Evaluating Goals and Methods of a Skills Curriculum: Challenges and Opportunities for Law Schools

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I. Introduction

Law schools have compelling reasons to begin a process of thoroughly reviewing their skills curriculum. A new ABA Standard for Accreditation, revised in 2005 to mandate skills education for every law student, is now being applied at law school re-accreditation reviews.¹ In addition, EDUCATING LAWYERS, a report by the Carnegie Foundation², and BEST PRACTICES FOR LEGAL

¹American Bar Association (ABA) Standards for Approval of Law Schools, Standard 302. CURRICULUM now states:
(a) A law school shall require that each student receive substantial instruction in:
(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
(2) legal analysis and reasoning, legal research, problem solving, and oral communication;
(3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
(5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.
(b) A law school shall offer substantial opportunities for:
(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence...
http://www.abanet.org/legaled/standards/standards.html
[Emphasis added to highlight the portions of the Standard discussed here.]

²WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (Educating Lawyers). The book is the most recent in a series on professional education by the Carnegie Foundation for the Advancement of Teaching. The series, called Preparation for the Professions, has previously published work regarding medicine, nursing, engineering, and religious clergy. The authors have produced extensive scholarly work on education and professionalism. Educating Lawyers, at ix-x.
Educatings Lawyers and Best Practices examine law school pedagogy throughout the curriculum in the light of that ambitious goal. The convergence of these thorough critiques of legal education provides an important opportunity, as law schools that are reviewing their skills curriculum to check for compliance with ABA Standards can expand their effort and look for excellence in their skills education.

Both Educating Lawyers and Best Practices call for greater focus on the professional “identity and purpose” of lawyers, better integration of the cognitive and practical elements of preparation for law practice, and creative use of experiential education. Both urge law schools to adopt more reliable, educationally sound methods of grading. Best Practices explicitly urges law schools to attend to the psychological well-being of law students. Integrating these perspectives, the goal of legal skills education is the development of law graduates who are competent, aware of key practical and ethical challenges affecting the practice of law, and prepared to continue to learn from reflection and mentoring. Students should be guided and coached, as in an apprenticeship, toward this goal.

Educating Lawyers, an analysis of legal education by the Carnegie Foundation for the Advancement of Teaching, presents a nuanced analysis of the multifaceted professional

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3ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007), also downloadable as a pdf file from the University of South Carolina Law School’s Center or Professionalism website, http://professionalism.law.sc.edu/. The work was sponsored by the Clinical Legal Education Association, a membership group of law professors primarily teaching clinical and other skills courses. The Educating Lawyers cites Best Practices frequently, referring to its publication date as 2006, based on a draft then available on the website. Prof. Stuckey involved many legal educators from across the country in drafting and reviewing the text, as explained in the text at page ix. Some of his prior publications about legal education are: Education for the Practice of Law: The Times They Are A-Changin’, 75 NEB. R. REV. 648 (1996); Preparing Students to Practice Law: A Global Problem in Need of Global Solutions, 43 S. TEX. L. REV. 649 (2002); Can We Assess What We Purport to Teach in Clinical Law Courses?, 9 INT’L J. OF CLIN. LEGAL EDUC. 9 (2006).

4Educating Lawyers, supra note 2, at 14, and 126 et seq.

5Educating Lawyers, supra note 2, at 12, and at 194; Best Practices, supra note 3, at 65-66.

6Educating Lawyers, supra note 2, passim, including learning “from the wisdom of practice,” at 115, and conclusions at 200; Best Practices, supra note 3, at 165 et seq.

7Educating Lawyers supra note 2, at 162 et seq.; Best Practices, supra note 3, at 235 et seq.

8Best Practices, supra note 3, at 90, and at 110 et seq.

9Educating Lawyers, supra note 2, at 61, describing the apprenticeship steps of “modeling...coaching...scaffolding...[and] fading.”
“apprenticeships” that legal education should offer. The report examines law schools’ mission which they cite as historically conflicted between preparation for practice and a focus on scholarship and doctrine. It challenges law schools to establish an integrated model of legal education, focusing on a mission to develop graduates who are prepared for practice not only in “legal analysis” but also “practical skill” and “professional identity” – the three “apprenticeships” necessary for preparation to practice law. Educating Lawyers addresses the broader question of the purpose and orientation of legal education as preparation for professional practice through apprenticeships of cognition, practical skills, and professional identity. As a result, the report stresses less easily measurable outcomes for legal education, notably developing “professional identity and purpose.”

Working independently at about the same time, a group of law professors under the leadership of Prof. Roy Stuckey of the University of South Carolina’s Center for Professionalism produced *BEST PRACTICES FOR LEGAL EDUCATION* (Best Practices). Best Practices, the culmination of intensive collaboration and research over several years, offers a comprehensive guide to teaching excellence in both doctrinal and experiential courses. Like Educating Lawyers, Best Practices acknowledges the importance of doctrinal analytical learning and the value of Socratic method in achieving that learning, but emphasizes the importance of developing lawyering skills for ethical and reflective practice.

As Educating Lawyers and Best Practices were being prepared, the Standards for Accreditation of Law Schools were revised to emphasize law schools’ obligations to skills and practice education for students. The revised version of ABA Standard 302 codifies the commitment by accreditation officials to both teaching specific skills and to opportunities for students to experience and reflect on legal practice.

In the light of these developments, this Article suggests how a law school can use the review of its skills curriculum implicated by Standard 302 to begin or deepen a conversation among faculty about the school’s educational goals and practices in regard to preparing students to enter the profession. The Article focuses on principal areas of information to be investigated when evaluating skills education. After considering the requirements and ambiguities of the new Standard, the Article identifies teaching practices, such as repeat opportunities for performance and feedback of various types, and curriculum structure, such as enrollment opportunity, which are relatively concrete identifiable features with important links to effective skills education. Second, it addresses the challenging task of understanding attainable pedagogical goals for skills.

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10 Educating Lawyers, supra note 2, at 27-28.
11 Educating Lawyers, supra note 2, at 126 et seq.
12 Partly in preparation for the United States Department of Education’s regular review of the ABA Council of the Section on Legal Education’s recognition as the accrediting authority for law schools, the Council reviewed standards applicable to a program of legal education, drafting revised Standard 302 and publishing it for comment in 2004. The ABA House of Delegates concurred in the revisions in February 2005. The revised ABA Standard 302 applies to students now in law school and anticipating graduating by 2009.
education in its various forms. Potential disparities between instructors’ intended educational goals, student learning, or an observer’s prediction of outcome, provide an opportunity for instructors to think critically about their educational objectives. Finally, the article suggests that worthwhile outcomes of evaluating skills curriculum are communication among all faculty members about goals and methods and clearer communication to students about a law school’s program of skills education.\textsuperscript{13}

\textsuperscript{13}My analysis is informed by what I learned from evaluating skills education at my law school, both as to process and results. I am not reporting those results here, but hopeful that those efforts have better prepared me to be thoughtful about this important challenge. With the support of the Dean and the Lawyering Programs committee, and the endorsement of other faculty committees, I developed and distributed a survey of skills and writing in the upper level curriculum during the fall term 2006. A summary of survey results were presented for faculty discussion during the spring term 2007. The written survey was followed by some telephone or personal conversations, and by enrollment analyses. I am treating those specific results as confidential, while sharing what I believe to be generalizable information derived from the effort. Colleagues and staff members Ann Freedman, Victoria Chase, Ruth Anne Robbins, Maureen Aguilar, Tom Ryan, Robert Williams, and John Beckerman and other members of the Legal Research and Writing Committee and the Lawyering Programs committee contributed significantly to the drafting of the survey and of the resulting reports to the faculty. Professors Victoria Chase and Ann Freedman were helpful in carefully analyzing survey results relating to the skills curriculum.
II. Overview of ABA Standard 302
To begin, the two relevant sections of ABA Standard 302 are examined here, with particular attention to what is mandated and in what respects there is room for interpretation.

