning Theory and Instructional Objectives* at 8, Submitted to Association of American Law Schools' Annual Meeting, January, 1984.

11 Roy Stuckey, *Assessing Law Student Learning in Clinical Courses: Issues for Discussion*, Slide 6 (Power Point presentation, 4th International Clinical Education Journal Conference, July 14, 2006)

and the bar admission authorities likewise disavow responsibility for doing so, should clinical law professors assume the burden?[12] I then go on to discuss the primary clinical evaluation technique of directly observing the student's performance, sometimes referred to as the gold standard method of assessment. Against the backdrop of the assertion that it is beneficial to use multiple methods of assessment, I then describe the several methods I have used to address the question of how best to assess interviewing and counseling skills. As an aside, it becomes clear that much more empirical analysis is in order.[13]

I. U.S. Legal Education and Bar Admission Standards.

Whether you reside inside or outside the United States, it is important to recognize some key differences between American legal education and licensure and the comparable legal institutions abroad. Much of the rest of the world has a law school and licensing structure different from that in the United States. In the U.S.[14] almost all lawyers first obtain a four year undergraduate college degree (typically a BA or BS) and then go on to complete either a full-time three year law school program or a four year part-time program, both culminating with a JD degree.[15] Following the acquisition of the JD, an applicant for admission to the bar must successfully pass a bar examination in the state in which the future lawyer wishes to practice.[16] Once admitted to the bar, the new attorney is licensed to practice in any and all areas of law and inside or outside of the courtroom. While nearly all states have some form of post-graduate mandatory continuing education requirements[17], there are almost no apprenticeship requirements[18], as there frequently are elsewhere in the world. In the U.S., the American Bar Association Section on Legal Education and Admission to the Bar is the entity that is authorized by the U.S. Department of Education to accredit law schools. It is the ABA, therefore, that determines what a law school is required to do or not to do in order to be accredited. With the exception of a very small number of states, one cannot sit for a bar examination unless one is a graduate of an accredited law school. The ABA has a fairly detailed set of regulations covering everything from the size of the faculty and the physical

12 More specifically, should clinicians devise and recommend ways to teach and evaluate skills learning for that large group of law school graduates who elect not to take clinics of skills courses?

13 I am in the process of addressing this dearth of data by conducting various studies of the efficacy of various assessment methods.

14 There are exceptions to all of the following generalizations in the text, however, this abbreviated summary of the differences, I believe, will be useful in considering the main theme of this essay regarding methods of evaluating interviewing and counseling skills.

15 Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* at 209 (1983). See also *ABA LSAC Official Guide to ABA-Approved Law Schools 2007* (Wendy Margolis ed., 2007 ed. April 2006).

16 There is one state, Wisconsin, where taking a bar exam is not required if the bar applicant graduated from an accredited law school in Wisconsin. This is referred to as the "diploma privilege." New Hampshire has just begun the experimental Webster Scholar Program pursuant to which a limited number of students are selected to participate after completing the first year. The students then will participate in clinical and skills activities during their last two years of law school. If they satisfactorily complete those tasks, they may be admitted to practice without taking a bar examination. See the discussion of this program in Clark Cunningham, "Rethinking the Licensing of New Attorneys - - An Exploration of Alternatives to the Bar Exam: Introduction", *20 Ga. St. U. L. Rev.* vii at xiii - xv (2004).

17 Much, if not most, of American Continuing Legal Education requirements do not involve graded evaluations of any written or oral work. Rather, using New York as an example, the only requirement is that the attendee sign an attendance sheet at the beginning and at the end of a CLE session.

18 Vermont and Delaware require forms of an apprenticeship. See V.R.A.B. § 6(i) and Del. Sup. Ct. R. 52(a)(8).

plant to guidelines on the curriculum.[19] With respect to experiential learning, either in the form of students working on real cases under the supervision of law professors or practicing lawyers (cf. apprenticing), or in the form of simulation exercises, the ABA does not require that every law graduate complete such training. The accrediting standards do encourage law schools to develop clinical education and they do mandate that every law school actually maintain some kind of a clinical or skills program.[20]

Likewise, the state bar admission authorities, all of which are completely independent of the ABA and the law schools, do not require any type of apprenticeship or experiential testing as part of the requirements for admission to the bar.[21] There are some bar exam pen and pencil tests that call on bar applicants to demonstrate some familiarity with lawyering skills such as investigation or interviewing or counseling or trial advocacy skills. But, these questions, called "performance tests"[22], do not in any way require the applicant to perform an oral skill.

What all of this means is that it is very possible for a law student to graduate law school in the U.S., pass a state bar exam and be admitted to practice law, without ever having interviewed or counseled a client (real or simulated) or tried a case or negotiated a transaction or even without having observed such lawyering activities. Thus, in terms of assessment of the actual performance of interviewing or counseling skills, there is neither a formative nor a summative evaluation requirement in law school or after, prior to being licensed to practice law. I am not aware of any data that specifies precisely how many American law graduates fall into this category of persons bereft of any clinical or skills training. But, extrapolating from my own law school experience and my familiarity with many others, it is clear that there is a significant number in this category, perhaps even half or more of American law graduates. Moreover, the remaining students may have taken only a single clinical or skills course, hardly a basis upon which one might conclude that such a student is well versed or even minimally competent in those skills.

