Teaching With Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses

A paper prepared for the Sixth International Clinical Conference: "Enriching Clinical Education," UCLA/IALS, October 27-30, 2005, Lake Arrowhead, California.

Roy Stuckey*

* Webster Professor of Clinical Legal Education, University of South Carolina School of Law and Chair of the Steering Committee for CLEA's Best Practices Project.

Part 1: Introduction

In 1973, Gary Bellow described "a tendency, within clinical programs, to subordinate the question of what should be taught to the demands of what students are actually doing."[1] This tendency still continues in clinical education, but it is one that we should resist and overcome.

A fundamental need of clinical legal education is for clinical teachers to develop a clearer understanding of the essential functions of clinical education in the preparation of lawyers for practice. After more than thirty five years of growth and diversification, we have failed to articulate and demonstrate the important learning that occurs uniquely in clinical courses. Law teachers in other countries are way ahead of law teachers in the United States in defining and achieving the desired outcomes of legal education. We should seek out opportunities to learn from and collaborate with them.

This paper begins with a discussion of the movement toward outcomes-focused programs of instruction in higher education, with a special focus on the changes that are occurring in legal education in the United Kingdom. It next explains some of the related recommendations of the ongoing Best Practices Project of the Clinical Legal Educators Association.[2] Finally, it proposes some desired outcomes that clinical legal educators can best achieve and how we can achieve them.

---

[1] Gary Bellow, Chapter 20, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, 374, 378 in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING: WORKING PAPERS PREPARED FOR CLEPR NATIONAL CONFERENCE, BUCK HILL FALLS, PENNSYLVANIA, JUNE 1-9, 1973 (CLEPR 1973).

[2] Segments of this paper were taken from Roy Stuckey, *The Evolution of Legal Education in the United States and the United Kingdom; How one system became more faculty-oriented while the other became more consumer-oriented*, INTERNATIONAL JOURNAL OF CLINICAL LEGAL EDUCATION 101 (December 2004) and from the August 31, 2005, draft of BEST PRACTICES FOR LEGAL EDUCATION, the most recent version of which is available on-line at http://www.professionalism.law.sc.edu (look in the "news" section on the main page).

Part 2: The Movement Toward Outcomes-Focused Education.

A typical citizen of the United States probably believes that law schools are striving to provide their students with the knowledge, skills, and values needed to practice law and that licensing authorities are doing everything possible to ensure that these outcomes are achieved before fully licensing new graduates. Unfortunately, neither is the case. When law schools in the United States articulate educational goals, they almost universally refer to what students will do in class, what they will learn about the law, or what specific skills they will acquire, not what they will be able to do with their knowledge and skills. Likewise, bar examinations traditionally evaluate only a narrow range of the legal knowledge and skills that lawyers use when they provide legal services. As a result of the failure of the system to define desired outcomes of legal education or to determine if they have been achieved, clients of new lawyers have no assurance that their lawyers have been adequately prepared to represent them. Many new lawyers are, in fact, unprepared for their first professional jobs.

Legal education would be improved if law schools clearly articulated the desired outcomes of their programs of instruction and each course in them. Educational theorists most frequently describe "outcomes" as having three components: knowledge, skills, and values. "Statements of intended educational (student) outcomes are descriptions of what academic departments intend for students to know (cognitive), think (attitudinal), or do (behavioral) when they have completed their degree programs . . . ."[3] As indicated in the preceding quote, educational theorists usually refer to "attitudes" instead of "values." Either word would suffice, but "values" seems preferable because attitudes are the products of value systems. Values are the bases from which preferences arise and on which all decisions are made. They guide human action and decisions in daily situations.[4]

Law schools, therefore, should describe their learning objectives in terms of what graduates will be able to do and how they will do it when they enter the legal profession, not just in terms of what they will know.

A transition from content-focused to outcomes-focused instruction is underway throughout higher education in the United States and abroad, including legal education

---

[3] James O. Nichols, THE DEPARTMENTAL GUIDE AND RECORD BOOK FOR STUDENT OUTCOMES ASSESSMENT AND INSTITUTIONAL EFFECTIVENESS 17 (1995).

[4] MILTON ROKEACH, THE NATURE OF HUMAN VALUES 14 (1973). "Values are determinants of virtually all kinds of behavior that could be called social behavior - of social action, attitudes and ideology, evaluations, moral judgments and justifications of self and others, comparisons of self with others, presentations of self to others, and attempts to influence others." *Id.* at 24.

programs in other countries and professional education in other disciplines. Prior calls for a similar transition among law schools in the United States have had some impact, but not much.[5] It is an idea that warrants aggressive implementation.

Part 3: The Ongoing Evolution of Legal Education in the United Kingdom

[5] *See, e.g.*, Gregory S. Munro, OUTCOMES ASSESSMENT FOR LAW SCHOOLS (Institute for Law Teaching 2000); Gregory S. Munro, *Integrating Theory and Practice in a Competency-Based Curriculum: Academic Planning at the University of Montana*, 52 MONTANA L. REV. 345 (1991); John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEG. ED. 189 (AALS 1986).

The nature of legal education in the United Kingdom began changing after World War II as enrollment in law schools greatly increased over prewar numbers, a trend that continues today.[6] Dissatisfaction about law schools and the system of professional training and qualification, especially apprenticeship, increased in the early 1960s,[7] leading to the appointment of the Ormrod Committee which undertook the first major review of legal education in England since 1846.[8]

The Ormrod Committee failed to achieve its primary objective of creating an integrated and unified system of legal education and training.[9] It did clarify the lines of responsibility: the academic phase would be the responsibility of the universities and polytechnics; the Bar and the Law Society would be responsible for professional and continuing education of barristers and solicitors, respectively, although they did not agree on a joint professional qualification. Instead, they insisted on conducting separate courses and examinations for the vocational stage in their own privately funded schools.[10]

Some recommendations of the Ormrod Report were never implemented and others took many years to become practice. However, the report marked a turning point in the history of legal education in England by making legal education an important topic of discussion, establishing patterns and stability, and articulating a philosophy about

---

[6] William Twining, BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL 26-33 (Stevens and Sons/Sweet and Maxwell 1994).

[7] *Id* at 32.

[8] *Id* at 33.

[9] *Id* at 35.

[10] *Id.*

legal education that continues to influence decision-makers today.[11]

[11] *Id.* at 36.

The Ormrod Report also marks the modern starting-point for defining a "core" of undergraduate legal education in England. The committee set five "basic core subjects" as satisfying the "academic stage" of professional formation: Constitutional Law, Contract, Tort, Land Law, and Criminal Law. English Legal System was assumed to be a part of the core curriculum. Some additional requirements were imposed after the Ormrod Report.[12] Change did not come quickly or easily. The academics "fought attempts to prescribe the detailed content of core subjects and their methods of assessment, with mixed success."[13] "By 1994, the *de facto* "core" effectively filled nearly two thirds of many curriculums and most students chose vocationally "important" options."[14]

Legal education in England began moving toward a vocational education built around skills in the 1970s. The public became increasingly dissatisfied with the legal profession and began questioning the benefits offered by lawyers to clients as consumers and the wider society. The public came to view lawyers as being more interested in their own power, privilege, and wealth than in the public good. "The undermining of the profession's public image prepared the ground for the political onslaught on the profession's jurisdiction by the Thatcher governments of the 1980s."[15] One result of governmental intervention was the demise of the five-year articles route into the legal profession. Another result was a growing challenge to two assumptions,

---

[12] *Id.* at 162-63.

[13] *Id.* at 165.

[14] *Id.* at 162-163.

[15] Andrew Boon, *History is Past Politics: A Critique of the Legal Skills Movement in England and Wales* TRANSFORMATIVE VISIONS OF LEGAL EDUCATION 155 (Blackwell 1998), *published simultaneously in* 25 J. LAW & SOC. 151 (1998).

first, that professional expertise was found and transmitted only within the body of the profession and, second, that a rigid distinction between academic and professional programs was inevitable.[16]

Pressures increased on both the universities and the professional organizations to modify their programs of instruction to place more emphasis on teaching generic skills, to 'learn how to learn,' to communicate effectively, and to work in teams, in accord with other common law jurisdictions and trends in higher education.[17]

[16] *Id.* at 156.

[17] *Id.* at 156-57.

In 1985, following the report of the Bromley Committee on Professional Legal Education in Northern Ireland,[18] substantial changes were made to the post graduate Certificate in Professional Legal Studies program to allow for greater and more structured integration of training with on-the-job training.[19] The Marre Report in 1988 legitimized the move to an undergraduate skills curriculum in England by endorsing instruction in legal and generic skills.[20]

The barristers responded first. The Bar Vocational Course that began in 1989,

> represented a radical switch from emphasis on knowledge to emphasis on skills. The selected skills are developed largely through practical exercises, which as far as is feasible simulate the kind of work that young barristers can expect to do in the early years of practice. This represented a genuinely sharp break from the past in objectives, methods, and spirit. In 1993 the Law Society introduced a new Legal Practice Course which moved in a similar direction, although it claimed to maintain more of a balance between knowledge and skills than the Bar Vocational Course.[21]

---

[18] HMSO (Belfast) 1985. Source: website of the Institute of Professional Legal Studies, www://qub.ac.uk/ipls/About Us.htm (last visited June 28, 2004).