A. ABA Standard 302(a)(4):
With regard to skills education, the Standard now states
Skills performance and assessment for every student
(a) A law school shall require that each student receive substantial instruction in:

... (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession...

This mandate is consistent with the increasing attention over the years by the ABA Council on Legal Education to the quality of professional skills education for law students.\(^\text{14}\)

\(^{14}\) A noted previous report on the need for improved skills education was AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, American Bar Association, Section of Legal Education and Admissions to the Bar (1992), viewable at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html, and usually referred to as the McCrate report.
“Other skills” include “professional skills related to the various responsibilities which lawyers are called upon to meet, ... [such as] trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting.”\(^{15}\) The obligation to provide instruction in skills other than writing and legal analysis is new.\(^{16}\) Official Interpretations state that this instruction may be provided in various ways, including simulation courses, as well as simulation exercises in subject-matter courses.\(^{17}\) Interpretations also establish a baseline standard for substantiality, requiring that each student be “engaged in a skills performance...assessed by the instructor.”\(^{18}\)

B. Interpreting “substantial instruction ... in professional skills”

1. “Performance”

As noted, the Standard defines “substantial instruction” as performance assessed by an instructor.\(^{19}\) “Performance” suggests observable activities, but should not so limited. A skills program should not overlook skills that are best demonstrated in a written document.\(^{20}\) For example, a student may perform a simulated negotiation of a commercial lease, either in a course on commercial real estate transactions or in a negotiation course, by means of a face to face encounter with another negotiator. The student may, alternatively, produce drafts of documents proposing positions to be taken in the negotiation, without an observable “performance.” Document drafting may even more closely resemble the process of an actual complex negotiation, and can also be assessed by the instructor. In addition to writing, complex skills that are demonstrated over a period of time, such as professional judgment, are harder to design as observable “performance.”

2. “Assessment”

\(^{15}\)ABA Standards, Interpretation 302-2, viewable at http://www.abanet.org/legaled/standards/20062007StandardsWebContent/B.Chapter%203_20061005150125.pdf

\(^{16}\)Standard 302 [(a)(4)] establishes a new requirement that all schools require that each student receive substantial instruction ‘in other professional skills generally regarded as necessary for effective and responsible participation in the legal profession’ and that requirement is further explicated in Interpretation 302-2 and 302-3.” From Commentary re changes: http://www.abanet.org/legaled/standards/adopted%20standards%202006/adoptedstandardscommenary.pdf

\(^{17}\)ABA Standards, Interpretation 302-3, supra note 15.

\(^{18}\)ABA Standards, Interpretation 302-3, supra note 15.

\(^{19}\)“To be ‘substantial,’ instruction in professional skills must engage each student in skills performances that are assessed by the instructor.” ABA Standards, Interpretation 302-3, supra note 15.

\(^{20}\)Writing may also fulfill an additional pedagogical purpose in connection with an observable performance, for example, a reflection or planning memo about a negotiation.
The Interpretation states that every student must be individually assessed by an instructor. “Assessment” in this context appears to refer to feedback or critique, a process that has unmistakable value in teaching skills. No specific format is mandated for the delivery of feedback. In skills education, individual feedback can be delivered as confidential critique via conference or memo, or collegially in a master-class style environment, allowing students to learn from each other’s performance as well as from their own.

3. Enrollment opportunity
While the Standard requires that schools provide substantial instruction to every student, the Interpretation states that a required course with a skills “component” is an “example” of how to fulfill that mandate. This presents a conundrum. If skills education is required for every student, what other than one or more required courses, or a requirement to select one from a list, would meet the Standard? In addition, since the Standard does not explicitly require that 302(a)(4) courses be upper level educational offerings, it appears that one-L course would satisfy the Standard’s mandate. The Standard could be understood to mean that an otherwise required course, not solely devoted to skills development, with a skills component, would suffice. However, can a minimum of one required course, no matter how thorough, be considered “substantial instruction”?

C. Standard 302(b)(1): Substantial opportunities for supervised reflective practice
The section of the Standard concerning real client experience states

(b) A law school shall offer substantial opportunities for:

21The word “assessment” is often used elsewhere to refer to evaluation of student learning, primarily by means of grading. The challenge of assessment of skills education is discussed in Roy Stuckey, Can We Assess What We Purport to Teach in Clinical Law Courses?, supra note 3. Current assessment methods used by law schools are critiqued by the Carnegie Foundation’s report Educating Lawyers, supra note 2, at 162 et seq.


23“A school may satisfy the requirement for substantial instruction in professional skills in various ways, including, for example, requiring students to take one or more courses having substantial professional skills components.” ABA Standard, Interpretation 302-3, supra note 15.

24A one-L introduction to lawyering process or lawyer role is in place or being developed at some law schools. Others have implemented or are developed more extensive programs of skills education. Prof. Roy Stuckey is examining these efforts, looking for “comprehensive structured programs” teaching “skills and values.” Presentation at annual meeting of the Southeastern Association of Law Schools (August 2, 2007). [cite to work in progress to be updated]
(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence...

A law school must provide “substantial opportunities” for supervised practice experience within a structure designed to encourage reflection on the legal system and on personal professional development, but is not required to mandate such experience for every student. The emphasis on practice supervision, accompanied by reflection on the legal system and on the student’s professional development as a lawyer is consistent with clinical pedagogy, which has long focused on just such a process, both in externship and in-house clinical settings.

D. Interpreting 302(b)(1)

1. Student role mandated by “Real-life practice experiences”
The Standard states no preference for in-house clinics versus externship, and the exact nature of the student role is not specified. It appears that a student in a practice setting could, for example, have his own clients under close supervision of an attorney, or could be responsible for selected assignments for matters on which the supervisor is the principal attorney, or could be collaborating extensively with other students and/or the attorney of record. At a minimum, I would argue that a student should feel personally engaged with the work to benefit from supervision and reflection, and to begin to learn from experience.

In contrast, a student’s assignment that has been generated by a real client but separated out from other aspects of the case in a way that limits opportunity to learn more about its legal and practical meaning, would ordinarily not fulfill the objectives for experiential education. Examples could be a pro bono research assignment taken on to assist in a real case, but supervised by a faculty member, assignments referred from a clinic or other source and handled by students in a class on a related subject, or isolated assignments that may be given students in some externship placements.