It is in this context that law schools must address their institutional responsibilities to produce competent lawyers. If the bar admission officials are not taking steps to ensure the public that this is the case, then law schools, and particularly its clinical faculty, it seems to me, must confront this reality. Even if the ABA does not require that law schools address this need, the law schools certainly are not prohibited by the ABA standards from trying to meet this deficiency. Assuming then that law schools want to address and, indeed, are addressing this need, we come full circle, back to the task of determining how best to teach and evaluate these skills, beginning with interviewing and counseling.

2. Professorial Observation of Student Performance.

How does a teacher evaluate a specific student's skills, either in a typical one-on-one live client clinic or in a larger simulation course such as Trial Advocacy or Negotiating, Counseling & Interviewing? A professor's first response to this question must take account of the teacher's objectives. One clinician might focus on ethics and community empowerment[23], while another

19 See *MacCrate Report*, *supra*, *note* 3 at 260-268.

20 *But*, *see* f.n. 4 *supra*.

21 *But*, *see* f.n. 18 *supra*, regarding apprenticeship requirements in Delaware and Vermont. Ibid at 274-284.

22 I do not mean to diminish the value of this form of written testing. I believe performance tests are an excellent format. I use them extensively, with and without an additional video component. See Grosberg, *supra n.* 8 *at* 2 *Clinical L. Rev.* 366-379.

23 Daniel S. Shah," Lawyering for Empowerment: Community Development and Social Change", 6 *Clinical L. Rev.* 217 (1999).

targets interpersonal skills such as the effective use of empathy. What are the skills or knowledge to be assessed, therefore, is the threshold issue for any teacher.

A second issue is whether the assessment is in the nature of a constructive critique[24] or a "graded" evaluation that directly affects a law student's standing and progression in law school or entry into the profession. There has been a considerable amount of clinical scholarship that focuses on giving constructive feedback, but much less on graded evaluations. Among other things, the critique-feedback literature has produced the detailed criteria that clinicians invariably use in one-on-one supervision sessions.[25] The critique literature also appropriately centers on self reflection and the life-long learning process that is so central to clinical teaching.[26]

A critical dimension of any graded evaluation of a skills performance is that it be fair. This raises the same kinds of basic testing issues - - the reliability and the validity of the testing measures - - that ought to be confronted by anyone who is administering a formative or summative assessment tool of any kind.[27] Does the assessment tool accurately and consistently measure what it purports to measure? This holds true for an elementary school teacher giving an English exam to a fifth grade student as well as for a law professor grading a torts essay exam or a bar examiner testing an applicant for admission to the bar.[28]

Despite the many years that I have been evaluating law students' performance of interpersonal lawyering skills - - in live client clinics, upper class simulation courses and first year introductory lawyering courses - - I still have recurring bouts of concern as to whether I am being fair in applying commonly accepted assessment criteria. For example, in the case of counseling skills, can I apply the criterion that a client receive a "clear summary of options" in a manner that would justify giving one student a B+ and a second, a B? These doubts were fueled by a group of studies done by medical educators who examined the results of analogous clinical evaluations conducted by medical professors.[29] What they found was that the medical professors were not consistent in their evaluations, as a result of which, the analysts concluded, those assessments were not fair. The same performance might be assessed differently by different medical professors. Or, the nature of the student-patient interactions observed were so different as to preclude consistent comparative grading of the students. Indeed, similar results were reached with respect to the inconsistency of law professor essay grading.[30] One consequence of the medical findings was that medical educators began to resort to other techniques - - one might say unorthodox or previously untried

24 See sources cited, *supra* note 6.

25 See *MacCrate Report*, *supra* note 3, at 138-148.

26 See Richard K. Neumann, Jr., "A Preliminary Inquiry into the Art of Critique", 40 *Hastings L.J.* 725 (1989); Amy L. Ziegler, "Developing a System of Evaluation in Clinical Legal Teaching", 42 *J. Legal Educ.* 575 (1992); Kenneth R. Krieling, "Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision", 40 *Md. L. Rev.* 284 (1981).

27 See Rachael Slaughter et al., "Bar Examinations: Performance or Multiple Choice?", *The Bar Examiner*, August 1994, 7.

28 This is not the place to examine generally the fairness or unfairness of all of our law school assessment tools. My focus here is only on the individual and systemic aspects of evaluating interviewing and counseling skills. See Friedland, *supra* note 8.

29 M.H. Swartz et al., "Global Rating of Videotaped Performance Versus Global Ratings of Actions Recorded on Checklist: A criterion for Performance Assessment with Standardized Patients", 74 *Acad. Med.* 1028 (1999).

30 *See,* e.g. Friedland, *supra* note 8, at 184 n.154. See also Greg Sergienko, "New modes of Assessment", 38 *San Diego L. Rev.* 463, 471-72 & n.37-38 (2001). (Discussing first a study that showed that when a law professor re-read an exam paper, there was only a seventy-five percent chance that the second reading would produce the same pass/fail result. A second study showed a bar exam question had only a sixty-seven percent chance of being graded consistently as to pass/fail by a second reader).

methods - - of evaluating medical students' clinical performance.[31] If the medical professors could not assess fairly the clinical interactions of their students, why do we think we are more able to do the same with our students?