[19] Website of the Institute of Professional Legal Studies, www://qub.ac.uk/ipls/About Us.htm (last visited June 28, 2004).

[20] *A Time for Change: Report of the Committee for the Future of the Legal Profession* (1988) ch. 12 (Marre Report).

[21] Twining, *supra* note 6 at 166-67.

These courses are continuing to evolve as they seek to teach competencies that lawyers need to be effective members of the profession.[22]

When it announced proposed changes to its Legal Practice Course in 1990, the Law Society also encouraged the universities to give more attention to skills instruction at the undergraduate stage, including legal research, problem solving, oral and written communications, initiative, leadership, and teamwork, particularly where this can be done in a legal context.[23]

[22] Boon, *supra* note at 154-55.

[23] Twining, *supra* note 6 at 160 (*citing* Law Society Training Committee, *Training Tomorrow's Solicitors: Proposals for Changes to the Education and Training of Solicitors* (1990) para 4.1 and para 5.1).

The Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) was created in April 1991 under the Courts and Legal Services Act 1990.[24] Its designated duty was "assisting in the maintenance and development of standards in the education, training, and conduct of those offering legal services."[25] It commenced a major review of legal education in England and Wales in 1992 and produced its "First

[24] News Release of the Lord Chancellor's Department, 22 April 1996, at www://www.newsrelease-archive.net/coi/depts/GLC/coi7764b.ok (last visited on June 16, 2004). The Lord Chancellor's Advisory Committee on Legal Education and Conduct was abolished in the Access to Justice Act 1999 and replaced by a Legal Services Consultative Panel appointed by the Lord Chancellor (Access to Justice Act 1999, part III, section 35 (1) and 18A (1), http://www.hmso.gov.uk/acts/acts1999/90022–c.htm (last visited on June 16, 2004)). The Consultative Panel assists in the "maintenance and development of standards in the education, training, and conduct of persons offering legal services." (Access to Justice Act 1999, part III, section 18A (3), http://www.hmso.gov.uk/acts/acts1999/90022–c.htm (last visited on June 16, 2004)). A "Standing Conference on Legal Education" including representatives from the profession and academia also exists to provide a forum in which "those responsible for the provision of legal education could discuss matters of common concern" and to provide a mechanism for communication between the world of legal education and the Lord Chancellor's Advisory Committee on Legal Education and Conduct. (The Institute of Advanced Legal Studies website, http://www.ials.sas.ac.uk/library/archives/scle.htm (last visited on June 16, 2004). *See also* the Department of Constitutional Affairs website, http://dca.gov.uk/dept/legeduc/standcomf.htm (last visited on June 16, 2004)).

[25] Courts and Legal Services Act 1990, part III, section 20 (1), http://www.hmso.gov.uk/acts/acts1990/Ukpga_19900041_en_3.htm (last visited on June 16, 2004).

Report on Legal Education and Training" in 1996.[26]

[26] UK Centre on Legal Education website, http://www.ukcle.ac.uk/resources/aclec.html (last visited on June 16, 2004).

The ACLEC Report (1996) encouraged a partnership between the universities and the professional bodies, and it called for an end to the rigid demarcation of responsibilities. It recommended that "the degree course should stand as an independent liberal education in the discipline of law, not tied to any specific vocation."[27] It also recommended that all teaching institutions should consider the adoption of active learning methods."[28] It called for "a clear set of guidelines on minimum standards in respect of such matters as: . . . internal quality assurance mechanisms."[29] These would be set by a "new audit and assessment body"[30] that should "assess law schools in terms of the subject outcomes proposed in this Report, the guidelines on minimum standards, and the law school's own mission statement."[31]

The ACLEC Report (1996) also concluded that "[e]ducation and training leading up to the point of initial qualification can no longer be considered as providing a sufficient base of knowledge and skill for the whole of one's career . . . [but] the function of the prequalification stages of legal education and training . . . must be to lay the broad foundations in legal knowledge and skill which practitioners will be able to use throughout their careers."[32]

The Dearing Report in 1997 added support to the movement toward skills instruction in undergraduate education by encouraging educational institutions to help students develop key generic and specific subject skills in part by involving students in experiential learning and encouraging them to reflect on their experiences.[33]

The institutionalization of skills instruction in undergraduate law schools was probably assured in 1997 when the Quality Assurance Agency for Higher Education (QAA) was created to "provide an integrated quality assurance service for UK higher education."[34] The QAA helps schools to define clear and explicit standards including

---

[27] Lord Chancellor's Advisory Committee on Legal Education, *First Report on Legal Education and Training* (April, 1996), R. 4.1 (1996 ACLE Report).

[28] *Id.* at R. 4.3.

[29] *Id.* at R. 7.1.

[30] *Id.* at R. 7.2.

[31] *Id.* at R. 7.2(3).

[32] *Id.* at R. 1.11.

[33] Andrew Boon, *supra* note 15 at 154-155.

[34] QAA website, http://www.qaa.ac.uk/ (last visited June 16, 2004).

frameworks for higher education qualifications and subject benchmark statements that set out expectations about the standards of degrees in a range of subject areas, including law.[35] The QAA also conducts audits to determine if schools are providing education of an acceptable quality and at an appropriate academic standard.[36] In 1999, the QAA developed benchmark standards for law schools which set levels of various abilities and skills that a student should demonstrate before being awarded a degree in law.[37] These are minimum standards that apply to all law schools. Each school is free to set higher benchmarks for its students.

[35] *Id.*

[36] *Id.*

[37] The benchmarks are on-line at http://www.qaa.ac.uk/crntwork/benchmark/bencheval/law.html (last visited June 18, 2004). "Commentary for Law Schools" about the benchmarks is on-line at http://webjcli.ncl.ac.uk/1999/issue2/aclec7c.html (last visited June 18, 2004).

The Law Society of Scotland launched a new Diploma in Legal Practice program in 1999 designed to help law school graduates convert their existing knowledge of the law into action on behalf of their future clients. The curriculum is outcomes-focused. At the Glasgow Graduate School of Law, for example, the program and each course in it emphasizes the integration of skills and knowledge, effective communication, and transactional learning.[38] Skills, including negotiation, interviewing, legal drafting and writing, advocacy, and legal research are taught within the contexts of subject matter specific courses such as criminal law, tax law, and conveyancing.[39]

Each course has specific learning objectives that are described in terms of the competencies that students should develop during the course and which will be assessed by various means. For example, by the end of the Company and Commercial course, students should be able to "prepare and draft appropriate documentation in connection with the incorporation of a company, including basic articles of association," "advise on the more commonly encountered duties and responsibilities of directors and secretaries," and perform thirteen other tasks.[40]

The Law Society of Scotland is reexamining the principle goals and specific objectives of the education and training of those intending to become Scottish solicitors. In June, 2004, the Society released a working draft of "A Foundation Document" for the

---

[38] Glasgow Graduate School of Law, *Diploma in Legal Practice 2003-2004 Course Handbook* 16 (copy on file with author) (Glasgow course handbook).

[39] To obtain a Degree in Legal Practice, students must receive passes in Conveyancing, Law and the Legal Process, Constitutional Law and History (Public Law I), Scottish Private Law I (Contract and Delict), Scottish Private Law II (Family Law and Property Law), Criminal Law, Mercantile Law, Tax Law, and Evidence. Although it is not required for the Degree, a pass in European Law is required for admission to The Law Society of Scotland and the Faculty of Advocates. *Id.* at 5.

[40] *Id.* at 24-25.

future development of professional legal training in Scotland.[41] The document describes the fundamental values of the legal profession and the fundamental principles of professional legal education, taking as its core educational concept the benchmark of competence in legal practice. The document defines competence in entry level professional legal practice as "the distinguishing but minimum performance standards characteristic of the performance of a novice legal professional."

The Scottish Foundation Document recognizes that the ongoing revolution in business practice and communication create the prospect of continuously changing requirements for law practice. Thus, it aims to identify how best to prepare lawyers to cope with and manage all the changes which they will encounter during their careers. The document endorses the concept of "deep learning" that is designed to foster understanding, creativity, and an ability to analyze material critically.

The Scottish Foundation Document challenges the philosophy of "coverage" which asserts that new lawyers should not be permitted to practice unless and until they have demonstrated knowledge of the key provisions of numerous branches of Scottish law. It views the 'coverage' philosophy as encouraging passive, unreflective learning, while discouraging analysis, reasoned argument, or independent research. In addition to continuing its emphasis on skills training in the three years between the granting of a law degree and the grant of a full Practising Certificate, the Society joins the Joint Standing Committee on Legal Education in Scotland and the Quality Assurance Agency in calling on undergraduate law programs to increase their emphasis on teaching generic, transferable skills such as communication, reasoning and analysis, problem-solving, teamwork and information technology.