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27ABA Standards, Interpretation 302-5, supra note 15.
28With careful planning by the supervising attorney, the student could be relatively engaged in a case even with selected assignments. In the Rutgers-Camden Pro Bono Research Project, an attorney referring research needs to the Project is required to communicate with the volunteer
2. “ Appropriately supervised”
Standards for supervision in various forms of clinical education have been the subject of a great deal of attention and are fairly well established, though not without dispute.29

3. “ Designed to encourage reflection ...”
Clinics and externships have long stressed the educational goal of reflection on the legal system and on personal development as a lawyer. Methods include well-designed seminars, setting individual goals, and student journals.30

4. “ Substantial opportunity”
Unlike the mandate for “substantial instruction” in skills, the “substantial opportunity” language does not establish a requirement for every student. It is not clear what would meet this standard. It may seem reasonable that substantial opportunities exist if there are enough enrollment openings that a student who is committed to taking one or more such courses can do so. The Interpretations state that a school need not accommodate a student in a particular clinical course, but clinical offerings too sparse to allow a student any reasonable chance of enrollment surely could not be “substantial.” Arguably, a student should be able to construct a schedule, making choices as necessary, in which enrollment in a supervised practice experience is possible.31

This interpretation of “substantial opportunity” seems to justify current enrollment patterns, whatever they are. A law school could conclude that it provides “substantial opportunity” if no student is turned away from a practice course, whether enrolled clinic and externship students represent 10%, half, or 90% of the student body. However many or few students enroll in real-life practice experiences, a school could declare that it met its responsibility if every student who wanted such a position eventually got one.

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31 Various barriers may limit availability of clinical courses, such as limits on faculty availability, enrollment caps, location, and scheduling. No single group of students should be excluded due to scheduling, such as part-time students, or practice interests, such as transactional legal skills.
The flaw in this reasoning is that student interest in clinical offerings may reflect how well the program is highlighted by the school, or in effect what may be called the “culture” of the school. Student enrollment patterns would then reflect student attitude, rather than what is best for the students educationally. Why should real-life experience not be available for every student even if not required?32 The Standard does not require a school to actively promote practice experience as a component of professional education. But if real-life experience is uniquely valuable, this may be exactly what a law school should do.

III. Specific features of the skills curriculum that a skills evaluation should examine
At its best, an analysis of a skills curriculum would identify key characteristics of excellence by considering teaching practices in individual courses, balance and scope in the skills curriculum as a whole, innovative teaching, and evidence that courses are working toward their most valuable and attainable educational goals. This is not to criticize the general qualitative language of the ABA Standard for not being prescriptive enough to mandate any of these features precisely, but to note that attention can be paid to these specific elements of good skills teaching. How educational goals can be identified and clarified is itself a larger topic, addressed in the next section of this article.

A. Additional pedagogical features in individual courses
1. Repeat opportunities for practice
Repeat performance of the same or similar task is critical to individual skills improvement. A significant body of research supports the idea that developing expertise requires personal effort at real or simulated realistic tasks in a practice context, critique, and a chance to repeat a performance for improvement.33

32It has been argued that externships are well positioned to expand availability of educationally high-quality practice experience. See James H. Backman, Where do Externships Fit? A New Paradigm is Needed: Marshaling Law School Resources to Provide an Educational Externship for Every Student, 56 J. LEGAL EDUC. 615 (2006).
33While novices in any field improve their skills due to early experience, development of truly excellent skills does not happen just by repetition of the skill; the student must seek out what is called “deliberate practice.”

“...Simple experience is not sufficient for the development of expertise”...[After acquiring a functional level of performance] research has shown that additional experience appears to make performance less effortful and less demanding, but to improve performance it is necessary to seek out practice activities that allow individuals to work on improving specific aspects, with the help of a teacher and in a protected environment, with opportunities for reflection, exploration of alternatives, and problem solving, as well as repetition with informative feedback.”
2. General feedback to a group by an instructor
While individualized feedback is essential for individual improvement in skills, there is also value in feedback to a group, identifying trends or common problems. As multiple pairs or groups of students perform a skills simulation at the same time, the instructor moves around the classroom observing. A comparable practice of providing group feedback about writing errors is commonly in use in legal writing classes. The instructor’s critique is based on his observations of various individuals in the group, and informed by his awareness of the challenging issues in the particular assignment. General feedback may involve some exposure of student errors to public view, but this can be done in a supportive manner, consistent with efforts to develop skills of self- and peer-critique. It may even help to reduce student anxiety over errors of performance by sharing information among students.

3. Assessment by peers
Students can play a role in providing feedback on their classmates’ skills performance, for example by offering critique after a negotiation, counseling, or interviewing role play they have conducted together, collaboratively discussing or questioning a student’s presentation about a case plan or appeal strategy, or a draft of a document. Faculty have used peer response creatively, taking advantage of both the expanded resources for critique that it obviously offers, and the incentive students have to perform well in front of their peers.

4. Self-assessment
Teaching students to monitor their own progress as they improve in lawyering skills is recognized as an important educational goal for skills education in the scholarly literature and in ABA Standards. While the ABA Standard connects self-assessment to “real-life practice experiences,”

exertion to improve performance ...intrinsic motivation...practice tasks that are within reach of current ability...feedback that provides knowledge of results...[and] repetition.” Ronald T. Kellogg, Professional Writing Expertise, CAMBRIDGE HANDBOOK, at 396. This effort places demands on instructors, as well as on students.

“It is not reasonable to teach students knowledge and rules about a domain...and then expect them to be able to convert this material into effective professional skills by additional experience in the pertinent domain. Schools need to help students acquire the skills and mechanisms for basic mastery in the domain, and then allow them gradually to take over control of the learning of their professional skills by designing deliberate practice activities that produce continued improvement.” Feltovich, CAMBRIDGE HANDBOOK, at 61.

34E-mail exchange with Prof. Sarah Ricks on 6/11/07 about her course Civil Rights Litigation. See [cite for peer review/writing article]
35If peer feedback will be used, it is critical that students be prepared to use effective methods that are specific, constructive and responsible. Best Practices, supra note 3, at 174-176.
37“A law school shall offer substantial opportunities for:
the setting where self-directed improvement will continue to be salient throughout a career, students can also be introduced to this skill in simulation courses.

5. Theory and texts
A review should examine what texts are used, if any, and how well the text content matches goals for the course. Texts for skills and practice courses extensively examine aspects of one or more skills, and a few address the clinical experience of students themselves. These materials are assigned to enable students to explore both critical issues implicit in ethical exercise of the skill and practical guides to methods of performance. A text may provide a framework about the goals of the skill, ethical considerations, philosophical considerations, or comparison to other professional perspectives. For these reasons, a clinical or simulation course would ordinarily select a text with a perspective matching her teaching goals. On the other hand, even when skills performances in doctrinal classes are regarded as contributing to skills education in a law school, intensive skills texts may not be appropriate. Practical obstacles aside, such as the cost to students of an additional text, assigning reading or attempting to teach in depth about an essentially marginal issue would likely make adoption of a skills text inappropriate in that context. Shorter materials, or lectures, could partly fill this gap, to the extent that knowledge about the skill is a

(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage ...the development of one's ability to assess his or her performance and level of competence” Excerpt, ABA Standard 302(b)(1), full text supra at note 1.


39For example, on the subject of the proper balance of decisionmaking authority between lawyer and client, see Stephen Ellman, Lawyers and Clients, 34 UCLA L. Rev.717 (1987); David A. Binder et al, supra note 38, at 280; Cochran et al, supra note 38 at 1-9. On the issue of truthfulness in negotiation, see Korobkin, supra note 38 at 377 et seq.

40Krieger and Neumann’s ESSENTIAL LAWYERING SKILLS and Bastress and Harbaugh’s INTERVIEWING COUNSELING, AND NEGOTIATING, cited in note 38 are good examples of text providing detailed and nuanced guidance on the conduct of skills.

goal of the class.