Traditionally, clinicians have graded clinic students' interviewing and counseling skills by observing them performing these tasks. This continues to be the most generally accepted method of assessment. The clinical professor presumably is the most qualified person to assess whether a student's overall interviewing and counseling skills performance meets the standards of competent lawyering and to ensure that their evaluations are measuring what they purport to measure.[32] This is the so-called "gold standard" evaluation.[33] Its validity is also reinforced when the students receive the applicable criteria with adequate advance notice.[34] Also, typically, the same criteria would be the learning vehicle for constructive non-graded feedback and student self-reflection as well as the bases upon which an ultimate grade would be determined.[35] As stated above, however, while teacher assessments are quite valid, they may not be reliable in terms of consistency.

The professorial observations more often than not would be faculty reviews of videotaped simulations. Usually, in a typical clinic that I have taught, however, we would be lucky to have completed one videotaped simulated preparatory session prior to the student meeting with a real client or a witness. Thus, the notion of repetition as the most valuable aspect of preparation, practice and more practice, is difficult to achieve.[36] Observing a student interviewing or counseling a real client might also take place, but the scheduling conflicts and unavoidable distractions and supervisory tensions often would interfere with the accuracy of these assessments or even prohibit these observations.[37]

3. Multiple Methods of Evaluation.

The question raised here is: Is the teacher's direct observation of a student's performance of interpersonal skills the most effective way or, indeed, the only way to grade such skills? Most importantly, is it fair? Or, to use testing terminology, is it reliable, accurate and consistent from student to student? Would another clinician give the same grade? And is it the most valid way to assess the overall levels of interviewing and counseling competency, or for that matter, specific components of the skills such as question form or the use of empathy? Why shouldn't we consider other potentially supplementary or complementary ways to assess a student's interviewing and counseling skills?

31 One of these is the "standardized patient" (using actors first to portray patients and then second, to give evaluations of performances). *See infra*.

32 *See* Kristin Booth Glen, "Thinking out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession", 23 *Pace L.Rev.* 343, 428 n. 357 (2004). (To be valid, any assessment must be certain to accurately measure what it purports to measure.)

33 See Swartz, *supra* note 29.

34 Cf. Sophie M. Sparrow, "Describing the Ball: Improve Teaching by Using Rubrics-Explicit Grading Criteria", 2004 *Mich. St. L.Rev.* 1 (2004).

35 In my case, the interviewing and counseling grades would be part of the computation of a final grade. See Gerald F. Hess, "Heads and Hearts: The Teaching and Learning Environment in Law School", 52 *J. Legal Educ.* 75, at 107 (2002) (reporting on the importance of detailed criteria).

36 See David A. Binder & Paul Bergman, "Taking Lawyering Skills Training Seriously", 10 *Clinical L. Rev*. 191 (2003).

37 See Joshua D. Rosenberg, "Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance of Human Relationships in the Practice of Law", 58 *U. Miami L. Rev.* 1225, 1234 (2004) (noting that the absence of repetition and the stepped development of these skills necessarily affects the quality of both feedback and grading.

There are at least two rationales that favor using more than one method of evaluating a student's performance of interviewing and counseling. Assume, for example, that the objective is achieving an overall novice level in initial client interviewing. First, using one method - - for example, observing a single live client-student interaction - - could have, depending on the circumstances, a distorting effect for any one of several reasons and, therefore, an unfair impact on any grade. It could be an interaction with a extremely difficult client. It could involve a much more complicated legal situation. There could be unreasonable time constraints or difficult physical conditions under which the meeting took place. The student might be feeling bad that day, etc. For any of these reasons a grade for interviewing based on this single interaction would be an inaccurate assessment of the student's overall competence level.[38] Why not err on the side of caution by not relying too heavily on only one method of evaluation? How can it hurt to use multiple assessment methods? One can also give different weights to different methods.

Still another reason for using more than one kind of testing device (e.g. multiple choice as well as essay questions) is that different students learn differently and, therefore, do better or worse depending on the type of assessment tools used.[39] Using a variety of methods enables the students to demonstrate their talents in at least some of the tests. This also improves the "validity" of the overall grade, because it accounts for different ways in which to register the multiple competencies that are necessary for lawyering.[40]

In addition, there is an element of repetition that favors giving students an opportunity to improve their abilities to both perform the same skill and reflect their full understanding of the skill and to improve their mastery of the testing device. The latter, I would characterize - - not in the pejorative phrases "teaching to the test" or teaching "test-taking skills" - - but rather as the opportunity to become familiar and comfortable with a particular kind of exercise. Just as the typical law student learns through repetition how to handle the usual law school essay exam question, they are less prepared for some of these skills testing methods that they may encounter only once. For example, in the case of the standardized client exercises discussed below, the students conducting the second, third or fourth standardized client exercise know and understand the mechanics of administering the exercises better than they did for the first exercise. Their added comfort level often facilitates a higher level of performance. It likewise seems indisputable that a student's experience with repeated tests of an interactive skill such as interviewing or counseling will benefit greatly from such opportunities. The value of repetition was noted earlier.[41] Another way to describe the repeated use of testing tools is that it is a way of giving stepped feedback to a student thereby reflecting that student's progress which is recognized as an "essential ingredient for

38 Cf. Friedland, *supra* note 8, at 185-86 (referring to this similar distorting impact when the grade is based solely on a single end of term exam and even worse, if the single question exam deals with the 1 of 6 course topics the student didn't prepare for.) See also Glen, *supra* note 32, at 405 n.264; *id*. at 446. Likewise, with respect to evaluating the overall competency of an interviewing performance, one student might be superb in establishing rapport with a client but quite ineffective in the use of properly formed questions, whereas a second student would be the reverse, but in a way that totally undermines the efficacy of the interaction. Limiting the evaluation to a single event or to only one aspect of the skill may result in a misleading overall assessment.