[41] The Foundation Document was available on-line at http://www.lawscot.org.uk/public/home.html on November 10, 2004.

The Law Society of England and Wales began the process of developing an outcome-based training framework for solicitors in 2001. Motivation to create a new framework of desired outcomes came largely from a decision of a European Court of Justice that requires professional regulatory bodies such as the Law Society to assess on an individual basis, and to give credit for, any equivalent qualifications and experience held by EU nationals. As a result the Law Society cannot prescribe how an EU national who has any qualification and experience in legal practice must study and prepare for qualification, although it can set the standard they must reach. Additional motivation was supplied by age and disability discrimination legislation that requires licensing regulations to be reasonably related to the attributes necessary to perform the job for which a license is required.[42]

Three consultation papers, most recently in March, 2005, proposed a statement of the core values, professional skills, and legal understanding that solicitors should have on their first day in practice, and the Law Society is developing new forms of examination and assessment of those values, skills, and knowledge.[43]

---

[42] "Qualifying as a solicitor – a framework for the future: a consultation paper," Introduction, para. 8 (The Law Society, March 2005). The document was available on-line at http://www.lawsociety.org.uk/documents/downloads/becomingfr05consultppr.pdf or through links in the Law Society's April 11, 2005 news release "Training framework review consultation" at http://lawsociety.org.uk/newsandevents/news (last accessed May 23, 2005) (Qualifying as a solicitor).

[43] *Id.* at Annex 1, Section A. The first and second consultation papers are also on the Law Society's website at http://www.lawsociety.org.uk/documents/downloads/becomingfrconsultation1.pdf and http://www.lawsociety.org.uk/documents/downloads/becomingfrconsultation2.pdf.

The proposals are intended "to ensure that qualification to practice law is based on an individual's knowledge and understanding of law and legal practice and their ability to deliver legal services to a high quality, rather than on their ability to complete a particular course or courses of study."[44] The proposals call for a final, verifiable and objective confirmation of an individual's readiness for practice, with a particular focus on the person's understanding of and commitment to professional responsibilities, ethics, and client care. This assessment is to take place "only in the light of significant experience in practice."[45]

The Law Society expects to make final recommendations for the new training framework in 2005, but it will delay implementation until it is confident that the new outcomes can be adequately examined and evaluated. The proposed outcomes are described in the following section.

Part 4: Recommended Outcomes for Legal Education in the United States.

The Best Practices Project of the Clinical Legal Educators Association (CLEA) was initiated in 2001 to describe best practices for legal education in the United States. The Best Practices document includes recommendations related to five areas of legal education: setting goals, organizing the program of instruction, delivering instruction, assessing student learning and assigning grades, and evaluating the effectiveness of the program of instruction. We believe that the drafting phase will be completed during the summer of 2006. The most current version of the Best Practices document is available on-line at http://www.professionalism.law.sc.edu (look in the "news" section on the main page).

One of the key elements of the Best Practices Project is its recommendation that law schools in the United States should switch from content-focused curriculums to

[44] *Id.* at Introduction, para. 17.

[45] *Id.*

outcomes-focused curriculums. While it is easy to conclude that legal educators should seek to achieve outcomes, it is difficult to determine how best to describe desirable outcomes.

There are many tenable ways to define and organize statements of desired outcomes, however, the Best Practices Project determined that, with some modifications, the statement of desired outcomes that is being developed by the Law Society of England and Wales provides the best framework for developing a statement of desired outcomes for law schools in the United States, at least as a starting point for discussion.[46] If legal educators in the United States can agree on a reasonably similar statement of desired outcomes to those in the United Kingdom, we can also study how legal educators in the United Kingdom are producing and assessing those outcomes.[47]

---

[46] The Law Society of England and Wales proposed the following statement of what a solicitor should be able to do at the point of qualification.

· identify the legal principles and issues presented by a set of facts, diligently conduct legal and factual research, and evaluate and implement legal and non-legal options as appropriate; [the Society of Legal Scholars recommended that the words "and other appropriate" be added before "research."]

· communicate effectively with members of a diverse society and identify and confirm with clients the action they can take on their behalf;

· work with clients to progress their cases or transactions expeditiously and with propriety, informing them of, and consulting with them on, all options and proposals;

· organize their work efficiently so as to meet their professional responsibilities and undertake the preparation necessary for competent representation;

· build on and develop their legal knowledge and professional skills;

· preserve their own integrity, act consistently with professional and ethical requirements and defend and promote the reputation of their profession.

"Second Consultation on a New Training Framework for Solicitors," Section 4, para. 46. The document no longer appears to be on the Law Society's website, http://www.lawsociety.org.uk/, but it was located on July 8, 2004, via a Yahoo search using key words "law society" and "second consultation". *See also* "Law Society Statement on the Training Framework Review," http://www.ukcle.ac.uk/quality/lawsoc.html (last visited July, 2004). The proposed statement of outcomes was organized into five categories which were modified slightly during the third consultation, the results of which are contained in "Qualifying as a solicitor – a framework for the future," *supra* note 42.

[47] Although we decided to track events in the United Kingdom as a starting point for discussion, we remain interested in discovering better or equally good alternative approaches. For example, we are monitoring a project funded by the Law School Admission Council (LSAC) to identify, in addition to the Law School Admission Test (LSAT), predictors of success in law school and law practice. One objective of the project is to identify job-related competencies of effective lawyers. A preliminary list of competencies identified by the project is included in Appendix D, "LSAC Project to Identify Competencies." The principal investigators of the LSAC project are Marjorie M. Shultz and Sheldon Zedeck. The project has identified 26 factors that seem to constitute lawyer effectiveness and has also developed items for multiple behavioral rating scales for those factors so that lawyers' performances could be appraised. The project is now developing tests that might predict competency in those 26 factors as evaluated by the behavioral scales. A report on this phase of the project is planned for July 2006. E-mail from Marge Shultz to Roy Stuckey on September 13, 2004.

The Best Practices Project is also monitoring the progress of a major study of legal education that

was started by the Carnegie Foundation in 1999. Professor Judith Wegner, a Senior Carnegie Scholar and former Dean at the University of North Carolina gathered data from a cross section of United States and Canadian law schools during the 1999-2000 academic year, and data analysis and writing has been underway since then. More details about the project are available at http://carnegiefoundation.org/PPP/legalstudy/index.htm.

The statement of outcomes set forth below is necessarily general. It would be inappropriate and fruitless to try to describe in detail the specific outcomes that every law school should seek to achieve because these will necessarily differ depending on the mission of each school and the needs of its students. Also, it would be inefficient to attempt to suggest even an intermediate level of specificity until we agree that the proposed general statement of outcomes is appropriate. We are also waiting for the Law Society to release a more detailed statement of desired outcomes. A project is underway to specify the Law Society's outcomes "to a level of detail that would enable the qualification requirements to be transparent."[48]

A. Overall desired outcome of legal education: graduates who can solve legal problems.[49]

The overall objective of legal education should be to teach students how to resolve legal problems. Graduates should be able to demonstrate at the point of admission their ability to solve legal problems effectively and responsibly, including the ability to:

- work with clients to identify their objectives, identify and evaluate the merits and risks of their options, and advise on solutions;

[48] Qualifying as a solicitor, *supra* note 42 at p. 9, para. 23.

[49] The Law Society included "effective approaches to problem solving" as one of the skills that law school should teach. We do not think it belongs in a list of skills because it is "the" skill of lawyering. We also removed the "ability to complete legal transactions and progress legal disputes towards resolution" from the Law Society's list of five core competencies because we believe this is a statement about the central goal of a program of legal education that aims to prepare students for practice, not just one of the categories of competence. We think a lawyers' ability to resolve disputes and process legal transactions are encompassed within the framework of "problem-solving."

· progress civil and criminal matters towards resolution using a range of techniques and techniques and approaches;

· draft agreements and other documentation to enable actions and transactions to be completed;

· plan and implement strategies to progress cases and transactions expeditiously and with propriety.[50]

[50] Qualifying as a solicitor, *supra* note 42 at Annex 1, Section B. The Law Society also included in its list of requisite abilities "the ability to establish business structures and transact the sale or purchase of a business," "the ability deal with various forms of property ownership and transactions," and "the ability to gain a grant of representation and administer an estate," but we thought these were too specific to include on a list of competencies that all law graduates should possess on day one in practice.