B. Additional features to identify in the skills curriculum as a whole

1. More than minimum enrollment opportunity
A range of skills courses and supervised practice should be available to every student intending to practice law, which is likely to be nearly all candidates for the JD. While the ABA Standard may arguably be met by one course, additional upper level skills courses can build on the students’ enhanced doctrinal sophistication. A continuum of courses can also develop depth of student understanding of skills. In addition, to provide skills education for each student there must be enough seats in lawyering courses often enough and in enough time slots that every student can enroll in one or more courses.42 “Substantial education” should certainly mean that a motivated student should be able to gain a thorough education in skills of interest, enrolling in both simulation and experiential courses during her or his law school career.43

2. Diversity of skills/range of applicable practice
A skills curriculum should reflect the diverse tasks performed by lawyers. It is hard to imagine that, for example, a program limited to litigation adequately meets the goal of improving lawyering skills among new lawyers. An excellent skills program should be concerned about what skills are taught, with an eye toward a broad introduction to lawyering skills and practice areas. Students should be guided in making coherent selections of courses to meet various goals.

3. Writing in the skills curriculum
As noted above, much lawyering work calls for writing in the planning and execution of a task. Many types of simulation exercises or lawyering assignments in real cases would normally consist of producing written materials. Examples from Rutgers are Transactional Document Drafting, in which documents, or particular segments of documents, are drafted by students,44 and Small Business Counseling, in which partnership agreements, employment contracts, financing plans and the like are drafted by students and reviewed by the instructor.45 In addition, for some more traditionally “performed” skills, notably negotiation, students benefit from producing plans or documenting results in written form. Trial or pretrial tasks also lend themselves to writing assignments. Committing ideas or results to writing is helpful to the individual practitioner, and critical to collaborative efforts that are a common aspect of contemporary law practice. Required writing of plans, proposals, or results may be an excellent pedagogical choice in teaching these

42 Scheduling can facilitate this by scheduling blocks of time for only lawyering courses. No student could then complain that a lawyering course would prevent taking a desired casebook course. On the other hand, the lawyering courses may conflict with each other.
43 See below at IV F discussing finding patterns among students unrollment in skills courses during their law school career.
44 Taught by Adjunct Prof. Lawrence Copeland, Senior Attorney, City of Philadelphia Law Department.
45 Taught by Adjunct Prof. Dennis Talty, attorney in private practice in New Jersey.
skills. Courses requiring any of these types of writing may be encompassed by a law school’s writing program, and anticipated by the ABA under its writing standard.

4. Problem-solving
The comprehensive skill set that has come to be called problem-solving is the mark of a mature legal mind, ready to represent clients responsibly. Learning to think like a problem-solving lawyer may be a challenge to students in their transition from the cognitive legal reasoning education of their first year of law school to the holistic judgment they will need to exercise on behalf of clients as lawyers. Law practice presents unstructured problems requiring a lawyer to integrate information about client objectives, design and implement fact investigation, and comprehensively understand both legal and practical considerations in each lawyering decision. This important and complex skill can probably best be taught in supervised practice, as addressed by 302(b)(1). Nevertheless, problem-solving could be kept in mind as simulation courses are reviewed, asking “how does this education create a building block for teaching the complex skill of lawyerly problem-solving?”

C. Educational features to be examined in supervised practice
Clinical and externship courses that provide supervised practice opportunities for students have particular potential that should be recognized by their instructors.

1. Professional identity
Developing a professional perspective and identity, the third apprenticeship identified by the Educating Lawyers is a key goal of all legal education. Students must grow to understand and be worthy of trust of their clients and responsibility to the justice system. While all three years of law school contribute to this development, supervised practice plays a special role, as a result of experience of integrating doctrine, judgement, and obligation to a client.

2. Engagement and motivation
A positive affective involvement by the student is an important foundation for learning a professional role. A real matter for a real client, whether in an external or on-campus setting provides unparalleled possibility for a student to engage with the responsibilities of law practice

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46 In these examples, the writing is part of the performance of a skill. Writing assignments may also be used to concretize student learning, such as writing portions of a hypothetical corporate compliance manual in an antitrust class, provide another type of bridge to practice.


49 Educating Lawyers, supra note 2, at 162 et seq.

affectively as well as cognitively.

Both externship and in-house clinics can foster personal engagement of a student in the context of a range of student-lawyer roles. Engagement frequently occurs by placing the student in the full role as counsel for the client. Students responsible for discrete assignments in aid of a lead attorney can also be very engaged in a collaborative role when they are treated as colleagues by the supervisor if they are brought fully into the discourse about the matter, if the supervisors take the time to mentor the students, and if the students are prepared to seek this engagement and mentoring.

3. Uncertainty and complexity
Real cases offer uncertainty and realistic complexity of facts. Making decisions under conditions of uncertainty is a key component of professional judgment, and introducing that factor to students is important to their development as lawyers.

D. Recognizing creative teaching
1. Blending genres of skills education

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51 After examining student assessments of teaching styles of supervisors in the Rutgers externship program, I have previously noted the positive strong impact of collegiality between students and supervisors on student motivation. Katz, supra note 50, at 340-342.

52 Judging by student comments “...supervisors’ interest in mentoring combined with ...efforts to guide [the students] by any means [of supervision] resulted in increased student confidence, enlivening student interest in all aspects of the clinical experience...by communicating to those students the importance of their work.” Katz, supra note 50, at 334.

53 Preparation for supervision is one focal point of the classroom component of externships. For example, see instruction to students in Learning from Practice, supra note 25, Chapter 2 (establishing personal goals), Chapter 3 (considering ways to learn from supervision), and Chapter 5 (reflecting on experience). Rutgers externs who reported a sense of collaborative engagement with supervisors at their placements appeared to be prepared by previous assignments. Katz, Reconsidering Collaboration, supra note 50, at 341. In making this point, based on substantial experience and the reports of students themselves in the reflective process, I respectfully disagree with those who argue that only full role assumption by the student can achieve this result. See also Minna Kotkin, Reconsidering Role Assumption in Clinical Education, 19 N. M. L. Rev. 185 (1989) (questioning full attorney role assumption for clinic students when it may contradict student learning styles); and Peter Toll Hoffman, The Stages of the Clinical Supervisory Relationship, 4 Antioch L. J. 301 (1986) (recommending increased student role, as readiness for case responsibility increases).

A review should be alert to recognize creative use of multiple forms of skills education. This would include, for example, primarily doctrinal courses taught with simulations, or with a practice-problem focus, and skills simulation courses or legal writing incorporating real controversies or transactions, possibly as referrals from clinics. The forms of skills education, as typically defined by their educational form and goals, are discussed below in Section V.

