Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools

by Harriet N. Katz*

I. INTRODUCTION

Law schools have compelling reasons to begin thoroughly reviewing their skills curriculum. Three new publications emphasize that preparing students for practice as competent and ethical lawyers is the central mission of legal education and scrutinize methods for achieving that goal. A new ABA Standard for Accreditation (the "Standard" or "Standard 302"), revised in 2005 to mandate skills education for every law student, is now being applied at law school reaccreditation reviews.¹

* Clinical Professor and Director of Lawyering Programs, Rutgers School of Law-Camden. University of Michigan (B.A.); Yale Law School (J.D.).

I am indebted to colleagues and friends Cynthia Batt and Sarah Ricks for their extensive and thoughtful comments on ideas and drafts for this Article, to John Beckerman, Randy Hertz, Ann Freedman, Michael Schwartz, and Victoria Chase Walters for very helpful suggestions, and to Roy Stuckey for his pioneering work to improve legal pedagogy.

- 1. Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Standards for Approval of Law Schools, Standard 302 (2007), available at http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf. Standard 302, entitled "Curriculum," states:
 - (a) A law school shall require that each student receive substantial instruction in:
 - (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
 - (2) legal analysis and reasoning, legal research, problem solving, and oral communication:
 - (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
 - (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

In addition, Educating Lawyers: Preparation for the Profession of Law (the "Carnegie Report"), a report written by the Carnegie Foundation for the Advancement of Teaching, and Best Practices for Legal Education ("Best Practices"), an analysis conducted by law professors, were both published in 2007 and distributed nationally. The Carnegie Report and Best Practices examine law school pedagogy throughout law school curriculums in light of the ambitious goal of preparing students for ethical and competent practice. Their thorough critiques of legal education should inspire law schools that review their curriculum for compliance with ABA Standards to expand their effort and promote excellence in skills education.

Both the Carnegie Report and Best Practices call for greater focus on the professional "identity and purpose" of lawyers, better integration

- 2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]. The book is the most recent in a series on professional education published by the Carnegie Foundation for the Advancement of Teaching. The series, entitled "Preparation for the Professions," has previously published work regarding medicine, nursing, engineering, and religious clergy. The authors have produced extensive scholarly work on education and professionalism. *Id.* at ix-x.
- 3. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES]. An updated online version of this text is available at the University of South Carolina Law School's Center on Professionalism website, http://law.sc.edu/faculty/stuckey/best_practices/ (last visited Mar. 29, 2008). The work was sponsored by the Clinical Legal Education Association, a membership group of law professors primarily teaching clinical and other skills courses. The Carnegie Report cites Best Practices frequently, citing the 2006 draft then available on the website. As principal author and editor, Roy Stuckey involved many legal educators from across the country in drafting and reviewing the text, as explained in the text at page ix. Some of Stuckey's prior publications about legal education are: Can We Assess What We Purport to Teach in Clinical Law Courses?, 9 INT'L J. CLINICAL LEGAL EDUC. 9 (2006); Education for the Practice of Law: The Times They Are A-Changin', 75 Neb. L. Rev. 648 (1996); Preparing Students to Practice Law: A Global Problem in Need of Global Solutions, 43 S. Tex. L. Rev. 649 (2002).

⁽⁵⁾ the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.

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

⁽¹⁾ live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence

Id. (emphasis added to highlight the portions of the Standard discussed here). Also note this admonition to law schools: "A law school shall engage in periodic review of its curriculum to ensure that it prepares the school's graduates to participate effectively and responsibly in the legal profession." Am. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302, Interpretation 302-8.

^{4.} Carnegie Report, supra note 2, at 14, 126-61.

of the cognitive and practical elements of preparation for law practice,⁵ and creative use of experiential education.⁶ Both urge law schools to adopt more reliable, educationally sound methods of grading.⁷ Best Practices explicitly urges law schools to attend to the psychological well-being of law students.⁸ Integrating these perspectives, it becomes clear that the goal of legal skills education is the development of law graduates who are competent, aware of key practical and ethical challenges affecting the practice of law, and prepared to continue learning through reflection and mentoring. As in an "apprenticeship," students should be guided and coached toward this goal.⁹

The Carnegie Report presents a nuanced analysis of the multifaceted professional "apprenticeships" that legal education should offer. The report examines law schools' mission as historically conflicted between preparing students for practice and focusing on scholarship and doctrine. It challenges law schools to establish an integrated model of legal education that focuses on a mission to develop graduates who are prepared for practice not only in legal analysis but also in practical skill and professional identity—the three apprenticeships necessary for preparation to practice law. The Carnegie Report places particular emphasis on the third apprenticeship of "professional identity and purpose," arguing that the special role of lawyers makes this goal especially important.

Best Practices, the culmination of intensive collaboration and research over several years, offers a comprehensive guide to excellence in teaching in both doctrinal and experiential courses. Like the Carnegie Report, Best Practices acknowledges the importance of doctrinal analytical learning and the value of the Socratic method in achieving that learning, but it also emphasizes the importance of developing lawyering skills for ethical and reflective practice. As these two comprehensive critiques of legal education were being prepared, the Standards for Accreditation of

^{5.} Id. at 12, 194; BEST PRACTICES, supra note 3, at 65-66.

^{6.} Best Practices, *supra* note 3, at 165-205; Carnegie Report, *supra* note 2, *passim*. Such education includes "learning from the wisdom of practice," *id.* at 115, and conclusions, *id.* at 200

^{7.} Carnegie Report, supra note 2, at 162-84; Best Practices, supra note 3, at 235-63.

^{8.} Best Practices, supra note 3, at 90, 110-29.

^{9.} Carnegie Report, supra note 2, at 61 (describing the apprenticeship steps of "[m]odeling, . . . [c]oaching, . . . [s]caffolding, . . . [and f]ading.").

^{10.} Id. at 27-28.

^{11.} Id. at 126-61.

Law Schools were revised¹² to emphasize law schools' obligation to provide skills and practice education for students. The revised version of ABA Standard 302 codifies the accreditation officials' commitment to both teaching specific skills and offering opportunities for students to experience and reflect on legal practice.

In light of these developments, this Article suggests how a law school can use the review of its skills curriculum implicated by Standard 302 to understand and strengthen its ability to develop the professional skills of its students. This Article focuses on principal areas of information to investigate when evaluating skills education and on specific challenges in conducting that review. The Article also comments on initial efforts of this type at Rutgers University School of Law-Camden.

Part II of this Article considers how key requirements of the Standard can be understood expansively in light of the ambitious goals of skills education embodied in both the Carnegie Report and Best Practices. Part III continues in that spirit, going beyond the ABA Standards to identify additional teaching practices and curriculum structure with important links to effective skills education. Part IV addresses the challenging task of understanding attainable pedagogical goals for skills education in its various forms. Part V identifies the principal tasks and challenges in evaluating a skills curriculum. Finally, the Article suggests that evaluating skills curriculum yields worthwhile outcomes, such as communication among all faculty members about goals and methods, more comprehensive options for students, and development of standards for the ongoing process of improving the program of skills education.