39 See Ian Weinstein, "Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam", 8 *Clinical L. Rev*. 247 (2001). See also, John. M. Bauman, "Oral Examination as a Method of Evaluating Students", 51 J. Legal Educ 130, 136 (2001)(students performed well on oral exams while others did better on written exams.)

40 Friedland, *supra* note 8, at 196.

41 See Binder & Bergman, *supra*, note 36. This would seem to be true whether it is repetition of overall assessments of complete client interviews or repetition (in the sense of drills) of more narrow skills (e.g. active listening or use of T-funnel questioning).

advancement".[42] Professors Binder and Bergman have certainly persuasively made this "practice and more practice" point regarding interviewing, deposition and counseling skills.[43]

Finally, before reviewing specific new assessment tools, it is worth noting clinicians' dislike of the grading process generally. Brustin and Chavkin recognized this reality in constructing their study as to whether a clinic should be graded in the usual fashion (A, B, C, etc.) or with a Pass/Fail.[44] While I very much believe in detailed feedback and constructive advice as to how students might improve their skills, I frequently find myself delaying the final calculation of grades until the last possible minute. In my experience, the notion of giving a clinic student a "test", therefore, has an even more unpleasant sound to most clinicians. Yet, most of us ultimately do in fact generally give a formal grade of some sort. If giving clinic students something that might be characterized as a test would make our grading better, fairer and more accurate, why not use these other devices.

It is against this backdrop of more traditional methods of clinical assessment that I continue to experiment with different ways to evaluate students' interviewing and counseling skills. The following assessment tools are intended to complement or supplement, NOT replace, the traditional clinician's direct observation.45

[A] Videotaped Performance Test.[46] This is a written exam in which a student views a videotape depiction of a lawyering activity and is asked to analyze all or part of what is on the tape. The ability of a student to articulate (either or both verbally or in writing) why a lawyer effectively counseled a client would suggest a cognitive understanding of skills theory and its requisite components. It not only would reflect a student's knowledge of skills models and theories, but an understanding of how someone succeeded or failed in applying those theories. Assuming one's teaching objectives included an understanding of skills theories, this is a valid way to assess that understanding. Being able to parse the deficiencies of a golf swing will not make you a top golfer.[47] But, it certainly cannot hurt in the development of the reviewer's swing. In simulation classes, we have asked students to view a videotape of someone else conducting a client interview or a counseling session and to write a critical analysis using those same criteria that I use in evaluating them.[48] We have used this method in large skills classes both with an in-class exam (open book and closed book) as well as in a take-home exam. I have also given students a narrative of a factual situation or a transcript of a lawyer-client interaction, not unlike a traditional law school exam, and asked them to write an essay as to how they might handle counseling a client in that situation, or

42 *Id*. at 204.

43 *Id* at 201; See also Rosenberg, *supra* note 37.

44 See Brustin & Chavkin, *supra* note 7, at 300-01.

45 I would be extremely reluctant to eliminate direct professorial observation of student performances even in the face of questionable reliability and accuracy data. Rather, in addition to implementing the theme of this paper (namely, using multiple methods of assessment) I would take steps to improve the observation method.

46 *See* Grosberg, *supra*, note 8 at 366-378.

47 *Contra* Rosenberg, *supra*, note 37 at 1234.

48 To make this assessment a more meaningful one, I give the students a case file that provides the context for the session. For example, for a counseling session, the file would include an initial client interview memo, as well as file memos and documents reflecting an investigation. It utilizes the same technique used on many bar exams (the "performance test") but adds the video component as part of the exam question. I have referred to these as "videotaped performance tests". Grosberg, *supra*, note 8. See Stephen P. Klein, "*An Analysis of the Relationship Between Trial Practice Skills and Bar Examination Results*," January 10, 1983 at 272 of *Learning and Evaluation in Law Schools, supra* n. 10. (In an analysis comparing the scores of a videotaped performance type exam and a traditional bar exam, the conclusion was that the former scores "were just as reliable" as the traditional essay questions *Id* at 293.)

in the case of a transcript, analyze the efficacy of the lawyer-client encounter. The former would call for an outline of a counseling session; the latter a critique. These kinds of questions would more explicitly call for an effective application of the readings and videotaped lessons that I typically assign in any course involving interviewing and counseling.[49] The desired teaching outcome is for the student to clearly reflect an understanding of the applicable theories and why the lawyer was effective or ineffective.

In many ways such a written critique of another's performance is comparable to a student's self appraisal, especially if it is facilitated by a videotape of the performance.[50] In the ideal Binder and Bergman world, the student would have several opportunities to repeat performances of a skill. In that context, it seems to me, the ability to do an effective critique of another's performance would be transferable and identifiable in the student's next performance of the skill. For that reason, the critical analysis skill can play an important role in the student's development of the performance skill. This is in addition to using this assessment method for the independent purpose of testing the student's understanding of and the ability to apply the skills theories.