2. Analysis of the lawyer’s role in doctrinal courses
In traditional doctrinal courses, analysis of a lawyer’s role in the underlying transaction or dispute under consideration adds pedagogical value, as discussed below. Among these is enhanced student awareness of the impact of particular lawyer roles. While this teaching approach does not require “performance” it could be a valuable element in a law school’s overall attention to lawyering skills in the curriculum. In a seminar on commercial real estate transactions, for example, a student may produce papers on key features of commercial leases, identifying ways a lawyer can add value to the transaction. This pedagogy appears to be frequent, but difficult to identify with certainty due to subjectivity in describing the structure or purposes of particular classroom teaching choices.\footnote{The challenge of understanding teaching methods as reported by instructors is discussed below in part V D.}

IV. Challenges in understanding and evaluating pedagogical goals

A skills curriculum evaluation faces particular challenges in regard to educational goals. What are the objectives of a skills courses? Teaching goals in skills courses may include proficiency at particular skills, a survey introduction to a range of skills, coherent theoretical understanding of a skill, contextual understanding of skills applicable to a practice setting, or awareness of how practicing lawyers make wise use of doctrinal knowledge. Are the teaching method and structure reasonably designed to achieve those objectives? Disparities may exist between faculty statements about intended educational goals and what an observer would note as a likely educational outcome. In addition to goals set by skills-centered courses, lawyering skills are referenced or demonstrated in doctrinal classes with a variety of other achievable pedagogical intentions, including enhancing the student appreciation of the subject matter of the course, introducing the relationship of lawyer role to case development, and presenting material in a way is engaging and memorable for students.\footnote{The Rutgers study asked respondents to identify goals in regard to role plays used in class in a way that would define purposes of skills exercises in a variety of courses, including ones primarily focused on skills. Faculty survey, Question I A 4 asked: What are your pedagogical goals for these required skills-building exercises/opportunities? (check all that apply)

\begin{itemize}
  \item to improve student understanding of the key features of the skill
  \item to improve student individual ability to perform the skill
  \item to enhance student understanding of the substantive law of the course
  \item to expose students to the lawyer/client context in which this area of law is practiced
  \item Other: ______
\end{itemize}
a realistic goal. My impression is that there could be a gap between an instructor’s intentions and the educational impact of these skills aspects of the class. Understanding or categorizing the pedagogical value of these various class scenarios present interesting challenges, both in describing what actually happened in class and in attributing pedagogical effect.

Comments are offered here in regard to five major educational settings for skills education in law schools: real-case experience (in-house clinics or externship); skills-focused simulation courses (“Interviewing, Counseling and Negotiation”); practice-context simulation courses (“Criminal Practice,” “Real Estate Transactions”); doctrinal courses with skills exercises as a part of the pedagogy (such as Family Law, in which students conduct lawyering exercises based on a simulated divorce problem, or Business Organizations, in which students advise a hypothetical entrepreneur); and critical analysis of lawyering in doctrinal courses (for example, using procedural developments in a case to illustrate lawyering decisions and their impact on case outcome.)

Without minimizing the difficulty of this task, I suggest that a skills evaluation would ideally attempt to consider whether courses are identifying and teaching their optimum skills-related objectives and communicating these objectives to students.

A. Real-case practice experience: on-campus clinic and off-campus externship
Real case experiences at their best provide a student with a contextual understanding of both specific lawyering skills and personal professional development. Depending on methods and goals of the in-house program, or the professional environment of the external placement, the student may have independent or collaborative opportunities for assuming the role of a lawyer that makes such learning powerful and immediate. It is inherently difficult to measure progress in some of the intangible qualities that are implicated in “professional development” – qualities such as professional judgment and problem-solving, empathy, and integrity. Evaluation could instead

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57 Alternative lists categorizing skills education courses may been seen in Stuckey, *Teaching with Purpose*, supra note 54 at 824-836 (“Simulation-based courses...Practice Observation Courses...Client Representation courses...”; and in Best Practices, supra note 3, at 165 et seq. (Simulation, In-House Clinical, Externship).


60 See, e.g, Lawrence S. Krieger, *The Inseparability of Professionalism and Personal*
focus on the presence of elements of the program which seem likely to promote awareness, reflection and growth in these areas.  

At the same time, skills elements such as counseling, interviewing, or negotiation appear in real cases but not predictably. This presents both advantages and limitations. Students will experience the reality of unpredictable clients and facts. For exactly the same reasons, students will less reliably have instruction and practice in particular aspects of a skill.

The unique value of in-house clinics, matched by some externships, is the likelihood of a close attention to the development of each student. The unique value of externship is the possibility of student involvement in practice contexts and collaboration with expert supervisors in legal specialties, with clients or cases that cannot be duplicated on campus. In either situation, the supervisor who engages the student both in the substance of assignments and in the process of inclusion as a valued colleague helps the student to be a lawyer motivated by professional responsibility to a client, as opposed to the stereotypical “student” attitude of focusing on meeting the demands of a supervisor or an instructor.

The differences and overlap in teaching goals for these significant forms of practice experience should be recognized as these programs are examined. A constructive conversation can develop among clinical and externship faculty about the various ways in which students can be motivated to develop a strong sense of professionalism.

B. Skills-focused simulation courses
   1. Balancing performance and theory, choosing texts

In contrast to live client courses, skills simulation courses can more precisely identify particular

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62 Stuckey *Teaching with Purpose*, supra note 54, at 835.

63 Some examples from Rutgers students have been a student extern with the State Police preparing a response to pending legislation and presented it for discussion and critique to the legal department of lawyer-troopers, and a student in the City of Philadelphia Law Department real estate group researching a specific issue of property law in regard to a parcel of land that the City wanted to reclaim and participating discussing decisionmaking about the best public use of the property and what it would take to negotiate that outcome.
elements of a skill, set out an orderly progression of steps in performance, and explore the deep structure of a skill. Texts can explain relevant concepts from other fields of study such as psychology, business, or social work, and identify significant ethical issues and legal constraints. Texts often provide carefully designed examples and problems for teaching and take a student chronologically through the steps of performance. Skills curriculum evaluation should inquire about which of these goals have been selected for emphasis by the instructor, and whether the text and other materials are consistent with the chosen educational aims.

Are students better served by focus on development of individual skills through examples and a chronological presentation of a skill as performed or by understanding the deeper theoretical structure of the skill even if the time for reading and discussing the assigned materials reduces the time available for simulations? Can one course combine both approaches and do justice to either? Is there a best practice for a sequence or order of such diverse approaches? Considering the best way to integrate or share pedagogical approaches could be an important part of the conversation about skills teaching.

It seems likely that most instructors will choose an approach that seems coherent and teachable, reflecting how they personally understand the subject best and believe students will grasp the materials. Possibly, there are discernable pattern as to which instructors use which methods, such as a divergence between adjuncts and clinical faculty.

2. Overview or proficiency?
Some skills simulation courses cover a broad range of lawyering skills and the relationship among those skills. For example, a course covering the pretrial period of litigation could begin with client interviewing and include case investigation and evaluation, developing a theory of the case, counseling the client, preparing pleadings, conducting discovery, motion practice, and initiating or responding to settlement possibilities. A pretrial course designed in this way could offer a coherent view of how these disparate skills are integrated in the process of representing a client in a dispute. If students conduct simulation exercises that demonstrate several of these disparate skills, they would be effectively introduced to the challenges of the skills. Essentially, these are survey courses; their particular educational value lies in the overview they can provide.