^{12.} The United States Department of Education has designated the ABA Council of the Section of Legal Education and Admissions to the Bar as the accrediting authority for law schools, and it regularly reviews that council as a condition of that grant of authority. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, at iv. Partly in preparation for the Department of Education's review, the council reviewed the standards applicable to a program of legal education, drafted revised Standard 302, and published it for comment in 2004. Memorandum from John A. Sebert, Consultant on Legal Educ., to Deans of ABA-Approved Law Sch., Univ. Presidents, Chief Justices of State Supreme Courts, Bar Admission Auths., Leaders of Orgs. Interested in ABA Standards, Deans of Unapproved Law Sch. 1 (Aug. 23, 2004) [hereinafter memorandum to Deans], available at http://www.abanet.org/legaled/standards/standards documents/memor302and305standards.pdf. The ABA House of Delegates concurred in the revisions in February 2005. *Id.* The revised ABA Standard 302 applies to law schools graduating students in 2009. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302.

II. KEY ISSUES IN IMPLEMENTING STANDARD 302: EXPLORING THE MEANINGS OF "PERFORMANCE," "SUBSTANTIAL INSTRUCTION," AND "SUBSTANTIAL OPPORTUNITY"

A. Section 302(a)(4) of the Standard: Skills Instruction

Law schools must be sure that every student has "substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession."¹³ This mandate is consistent with the increasing attention given over the years by the ABA Council on Legal Education to the quality of professional skills education for law students. 14 "[O]ther professional skills" include those "related to the various responsibilities which lawyers are called upon to meet, ... [such as t]rial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting."15 The mandate to provide instruction in skills other than writing and legal analysis is new. 16 ABA Interpretations state that this instruction may be provided in various ways, including simulation courses and simulation exercises in subject-matter courses. 17 The Interpretations provided by ABA for its Standards also establish a baseline standard for substantiality, requiring that "each student" be "engage[d] . . . in skills performances that are assessed by the instructor."18 A careful evaluation of a law school skills curriculum will require consideration of the potential meanings of the concept of

^{13.} AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(4) (2007), available at http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf.

^{14.} See, e.g., Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992), available at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html. This publication is usually referred to as the "MacCrate Report."

^{15.} AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302, Interpretation 302-2.

^{16. &}quot;Standard 302(a)(4) establishes a new requirement that all schools require that each student receive substantial instruction in 'other professional skills generally regarded as necessary for effective and responsible participation in the legal profession,' and that requirement is further explicated in Interpretations 302-2 and 302-3." Memorandum to Deans, supra note 12, at 2.

^{17.} AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302, Interpretation 302-3.

^{18.} Id.

"substantial instruction" in the Standard and the concept of "performances" as defined in the Interpretation. 19

"Substantial instruction" is defined as performance "assessed" by an instructor.²⁰ Assessment, in this context, appears to refer to feedback or critique, a process that has unmistakable value in teaching skills.²¹ The word assessment is also used in other analyses of legal education to refer to evaluation of student learning, primarily by means of grading.²² While the Standard does not specify methods of assessment, a skills curriculum review will benefit from consideration and comparison of methods of assessment used by faculty.

"Performances" suggests observable activities, but should not exclude skills that are demonstrated well in a written document.²³ For example, a student may perform a simulated negotiation of a commercial lease, either in a course on commercial real estate transactions or in a negotiation course, by means of a face-to-face encounter with another negotiator. Alternatively, the student may produce drafts of documents proposing positions to be taken in the negotiation without an observable performance. Document drafting can also be assessed by the instructor and may even more closely resemble the process of an actual complex negotiation.

Finally, while the Standard requires schools to provide substantial instruction to every student, it appears to allow for some flexibility concerning the manner of fulfilling that requirement; one or more mandatory courses with "substantial professional skills components" is only one option.²⁴ If skills education is required for every student, it is not clear what would meet the Standard, other than one or more

^{19.} Id.

^{20.} Id.

^{21.} Articles reflecting on the process of feedback in legal skills education include Brook K. Baker, Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice, 6 CLINICAL L. REV. 1 (1999); Peter Toll Hoffman, The Stages of the Clinical Supervisory Relationship, 4 ANTIOCH L.J. 301 (1986); 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).

^{22.} The challenge of assessing skills education is discussed in BEST PRACTICES, *supra* note 3. Current assessment and grading methods used by law schools are critiqued by the CARNEGIE REPORT, *supra* note 2, at 162-84.

^{23.} Writing may also fulfill an additional pedagogical purpose in connection with an observable performance, for example, a reflection or planning memo about a negotiation.

^{24.} AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302, Interpretation 302-3. "A school may satisfy the requirement for substantial instruction in professional skills in various ways, including, for example, requiring students to take one or more courses having substantial professional skills components." *Id.*

required courses or a requirement to select one from a course list. In addition, because the Standard does not explicitly require that 302(a)(4) courses be upper level educational offerings, it appears that a first year course would satisfy the Standard's mandate. The Standard could be understood to mean that an otherwise required course would suffice if it contained a skills component as opposed to being solely devoted to skills development. However, the flexibility and creativity that is permitted under the Standard could be used to develop more rigorous measures as a skills program is evaluated; substantial education for practice could be provided by the curriculum in upper level courses being geared towards taking advantage of students' increased legal sophistication and making full use of opportunities under state student practice rules.

B. Section 302(b)(1) of the Standard: Providing Genuinely "Substantial" Opportunities for Supervised Reflective Practice

Section 302(b)(1) of the Standard, which concerns practice experience, states:

A law school shall offer substantial opportunities for:

(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence.²⁶

A law school must provide "substantial opportunities" for supervised practice experience within a structure designed to encourage reflection on both the legal system and personal professional development, but it is not required to mandate this experience for every student.²⁷ The emphasis on practice supervision, accompanied by reflection on the legal

^{25.} A first year introduction to the lawyering process or the lawyer's role is in place or being developed at some law schools. Others have implemented or are developing more extensive programs of skills education. Professor Roy Stuckey examined these efforts, identifying many such comprehensive programs at law schools around the country. Roy T. Stuckey, Webster Prof. of Clinical Legal Educ., Univ. of S.C. Sch. of Law, "How Do Law Schools Comply With the ABA's New Mandate Requiring Significant Instruction in Professional Skills for All Students?" Presentation at Annual Meeting of the Southeastern Association of Law Schools (Aug. 2, 2007); Symposium, The Opportunity for Legal Education: A Symposium of the Mercer Law Review, Morning Session, 59 MERCER L. REV. 859 (2008)

^{26.} Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Standards for Approval of Law Schools, Standard 302(b)(1).

^{27.} See id.

system and on the student's professional development as a lawyer, is consistent with clinical pedagogy, in externship²⁸ and in-house clinical settings.²⁹ Those who review the supervised practice aspect of a law school's curriculum will examine whether instructors are providing adequate supervision and adequate guidance for students to reflect on the legal system and their personal professional development.³⁰

A more challenging question will be how to quantify substantial opportunity for supervised practice experience. In contrast to the portion of the Standard concerning skills education, the portion regarding supervised practice does not require that every student participate, as the Interpretations state that a school need not accommodate a student in a particular experiential course. However, offerings too sparse to allow a student any reasonable chance of enrollment surely could not be substantial. Arguably, a student should be able to construct a schedule, making choices as necessary, in which supervised practice experience is possible. Various barriers may limit the availability of experiential courses, such as faculty availability, enrollment caps, location, and scheduling. No single group of students should be excluded from participation; care should be taken to provide for the scheduling needs of part-time students, and the practice interests of students interested in transactional legal work.

^{28.} J.P. OGILVY ET AL., LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS, at xi (1998); Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 Neb. L. Rev. 537 (1990); Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. Rev. 287 (1989).

^{29.} See, e.g., Kreiling, supra note 21.