The term "performance test" (PT) has come to mean in the world of bar exams and legal education, an opportunity to draft a written document that a lawyer might produce; e.g. a deposition outline, a jury summation, an opinion letter, etc. Thus far, bar examiners have not yet extended it to include any oral lawyering performance or, indeed, to include a video component.[51] The PT typically gives the test-taker a file with original fact documents and some law (cases, statutes, etc.) and asks the student to produce the requested document in a stated period of time based on that file. The PT is in stark contrast to the typical traditional law school exam which gives a one paragraph hypothetical and asks the student to write a judicial opinion resolving the dispute.

In the "videotaped PT", the student is given similar fact and law files and then asked to provide an analysis of both doctrine and the interpersonal skill. For example, the student would then observe a lawyer counseling a client in the case reflected in the case files. In addition to analyzing the case and possibly producing a practice document of some sort (e.g. a negotiation outline), the student would also be asked to provide a critical analysis of the lawyer's counseling skills performance.

In evaluating a student's response to a videotaped PT, the clinician can assess the students' legal reasoning and analysis skills as well as their understanding of what worked or didn't work in the interviewing or counseling performance and why. This depiction of a lawyer applying the law in

49 *See* books cited *supra* note 2. These works offer a theoretical foundation for a full discussion in an examinee's response to any test device that asks for an analysis of some aspect of a lawyer-client interaction.

50 See Steven A. Lieberman, "Introduction of Patient Video Clips into Computer-Based Testing: Effects on Item Statistics & Reliability Estimates", 78 *Academic Med*. S48 (2003). Here again our medical colleagues have examined the use of such video exams and found them to be sufficiently reliable compared to text based questions.

51 The genesis of the performance test (PT) was an experiment in California in 1981 when the California Board of Bar Examiners established an experimental "Assessment Center" in which applicants for bar admission completed both oral simulation exercises, videotaped performance tests as well as traditional bar exam questions. The results of the experiment were positive, however, both oral simulation exercises and video taped components were rejected for administrative and cost reasons. To my knowledge, the recommendation or even a modest suggestion to implement these more comprehensive testing techniques was never to be heard again, at least not publicly. Those 1981 experiments did, however, lead to California's implementation of the three-hour PT and later to the development and implementation by the National Conference of Bar Examiners a ninety minute PT. See Stephen P. Klein & Roger B. Bolus, "An Analysis of the Relationship Between Clinical Skills and Bar Exam Results", July 1, 1982 at 164, Josephson, *Learning and Evaluation in Law Schools, Volume 1*, supra note 10.

context offers the students the opportunity to analyze the lawyer's attempt to synthesize the law and the facts and then explain the law and the options available to the client. To make this assessment tool even more realistic, a professor might dispense with the typical in-class short time limits. For example, instead of giving students two or three hours to complete a videotaped PT, they might be given 2-3 days.[52] As far as the ultimate grade in a live-client clinic, the video PT could play a role there as well.[53] This, of course, assumes that learning and understanding skills models and theories is an objective of the clinician. The notion of a written final exam in a clinic, and often even in a simulation course, is contrary to most clinicians' pedagogical instincts. Based on my experience, the use of any kind of a written exam in a clinic remains rare. Once again, however, the starting point or premise for this survey of alternative methods of evaluating interviewing and counseling skills, is that what we're now doing might not be as fair - - or accurate for that matter - - as we might like to think it is. If that is true, we should be considering ways to move it closer to that ideal.[54] The question is whether we remain open to improving our method(s) of evaluation.

[B] Multiple Choice Questions. The use of multiple choice questions on law school exams or the bar exam has often elicited controversy.[55] For some law teachers, this testing method constitutes a poor substitute for an exam that calls on the student to write an answer demonstrating the ability to use and apply the law to a factual situation. The essay question continues to be the dominant form of law school exams.[56] I was among those who reacted skeptically (even negatively) to the suggested use of multiple choice questions both on the bar exam and for traditional doctrinal courses. I never even contemplated using them for assessing interpersonal skills proficiency. Yet some professors rely exclusively on multiple choice questions (evidence is one example[57]) and others are even now proposing their use for skills evaluations.[58]

Overcoming a certain amount of resistance, we first began to use this assessment method in our first-year Lawyering course. Initially, we used multiple choice questions as ungraded in-class quizzes and then later as part of a final exam. One set of questions was based on a transcript of a videotaped interview that the students had viewed.

52 *See Glen, supra*, note 32 at 368 (criticism of bar exam questions because of the disparate racial effect of exams with time limits).

53 *See* Larry Grosberg, "Evaluation of Oral Lawyering Skills Through a Video Exam", in Gerald F. Hess & Steven Friedland, *Techniques for Teaching Law* 308 (1999).

54 Sparrow, *supra*, note 34 at 28-9, noting a colleague's use of her suggested rubrics as a way to make grading more consistent.

55 Committee on Legal Education and Admission to the Bar, Association of the Bar of the City of New York, "Report on Admission to the Bar in New York in the Twenty-First Century - - A Blueprint for Reform", 47 *Record* 464, 482 (1992). (Criticism of bar exam because of too much use of multiple choice questions.)