"Educational programs have the important ultimate purpose of teaching students to solve problems."[51] The core function of lawyers is to help people and institutions resolve legal problems,[52] therefore, the central goal of legal education should be to teach students how to resolve legal problems.[53]

> [M]ost lawyers spend most of their time trying to solve problems. Those problems consist of raw facts (not yet distilled into the short, coherent story laid our in the appellate court opinion) – facts presented by clients, along with some question like "Legally speaking, how do I get myself out of this mess?" or "How do I plan my affairs to avoid getting into a mess in the first place?"
>
> If our job is to teach students how to"think like lawyers," then we should train them to solve such a problem, because that is the kind of thinking that lawyers must actually do. But – you reply – law schools

---

[51] Robert M. Gagne, THE CONDITIONS OF LEARNING AND THEORY OF INSTRUCTION 195 (1985).

[52] Problem-solving skill includes the ability to help clients avoid legal problems, as well as how to resolve disputes and process legal transactions.

[53] The notion that developing problem-solving skills is the end goal, and other aspects of legal education are simply the means to this end is not a novel concept. Stephen Nathanson makes the ends-means analogy in *The Role of Problem-Solving in Legal Education*, 39 J. LEG. EDUC. 167, 182 (AALS 1989). He also concludes that problem-solving is "the essence of what lawyers are supposed to do" and that "the development of problem-solving skill should be made the primary goal of legal education." *Id.* at 168, 182. Tony Amsterdam discusses the central importance of teaching problem-solving and "ends-means thinking" in *Clinical Legal Education - A 21st Century Perspective*, 34 J. LEG. EDUC. 612, 613-14 (AALS 1984).

> cannot spend their scarce academic resources teaching students every single skill they will need in law practice – how to bill clients, how to manage a law office, how to find the courthouse. True, but problem-solving is not like any of those activities. Problem-solving is the single intellectual skill on which all law practice is based.[54]

Students arrive in law school with problem-solving skills they developed dealing with problems before law school. Although these skills provide a foundation on which students can build their legal problem-solving skills, legal problems require specialized skill that must be acquired after entering law school.

[54] Myron Moskovitz, *Beyond the Case Method: It's Time to Teach With Problems*, 42 J. LEG. EDUC. 241, 245 (AALS 1992) (citations omitted).

Problem-solving expertise depends on more than understanding the nature of problem-solving or the processes in which solutions may be discovered. Repeated opportunities to engage in problem-solving activities is an essential ingredient. Gary Blasi explained that "to some extent each lawyer must construct from experience the schemas and mental models employed in lawyerly problem-solving. But research in other domains suggests that the structured knowledge of experts is made of more than experience."[55] In addition to experience, students can more rapidly develop problem-solving expertise by studying the theory of problem-solving, observing how experts solve problems and drawing on their expertise by analogy, and receiving mentoring as to which aspects of their problem-solving experience should be most closely attended.[56]

The kind of careful instruction, study, practice, and reflection that will help students more quickly become effective, responsible problem-solvers can and should occur in law school, even though students' problem-solving expertise will not fully develop until years after graduating from law school. The most important task of legal education is to help students begin developing legal problem-solving expertise by giving them as many opportunities as possible to study and practice solving legal problems.

B. Outcomes that enable graduates to solve legal problems.

In order for graduates to develop the attributes of effective, responsible legal problem-solvers, they must acquire the following knowledge, understandings, skills, and abilities:

1. intellectual, analytical, and life-long learning[57] skills required to:

---

[55] Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 355 (1995).

[56] *Id.* at 355-59 and 378 (1995). "The most critical thing that a trainer can do may be to suggest the factors in the environment to which trainees should attend." *Id.* at 390.

[57] The Law Society included "problem-solving skills" which we are treating as the central goal of legal education. We added "lifelong learning skills" which are probably implicitly included within the Law Society's statement, but we believe such skills should be more explicitly emphasized as critically important

· apply methods and techniques to review, consolidate, extend, and apply knowledge and understanding and to initiate and carry out projects;

· critically evaluate arguments, assumptions, abstract concepts and data to make judgments and to frame appropriate questions to achieve a solution, or identify a range of solutions to a problem; and

---

core skills.

· communicate information, ideas, problems, and solutions to both specialist and non-specialist audiences.[58]

2. core knowledge of the law.

· the jurisdiction, authority, and procedures of the legal institutions and the professions that initiate, develop, interpret, and apply the law of relevant jurisdictions, including knowledge of constitutional law and judicial review;

· the rules of professional conduct (including the accounts rules);

· the regulatory and fiscal framework within which business and other legal transactions and financial services are conducted.

3. core understanding of the law.[59]

· the law of contract and tort and of parties' obligations, rights, and remedies;

· criminal law;

· the legal concept of property and the protection, disposal, acquisition, and transmission of proprietary interests;

---

[58] Qualifying as a solicitor, *supra* note 42 at Annex 1, Section A.

[59] The Law Society combined core legal knowledge and understanding as a single competency, but described the components of them separately, as we show here. The Law Society explained that the distinction between knowledge and understanding is suggested to indicate the emphasis to be placed, pre qualification, on the different aspects and the required capabilities of individuals to work with and manipulate their knowledge base. Knowledge indicates familiarity with an area, recollection of key facts, rules, methods and procedures. Understanding indicates a higher level capacity to work with, manipulate and apply knowledge including in unfamiliar situations.

· equitable rights, titles, and interests;

· the range of legal protections available to the individual in society in civil and criminal matters and with regard to their human rights;

· legal personality and business structures;

· the values and principles on which professional rules are constructed.[60]

[60] Qualifying as a solicitor, *supra* note 42 at Annex 1, Section A.

4. a practical understanding of and commitment to the values, behaviors, attitudes, and ethical requirements of a lawyer (professionalism).[61]

· appropriate behaviors and integrity in a range of situations;

· the capacity to deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives.[62]

5. professional, personal management, and client relationship skills.

· the application of techniques to communicate effectively with clients, colleagues, and members of other professions;

· the ability to recognize clients' financial, commercial, and personal constraints and priorities;

· the ability to advocate a case on behalf of clients, and to participate in trials to the extent allowed upon admission to practice;[63]

---

[61] The Best Practices Project added to the Law Society's description the phrase "and a commitment to," because two factors determine whether a lawyer will perform in a professional manner: whether the lawyer is *capable* of performing professionally (which requires understanding) and whether the lawyer is *committed* to performing professionally. The Best Practices Project also added the characterization of these attributes as "professionalism."

[62] Qualifying as a solicitor, *supra* note 42 at Annex 1, Section C.

[63] The Law Society's language for the second part of this statement is "and to exercise the rights of audience available to all solicitors on admission."

· effective use of current technologies and strategies to store, retrieve, and analyze information and to undertake factual and legal research;

· an appreciation of the commercial environment of legal practice, including the market for legal services;

· the ability to recognize and resolve ethical dilemmas;

· effective skills for client relationship management and knowledge of how to act if a client is dissatisfied with the advice or service provided;

· employment of risk management skills;

· the capacity to recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge and skill and to develop strategies that will enhance professional performance;

· the ability to manage personal workload and to manage efficiently, effectively, and concurrently a number of client matters; and

· the ability to work effectively as a member of a team.[64]

C. The need to articulate instructional objectives for each component of the program of instruction.

The foregoing statement of desired outcomes relates to the overall program of instruction. Once a law school has determined its desired overall outcomes, it should articulate what its students should know, understand, and be able to do, and the attributes they should develop in each component of the program of instruction.

This requires the school to map its curriculum. A curriculum map is sort of a wide-angle view of a program of instruction. For each outcome, a curriculum map identifies where in the curriculum students will be introduced to the skill, value, or knowledge, where in the curriculum the students will practice it, and by where in the curriculum students can be expected to have attained competency. For example, a law school may decide that legal research skills can be introduced, practiced, and mastered by the end of the first year of law school, whereas problem-solving skills are introduced and practiced in the first year, practiced again in the second year, and not mastered until the

[64] Qualifying as a solicitor, *supra* note 42 at Annex 1, Section D. The Law Society included "effective approaches to problem solving" among the descriptive components of this competency, but we took it out because we believe that helping students become effective and responsible problem-solvers is the primary goal of legal education, not just a component of one category of competency.

third year.