^{30.} Standards for supervision in various forms of clinical education have been the subject of a great deal of attention. See J.P. Ogilvy & Karen Czapanskiy, Clinical Legal Education: An Annotated Bibliography 26-27 (Revised ed. 2005), available at http://faculty.cua.edu/ogilvy/Biblio05clr.pdf (listing forty-six articles published between 2001 and 2005 on the subject of clinical supervision). Externship supervision is addressed in BEST PRACTICES, supra note 3, at 202. Clinics and externships have long stressed the educational goals of reflection on the legal system and on personal development as a lawyer. Methods used to reach these goals include creating well-designed seminars, setting individual goals, and maintaining student journals. OGILVY ET AL., supra note 28, at 11, 79; Jane H. Aiken et al., The Learning Contract in Legal Education, 44 MD. L. REV. 1047 (1985); Linda Morton, Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy, 45 ME. L. REV. 19 (1993); J.P. Ogilvy, The Use of Journals in Legal Education: A Tool for Reflection, 3 CLINICAL L. REV. 55 (1996).

^{31.} Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Standards for Approval of Law Schools, Standards for Approval of Law Schools Standard 302, Interpretation 302-4.

Care should be taken, however, to avoid defining substantial opportunity solely on the basis of current enrollment patterns. A law school could conclude that it provides substantial opportunity if no student is turned away from an experiential course, whether enrolled clinic and externship students represent ten percent, fifty percent, or ninety percent of the student body. Regardless of how many students enroll in real-life practice experiences, a school could declare that it met its responsibility if every student who wanted real-life practice experience eventually received it. This reasoning is flawed, however, because student interest in clinical offerings may reflect how well the program is highlighted by the school (what may be called the "culture" of the school) rather than what is best for the students educationally. Why should real-life experience not be available for every student even if it is not required?³²

III. SPECIFIC FEATURES OF THE SKILLS CURRICULUM THAT A SKILLS EVALUATION SHOULD EXAMINE

At its best, an analysis of a skills curriculum would identify key characteristics of excellence by considering teaching practices in individual courses (in addition to the requirement of performance assessed by an instructor), balance and scope in the skills curriculum as a whole, innovative teaching, and evidence that courses are working toward their most valuable and attainable educational goals. This is not to criticize the ABA Standard for failing to mandate any of these features precisely, but to note that attention should be paid to these elements of good skills teaching. How to identify or clarify the educational goals of particular types of skills education is itself a larger topic, addressed in Part IV.

A. Additional Pedagogical Features in Individual Courses: Repeat Opportunities for Practice, Texts for a Theoretical Foundation, and Varied Forms of Assessment

1. Repeat Performance. Repeat performance of the same or similar task is critical to the improvement of individual skills and should be featured in a course with a pedagogical goal of proficiency in the skill. A significant body of research supports the idea that developing

^{32.} See James H. Backman, Where Do Externships Fit? A New Paradigm Is Needed: Marshaling Law School Resources to Provide an Externship for Every Student, 56 J. LEGAL EDUC. 615 (2006) (arguing that externships are well positioned to expand the availability of educationally high-quality practice experience).

expertise requires personal effort at actual or simulated realistic tasks, critique, and repeat performance for improvement.³³ While novices in any field improve their skills due to early experience, development of truly excellent skills does not occur by mere repetition of the skill.³⁴ Student and teacher should look for opportunities for "deliberate practice" of the skill, with increasing levels of difficulty.³⁵ If the pedagogical objective is not to develop an advanced proficiency in the skill, but to understand the landscape of skills in a practice area, then deliberate practice will be less important.

2. Texts. A curriculum review should examine any texts that are used and how well the text's content matches the course's goals. Texts for skills and practice courses extensively examine aspects of one or more skills, and a few address the clinical experience of students themselves.³⁶ These materials are assigned to enable students to

33. Paul J. Feltovich et al., Studies of Expertise from Psychological Perspectives, in The Cambridge Handbook of Expertise and Expert Performance 41, 60 (K. Anders Ericsson et al. eds., 2006). In a section entitled, "Simple Experience Is Not Sufficient for the Development of Expertise," the authors write that after acquiring a functional level of performance

[r]esearch...has shown that additional experience appears to make performance less effortful and less demanding, but to improve performance it is necessary to seek out practice activities that allow individuals to work on improving specific aspects, with the help of a teacher and in a protected environment, with opportunities for reflection, exploration of alternatives, and problem solving, as well as repetition with informative feedback.

Id.

34. Id.

35. Deliberate practice demands "effortful exertion to improve performance, . . . intrinsic motivation[,] . . . practice tasks that are within reach of the individual's current level of ability, . . . feedback that provides knowledge of results, and . . . repetition." Ronald T. Kellogg, *Professional Writing Expertise*, in The Cambridge Handbook of Expertise and Expert Performance, supra note 33, at 389, 396. This effort places demands on instructors as well as on students.

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

Feltovich et al., supra note 33, at 61.

36. See, e.g., Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating (1990); David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (2d ed. 2004); Robert F. Cochran, Jr. et al., The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling (1999); Russell Korobkin, Negotiation Theory and Strategy (2002);

explore both critical issues implicit in the ethical exercise of the skill³⁷ and practical methods of performance.³⁸ A text may provide a framework to examine the goals of the skill, ethical or philosophical considerations, or comparison to other professional perspectives.³⁹ An instructor in a clinical or simulation course ordinarily selects a text with a perspective matching his or her teaching goals. On the other hand, while skills performances in doctrinal classes can contribute to skills education of students, intensive skills texts may not be appropriate. Practical obstacles aside, such as the cost to students of an additional text, assigning texts for and teaching in depth about an essentially marginal issue would likely make adoption of a skills text inappropriate in that context. Shorter materials or lectures could partly fill this gap to the extent that knowledge about the skill is a goal of the class.

3. Varied Forms of Feedback. While individualized feedback is essential for significant improvement in skills, other structures for providing feedback are valuable. After an instructor moves around the classroom observing multiple pairs or groups of students perform a skills simulation, feedback to a group can identify common problems. The instructor's critique is based on his or her observations of the current and prior classes and by his or her awareness of the challenging issues in the particular assignment. General feedback may expose some student errors to public view, but feedback may be given in a supportive manner, consistent with efforts to develop skills of self- and peer-critique. It may even help reduce student anxiety over performance errors by sharing information among students.

Peer- or self-assessment is also helpful. Students can provide feedback on their classmates' skills performance. For example, students can offer individual or collaborative critique of a role play, presentations of a case

STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS (2003).

^{37.} See, e.g., BINDER ET AL., supra note 36, at 280 (discussing the proper balance of decision-making authority between a lawyer and his or her client); COCHRAN ET AL., supra note 36, at 1-9; Stephen Ellman, Lawyers and Clients, 34 UCLA L. REV. 717 (1987). On the issue of truthfulness in negotiation, see KOROBKIN, supra note 36, at 377-416.

^{38.} Krieger and Neumann's Essential Lawyering Skills, and Bastress and Harbaugh's, Interviewing Counseling, and Negotiating, supra note 36, are good examples of texts providing detailed and nuanced guidance on the conduct of skills.