56 See Greg Sergienko, *supra* n.30.

57 Interview of my colleague, Professor Eugene Cerruti, with respect to evidence. October, 2004.

58 My colleague, Professor Stephen Ellmann, encouraged me to use multiple choice questions for some limited teaching objectives regarding the assessment of interpersonal lawyering skills. Professor Sergienko discusses the use of multiple choice questions for "skills testing" in a recent article, but his focus is on "higher level cognitive skills" (Sergienko, supra n. 30 at 493-501) and not the kind of interpersonal verbal skills that are the focus of this paper.

The students were asked to choose the best of four assessments of an exchange.[59] Or, they might have to select the applicable concept or rule of law.[60] Still another multiple choice question we used was to select the best assessment(s) of a lawyer-client interaction.[61] There is much to be said for using such quizzes simply because of the speed with which the student receives the test results. The quick turn-around to students can be extremely useful in terms of their improvement of their performance.[62]

As with other methods to assess interviewing and counseling skills the threshold issue is does it assist us in achieving our teaching objectives, and, therefore, is it adding anything useful to our

59 Q#1. At the beginning of the excerpt from the session between attorney Mary Hogart (AT) and Maureen Redhail (MR), this exchange takes place:

MR: So, can you tell me what to do? I'm torn between my choices.

AT: Well, I understand why you might be torn in this situation, you're facing a really tough decision. But, really it's your decision. Ummm, and as tough as it is, you're in a much better position than anybody, including me, to make the decision. Because you know what's important to you and also you're, you know, you're going to have to live with the consequence of your decision. So I'm-

MR: Right.

AT: I'm very happy to help in any way that I can. Is there anything that I can tell you that might help you sort this out?

In light of the options that Maureen Redhail had (as explained in the prior dialogue), which of the following assessments of this exchange is the soundest?

A. Since no one could reasonably have chosen to go to trial in this case, the lawyer should simply have said right that right away.

B. In responding this way, the lawyer is showing no empathy for the client's understandable uncertainty and desire for help.

C. The lawyer bluntly and properly refuses to answer this question since lawyers should never state their opinions about what to do in case.

D. The lawyer rightly urges the client to reach her own decision, since it is her case and her life, but does not absolutely refuse to answer the question.

[correct answer to Q#1: D]

Unpublished quiz, Lawyering, Spring 2004 (on file with author)

60 Friedland, *supra* note 8, at 165. This would be relevant to the legal reasoning and analysis skills as opposed to oral lawyering skills.

61 Q#3. Based on prior dialogue between the attorney Mary Hogart (AT) and her client Maureen Redhail (MR) regarding the client's concern for the welfare of her two children, they go on:.

AT: So, one of the things that might help you with this decision is trying to sort out, ummm, what is the most important priority. Knowing that the kids are really important to you-

MR: Right.

AT: Is the chance of getting a better financial settlement at the end of trial, ummm, and being in a slightly better position financially more important to you than the risk of having them deposed and having this continue?

MR: Yeah. I see. Well, the settlement, what they're offering, is already better than what I've had this past year.

AT: It is better than what you've had. It's absolutely better...

Please consider the following assessments of this excerpt:

1. Because the lawyer's job is to help the client to clarify her own thinking, it makes good sense for the lawyer to ask the client to compare two different ways that she might help her children and to judge which is more important to her.

2. The lawyer potentially skews the comparison she is asking the client to make by recognizing the extent of the financial improvement that the trial might produce.

3. The lawyer's statement that the settlement is "absolutely better" than what Maureen has had for the past year is accurate but may be so strongly phrased as to encourage Maureen to lean towards settlement.

4. By putting the comparison in terms of the client's own values, the lawyer avoids taking on the role of telling the client what values she should hold.

Which of these statements are well-founded

A. 1 & 3

B. 2 & 4

C. 1, 2, 3, & 4

D. 1, 3, & 4

[correct answer to Q#3: C]

Quiz, *supra* note 49.

62 See Sergienko, *supra*, note 30, at 493.

repertoire of evaluation tools. I think the answer is a modest yes. While it does not evaluate a student's ability to perform, it does enable us to evaluate a student's understanding of skills theories and lawyering models. One prerequisite, of course, is that the questions are valid, reliable and efficiently administered.[63] Do the questions measure what they purport to measure? In our case, did the questions measure a student's cognitive understanding of basic interviewing and counseling concepts? I believe the answer is yes. While intellectual understanding of applicable lawyering theories does not mean someone will be a good interviewer, it does mean something, and it could later aid in someone's actual ability to perform. More importantly, if a lawyer understands why certain interpersonal concepts are valid, that lawyer is more apt to ground her behavior in those principles than to just act instinctively or spontaneously in a very ad hoc manner.

Finally, the use of multiple choice questions simply adds an alternative evaluation device. Its use means that a student's entire assessment is not unduly placed on one evaluation tool.[64] It enables us to minimize the deficiencies of an one particular method of assessment. To the extent such questions are used in mid-semester quizzes, and then repeated in a course summative final exam, it also is an effective and efficient method both of providing ongoing or interim feedback (always useful from a learning perspective) and giving them notice of the testing method to be used on the final. From an instructor's perspective, it's also much easier and speedier to grade such questions than essay or other textual test responses, an especially important factor in large classes.