Curriculum maps are crucial to institutional advancement because they can reveal both curricular redundancy and curricular gaps and inadequacies. For example, a law school may discover that its curriculum re-teaches certain skills, such as issue-spotting, applying rules to facts and applying and distinguishing cases, over and over again whereas the curriculum fails to provide students with sufficient opportunities to handle the complex, multi-disciplinary client issues necessary to student development of problem-solving skills and no opportunity to develop self-regulated learning skills. Peggy L. Maki, a Senior Scholar with the American Association of Higher Education, explains the benefits of curriculum mapping:

> To assure that students have sufficient and various kinds of educational opportunities to learn or develop desired outcomes, faculty and staff often engage in curricular and co-curricular mapping. During this process, representatives from across an institution identify the depth and breadth of opportunities inside and outside of the classroom that intentionally address the development of desired outcomes. Multiple opportunities enable students to reflect on and practice the outcomes an institution or program asserts it develops. Furthermore, variation in teaching and learning strategies and educational opportunities contributes to students' diverse ways of learning. Column B provides a list of possible opportunities that might foster a desired outcome. That is, an institution has to assure itself that it has translated its mission and purposes into its programs and services to more greatly assure that students have opportunities to learn and develop what an institution values. If the results of mapping reveal insufficient or limited opportunities for students to develop a desired outcome, then an institution needs to question its educational intentionality. Without ample opportunities to reflect on and practice desired outcomes, students will likely not transfer, build upon, or deepen the learning and development an institution or program values.[65]

A similar sentiment is expressed by the Association of American Colleges and Universities:

> Well-designed curricula are more than just collections of independent courses; they are pathways for learning. Graduating intentional learners – empowered, informed, and responsible – calls for curricula designed to further learning goals in a sequential manner . . . .[66] [67]

---

[65] Peggy L. Maki, *Developing an Assessment Plan to Learn About Student Learning*, http://www.aahe.org/assessment/assessmentplan.htm.

[66] *Principles of Good Practice in the New Academy* in GREATER EXPECTATIONS: A NEW VISION FOR

As part of this process, therefore, law schools must also describe the specific educational goals of each component of the program of instruction in terms of what students will know, understand, and be able to do, and what attributes they will develop by completing that component.

LEARNING AS A NATION GOES TO COLLEGE, 30 (Association of American Colleges and Universities 2002).

[67] Michael Hunter Schwartz drafted the preceding discussion of curriculum mapping for the Best Practices document.

> A formidable obstacle every teacher faces is how to analyze the content of a course, predetermine the outcomes desired, and communicate the necessary performance expectations to the learners in a detailed, congruous syllabus that logically connects goals to the measures for grades. That is, the objectives follow from the goals, the requirements are demonstrations of performance of those objectives, and the evaluation methods reflect attainment of the objectives to measurable criteria. This is rarely simple – at times teachers need their own cooperative learning groups in order to solve the myriad of problems in coordinating course goals, uncovering the traditional discontinuities between goals and grading, and clarifying assessment.[68]

Setting specific educational goals and determining how best to achieve them is an unfamiliar task for most law teachers in the United States. We can be guided by the work that our colleagues are doing in the United Kingdom and elsewhere. For example, clear learning objectives have been established for each course in the Diploma in Legal Practice Program at the Glasgow Graduate School of Law in Scotland.[69] Here are a few examples:

> - when they complete the Company and Commercial course, students should be able to "prepare and draft appropriate documentation in connection with the incorporation of a company, including basic articles of association," "advise on the more commonly encountered duties and responsibilities of directors and secretaries," and perform thirteen other tasks.
>
> - when they complete the Civil Court Practice: Civil Procedure and Civil Advocacy & Pleadings course, students should be able to "interview and advise clients in relation to straightforward or relatively straightforward problems," "draft basic

[68] Tom Drummond, *A Brief Summary of the Best Practices in Teaching* 6 (1994, 2002), http://northonline.sccd.ctc.edu/eceprog/bstprac.htm.

[69] Glasgow course handbook, *supra* note at 17-25.

pleadings," "explain and discuss the rules of professional ethics and conduct applicable to civil litigation and dispute resolution," and perform five other tasks.

- when they complete the Conveyancing course, students should be able to "understand the mechanics of a straightforward purchase and sale transaction of a domestic property," "understand the formalities required in revising a commercial lease, and drafting the appropriate documents," and "understand how to create assured and short-assured tenancies, to draft the appropriate documentation, and the role which any lender to a landlord would have, and explain and discuss the practice rules, money laundering and accounts rules applicable to conveyancing transactions and the practice management and client care implications of conveyancing, including letters of obligation and accounting to the client."[70]

Clinical teachers should develop clear and thorough statements of the educational goals of our courses and share them with each other. Perhaps CLEA'S website could serve as a repository and clearinghouse.

Part 5: Defining and Achieving Desired Outcomes in Clinical Courses.

I want to begin with a disclaimer. I am a novice at this. I have become an outcomes advocate late in my career, only starting to focus on the issue during the past year after learning more about the work being done in the United Kingdom. Thus, my comments are intended to raise questions and facilitate discussion, not to be the proposed gospel according to Stuckey. I reserve the right to change my mind as I become better educated about outcomes-focused education.

My qualifications for expressing any opinions on the topic are that over the course of thirty one years in legal education, I have used each of the three basic forms of clinical education -- in-house clinics, externships, and simulation courses -- and I have worried all along about whether I am setting or achieving clear educational goals. My statements about typical practices are based on my experiences at my home institution, my visitorships at six other law schools, my attendance at many clinical teachers conferences, and my participation on approximately fifteen ABA site inspection teams.

A. Introduction to experiential learning: the common strengths of simulation-based courses, externships, and in-house clinics.

Clinical education involves experiential learning. "Clinical education is primarily concerned with the process of learning from actual experience, learning through taking

[70] *Id.*

action (or observing someone else taking action) and then analyzing the effects of the action."[71]

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

[71] 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, 285 (1981) (*citing* Coleman, *Differences Between Experiential and Classroom Learning*, in EXPERIENTIAL LEARNING 49 (M. Keeton ed. 1976).

> 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.[72]

All clinical students are involved at all three "domains" of learning: the cognitive domain (increasingly complex sorts of understandings and analytical processes), the affective or feeling domain (values, attitudes, and beliefs), and the psychomotor or performance domain (complex patterns of physical or motor activity such as lawyering activities).[73]

Experiential learning 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.

Experiential learning occurs in many law school courses, especially in courses that are generally described as "clinical:" simulation-based courses, in-house clinics, and externships.[74] These courses differ from each other in the following ways:

---

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

[73] Kreiling, *supra* note 71 at 287, n. 10 (citations omitted).

[74] I acknowledge that some people define experiential learning as involving "real life," not simulated, experience. *See, e.g.,* Gerald F. Hess and Steven Friedland, TECHNIQUES FOR TEACHING LAW 105 (Carolina Academic Press 1999). I include simulated as well as real life experience. Law students also learn experientially in nonclinical courses, e.g., by going on field trips and participating in simulations. Although law students certainly learn from their experiences while working for legal employers, such learning does not fit within my concept of experiential learning because it is not accompanied by academic inquiry.

-in **simulation-based courses**, students assume the roles of lawyers and perform law-related tasks in hypothetical situations;

-in **in-house clinics**, students participate as lawyers in the representation of real clients under the supervision of members of the faculty; and

-in **externships**, students either participate as lawyers in the representation of real clients under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges at work.

Gary Bellow was one of the first to focus on the fact that clinical courses are forms of experiential learning, and he wrote about the important role that clinical courses play in helping students learn about and adjust to their future roles as lawyers.

> The central feature of the clinical method is its conscious use, both conceptually and operationally, of the dynamics of role adjustment in social life. . . . As used in this essay, a person's role refers to the set of actions and qualities which are expected in a given social position or status. To perform in a role – that is to "validate one's occupation of the position" – the actor must learn: 1) the duties, rights, obligations, and privileges that are the defining characteristics of the position; 2) the cues, signs, behaviors, and demands which enable the actor to choose the appropriate role manifestation in a particular situation, i.e., "he must locate others and himself in social space;" 3) the aptitudes (cognitive, perceptual, verbal, gestural) needed to perform in the position.[75]

The most important professional aptitude for law students to develop is expertise in solving legal problems. As indicated earlier in this paper, the central goal of legal education should be to help students become effective, responsible problem-solvers. All forms of clinical education involve problem-based learning, so one of the strengths of clinical education is that it gives students opportunities to practice solving problems and to receive feedback on the quality of their efforts.

Unfortunately, the current structure of legal education in the United States makes it impossible for students to become proficient problem-solvers during three years in law school. Students do not begin engaging in problem-solving exercises early enough, and they do not have enough problem-solving opportunities during law school to develop

[75] Bellow, *supra* note 1 at 381.

very much expertise. I, therefore, agree with Ken Kreiling's insight that the primary goal of clinical educators should be "to teach students a method of learning from their experiences, then by applying this method they can continue to learn and to grow professionally after their formal education has ended."[76]

[76] Kreiling, *supra* note 71 at 286.

Kreiling was one of the first to help us understand that the most effective way to learn from experience is for students to develop and articulate "espoused theories of action" which are explanations of theories students plan to apply to lawyering situations, e.g., 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" can be compared to the behavior actually exhibited, the "theory in use."[77] If the comparison of the student's theories of action discloses that the student was ineffective in applying the espoused theory of action, the student and the teacher can analyze what caused the ineffectiveness, whether it be related to the quality of the espoused theory; the student's skills, values, or knowledge; or some other factor.