^{39.} An early clinical text that set the tone of theory, practice, and reflection on the lawyer's role is Gary Bellow & Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy (1978). For a discussion of the influence of *The Lawyering Process* on clinical teaching and scholarship, see Symposium, *The 25th Anniversary of Gary Bellow's & Bea Moulton's* The Lawyering Process, 10 Clinical L. Rev. iii (2003).

plan or appeal strategy,⁴⁰ or a draft of a document. Faculty members have used peer response exercises creatively, taking advantage of both the expanded resources inherent in student critique and the incentive students have to perform well in front of their peers.⁴¹ Teaching students to monitor their own progress as their lawyering skills improve is recognized as an important goal for skills education in scholarly literature⁴² and in the ABA Standards.⁴³ While the ABA Standards connect self-assessment to "real-life practice experiences"—a setting where self-directed improvement will continue to be salient throughout a career—students can also be introduced to this skill in simulation courses.⁴⁴

B. Educational Features to Be Examined in Supervised Practice Opportunities

Clinical and externship courses that provide supervised practice opportunities contribute to developing a professional perspective and identity, the "third apprenticeship" identified by the Carnegie Report. ⁴⁵ A student role that promotes engagement and motivation is the key to this development.

The Standard does not specify the exact scope of the student role, but it seems clear that the student must participate in real practice with an opportunity to reflect on the experience. The student could have his or her own clients under the close supervision of an attorney; be responsible for selected assignments for matters on which the supervisor is the principal attorney; or collaborate extensively with other students, the attorney of record, or both. Any of these student roles in real cases may offer opportunities for problem solving under conditions of uncertainty

^{40.} E-mail from Sarah Ricks, Clinical Associate Professor of Law, Rutgers University School of Law-Camden, to author (June 11, 2007, 11:15 EST) (on file with author). The email was part of an exchange about her course, "Current Issues in Constitutional Litigation."

^{41.} If peer feedback will be used, students must be prepared to use methods that are effective, specific, constructive, and responsible. BEST PRACTICES, *supra* note 3, at 174-76.

^{42.} Id. at 172; Nina W. Tarr, The Skill of Evaluation as an Explicit Goal of Clinical Training, 21 PAC. L.J. 967 (1990).

^{43. &}quot;A law school shall offer substantial opportunities for: (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage . . . the development of one's ability to assess his or her performance and level of competence" Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Standards for Approval of Law Schools, Standard 302(b)(1) (2007), available at http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf.

^{44.} Id.

^{45.} Carnegie Report, supra note 2, at 162-84.

and complexity—a key component of professional judgment.⁴⁶ In contrast, a student assignment generated by a real client but separated out from other aspects of the case in a way that limits opportunity to learn more about its legal and practical meaning would probably not fulfill the objectives for experiential education. For example, these objectives would not ordinarily be met by pro bono research assignments taken on to assist in real cases, but supervised by a faculty member; assignments referred from a clinic or other source and handled by students in a class on a related subject; or isolated assignments given to students in some externship placements.⁴⁷

A student's positive affective involvement with the work is an important foundation for learning a professional role. 48 At a minimum, a student should feel personally engaged in his or her work to benefit from supervision and reflection and to begin learning from experience. Students must grow to understand and be worthy of their clients' trust; they must recognize their duty to the justice system. While all three years of law school contribute to this development, supervised practice plays a special role because the student's experience is shaped by an integration of doctrine, judgment, and obligation to a client. A real matter for a real client, whether in an external or on-campus setting, provides unparalleled possibility for a student to engage the responsibilities of law practice affectively and cognitively. Engagement frequently occurs by placing the student in the full role as counsel for the client. Students aiding a lead attorney in discrete assignments can also be very engaged in a collaborative role if they are treated as colleagues by the supervisor, they are brought fully into the discourse about the matter, 49

^{46.} Roy Stuckey, Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses, 13 CLINICAL L. REV. 807 (2007); see Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. LEGAL EDUC. 313, 348-49 (1995); see also Kandis Scott, Non-analytical Thinking in Law Practice: Blinking in the Forest, 12 CLINICAL L. REV. 687 (2006) (citing the need for holistic rather than analytical reasoning in the context of complex and uncertain facts).

^{47.} With careful planning by the supervising attorney, the student could be relatively engaged in a case even with selected assignments. In the Rutgers-Camden Pro Bono Research Project, an attorney who refers research needs to the Project is required to communicate with the volunteer student directly, which has facilitated student interest and commitment. Kristi Poling, *Law Students Build a Link*, Phil. LAW., Fall 2004, at 18, 18-19.

^{48.} BEST PRACTICES, supra note 3, at 110; Gerald F. Hess, Heads and Hearts: The Teaching and Learning Environment in Law School, 52 J. LEGAL EDUC. 75 passim (2002); Harriet N. Katz, Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy, 41 GONZ. L. REV. 315, 334 (2006).

^{49.} When I examined student assessments of the teaching styles of supervisors in the Rutgers externship program, I observed the positive impact of collegiality between students

the supervisors take the time to mentor the students,⁵⁰ and the students are prepared to seek this engagement and mentoring.⁵¹

C. Seeing the Skills Curriculum as a Whole: Balance and Variety

The goal of substantial instruction applies not only to the pedagogy of individual courses, but also to the skills curriculum as a whole. Evaluation can examine whether a school offers courses covering a diverse range of lawyering practices and skills, giving particular attention to practice-oriented legal writing and problem solving, both of which may appear in a variety of courses. Giving appropriate attention to lawyering skills in some doctrinal courses, when suitable, may also enhance student understanding of lawyer skills.

- 1. Broad and Varied Enrollment Opportunities. A skills curriculum should reflect the diverse tasks performed by lawyers. Creative efforts to develop a diverse program of skill instruction may include not only traditional categories of litigation and transactions, but also practice tasks such as business formation, legislation drafting, or persuasion in argument. Upper level skills courses can build on the students' enhanced doctrinal sophistication. A continuum of courses can also deepen students' understanding of skills. Sheer numbers of courses are also important. To provide skills education for each student, there must be enough seats in enough courses in enough time slots for every student to enroll in one or more courses. Substantial opportunity should certainly mean that a motivated student, who is interested in particular skills, can gain a thorough education in those skills through both simulation and experiential courses during law school.
- 2. Writing in the Skills Curriculum. As noted above, many tasks that lawyers perform in practice call for writing in the planning and

and supervisors on student motivation. Katz, supra note 48, at 340-42.

_

^{50.} Judging by student comments, "supervisors' interest in mentoring combined with . . . efforts to guide [the students] by any means [of supervision] resulted in increased student confidence, enlivening student interest in all aspects of the clinical experience . . . by communicating to those students the importance of their work." *Id.* at 334.