[C] ***Self Reflection or Self Evaluation.*** This has certainly been one of the traditional ways in which clinicians have engaged students in the process of evaluation. Indeed, teaching the skill of self-critique is itself often a clinical teaching objective.[65] To the extent that student development of life-long learning habits is a goal, self evaluation can be a valuable tool. A student's self-evaluation/critique often is done in the form of a written document, typically without any (or much) time pressure. But it also could be done more informally and only verbally. For me, in clinics, this is often part of a semester-end one-on-one meeting with students. The care with which a student analyzes her or his own performance will necessarily reflect the student's understanding of and application of interviewing and counseling theories to the specific situation that is the object of the critique.[66] And as discussed above, the same would be true of an analysis of someone else's performance. Both provide additional components of what might be a student's final grade on her interviewing and counseling skills.

[D] ***Standardized Clients.*** Still another method of evaluating student skills performance is the "standardized client". This is a method that is based on the medical education model - - the "standardized patient"- - in which a lay person is trained to portray a patient and then to give written feedback to the student interviewing and examining them. I have been experimenting with my adaptation of this tool to law school in several contexts.[67] Essentially, we train actors first, to

63 Friedland, *supra*, note 7 at 157-163.

64 *Id*. at 182 (measuring skills has "perplexed" professors, especially those that typically administer essay exams).

65 See Nina W. Tarr, "The Skill of Evaluation as an Explicit Goal of Clinical Teaching", 21 *Pac. L. J.* 967 (1990) and Ziegler, *supra*, note 26.

66 "Helping students identify when they had difficulty acting consistently with their intentions enhances skills learning." Don Peters, "Mapping Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling", 48 *Fla. L.Rev.* 875, 924(1996).

67 *See, e.g. See e.g.*, Lawrence M. Grosberg, "Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client", 51 *J. Legal Educ.* 212 (2001); and Lawrence M. Grosberg, "Standardized Clients: A Possible Improvement for the Bar Exam", 20 Ga. St. U. L. Rev. 841 (2004).

role-play clients or witnesses and second, to complete an assessment of the student's performance on a checklist[68] that the professors prepare. While dispositive results are not yet in, the preliminary findings[69] suggest that this is a valuable assessment tool which gives students multiple[70] opportunities to perform a skill and to receive valid and reliable feedback as to how they are doing.

In our first-year Lawyering course, these exercises facilitate achieving the objective of introducing students to the basics of interviewing and counseling and fact analysis. We do not purport to do more. At most, a student might reach a novice level as an interviewer. On a more mundane level, the SC exercises also offer students some feedback on how a stranger might perceive them. It also affords them the opportunity to achieve a higher comfort level in trying to engage a client or a witness in a conversation. For many students, it is the first time they have had such a human interaction with a stranger.

As I suggested at the outset, a major concern is whether our overall assessments are fair, sufficiently objective, and, ultimately, accurate measures of a student's interviewing and counseling skills. One of the reasons that this device began to be used in medical education was that the professors concluded that their direct observations of their students' clinical skills were too variable and unpredictable.[71] Observing a student performing a tonsillectomy is not the same as observing that student operating on a broken back. Similarly, a medical professor might be called away from an observation of a student for an emergency. The use of standardized patients was one way to ensure that all students got the full, as well as the same, array of cases to deal with.[72] Very similar obstacles (and others as well) get in the way of law school clinicians in observing student performances on real cases. Thus, it could be a useful supplement even in our live-client clinics and simulation courses. The standardized client can also be valuable as a vehicle for introducing students to skills learning in situations where it is practically or financially impossible to provide professorial feedback on skills performances. That in fact is the context in which I have been conducting most of my experiments with this technique. Our first-year required course in Lawyering is a large class (we have four sections of 110 students each) which has as its purpose, the introduction to fact analysis and interviewing and counseling.[73] One-on-one teacher feedback is not financially feasible. Providing each of them with three standardized client opportunities,

68 For an example of such a checklist, see www.nyls.edu/grosberg.

69 The institutional research specialist at New York Law School, Dr. Joanne Ingham, compared the scores given by forty-two actors and four law professors on a random sample of 99 professor-actors pairings from three different SC exercises conducted during the actor training sessions. She found that the average agreement levels for SC exercises I, II and III were 64%, 70% and 53% respectively. An assessment of the data indicated that future modifications to the training program will produce an increase in the current agreement levels. In her opinion, these data are sufficient to support the reliability and the validity of low stakes grading of the SC exercises. See also Karen Barton, Clark D. Cunningham, Gregory Todd Jones & Paul Maharg, "Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence", *Clinical L. Rev.* (2006) (forthcoming). (The preliminary results of their full-scale study of the use of standardized clients in Scotland as part of the Scottish requirements for admission to the Bar suggest strong correlations with assessments by the Scottish tutors, attorney-teachers already admitted to the Bar.)

70 Binder & Bergman, *supra*, note 36 at 201 (noting the significance for value of opportunities for repeat performance).

71 See also Sergienko, *supra*, note 30 at 471-472.

72 See Mark H. Swartz & Jerry Colliver, "Using Standardized Patients for Assessing Clinical Performance-An Overview", 63 *Mount Sinai J. Med.* 241 (1996); Grosberg, "Medical Model", *supra* note 67 at 215.

73 For a fuller description of the Lawyering course, see Grosberg, "Bar Exam Improvement", *supra* note 67.

however, is a viable option.[74] As a result, each of our students has the chance to conduct an initial interview of a potential client, an interview of a witness in another case and a counseling session with a client in still another matter.[75] We also use a videotaped PT as part of the final exam in this course.