Thus, an important part of clinical teaching is to help students understand the importance of articulating theories of practice and to provide them with information, models, and frameworks that will enable them to develop espoused theories of action against which their actual performances can be compared. "Without theory and the ability to theorize, one muddles through, is often ineffective, and cannot generalize from experience."[78]

If the primary goal of clinical education is to teach students a method of learning from experience to help them more easily become proficient legal problem-solvers after graduation, what other goals can be accomplished most effectively and efficiently through clinical education?

Before considering what clinical teachers should set as our educational goals, we should acknowledge that a significant part of student learning in clinical courses depends on the individual experiences of each student. Each student's experience is unique, and each student's perceptions of his or her experiences is unique. Thus, it is impossible to determine in advance everything that a student will have an opportunity to learn in a clinical course, control its delivery, or evaluate how well students understand what they've learned. We can, however, assist individualized student learning by seizing "teaching opportunities" when they arise or by working with students to help them select and achieve student-specific learning objectives.[79]

---

[77] *Id.* at 291-97.

[78] *Id.* at 306 n. 73 (citation omitted).

[79] *See, for example,* Jane Aiken, et al., *The Learning Contract in Legal Education*, 44 MARYLAND L. REV. 1047, 1064 n. 66 (1985) (describing learning contracts in which students select three learning objectives from a list of thirty seven potential learning objectives to pursue during a client representation course).

We can also assist students' self-learning by creating structures and protocols that will help them reflect on and understand better what they are learning from experience, whether or not it is something we intend for them to learn. This can be accomplished, for example, by giving students materials on the value of reflective thinking, requiring students to write reflective journals, and having students do self-evaluations at one or more points during the semester or at the end of the term.

As professional educators, we have an obligation to select educational objectives that we want every student in our courses to achieve. Although we cannot predict or control everything our students might learn in an experiential course, we should make conscious decisions about what we intend for every student to learn, and we should try to design our courses to most effectively and efficiently deliver such instruction. As noted earlier, these are not decisions which should be left to individual teachers; rather, the law school should have a curriculum map that designates the knowledge, skills, and values to be taught in each course. The reality today, of course, is that such curriculum maps do not exist in most, if any, law schools, so clinical teachers are left on our own to decide where to focus our efforts.

So, what should we select as the goals of clinical courses other than to teach students a method of learning from experience to help them more easily become proficient legal problem-solvers after graduation? In the early years of clinical legal education when the survival of clinical education was uncertain, there were many efforts to describe the educational goals of clinical courses and, thereby, justify their existence in law schools.[80] As one might imagine, the proposals were diverse and wide-ranging. One of the more insightful statements about the general goals of clinical education were unpublished remarks made by Tony Amsterdam in 1982.[81] Amsterdam presented the following list of the objectives and potential uses of clinical techniques.

---

[80] *See, for example,* Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH LAW REV. 287 (1986); Jane Aiken, et al., *The Learning Contract in Legal Education*, 44 MARYLAND L. REV. 1047 (1985); Peter Hoffman, *Clinical Course Design and the Supervisory Process*, 2 ARIZONA STATE LAW JOURNAL 277 (1982); Frank Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VANDERBILT LAW REV. 321 (1982); 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 (1981); AALS/ABA GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980); Gordon Gee and Donald Jackson, *Bridging The Gap: Legal Education and Lawyer Competency*, 4 BYU LAW REV. 689 (1977); David Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 4 BYU LAW REV. 1025 (1977); Steve Pepe *The Clinical Law Experiment: Goals, Methods and Problems*,, 20 LAW QUAD NOTES (Spring, 1976).

[81] Amsterdam made his remarks during a Dean's Workshop conducted by the ABA Section of Legal Education and Admissions to the Bar on January 23, 1982. I have no recollection of how I came to have a record of these remarks. I included them in a list of educational objectives of professional skills courses that I prepared for the 1987 Conference on Professional Skills and Legal Education in Albuquerque and updated in June, 1988. If you would like to have a copy of my incomplete record of Amsterdam's remarks, I would be happy to provide one.

-to expose students to the demands, constraints, and methods of thinking in role, and to explore the impact of role on thinking.

-to expose students to the demands, constraints, and methods of analyzing and dealing with unstructured situations, in which the "issues" have not been pre-identified.

-to give students a basis for examining the interaction of legal analysis and human behavior, including interpersonal dynamics and communication.

-to give the students an opportunity to learn how to learn from experience.

-to provide professional skills instruction.

-to provide the basis for insights into the functioning of the legal system, and to raise questions about its capacities and limitations.[82]

-in general, to provide students with the opportunity to develop and to guide them in developing - a breadth of perspective, a depth of insight, and a rigorously systematic set of analytic and behavioral techniques, which they can train on the varied problems that confront lawyers and the law.

I was struck by how often Amsterdam described these objectives in terms of "exposing" and "providing opportunities" rather than "teaching" or "learning." Nevertheless, we can see that Amsterdam was emphasizing the value of clinical education for helping students adjust to their roles as lawyers, learn how to learn from experience, engage in critical analysis of legal institutions and systems, develop interpersonal and professional skills, and become better legal problem-solvers. In the text of his remarks, Amsterdam stressed, as I am, that "the most significant contributions of the clinical method to legal education" is giving students an opportunity to learn how to learn from experience.

> 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 <u>if</u> the

[82] My notes reflect that this objective and the next one were not included in Amsterdam's remarks at the Dean's Workshop but were added to the preceding goals in an internal NYU memo dated March 23, 1983, from the Clinical Group to the Personnel Committee. I do not know if I still have a copy of the memo.

> 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.

Assuming that we can agree that the outcomes described above are the ones we would like to achieve through clinical education and assuming we can agree on ways to help students achieve those outcomes, we also need to consider how we can tell whether or not we are actually achieving the desired outcomes. This is not an easy task, but it is critically important.

My thesis is that we cannot fully determine if some of our desired outcomes have been achieved, but we can get a sense of our success by measuring components of those outcomes. Thus, we may need to distinguish between desired outcomes and measurable outcomes. Let me provide a few examples.

If our goal is to develop our students' abilities to learn from experience, we cannot follow our students into practice to evaluate whether these skills exist and are applied. We can, however, determine whether our students understand how to apply theories about life-long learning 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 we studied during the course. While success on these tests would not conclusively establish that a student has life-long learning skills, failing these tests would indicate that the student has not yet developed life-long learning skills.

As another example, consider our objective of teaching students how to establish appropriate attorney-client relationships with their clients. Most of us do not have the resources to ask students to conduct end-of-the-semester interviews that we can observe to evaluate what they've learned during the semester. We can, however, find out if our students can define "appropriate attorney-client relationships" and explain why it is important to establish them. Students could also be asked to first articulate theories of practice for establishing appropriate attorney-client relationships then evaluate the degree to which these were accomplished in videotaped meetings between attorneys and clients.

My point is simply that once we set educational objectives for our courses, we should be trying to devise ways for determining whether students are learning what we purport to be teaching them. Legal educators in the United States should investigate how legal educators in the United Kingdom and other countries are evaluating the success of their educational efforts in clinical courses. We should also share our ideas

about testing with each other. Perhaps CLEA's website could serve as a repository and clearinghouse.

I will now turn to a consideration of the unique strengths of each form of clinical education and the learning objectives they may be able to achieve more effectively and efficiently than any other method of instruction.[83] If another method of instruction can achieve an educational goal more effectively or efficiently than a clinical method, the inclusion of that objective does not validate the need for the clinical course. Gary Bellow pointed this out in 1973.

> The appropriate question for legal education is not whether students learn from experience, but to what degree, if any, these learning possibilities are greater than offered by traditional law school pedagogy.[84]

More than thirty years later, legal education has not completely answered the question posed by Bellow. If clinical education is going to continue to thrive and grow, or even to maintain its current position in legal education, we must work harder to understand the strengths and limitations of each form of clinical education. I offer the following thoughts in order to facilitate our discussion, knowing they do not fully answer the question.

B. The unique strengths of simulation courses.

There is general agreement that simulation courses are an effective way to help students begin developing lawyering skills, which are described earlier as "professional, personal management, and client relationship skills" (see subheading 5, *supra* p. 17). However, when one looks at the more specific, but still very general, list of outcomes under that heading, one quickly realizes that no single course in law school can help students develop the entire range of activities on the list. There are probably more efficient methods for teaching students about many concepts on the list than simulation courses, or at least for introducing students to them. A couple of obvious examples are "the ability to recognize and resolve ethical issues" and "an appreciation of the commercial environment of legal practice, including the market for legal services."

---

[83] I am working on the assumption that clinical courses will remain discrete and separate from doctrinal courses. It does not have to be this way. Legal education would be improved if it integrated the teaching of theory, doctrine, and practice, which is another recommendation of the Best Practices Project. As mentioned in Part 3, the Scottish Diploma in Practice program "emphasizes the integration of skills and knowledge, effective communication, and transactional learning." For now, however, I address the situation in legal education in the United States as it exists today.

[84] Bellow, *supra* note 1 at 386.