^{51.} Preparation for supervision is one focal point of the classroom component of externships. For example, see instructions to students in the following chapters from OGILVY ET AL., *supra* note 28, Chapter 2 (establishing personal goals), Chapter 3 (considering ways to learn from supervision), and Chapter 5 (reflecting on experience); see also Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989) (questioning full attorney role assumption for clinic students when it may contradict student learning styles); and see also Hoffman, *supra* note 21 (recommending gradually expanding the student role in clinic cases as the student's individual readiness for case responsibility increases).

execution stages of those tasks. Many types of simulation exercises or lawyering tasks in real cases normally consist of producing written Drafting courses at Rutgers University School of Law-Camden include "Transactional Document Drafting," in which students draft documents or segments of documents, 52 and "Small Business Counseling," in which students draft partnership agreements, employment contracts, financing plans, and the like—all of which are reviewed by the instructor.⁵³ In addition, for more traditionally performed skills like negotiation, students benefit from producing plans or documenting results in written form. Trial or pretrial tasks also lend themselves to writing assignments. Committing ideas or results to writing is helpful to the individual practitioner and critical to the collaborative efforts that are a common aspect of contemporary law practice. Requiring students to document plans, proposals, or results is an excellent pedagogical choice in teaching certain performed skills.⁵⁴ Courses requiring any of these types of writing may be encompassed by a law school's writing program and are acknowledged by the ABA under its writing standard.55

3. Problem Solving. The mark of a mature legal mind includes a firm grasp on the comprehensive skill set that comprises problem solving. Learning to think like a lawyer, whose core task is solving client problems, may be a challenge to students as they transition from the cognitive legal-reasoning education of their first year of law school to the holistic judgment they will exercise on behalf of clients. Law practice presents unstructured problems that require a lawyer to integrate information about client objectives, design and implement fact investigation, and comprehensively understand both legal and practical considerations in each lawyering decision. This important and complex skill is probably best taught in supervised practice, as addressed by

^{52.} This course is taught by Adjunct Professor Lawrence Copeland, Senior Attorney, City of Philadelphia Law Department.

^{53.} This course is taught by Adjunct Professor Dennis Talty, an attorney in private practice in New Jersey.

^{54.} In these examples, the writing is part of the skill performance. Writing assignments may also be used to concretize student learning or to provide an alternative to class participation for students to demonstrate their understanding of the material. As an example, students in my negotiation course write several short papers analyzing negotiation concepts illustrated by simulations and by news stories.

^{55.} AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(b)(1).

^{56.} CARNEGIE REPORT, supra note 2; Blasi, supra note 47.

section 302(b)(1) of the Standard.⁵⁷ Nevertheless, problem-solving should be kept in mind as simulation courses are reviewed by asking, "How does this education create a building block for teaching the complex skill of lawyerly problem-solving?"

4. Analysis of the Lawyer's Role in Doctrinal Courses. In traditional doctrinal courses, analysis of the lawyer's role in an underlying transaction or dispute enhances student awareness of the impact of particular lawyering skills. While this teaching approach does not require performance, it could be a valuable element for a law school to consider as it implements lawyering skills into its curriculum. Discussion questions may be directed, for example, toward counseling ("Should the lawyer in this case have advised the client differently about this transaction when it was first developed?" or "Given your understanding of this line of cases, how would you advise a similar client?") or strategic advocacy ("Should this litigant appeal this ruling?").⁵⁸

IV. CHALLENGES IN IDENTIFYING PEDAGOGICAL GOALS

Without minimizing how difficult it will be, I suggest that a skills evaluation should consider whether courses are identifying and teaching their optimum skills-related objectives and communicating those objectives to students. Pedagogical goals in skills courses may include proficiency at particular skills, a survey introduction to a range of skills, coherent theoretical understanding of a skill, contextual understanding of skills applicable to a practice setting, or awareness of how practicing lawyers make wise use of doctrinal knowledge. This task is particularly challenging if the goals claimed by instructors do not match their principal teaching methods. Disparities may exist between an instructor's stated educational goals and the likely educational outcomes.

Discussed below are five major educational settings for skills education in law schools: settings that allow students to gain real case experience, such as in-house clinics or externships; skills-focused simulation courses, such as "Interviewing, Counseling, and Negotiating"; practice-context simulation courses, such as "Criminal Practice," and "Real Estate Transactions"; doctrinal courses with skills exercises as a part of the pedagogy, such as "Family Law," in which students conduct lawyering exercises based on a simulated divorce problem, or "Business Organizations," in which students advise a hypothetical entrepreneur; and

^{57.} AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(b)(1).

^{58.} Other examples of the role that skills materials have in doctrinal courses are discussed below in Part IV.D.

doctrinal courses that critically analyze lawyering by, for example, using procedural developments in a case to illustrate lawyering decisions and the impact of those decisions on case outcomes.⁵⁹

A. Real Case Practice Experience: On-Campus Clinic and Off-Campus Externship

At their best, real case experiences provide a student with a contextual understanding of both specific lawyering skills and personal professional development. Depending on the methods and goals of an in-house program or the professional environment of an external placement, the student may have independent or collaborative opportunities to assume the role of a lawyer, which makes this learning powerful and immediate. It is inherently difficult to measure progress in the intangible qualities implicated by professional development, such as professional judgment and problem-solving, ⁶⁰ empathy, ⁶¹ and integrity. ⁶² Evaluation could instead focus on the presence of elements of the program that seem likely to promote awareness, reflection, and growth in these areas. ⁶³

At the same time, depending on the subject matter and design of the clinic, skills elements such as counseling, interviewing, and negotiating may appear in real cases, but they may appear unpredictably or without predictable design. This presents both advantages and limitations. Students will experience the reality of unpredictable clients and facts.

^{59.} Alternative lists categorizing skills education courses can be found in Stuckey, *supra* note 47, at 824-36 (simulation-based courses, practice observation courses, and client representation courses), and in BEST PRACTICES, *supra* note 3, at 165-205 (simulations, inhouse clinics, externships).

^{60.} There are numerous articles about professional judgment and problem-solving. See Mark Neal Aaronson & Stefan H. Krieger, Teaching Problem-Solving Lawyering: An Exchange of Ideas, 11 CLINICAL L. REV. 485 (2005); Mark Neal Aaronson, Thinking Like a Fox: Four Overlapping Domains of Good Lawyering, 9 CLINICAL L. REV. 1 (2002); Mark Neal Aaronson, We Ask You to Consider: Learning About Practical Judgment in Lawyering, 4 CLINICAL L. REV. 247 (1998); Deborah J. Cantrell, Teaching Practical Wisdom, 55 S.C. L. REV. 391 (2003).

^{61.} See, e.g., Robert Dinerstein et al., Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary, 10 CLINICAL L. REV. 755 (2004).

^{62.} See, e.g., Lawrence S. Krieger, The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness, 11 CLINICAL L. REV. 425 (2005); Eleanor W. Myers, Teaching Good and Teaching Well: Integrating Values with Theory and Practice, 47 J. LEGAL EDUC. 401 (1997).

^{63.} The difficulty of measuring outputs of legal education was recently (and reluctantly) acknowledged by an ABA task force reviewing accreditation policy. Am. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE ACCREDITATION POLICY TASK FORCE 7-9 (2007), available at http://www.abanet.org/legaled/AC%20 Task%20Force/cmtetf_20070612134026.pdf (URL is case-sensitive).

But, for the same reasons, students will have less reliable opportunities for instruction and practice in particular aspects of a skill.

The value of in-house clinics, a value that is matched by some externships, is the close attention that instructors provide to each student's development. Externships often also provide students involvement in practice contexts and collaboration with expert supervisors in legal specialities with clients or cases that cannot be duplicated on campus. In either situation, the supervisor who both engages the student in the substance of assignments and includes the student as a valued colleague helps the student to become a lawyer motivated by professional responsibility to a client, rather than promoting the stereotypical student attitude of focusing on meeting the demands of a supervisor or an instructor.

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

B. Skills-Focused Simulation Courses

1. Balancing Performance and Theory, Choosing Texts. In contrast to live-client courses, skills simulation courses can precisely identify particular elements of a skill, set out an orderly progression of steps in performance, and explore the deep structure of a skill. Texts can explain relevant concepts from other fields of study such as psychology, business, or social work⁶⁶ and can identify significant ethical issues and legal constraints.⁶⁷ Texts often provide carefully designed examples and problems for teaching⁶⁸ and take a student

^{64.} Stuckey, supra note 47, at 835.