64E.g., Bastress and Harbaugh, supra note 38, at 19 et seq., and 175 et seq.; Korobkin, supra note 38, at 67 et seq.
65E.g., Korobkin, supra note 38, at 375-468.
66Bastress and Harbaugh, supra note 38, passim, especially the Weber and Jones dispute, used extensively in connection with the negotiation unit; Korobkin, supra note 38, TEACHER’S MANUAL AND SIMULATION MATERIALS (2002).
67E.g., Binder et al, supra note 38, passim; Bastress and Harbaugh, supra note 38 at 405 et seq.
68Instructors in some courses may minimize the use of texts, focusing solely on performance and critique, an approach that overlooks the rich resource of theory and is a questionable approach, if used as a primary method of instruction.
In a fourteen or fifteen week term, however, students in such a course would be unlikely to have detailed individual feedback or repeat opportunities to improve personal competence each of the covered skill dimensions by very much, even if the instructor in such a course intends the educational goal of achieving competent student performance of some of these skills. An educational outcome of competent performance of a skill is more likely to be achieved in a course that is more narrowly focused, for example on interviewing and counseling, negotiation, or depositions. If the educational goal is proficiency at the skill, repeated opportunities for student practice of skills with a structured progression of the elements of the skill would gradually increase student ability and lay the framework for continued improvement.69

C. Practice context simulation courses
A practice-context course examines the range of lawyering decisions in a particular practice speciality, integrating substantive law with lawyering skills as they are applied in that setting.70 A law school reviewing this aspect of its skills program will be looking for a coherent, client- and practice-focused perspective as a foundation for these courses, whether they otherwise concentrate on policy, procedure, skills, or a combination of these elements.

Examples of practice context courses at Rutgers are Immigration Practice and Procedure, Criminal Practice, Bankruptcy Workshop, and Small Business Counseling. Skills courses organized around a practice area can focus on client-centered problem solving in a particularly coherent and natural way as each lawyering task builds on or is interrelated with other decisions or tasks.71

69BEST PRACTICES, supra note 3, at 178; David A. Binder, Albert J. Moore & Paul Bergman, A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer, 13 CLIN. L. REV. 871, at 885-886 (referring to a goal that skill be sufficiently developed to be “transferable” to new similar tasks in practice); Roy Stuckey, Teaching with Purpose: Defining and Achieving Described Outcomes in Clinical Legal Education, supra note 54, 808 (2007) (analyzing the educational goals of clinical education, and asserting as a beginning principle that “developing competence is the primary purpose of legal education”). Understanding the structure of the skill is also asserted to aid transferability, as argued by Paul Bergman, Transferable Rhetoric, in STEVEN FRIEDLAND & GERALD F. HESS, ED., TEACHING THE LAW SCHOOL CURRICULUM (2004) at 72-73 (discussing understanding rhetorical devices in persuasive argument).

70There would likely be overlap in content or teaching goals between a practice-context course, such as Business Counseling and a doctrinal course on Business Organizations that is regularly taught using a lawyering problem-based perspective, as described below in Section V D. It would be an interesting endeavor to compare such courses and consider the similarities and differences in educational goals and emphasis.

71Compare discussion of the “ecological” learning environment of an apprenticeship in the real work context, as explored in Brook K. Baker, Beyond McCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning, 36 ARIZ. L. REV. 287 (1994); Brook
traditional performable skills can be included in such a course, their context in a practice area means that students are constantly expected to base their simulated decisionmaking and lawyering skills taking into account the particular perspective of clients in that setting—business owners, debtors, immigrants—along with instruction about the specific skill. In this way, a practice course is basically a bridge to client-based experience, while retaining the feature of more precise control of content that is found in the skills-focused simulation courses. A practice course can also actually integrate some real client experience by including referrals from a clinic or other program along with simulated problems.

For example, the experienced practitioner who teaches Small Business Counseling at Rutgers takes students through formation, financing, employment and partnership arrangements, and other stages in the life of a closely held small business. Students perform required skills of fact investigation, drafting, transaction planning, and file management. Some assignments are actual client questions referred from a Small Business Development Center connected with the business administration school on the Rutgers campus. Simulations are added to the student assignments to be sure that students have a complete picture of small business representation. Documents are examined in class in a fishbowl style, with line-by-line discussion of student drafting.

Client concerns permeate class discussion. In a class during a recent course, when students began a roleplay about financing options for expansion of a business, a student—“lawyer” advised a student—“business owner” that a lender would have to be repaid while an investor would make money only if the business succeeded. The “owner” replied immediately that he did not want to share control of his business. The class then discussed how client preference for sole management could be a value that affects various decisions, including financing. A commitment to respect for the client perspective, a cornerstone of thinking like a practicing lawyer, can come from thoughtful reflection on practice.

K. Baker, Learning to Fish, supra, note 22.

72Adj. Prof. Dennis Talty is a practicing attorney with a specialization in representation of closely-held business.

73Class observed by the author on Nov. 16, 2006. Contemporary counseling texts stress the importance of identifying client preferences that bear upon decisions. See., e.g., “client-centered” counseling models presented in Binder et al, supra note 38, at 4-15; Krieger et al, supra note 38, at 21 et seq. The text credited with originating the emphasis on “client-centered” counseling was DAVID A. BINDER & SUSAN PRICE, INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). See also, Cochran et al, supra note 38, at 6-9 (similarly asserting the importance of understanding client preferences but describing the desirable relationship between lawyer and client as “collaborative”) and Bastress and Harbaugh, supra note 38, at 255-257 (describing the lawyer-client counseling relationship as a “cooperative” one in which the lawyer helps the client make a decision that “best meets their needs and priorities.”)

74In Bankruptcy Workshop, clients portrayed by actors lead students from the initial stages of meeting the client through planning and strategy, fact investigation, and presentation of
D. Doctrinal courses with skills exercises

Doctrinal, or “casebook,” courses sometimes incorporate brief roleplay exercises in particular class sessions or extended simulations that appear throughout the course.\(^{75}\) Simulations can be effective teaching tools.\(^{76}\) Although a skill experience without individual critique seems unlikely to contribute to the “deliberate practice” that is recommended for significant improvement of a skill, repeated exposure to skill exercises of any sort may increase appreciation of the skill, and therefore increase a student’s openness to other opportunities to get more significant experience and critical perspective.

It can be tricky to assess the likely educational potential of skills exercises in doctrinal courses due to subtle differences in what happens in the classroom. To understand this challenge, consider this theme and variations.

The topic of a Business Organization class session is the corporate form. Using a traditional method focusing on review of legal characteristics, one professor helps students clarify the key legal characteristics that ensue when a business becomes a separate legal entity from its owners. The class may also consider organizational and financial consequences and opportunities of the corporate format. The professor intends that, at the conclusion of this unit of material, students will know the black letter law of corporations, understand case decisions in litigation by or against corporations better, and be prepared to comprehend more advanced concepts about corporate legal bankruptcy issues in simulated hearings. Other practice context examples in the Rutgers curriculum are Intellectual Property Business Transactions, Patent Prosecution and Licensing, Current Issues in Civil Rights Law, Transactional Document Drafting, Criminal Practice, and Immigration Law Practice and Procedure.

\(^{75}\)Teaching doctrinal courses with lawyering simulations may be an increasingly common practice. Under the editorial supervision of Prof. Michael Hunter Schwartz, Carolina Academic Press is soliciting proposals to develop a series of casebooks using a problem method. The “books in this series will...emphasize active learning; make it easier for professors to create multiple opportunities for practice and feedback; use multiple methods of instruction; focus on the application of concepts in simulated law practice contexts...;guide student’ development of self-directed learning strategies...” AUTHOR’S GUIDE, CONTEXTUAL LEGAL EDUCATION SERIES (2007). Publisher LexisNexis plans a series of texts providing materials for simulations in doctrinal courses, to be issued beginning in 2008-2009 under the title Skills and Values. Authors are currently being solicited to create publications that will “actively engage” students, illustrate the values and skills of lawyers in the field, and “bridge the gap between theory and practice.” LexisNexis, Skills & Values Series Author Guidelines, provided to the author by Prof. Ruth McKinney, an editor of the series, e-mail June 28, 2007.

responsibilities. The professor describes an ongoing business that is now a sole proprietorship or partnership and asks the students “Should this business incorporate?” Introducing the same topic as a life-based problem reminds the students of the real people affected by such a decision. The pedagogical focal point of this approach could include understanding which key turning points in the life of a business make a corporate form relatively advantageous for the owner. The student then appreciates what a legal advisor would need to know about a business to determine if and when it should incorporate. She learns that choice of business form is not determined by doctrine but by problem-solving strategies to implement client goals. This student implicitly needs to find out about personal client concerns, as well as business practices in the particular industry. The discussion introduces lawyerly problem-solving, as well as cogently demonstrating the advantage of a business lawyer being knowledgeable about the client and his business. The ensuing discussion may become focused on the content of corporate definitions and parameters, however, not the quality of counseling. Despite the appearance of a question focused on counseling the client; no counseling performance has taken place.