If an institution wants to accomplish the outcomes on the list, it must first decide where in the program of instruction students will be introduced to each item and how instruction about each item should progress until students have achieved the desired level of proficiency. In the ideal world the targeted level of proficiency would be the level of proficiency that a new lawyer needs to provide competent legal services.

Professional skills instruction in most United States law schools does not produce sufficiently proficient graduates. The fact of the matter is that very few, if any, simulation courses develop proficiency in any professional skill to the level that a new lawyer needs to have. Some skills instruction is better than none at all, but law students will not develop adequate entry level lawyering skills as long as professional skills instruction for most law students is relegated to one course in the second or third year of law school.

Consider, for example, our current approach to teaching professional skills in simulation courses, using as an example how many of us approach teaching students how to conduct an initial client interview. We begin by giving students information about the goals of client interviewing and techniques for conducting one, and we often provide demonstrations of interviews to help illustrate key points. We also try to persuade our students to employ client friendly philosophies of lawyering. Then we give them one or more opportunities to practice applying what we've tried to teach them, and we provide feedback about how well they performed. Sometimes we even grade their performances. What we do not do is to require them to continue practicing until they demonstrate an acceptable level of proficiency. In many interviewing, counseling, and negotiating courses, students may only conduct one simulated client interview before moving on to another skill. They do not develop proficiency.

I am not demeaning the value of what we do. Our current approach gives students a better understanding of the complexities of interviewing, information about how to conduct interviews, and some insights into their level of competence. As Tony Amsterdam explained in 1982,

> It is not necessary or possible for the law school to turn out accomplished trial lawyers, counselors, negotiators, etc. But it is possible and desirable to get the students past the kind of first-level errors that are so disruptive of performance and so unserving to the performer that they cannot even serve as a valuable learning experience in the school of hard knocks. By giving students the opportunity to commit these first-level errors in law school, and by giving them the opportunity and assistance which only an educational institution can provide to reflect upon the errors and develop some initial insight into their causes and probable cures, clinical courses can aim to graduate lawyers capable of making

educationally productive second-level errors and learning from them in practice.[85]

Our current inability to help students develop skills proficiency during law school is a shortcoming to keep in mind. It also highlights the need for us to be careful in articulating the educational objectives of simulation courses, both to keep from misleading students and ourselves about what we can accomplish and also to make us more thoughtful about which skills we choose to teach and to what level of proficiency. If we assert that "students who complete this course will be able to conduct an initial client interview at an appropriate level of competence for a new lawyer," then we would have an obligation to work with each student until that level of proficiency is achieved. On the other hand, if we assert that "students who complete this course will be able to describe the goals and components of an effective client interview," our educational obligations would be quite different, as would our assessment efforts.

Simulation courses are well-suited for achieving additional education goals beyond providing an introduction to professional skills, but one must make a decision to pursue them and then design the course accordingly. Without suggesting that they are the only or even the most appropriate goals, many simulation courses can achieve the following objectives:

-to begin developing a student's "capacity to recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge and skill and to develop strategies that will enhance professional performance."

-to develop a student's "ability to recognize and resolve ethical dilemmas" and "employ risk management skills."

-some of the components of giving students "a practical understanding of and commitment to the values, behaviors, attitudes, and ethical requirements of a lawyer (professionalism)." For example, one cannot teach negotiation without

[85] Amsterdam, *supra* note 81. Although I agree with the sentiment that some instruction is better than none, I believe (and I think Tony likely agrees with me) that law schools can accomplish more ambitious skills development goals than were possible in 1982.

discussing the conventions about lying during negotiation and their potential implications, and students participating in simulated negotiations must decide whether to misrepresent relevant facts or otherwise engage in deceitful conduct.

In order to achieve these or any other educational goals, however, it is important that we provide students with relevant instructional materials and lessons to enable them develop "espoused theories of action" and deliberately design our simulations and feedback mechanisms to help achieve the desired educational goals.

We also need to improve the methods we use for determining whether simulation courses are achieving their goals. I wonder whether we are approaching evaluation correctly in simulation courses. Typically, a teacher will observe a student's performance, provide feedback, and assign a grade (or determine whether to pass or fail the student). I question whether it is fair, or educationally effective, to grade students on performances without first giving them opportunities to practice the skill and receive feedback before being graded. Perhaps in courses that can only provide limited opportunities to perform, we should use those practice opportunities to help students better understand the information being delivered in the course but not assign grades to their performances. I also question how well we can evaluate student performances without first establishing performance benchmarks. It may be fairer and a more accurate measure of student learning to test students' understanding of the materials and lessons, that is, to test their knowledge and understanding of lawyering rather than their skills.

C. The unique strengths of practice observation courses (externships in which students observe or assist lawyers or judges).

I have always been surprised by the trouble we have had articulating the educational goals of courses in which students observe or assist lawyers or judges and figuring out what to do with their classroom components. We understand, of course, that putting students in prosecutor's or defender's offices will help students learn about criminal law practice, that placing students with judges will help them learn about the workings of the judiciary, and so forth. These are all valid purposes for externships that suggest natural topics for materials and class discussion.

What has surprised me is the apparent absence of our collective appreciation of practice observation courses as a forum for studying the values, behaviors, attitudes, and ethical requirements of lawyers (professionalism) (see subheading 4., *supra* p. 17). In-house clinics have special strengths, but most do not accurately replicate the atmosphere of law practice in terms of their office settings, workloads, and ivory tower approaches to practice. Placing students in practicing lawyers' and judges' offices removes this artificiality, and students know they are working in contexts similar to those that await them after graduation. Students' observations and experiences in all types of

externships can provide rich fodder for discussing and reflecting on professionalism issues without jeopardizing confidences.

The problems that supervising lawyers and judges encounter and the environments in which they work are not artificial. When a student sees a lawyer turn away a potential client because of a remote possibility of a conflict of interest arising, it affects the student's opinion of the relationship of the rules of ethics to real life practice. When a student hears a judge describe how a particular lawyer cannot be trusted because he makes up reasons for requesting delays of hearing, the student learns a lesson in a more meaningful way than can be learned from a book or a law professor.

In order to enhance student learning, we should ensure that students have "theories of practice" against which they can compare the behaviors they are observing and their own performances of any tasks they undertake to assist lawyers and judges. 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.

Some externships also provide excellent opportunities to study and learn about the functioning of the legal system and its capacities and limitations. It is especially important for students to study issues of justice in our society and learn to appreciate the importance of the rule of law for ensuring justice to all members of society. Only in a real world context can students examine the interaction of legal analysis and human behavior, including interpersonal dynamics and communication. They should learn during law school how the law affect's people's lives by bringing fear or hope, sadness or joy, pain or relief, frustration or satisfaction.

Externships would benefit from developing statements of expected outcomes that participants in the course will achieve. It is common for externships to require supervisors to give students opportunities to observe or participate in a range of activities, such as observing an initial interview, drafting interrogatories, attending a trial, etc. A statement of outcomes would be better. A statement of an outcome would begin "upon completion of the externship, students will be able to _____," then fill in the blank with a statement of what students would know, understand, or be able to do. For example, "draft interrogatories in a civil lawsuit," "present the state's case in taking a guilty plea," "draft a motion for continuance," "describe how criminal cases proceed from arrest to conviction," or "explain the value of lawyer's reputation for integrity." Such statements of outcomes, even if they do not encompass everything a student might learn in the course, would force us to think more carefully about what we believe are the most important aspects of our courses and guide us in designing the delivery of the promised outcomes.

One of our challenges related to externships is to demonstrate that the teaching and learning that occurs in placement settings needs to be learned during law school rather than in the first year of practice. While one can plausibly claim that exposure to law practice during law school is inherently valuable, exposure alone is insufficient to warrant awarding academic credit and charging high tuition for providing that exposure. Students can gain exposure to practice by clerking for a law firm or volunteering to work with an agency or a judge. Thus, it is critical that externships have clear educational objectives that are accomplished through a combination of assigned readings (about professionalism and other topics to be studied), classroom discussions, supervisors who will take time to explain and answer questions, and structured systems that require students to reflect on their experiences.

We also need to improve our methods for determining whether we are achieving our goals. I do not know if there is a typical way of evaluating what students learn in externships. Some externships are pass/fail courses, and the result appears to be based on whether a student puts in the requisite number of hours at the placement. They involve no evaluation of learning. Other externships require journals and/or papers, but I am unsure if these ensure a connection between what students are learning and the educational objectives of the course. I don't know of any that give exams. Perhaps this should be reconsidered. If an externship has educational objectives, some effort should be made to determine if it is achieving them.

D. The unique strengths of client representation courses (in-house clinics and externships in which students represent clients).

It is impossible to describe fully what a student learns by participating as a lawyer in the representation of real clients. Potentially it encompasses everything about being a lawyer. The almost infinite opportunities for teaching and learning in client representation courses makes it particularly important for us to have clear understandings about what we want students to learn.