^{65.} For example, a Rutgers student who was an extern with the State Police prepared a response to pending legislation and presented it for discussion and critique to the legal department of lawyer-troopers. Another Rutgers student, in the City of Philadelphia Law Department real estate group, researched a property law issue regarding a parcel of land that the City wanted to reclaim, and the student participated in deciding the best public use of the property and how to achieve that outcome.

 $^{66.\;}$ Bastress & Harbaugh, supra note 36, at 19-57, 175-96; Korobkin, supra note 36, at $67\text{-}110.\;$

^{67.} KOROBKIN, supra note 36, at 375-468.

^{68.} Bastress & Harbaugh, *supra* note 36, *passim* (note especially the Weber and Jones dispute, which is used extensively in connection with the negotiation unit); Korobkin, *supra* note 36.

chronologically through the steps of performance.⁶⁹ A skills curriculum evaluation should ask the instructor which of these goals he or she selected for emphasis and whether the text and other materials are consistent with the curriculum's educational goals. Instructors in some courses may minimize the use of texts, focusing solely on performance and critique. This approach may make good use of the instructor's expertise, but it overlooks the rich resource of theory and critique found in texts.

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

2. Overview or Proficiency? Some skills simulation courses cover a broad range of lawyering skills and the relationships among those skills. For example, a course covering the pretrial period of litigation might begin with a client interview and include investigating and evaluating the case, developing a theory of the case, counseling the client, preparing pleadings, conducting discovery, practicing motions, and initiating or responding to settlement possibilities. A pretrial course designed in this way would offer a coherent view of how these disparate skills are integrated into the process of representing a client in a dispute. If students conduct simulation exercises that demonstrate several of these skills, they would experience an effective introduction to the challenges of the skills. Essentially, these are survey courses; their educational value lies in the overview they can provide.

In a fourteen or fifteen week term, however, students in these courses would not likely receive detailed individual feedback or repeated opportunities to improve in each of the covered skill dimensions. This would be so even if the instructor's intended educational goal is achieving competent student performance of some of these skills. Indeed, competent performance of a skill is more likely to be achieved in a course that is narrowly focused on, for example, interviewing and counseling, negotiation, or depositions. If the educational goal is proficiency at the skill, repeated student practice that includes a

^{69.} Bastress & Harbaugh, supra note 36, at 405-28; Binder et al., supra note 36, passim.

structured progression of the skill's elements would gradually increase student ability and lay the framework for continued improvement.⁷⁰

C. Practice-Context Simulation Courses

A practice-context course examines the range of lawyering decisions in a particular practice speciality, integrating the substantive law with lawyering skills as they are applied in that setting.⁷¹ A law school reviewing this aspect of its skills program will look for a coherent client-and practice-focused perspective as a foundation for these courses. In addition, these courses may otherwise concentrate on policy, procedure, skills, or a combination of these elements.

Examples of practice-context courses at Rutgers University School of Law-Camden are "Immigration Practice and Procedure," "Criminal Practice," "Bankruptcy Workshop," and "Small Business Counseling." Skills courses organized around a practice area can focus on client-centered problem solving in a particularly coherent and natural way, as each lawyering task builds on or is interrelated with other decisions or tasks. While traditional performance skills can be taught in such a course, their context in a practice area requires students to constantly make decisions and demonstrate lawyering skills after taking into account the particular perspective of clients in that setting (business owners, debtors, immigrants) along with instruction about the specific skill. In this way, a practice course is a bridge to client-based experience that retains the precise control of content that is found in skills-focused simulation courses. Moreover, a practice course can integrate real client

^{70.} BEST PRACTICES, supra note 3, at 178; David A. Binder, Albert J. Moore & Paul Bergman, A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer, 13 CLINICAL L. REV. 871, 885-86 (2007) (referring to the goal that a skill be sufficiently developed to be "transferable" to new, similar tasks in practice); Stuckey, supra note 47, at 808 (analyzing the goals of clinical education and asserting, as a beginning principle, that "developing competence is the primary purpose of legal education"). Understanding the structure of the skill has also been asserted to aid transferability, as argued by Paul Bergman, Transferable Rhetoric, in Teaching the Law School Curriculum 72-73 (Steven Friedland & Gerald F. Hess, eds., 2004) (discussing understanding rhetorical devices in persuasive argument).

^{71.} There would likely be overlap in content or teaching goals between a practice-context course and a doctrinal course that instructors teach using a lawyering, problem-based perspective. The problem-based perspective is described below in Section V.D. It would be an interesting endeavor to compare such courses and consider the similarities and differences in educational goals and course emphasis.

^{72.} Cf. Brook K. Baker, Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning, 36 ARIZ. L. REV. 287 (1994) (discussing the "ecological" learning environment of an apprenticeship in the practice context); see also Baker, supra note 21.

experience by including referrals from a clinic or an other program in addition to simulated problems.

For example, the experienced practitioner who teaches "Small Business Counseling" at Rutgers University School of Law-Camden takes students through the stages in the life of a closely held small business, such as formation, financing, and the drafting of employment and partnership contracts. Students perform the required skills of fact investigation, drafting, transaction planning, and file management. Some assignments are real client questions referred from the New Jersey Small Business Development Center connected with the business administration school on the Rutgers campus. Simulations are added to students' assignments to ensure that they have a fuller understanding of small business representation. Documents drafted by students are examined line-by-line in class.

Client concerns permeate this class's discussion. In a recent class, when students began a role play about financing options for expansion of a business, a student acting as a lawyer advised a student acting as a business owner that a lender would have to be repaid, while an investor would make money only if the business succeeded. The student business owner replied immediately that he did not want to share control of his business. The class then discussed how client preference for sole management could be a value that affects various decisions, including financing.⁷⁴ A commitment to respecting the client's perspective—a cornerstone of thinking like a practicing lawyer—is demonstrated in this thoughtful pedagogy.⁷⁵

^{73.} This course is taught by Adjunct Professor Dennis Talty, who is a practicing attorney specializing in representing closely held businesses.

^{74.} Contemporary counseling texts stress the importance of identifying client preferences that bear upon decisions. For examples of client-centered counseling models, see BINDER ET AL., supra note 36, at 4-15, and KRIEGER NEUMANN, supra note 36, at 21. The text credited as the first to emphasize client-centered counseling was DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). See also BASTRESS & HARBAUGH, supra note 36, at 255-57 (describing the lawyer-client counseling relationship as a "cooperative" one in which the lawyer helps the client make a decision that "best meets [the client's] needs and priorities"); COCHRAN ET AL., supra note 36, at 6-9 (similarly asserting the importance of understanding client preferences and also describing the desirable relationship between the lawyer and his or her client as "collaborative").

^{75.} In "Bankruptcy Workshop," clients portrayed by actors lead students from the initial stages of meeting the client through planning and strategy, fact investigation, and presentation of bankruptcy issues in simulated hearings. Other practice-context examples in the Rutgers University School of Law-Camden curriculum are "Intellectual Property Business Transactions," "Patent Prosecution and Licensing," "Current Issues in Constitutional Litigation," "Transactional Document Drafting," "Criminal Practice," and

D. Doctrinal Courses with Skills Exercises

Doctrinal courses sometimes incorporate brief role-play exercises in particular class sessions or extended simulations that appear throughout the course. Lawyering skills referenced or demonstrated in doctrinal classes may enhance students' understanding of the substantive law of the course, explain the role of a lawyer in case development, and introduce the elements of a skill. Without individual feedback, however, significant individual skill enhancement is not a realistic goal. Although a skill experience without individual critique seems unlikely to contribute to the deliberate practice that is recommended for significant improvement of a skill, repeated exposure to skill exercises of any sort may increase appreciation of the skill and therefore increase a student's willingness to take more academic skills courses.