A third instructor also selects the problem-context approach to teaching corporate formation. He describes the business, posing the same question, but formulates the question this way – “Owner Mary Jones consults you, and asks ‘should she incorporate?’ How do you respond?” Framing the inquiry in this way more directly potentially implicates the skills of interviewing and counseling. As in the former example, the student would be called upon to think about the kinds of information needed to provide well-informed advice. In addition, the student appears to be introduced to the client interaction skills necessary to obtain that information and to convey information and guidance to the client. However, what happens at this point in the class? The student could be prompted to begin a simulated interview, but after beginning the interview with a single question, could be diverted to a discussing of the type of information needed. The idea of using interviewing methods has been introduced, but the interview itself did not take place—likely, the

77 Examples of texts with such a traditional approach to instruction about corporate business formation are MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS, 9th Ed. (2006), at 106, and ROBERT W. HAMILTON AND JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES, 9th Ed. (2005), at 208.

78 The hypothetical may include personal information about the business owner such as family members who may be involved in the business, or financial planning considerations. A text structured for teaching choice of business organization form as a contextual problem is JEFFREY D. BAUMAN, ALAN R. PALMITER, AND FRANK PORTNOY, CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 6th Ed. (2007), at 132.

79 For example, a corporate form limits liability of the owner. But will this entrepreneur need to commit his personal creditworthiness or assets in order to obtain favorable terms as he leases property or equipment, despite having a corporation? Does the owner’s active work in the firm expose him to personal liability for foreseeable risks?
interview was an idea for varying the class but was not a significant teaching goal.

Consider a final example. Ms. Jones’s business question is posed. Either one student is asked to be “Mary (or Mark) Jones” and a second to be the business lawyer as others observe\(^{80}\), or all students are paired as lawyer and client.\(^{81}\) The roleplay may have been planned by the instructor. Or it may be a spontaneous teaching moment, when a student – perhaps someone with a business background – responds to another’s opinion about incorporation with a remark like “If I were Mary, I wouldn’t want to hear that.” If teaching goals for that class included consideration of the counseling task itself, appropriate critique of the student “performance” would address the tone and order of questions, the student’s listening skills, the way the student explained information, in addition to the substantive content of the student lawyer’s questions.\(^{82}\) However, it is likely that the instructor would make the reasonable decision to not pursue that line of critique, which would distract from the primary purpose of the class.

In each of these classes, the lawyering role in a business practice has been highlighted to different degrees. The approach is likely to be memorable for students and help them understand their future practice challenges. While the student been not been taught interviewing or counseling with an objective of competency in the skill, nor would that be a realistic goal for such a class, awareness of those skills in working with clients would be enhanced.

E. Critical analysis of lawyering skills analyses in doctrinal courses

At the urging of two faculty members who read and critiqued an early draft of the Rutgers survey, I added a set of questions about using “analysis or discussion” of lawyer skills in classes that did not otherwise require “performance” of such skills. My colleagues’\(^{83}\) view was that faculty members would want an opportunity to report their teaching practices that recognized lawyering skills implicated in the material they were teaching. Many faculty members recognize the role lawyers play in the cases they teach and would not want to conclude a survey about skills education in the curriculum by simply saying “no, my students are not required to perform skills.” I believed these responses would also enlarge our understanding of the law school’s culture in regard to the role of education about lawyering.

Respondents were therefore asked whether any of a list of skills were discussed in class and how this was done.\(^{84}\) It seems likely that such practices are reasonably common in law school teaching.

\(^{80}\) A “fishbowl” method of focusing all student attention on one pair or group of simulation performers. Other students are invited in to take over one role or another, and/or are prepared to offer critique.

\(^{81}\) A “breakout” method that involves all students in attempting the roleplay.

\(^{82}\) See, e.g., Cochran, DiPippa & Peters, supra note 38 at 29 et seq.; Binder, Bergman, Price, Tremblay, supra note 38 at 41 et seq.

\(^{83}\) I owe this insight to Robert Williams and John Beckerman.

\(^{84}\) Methods listed were “discussion of lawyer skills reflected in the reported cases.
A family law professor may ask students to consider how a lawyer might counsel a client about a child custody dispute in the light of a series of appellate opinions about a custodial parent’s proposed move out of state. Having taken students through the rules on introducing evidence of prior bad acts, along with the case law on the consequence of error on this issue by the trial court, an evidence instructor may ask students to consider whether the defense lawyer should advise his client to testify.

This teaching practice seems likely to strongly enhance student understanding of the relationship between doctrine and lawyerly judgement. Ultimately, paying significant attention to lawyering in law school classes should increase student receptivity to the work and reflection necessary to improve their personal ability to perform the skills.

F. A personal reflection on the challenging of discerning educational goals and outcomes

The reading and thinking I have done to write this article has led me to an insight about my own teaching, which I offer here as a cautionary note. In materials introducing my syllabus provided to students, I have claimed that an objective for my course “Negotiation” is basic student competency in the skill of negotiation. My students are paired for at least half a dozen simulated negotiating sessions, two or three of which are fully critiqued by me. Nevertheless, I now wonder if this effort produces, or could produce, the result I declared.

The text I use is built around understanding the fundamental structure of negotiations and the decisionmaking by principals and agents that is involved in planning and carrying out a negotiation. Each simulation is designed to feature the aspect of negotiation that is the subject of a corresponding chapter of the text.85 Despite their performance of multiple simulations, I now think that students are not building on performance skills, as much as they are building on a cognitive understanding of the text author’s theory of negotiation. Students do not repeat exercises on particular aspects of negotiation, but go on to another dimension of the subject in the next assignment. Having used several other negotiation texts, I currently think that a coherent cognitive grasp of negotiation structure is a sound foundation for students, an approach I prefer to beginning with strategy and style, independent of this structure.86 I do think students will be able to build negotiating skills with this beginning, but I doubt that their skills will be proficient solely due to this course.

I am coming to the conclusion that even if every instructor understands that it is good for teaching quality, and fair to students, to be insightful and realistic about educational goals in a course, there would likely be discrepancies not only between espoused and achieved goals but between espoused and achievable goals. Is there an adequate degree of reliability among evaluators of courses—the instructors themselves or a study team from the law school—about actual pedagogical studied...hypothetical or problem posed to the class...guest speaker...readings...role play/moot.”

85Korobkin, supra note 38, at xix and xx.

86Some skills instructors will, no doubt, teach differently. Determining the sequence and relative importance of teaching performance and theory are a challenging aspect of teaching skills.
goals for a given course? I cannot answer the question confidently, but I believe the effort to choose, discern and communicate goals well is worthwhile.