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 the law, procedures, systems, and protocols of the types of practice settings in which they will be engaging. We have to teach students about their relationships with us and the restrictions we are placing on their freedom to act as lawyers. Sometimes we have to teach things students should have learned before enrolling in client representation courses such as the rules of evidence and professional conduct or basic lessons about lawyering skills.

While these are important topics, we should dispatch with these matters as efficiently as we can by giving students manuals and by setting up our office systems to

make it as easy as possible for them to process the legal work. If we can help students process the legal work efficiently, we will have more time to help them learn the really important lessons that supervised practice can teach.

The most important lessons that can be learned in client representation courses include many of the same lessons that can be learned through simulations or observation, including the values, behaviors, attitudes, and ethical requirements of a lawyer (professionalism). However, the learning is deeper and more meaningful when a student is participating as a lawyer, rather than as an observer or assistant or in a make believe simulation. This is particularly true of what I consider the key values of the profession: the importance of seeking justice and providing access to justice, the reasons for fostering respect for the rule of law, the essentiality of integrity and truthfulness, the need to deal sensitively and effectively with diverse clients and colleagues, and the value of nurturing quality of life in light of the stresses and time commitments of law practice.

Representing clients presents opportunities for students to test for the first time on a personal level a number of abilities that are essential for lawyers. These include, for example, such things as whether they:

> -can "communicate effectively with clients, colleagues, and members of other professions,"
>
> -have "effective skills for client relationship management and knowledge of how to act if a client is dissatisfied with the advice or service rendered," and
>
> -can "handle personal workload and to manage efficiently, effectively, and concurrently a number of client matters."

More importantly, representing clients tests a student's ability:

> -to engage in "appropriate behaviors and integrity in a range of situations" and
>
> -"to deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives."

In sum, students in client representation courses are beginning to learn the extent to which they are able to conduct themselves professionally.

Students participating as lawyers also test their intellectual and analytical skills, and they learn how well they are able to apply practical judgment to the situations they

encounter. Watching lawyers and judges in practice helps students understand these things, but students must practice law themselves before they can evaluate how far they have to go before they will be effective, responsible lawyers. Only in real life contexts can students learn how they measure up to the requirements and expectations of the legal profession. Only then can they really test how their "espoused theories of practice" play out in the actual practice of law.

An issue that legal educators should carefully evaluate is the degree to which externships in which students engage in practice under supervision can achieve the educational objectives described above. One of our operating assumptions is that in-house clinical faculty have superior one-on-one teaching skills for helping students learn how they function as lawyers and how they can grow. Perhaps only in in-house clinics are they likely to encounter teachers who will help them learn about their strengths and weaknesses and develop strategies for improving.

In-house clinic teachers may be uniquely situated to help students "recognize personal and professional strengths and weaknesses, to identify the limits of personal knowledge and skill and to develop strategies that will enhance professional performance." Such instruction requires the teacher to be attentive to individual students' attributes and to develop specialized teaching skills that neither externship supervisors or students' first employers in practice are likely to have. At least that is the theory.

I do not know of any data comparing the teaching effectiveness of externship supervisors with in-house clinic faculty. In theory, the lessons described above could be taught and learned in externships in which students participate as lawyers under the supervision of practicing lawyers. This would not be possible, however, unless the externship supervisors embrace their educational functions and work to develop their teaching knowledge and skills. This is not likely to happen unless the law school makes this expectation clear, selects externship supervisors based on their teaching potential, provides training about the educational goals of its externships and methods of instruction, exercises control over the tasks to be assigned to students, establishes protocols for observing student performances and providing feedback, coordinates the fieldwork experience with assigned readings and classroom discussions, and closely monitors the performance of externship supervisors.

Another way in which the potential of in-house clinics may surpass that of externships is that in-house clinics can afford the time to encourage students "to aim beyond the typical standard of the marketplace, a standard often based on 'theories' that do more to make the lawyer's work easier than to serve the clients, and that include elaborate rationalizations for ineffectiveness so as to make it easier to externalize failure.

The law school clinical program must start the student on the road to excellence."[86] Perhaps only in-house clinical courses can give students an "attitudinal and learning model sufficiently strong to insulate the student from external pressures toward mediocre practice."[87]

I do not know how closely this vision of the educational potential of courses involving supervised law practice resembles reality. My fear is that too many of these courses are overwhelmed with processing cases and with teaching those matters described earlier that we cannot avoid teaching, e.g., office procedures and how to process certain kinds of cases. As I mentioned earlier, it is important and valuable for students to learn these things. I just do not believe they are the most valuable lessons that students can learn in in-house clinics, and there may be more efficient and effective ways to teach them. If an in-house clinic cannot demonstrate that it is doing nothing more than teaching office procedures and how to process certain types of cases, perhaps it should be replaced with a less expensive externship that can achieve the same objectives in a more realistic work environment.

As with every other course in the law school, we would benefit from developing clear statements of the outcomes that each client representation course seeks to achieve. Until we do this, we will be less able to demonstrate the value of supervised practice courses, less focused on accomplishing our objectives, and less able to evaluate the success of our efforts.

We also need to improve the methods we use for determining whether supervised practice courses are achieving their goals. I do not know if there is a typical way in which students in such courses are graded. I know some base a student's grade on an evaluation of the student's overall effort and abilities in handling their casework. Some evaluations are linked to written descriptions of lawyering competence that are handed out at the beginning of the semester. I do not know of any in-house clinic or externship that gives a written or oral exam, nor do I know of any that evaluate what students know at the end of the semester about the lessons that were the subject of instruction during

[86] Kreiling, *supra* note 71 at 305.

[87] *Id.* at 306.

the semester. The focus is almost always on how the student performed rather than what the student learned except, perhaps, in those situations that also incorporate students' end of the semester self-evaluations. I do not have an answer, but evaluating student learning in client representation courses is a question that we have not yet adequately addressed.

Part 6: Conclusion

Preparing students for practice is a complex undertaking, and clinical teachers have the most complex jobs in the academy. Clinical teaching and scholarship have come a long way since the 1960's, and the growth of clinical education in law schools has been the biggest change to occur in legal education in the United States in the past 100 years. We still have a surprisingly long way to go, however, before clinical education will have its rightful place in legal education.

I am convinced that the movement toward outcomes-focused education is a positive development. It will help clinical teachers better understand and demonstrate the strengths and weaknesses of clinical education and help us focus our attention on achieving objectives that are uniquely suited for clinical teaching. Thinking more clearly about our goals and whether we are achieving them will enable us to become more effective and accountable teachers.

We should encourage our nonclincial colleagues to work with us in articulating the desired outcomes of legal education and in coordinating the program of instruction to achieve those outcomes. We should seek out opportunities to learn from and collaborate with our colleagues in the United Kingdom and elsewhere. Their progress towards outcome-focused legal education will make our transition easier, though they and we have much work remaining.

No matter how sophisticated clinical education may become, however, we should keep our limitations in mind and remain concerned that law school graduates become fully licensed to practice law without any requirement that they practice under supervision until they can demonstrate minimal competence. Countries in the United Kingdom and in many other parts of the world are committed to apprenticeships. With all of their imperfections, at least clients of new lawyers in those countries can be assured that their lawyers have spent some time working under the guidance of experienced lawyers.

Even if the day comes when every student is required to take extensive numbers of well-designed clinical courses, I wonder if that will be an adequate substitute for supervised practice after graduation. With all of the changes to legal education in the United Kingdom, no proposal is pending to end the apprenticeship requirement. A period of supervised practice before full licensure is viewed as an essential consumer

protection component of legal education. Michael Burrage explained in 1996 why English solicitors and barristers continue to require students to participate in articles and pupillage:

> By forcing clerks and pupils to submit to a period of hardship, drudgery and semi-servitude, it necessarily conveyed a due appreciation for the value of membership in the profession. It also instilled respect for one's elders, for their experience, for their manners, conventions and ethics and for their sense of corporate honour. Articles and pupillage could, therefore, provide cast iron guarantees about the attitudes, demeanor and commitment of those who were to enter the profession. A university degree, by contrast, guaranteed only the acquisition of legal knowledge of uncertain relevance to the actual practice of law.
>
> . . . They were forms of moral training, of initiation into networks that linked every past and present member of the profession, by ties of obligation, loyalty, and possibly affection, that enabled to [sic] newcomers to belong, to empathize with its aspirations and concerns and to share its sense of honour.[88]

I doubt that clinical courses in United States law schools, even at their best, can replicate the values of supervised practice following graduation from law school. Three years in law school is not long enough to prepare our students for practice. This makes it all the more important for clinical teachers to use our time and resources as carefully and thoughtfully as possible. Defining the desired outcomes of our courses will help us achieve that objective.

[88] Michael Burrage, *From a gentleman's to a public profession: status and politics in the history of English solicitors*, 3 INT'L J. LEG. PROF. 45, 54 (March, 1996).