In the simulation skills courses (e.g interviewing, counseling and negotiating) as well as the live-client clinics[76], the use of standardized clients may be the only way to accomplish the kind of repetition of skills exercises which some feel is critical to meaningful skills learning.[77] It is worth noting that repetition is integral to law students' learning of legal reasoning and analysis skills; they are developing those skills in all of their first year classes, as well as most of the upper class courses. The same should be true as to interpersonal skills. Again, the goal in the use of standardized client exercises is not to displace other evaluation methods, especially direct professorial feedback, but to supplement those clinical assessment tools with additional and repeated measures of competence.

[E] ***Computerized Assessment Tools.*** The videotaped performance test and the use of multiple choice questions are assessment devices that may now be used via the computer.[78] The technology (either on line of via CD's of DVD's) is available for use either as a formative or summative assessment tool or as a self-learning device for students to take home and use as desired. In the latter case, it raises basic questions about how to lay the groundwork for effective student use of such a self-learning vehicle. In its more extreme form, the "distance learning" concept is similarly raising these questions.[79] To what extent can students develop the necessary lawyering skills (legal reasoning and analysis and writing, as well as skills such as interviewing and counseling) simply by sitting next to a computer? Has the law school Socratic discussion become an anachronism? This is not the place to address these fundamental issues about how people learn and the extent to which it is reasonable to rely on self-learning techniques. But, it is clear to me, that just as the video PT assessments and multiple choice test questions can have some benefit in students' learning, the computerized versions of those methods might do the same.[80] They cannot be a replacement, however, of interpersonal live interactions. Professor Maharg has taken things a step further by

74 The cost of standardized clients is not insignificant. To conduct nearly 1500 standardized client exercise entails approximately $45,000 out-of-pocket costs. But consider how much it would cost if professors gave feedback on that many lawyer-client interactions. Also, we hope to establish a center that could be used by more than one law school, thereby reducing the costs via the economy of scales. This is what medical schools often do as well.

75 Last year we received faculty approval to giving grades on the standardized client exercises; 10 % of the students' grades in this two credit course is based on their SC evaluations. This would be considered a "low stakes" evaluation, as contrasted with the "standardized patient" exercises that are now, as of June, 2004, an integral part of the medical licensing exam - - a "high stakes" evaluation. The results from this past semester suggest that a small but vociferous minority had strong objections to being assessed by a non-lawyer. Similar complaints, however, are made to medical educators' use of standardized patients, even after thirty years of use and full acceptance by the medical schools and the medical licensing authorities.

76 Some clinics may not include skills training as a teaching goal.

77 See, e.g., Binder & Bergman, *supra*, note 36 at 201.

78 Professor Paul Maharg at the Glasgow Graduate School of Law has been doing innovative work with regard to interactive computer programs. I have also produced an interactive CD for use in a first-year property class. The CD contains alternative video depictions of a lawyer-client counseling session, the contents of the case file, the relevant law and a series of multiple choice questions calling for analysis of the various aspects of the case. It is available by contacting the author at lgrosberg@nyls.edu. .

79 See e.g. Phil Agre, "The Distances of Education", 85 *Academe* 37 ((1999)(discussion of distance learning in education).

80 The Grosberg CD is essentially a videotaped performance test via a computer. Again, I believe these computer modes are not a substitute for traditional skills feedback, but simply supplements or complements.

developing a virtual world in which students can practice law and have their virtual world law work evaluated.[81] Practicing law in the virtual world gives Maharg students the opportunity to be creative and do things not possible in a clinic, or even in a traditional simulation course and to do so without the concern that they will make a mistake with a real client. For example, they can exercise initiatives to bring a lawsuit or alternatively, to propose an ADR device to resolve a dispute without litigation, just to name two. The opportunities in the virtual world provide a potentially richer base upon which to assess the students' strategic as well as interpersonal lawyering skills. The computer records provide the basis upon which the assessments of student work are based. While he has not yet developed avatars who could be interviewed and counseled by the students in an interactive and interpersonal sense, he has taken simulation several steps further than anything I have seen in the U.S. There is certainly room for some American pedagogical initiative here.

Conclusion

Evaluating interviewing and counseling skills calls on us to apply different measurement tools from those used to assess students' grasp of doctrinal law. We should approach this responsibility as clinicians in the same open-minded manner we would like to think we approach all educational issues. Numerous ways to evaluate skills have been developed and we should use or at least consider the potential use of all of them, having in mind the ultimate refinement of the most appropriate mix in each situation. While clinicians have made much headway in developing sophisticated critique and feedback tools, there has been less effort expended on the more formal grading evaluation. To the extent we make progress in developing law school measuring tools, we should try to carry over developments to the bar exam.

81 Paul Maharg, "Legal Sims: From Everquest to Ardcalloch (and back again)" 2004; and Patricia McKellar and Paul Maharg, "Virtual Learning Environments in Action" , 2002 and Patricia McKellar and Paul Maharg, "Presence, Emergence and Knowledge Objects: User Interaction in A Virtual Learning Environment", all available at http//www.ggls.strath.ac.uk/Itdu/research/default.htm (description of Professor Maharg's virtual world of the city of Ardcalloch in Scotland in which his law students conduct law practices).