V. Methods, challenges, and purpose in evaluating skills education
When a law school’s skills education review goes beyond compliance with ABA Standards and looks at larger issues of quality, its effort has the potential to begin or be part of an ongoing conversation among the faculty about fulfilling a mission of student professional development. Keeping that goal in mind, a review should be part of an overall dialogue about pedagogical goals and methods, a dialogue that may well be more important than specific factual descriptions of courses.  

A. Who should participate
At Rutgers, including the whole faculty was in part a decision to reach out to the adjuncts who play an important role in certain of the skills courses, and to increasing awareness of teaching methods among all segments of the faculty, in addition to having complete information. Therefore, survey invited participation by all instructors including tenured/tenure track, visitors, adjuncts, clinician and writing professors, and associate deans with teaching responsibilities. In addition, this inclusive scope made it possible to identify doctrinal courses with skills components, which could possibly satisfy ABA Standards, as well as doctrinal courses featuring pedagogical attention on analysis of lawyering skills.

B. The challenge of communicating about pedagogy among various instructors
It is my strong feeling that the various instructors in skills courses – clinicians, field supervisors, adjuncts, and doctrinal faculty – often do not share vocabulary or a common understanding of such teaching tools as individualized feedback, peer assessment, or simulation design. If these diverse understandings are not acknowledged, confusion about the meaning of data would result. The study method itself may be a way to introduce and clarify concepts that will be helpful both in obtaining accurate information and in improving the skills program. Non-clinician faculty should participate in the design of the investigation, so their understanding of terminology is taken into account.

The Rutgers evaluation consisted of a paper survey, followup interviews, and enrollment data analysis assisted by the registrar and the information technology director. As noted above, while not discussing those results, respecting the confidential nature of the study and the expectations of participants, insights gleaned from that effort have added to my understanding and are reflected in this discussion. My focus here is more on the content and goals of a survey and less on the mechanics. There are good resources for creating web-based surveys, which can then be accessed for data reports directly, a significant advantage over paper surveys. A paper survey allows free comments in the margins, and a web-based survey should be structured to allow that, as well, if possible.
C. Content of a survey
A skills review will collect information about skills performance and assessment, but should also explore pedagogy. Which skills does the instructor plan to teach in these performances? What is the format of the skills exercises and how often do they take place? How are they critiqued and by whom? Do students get individual feedback? Do they have opportunities to attempt the skills again in order to attempt to incorporate the feedback they have received? Questions could be designed to be sure that writing components of skills exercises are also reported. The recommended ABA site evaluation process related to standard 302 provides only a modest amount of guidance, but its suggestion to look at descriptions, innovations, and enrollment patterns are a good starting point.88 Structured surveys have the advantage of forcing answers into categories that can be compiled easily, but they could miss nuances. In-depth interviews or extensive observation of classes would be a better way to get a good understanding of more creative pedagogies.

D. Discerning accurate information about pedagogy and pedagogical goals
Reporting about pedagogical choices may also be inconsistent, as various instructors understand the content and purpose of teaching methods differently. For example, an instructor may observe part of a student skill simulation exercise by checking in among many students who are practicing a skill simultaneously. If the instructor then offers some comments on what he has seen, has he provided “individual feedback”? However insightful these comments are, should only an observation of a complete skill performance be regarded as an adequate basis for feedback? A research design could define terms so as to get precise information without distortion that could result from subjective views of what is best practice.

88 Instructions regarding site evaluation are generally not overly detailed; instruction in regard to this and related Standards is no exception:
Briefly describe and analyze the program of professional skills instruction at the law school. What live client or other real-life practice experiences are available to the students? Does the professional skills curriculum emphasize certain areas of the law? In what ways is the professional skills program innovative? Provide information on enrollment patterns in the skills curriculum.

http://www.abanet.org/legaled/accreditation/formatreport.pdf
E. Getting other perspectives
Other methods to verify, confirm, or simply to gain another perspective on reported methods obviously include talking with students, observing classes, and reviewing syllabi, along with interviewing the instructors themselves. In scholarship studying what highly skilled individuals do on the job in various fields, researchers have had considerable success with an interview method that reviews a specific critical event through a detailed interview method that focuses on specific perceptions, decisions, and actions by the studied expert.89 Recording and viewing whole classes with an instructor may be a possible way to get a rich understanding of teaching methods.90

F. Using enrollment patterns to measure depth and breadth of student exposure to skills courses
Who enrolls in skills or clinical courses? Are we missing an identifiable group of students, and for what reasons? Which courses do students choose? Looking at enrollment patterns concretely can begin to help answer these questions. Do part-time or evening students have less access to skills course? Do some students with a primary interest in law practice contexts or skill sets that are less well represented in the curriculum, such as transactional practice, find a litigation-heavy set of courses less desirable? Does the relatively heavy time demand of clinic, both in absolute hours and in priority-setting over the term, conflict with other substantial time demands on students?

While class rosters or individual transcripts may be available online to faculty with appropriate system passwords, depending on the data configurations at a law school, both practical and privacy considerations suggest using computer-generated means to collect this data. The step that was technically feasible at Rutgers, and may be duplicable elsewhere, was to ask the information technology staff to derive information about individual students and the courses they have taken. The resulting tables identified the numbers of students who had enrolled in specified numbers of selected courses that we had identified, without specific names. We then knew how many students had enrolled in one of the selected courses, how many in two, and so forth, with courses identified by name.

89 In this Critical Decision Method, an interviewer asks the expert to review a particular incident in detail, using prompts to be sure information is complete, guiding the interviewee through multiple dimensions and perspectives. The method produces a rich array of information about the perceptual cues and decision paths of experts, which can be used to improve training of novices in the expert’s field. Robert R. Hoffman and Gavan Lintern, Eliciting and Representing the Knowledge of Experts, Cambridge Handbook, supra note 33, at 209.

90 I am not aware of attempts to use this method in studying law school pedagogy. It resembles clinical method for post-event review with a student, the interview technique that may be taught in a skills class, as well the director’s commentary on some film DVD’s.
Student choices in enrollment can also be understood better if a decision is made that it is acceptable to contact selected groups of students for this purpose. The students would have to be identified by name in order to communicate with them. Understanding why students do not take skills or clinical courses, or take only a minimum of such courses could lead to dialogue with students about their confidence in skills learned from paid employment or volunteer positions unsupervised by the law school, or their perception of a disconnect between offered courses and their expected career path. Responses may suggest that the skills curriculum may not be well scheduled or its content well communicated to students.

VI. Conclusion: using skills curriculum information
Our skills and clinical curriculum is the foundation for the apprenticeships of practice and of professional formation called for by the Carnegie Report. Review of these course offerings helps a faculty to recognize the pedagogy that is already in place, and to be thoughtful about what it is being accomplished. The best results for this process include starting a conversation about the whole range of skills education, while introducing disparate teaching staff to each other and to each other’s methods and goals. This should lead to the ability to highlight a coherent yet varied curriculum of skills courses; and to articulate to students clearer paths through the skills curriculum. It could also lead to possible sharing of pedagogies, and ideas for new development. In addition to this rich and fruitful conversation among faculty, individual instructors can think more deeply about their own pedagogy.

91If student enrollment is generally available to faculty, and these students were identified by means of simply additional technological help, there may be no privacy problem, but each school should assess its responsibilities and policies as to who has access to these data.