Due to subtle differences in what happens from classroom to classroom, assessing the educational potential of skills exercises in doctrinal courses can be challenging. As examples, consider the following theme and variations in which corporate form is the topic of a business organization class session.

In a traditional approach, a professor helps students clarify the key legal issues that arise when a business becomes a separate legal entity from its owners. The professor intends for students to know the black letter law of corporations, understand judicial decisions in litigation by

[&]quot;Immigration Law Practice and Procedure."

^{76.} Using simulations in doctrinal courses may be an increasingly common practice. Under the editorial supervision of Professor Michael Hunter Schwartz, Carolina Academic Press is soliciting proposals to develop a series of casebooks using a problem method. "[The] books in this series will... emphasize active learning; make it easier for professors to create multiple opportunities for practice and feedback; use multiple methods of instruction; focus on the application of concepts in simulated law practice contexts...; guide student development of self-directed learning strategies...." AUTHOR'S GUIDE, CONTEXTUAL LEGAL EDUCATION SERIES (2007). LexisNexis plans to publish a series of texts providing materials for simulations in doctrinal courses, which will be issued beginning in 2008-2009 under the title "Skills & Values." Authors are currently being solicited to create publications that will actively engage students, illustrate the values and skills of lawyers in the field, and "bridge the gap between theory and practice." LexisNexis, Skills & Values Series Author Guidelines, provided to the Author by Professor Ruth McKinney, an editor of the series, by email June 28, 2007.

^{77.} Lynne L. Dallas, *Limited-Time Simulations in Business Law Classes*, 45 J. LEGAL EDUC. 487 (1995); Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 471 (1995).

^{78.} Feinman, supra note 77, at 472. "In a large basic course, a reasonable performance objective is to make students aware of the importance of skills in the lawyering process" Id.

or against corporations, and be prepared to comprehend advanced concepts about corporate legal responsibilities at the conclusion of this unit of material.⁷⁹

In another classroom, a professor describes an ongoing business that is now a sole proprietorship or partnership and asks the students, "Should this business incorporate?" Introducing the same topic as a lifebased problem reminds the students that real people are affected by such a decision.⁸⁰ The aim of this approach is for students to understand which turning points in the life of a business make a corporate form relatively advantageous for the owner. The student then appreciates that the choice of a business form is not determined by doctrine but by problem-solving strategies to implement client goals, personal client concerns, and business practices in the particular industry.⁸¹ discussion introduces lawyerly problem solving and demonstrates the advantage of a business lawyer being knowledgeable about the client as well as the client's business. However, subsequent discussion may focus on the content of corporate definitions and parameters rather than the dynamics of client counseling in the decision-making process. In this example, although the question focuses on the need to counsel the client, no counseling performance takes place.

A third instructor asks, "Owner Mary Jones consults you and asks, 'Should I incorporate?' How do you respond?" Framing the inquiry in this way directly implicates the skills of interviewing and counseling. As in the former example, the student would be called upon to think about the information needed to provide well-informed advice. In addition, the student is introduced to the client interaction skills necessary to obtain and convey that information and to guide the client. However, what happens at this point in the class? The student could be prompted to begin a simulated interview, but after beginning the

^{79.} For examples of texts with this traditional approach to instruction about corporate business formation, see Melvin Aron Eisenberg, Corporations and Other Business Organizations 106 (9th ed. 2005); Robert W. Hamilton & Jonathan R. Macey, Cases and Materials on Corporations Including Partnerships and Limited Liability Companies 208 (9th ed. 2005).

^{80.} The hypothetical may include personal information about the business owner, such as the names of family members who may be involved in the business or financial planning considerations. A text structured for teaching about choice of business organization form as a contextual problem is Jeffrey D. Bauman et al., Corporations Law and Policy: Materials and Problems 132 (6th ed. 2007).

^{81.} For example, a corporate form limits the owner's liability. But will this entrepreneur need to commit his or her personal creditworthiness or assets to obtain favorable terms for leasing property or equipment, despite having a corporation? Does the owner's active work in the firm expose him or her to personal liability for foreseeable risks?

interview with a few questions, he or she could be diverted to discussing the type of information needed. In this example, the idea of using interviewing methods is introduced, but the full interview itself does not take place.

In a final example, one student is asked to be Mary (or Mark) Jones and a second to be the business lawyer as others observe, 82 or all students are paired as lawyer and client.83 The role play may be planned by the instructor. Conversely, it may be spontaneous, for example, if a student responds to another's opinion about incorporation with a remark such as, "If I were Mary, I wouldn't want to hear that." This format would allow the students to attempt the counseling session with a fuller understanding of the issues involved. If the teaching goals for that class included the consideration of the counseling task itself, appropriate critique of the student performance would address the tone and order of the questions, the student's listening skills, and the way the student explained information, in addition to the substantive content of the student lawyer's questions.⁸⁴ But the instructor may instead reasonably decide not to pursue that line of critique, which would distract from the primary purpose of the class.

In each of these classes, the lawyering role in a business practice has been highlighted to a different degree. The approach will be memorable for students and will help them understand their future practice challenges. While the students have not been taught interviewing or counseling with an objective of competency in the skill, which would not be a realistic goal for such a class, awareness of those skills in working with clients is likely enhanced.

E. Critical Analysis of Lawyering Skills in Doctrinal Courses

Many faculty members recognize the role lawyers play in reported cases and the effect legal doctrines have on practice, and they work these insights into their teaching. A family law professor may ask students to consider how a lawyer should counsel a client in a child custody dispute in light of a series of appellate opinions about a custodial parent's proposed out-of-state move. An evidence instructor may take students through the rules on introducing evidence of prior bad acts, along with the caselaw on the consequence of trial court error

^{82.} This is the "fishbowl" method of role play, which focuses all student attention on one pair or group of performers. Other students may be invited to take over one role or another, asked to offer critique, or both.

^{83.} This describes the "breakout" method, in which all students attempt the role play.

^{84.} See, e.g., BINDER ET AL., supra note 36, at 41-63; COCHRAN ET AL., supra note 36, at 29-30.

on this issue and then ask students to consider whether the defense lawyer should advise his or her client to testify. While this teaching practice does not teach skills per se, it will likely enhance student understanding of the relationship between doctrine and lawyerly judgment, and it may increase student receptivity to the work and reflection necessary to improve their personal ability to perform the skills. Acknowledging this aspect of a curriculum in the course of reviewing skills pedagogy may increase understanding of a law school's culture in regard to the role of education about lawyering.⁸⁵

F. A Personal Reflection on the Challenges of Discerning Educational Goals and Outcomes

My research and reflection on this Article has led me to an insight about my own teaching, which I offer here as a cautionary note. In introductory materials provided to students, I stated that an objective for my course "Negotiation" is basic student competency in the skill of negotiation. My students are paired for at least six simulated negotiating sessions, two or three of which I fully critique. Nevertheless, I now wonder if this effort produces, or could produce, the result I declared.

The text I use is built around understanding the fundamental structure of negotiations and the decision-making process that principals and agents engage in as they plan and carry out a negotiation. Each simulation is designed to feature an aspect of negotiation emphasized in a corresponding chapter of the text.⁸⁶ Despite their performance of multiple simulations, I now think that my students are not building on performance skills as much as they are building on a cognitive understanding of the text author's theory of negotiation. Students do not repeat exercises on particular aspects of negotiation; they move on to another dimension of the subject in the next assignment. Having used several other negotiation texts, I currently think that a strong comprehension of negotiation structure is a sound foundation for students beginning their academic study of negotiation. I prefer this approach to beginning with negotiator strategy and style, independent of this structure. Some skills instructors will, no doubt, teach differently; determining the sequence and relative importance of teaching performance and theory is a challenging aspect of teaching skills to students. I do think students will be able to build negotiating skills with a foundation of theory, but I doubt that their skills will be proficient solely

^{85.} I am grateful to Professor Robert F. Williams and Associate Dean John Beckerman for their insight into the importance of this pedagogy and the value placed on it by law faculty.

^{86.} KOROBKIN, supra note 36, at xix, xx.

due to this course. This reflection leads me to conclude that even if every instructor understands that being insightful and realistic about educational goals is good for teaching quality and fair to students, discrepancies will likely exist not only between espoused and achieved goals, but also between espoused and achievable goals.

V. METHODS AND CHALLENGES IN EVALUATING SKILLS EDUCATION

Appropriate and attainable evaluation tasks include understanding the pedagogy of individual courses, evaluating balance in the curriculum as a whole, and measuring student participation. The recommended ABA site evaluation process related to Standard 302 provides only modest guidance, but its suggestion to look at course descriptions, teaching innovations, and enrollment patterns is a good starting point.⁸⁷

A. Gathering Information About Pedagogy in Individual Courses, Sharing Vocabulary

A survey asking for a self-report of skills teaching goals and methods can begin the task of gathering information about each available course. Participation by all instructors, including tenured or tenure track, visiting, adjunct, clinician, and writing professors, produces complete information, increases awareness of teaching methods among all segments of the faculty, and helps identify doctrinal courses with skills components or analysis of lawyering skills.

Self-reporting can lead to anomalous results, sometimes apparently due to the lack of a shared vocabulary. An instructor may observe part of a student skill simulation exercise by checking in with many students who are practicing a skill simultaneously. If the instructor then offers comments on what he or she has seen, he or she has provided some individual feedback. But, however insightful these comments are, should only an observation of a complete skill performance be regarded as an adequate basis for identifying this course as providing individual feedback? While most descriptions of teaching methods will be clear,

^{87.} Instructions regarding site evaluation are generally not overly detailed; instructions regarding this and related standards are no exception:

[[]D]escribe and analyze the program of professional skills instruction at the law school. What live client or other real-life practice experiences are available to the students? Does the professional skills curriculum emphasize certain areas of the law? In what ways is the professional skills program innovative?

AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, THE SUGGESTED FORMAT FOR AN ABA SITE TEAM REPORT 5 (2007), available at http://www.abanet.org/legaled/accreditation/sitevisit/formatmemo200708.doc.

misunderstandings can occur, creating confusion about the meaning of data. The study method itself may be a way to introduce and clarify concepts that will be helpful both in obtaining accurate information and in improving the skills program. Nonclinician faculty should participate in the design of the investigation, so that their understanding of terminology is taken into account.

A structured skills curriculum survey can collect information about skills performance, assessment, and other aspects of pedagogy and course planning. Which skills does the instructor plan to teach in these performances? What is the format of the skills exercises, and how often do they take place? How are they critiqued and by whom? Do students get individual feedback? Do students have opportunities to attempt the skills again to incorporate the feedback they have received? Questions could be designed to ensure that writing components of skills exercises are also reported.

Other methods to verify, confirm, or simply gain another perspective on reported teaching may include talking with students, observing classes, and reviewing syllabi, along with interviewing the instructors themselves. Recording and viewing whole classes with an instructor may be a way to get a rich understanding of teaching methods.⁸⁸

B. Balance in the Curriculum

Curriculum design is an art; it is the creation of hiring decisions, faculty interest, student interest, available talent inside and outside the law school, and guidance from the administration. That said, some effort should be made to examine course offerings that teach skills for balance of various sorts. These may include: types of skills, such as litigation and transactional work; types of performance, such as courtroom performance, interpersonal skills relating to clients or to other lawyers, or legal writing; the scope of educational goals, such as proficiency in the performance of a skill or understanding a panorama of skills; or other goals discussed above.

^{88.} Researchers studying what highly skilled individuals do on the job in various fields have had considerable success with the Critical Decision Method, an interview method that reviews a specific critical event through a detailed review of specific perceptions, decisions, and actions by the studied expert. As the expert reviews a particular incident in detail, the interviewer uses prompts to ensure the information is complete, guiding the interviewee through multiple dimensions and perspectives. This method produces a rich array of information about the perceptual cues and decision paths of experts, which can be used to improve the training novices receive in the expert's field. Robert R. Hoffman & Gavan Lintern, *Eliciting and Representing the Knowledge of Experts, in* THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE, *supra* note 33, at 203, 209.

C. Looking at Student Participation

Enrollment patterns can measure the depth and breadth of student exposure to skills courses. Which courses do students choose? Do parttime or evening students have less access to skills courses? Do some students with a primary interest in law practice contexts or skill sets that are less well represented in the curriculum (such as transactional practice) find a litigation-heavy set of courses less desirable? Practical and privacy considerations suggest using computer generated means to collect this data. At Rutgers University School of Law-Camden, the resulting tables identified the numbers of students who had enrolled in specified numbers of selected courses that we had identified, without specific names.

Student choices in enrollment can also be better understood if a decision is made that contacting selected groups of students for this purpose is acceptable. The students would have to be identified by name in order to communicate with them. ⁸⁹ Understanding why students do not take skills or clinical courses, or take only a minimum of such courses, may lead to dialogue with students about their confidence in skills learned from paid employment or volunteer positions unsupervised by the law school, or their perception of a disconnect between offered courses and their expected career paths. Responses may suggest that the skills curriculum may not be well scheduled or its content adequately communicated to students.

D. Some Reflections on Evaluating Skills Education at Rutgers University School of Law-Camden

This Article is informed by what I learned when I began to evaluate skills education at my law school. The Rutgers evaluation began with an effort to identify the skills-related courses in our curriculum, to understand something about their pedagogy, and to examine student participation in skills and writing courses. Respecting the confidential nature of the study and the expectations of participants, I am not reporting those results here but am hopeful that those efforts, along with continuing evaluation tasks, have better prepared me to be thoughtful about this important challenge.

^{89.} If student enrollment information is generally available to faculty and these students were identified simply by additional technological help, there may be no privacy problem. However, each school should assess its own responsibilities and policies regarding who has access to this data.

With the support of the Dean and the Lawyering Programs Committee and the endorsement of other faculty committees, I developed and distributed a survey of skills and writing in the upper level curriculum during the 2006 fall term. 90 All full time faculty and all adjunct faculty who taught courses identified as skills-related were asked to respond to a series of questions. Inquiries were made about assignments of skills performance, analysis of lawyer skills, and writing assignments for each of the courses they regularly teach. Their responses provided information about a wide variety of courses and teaching practices. I spoke with several respondents to clarify survey answers, and I supplemented the study by assembling data on student enrollment patterns in courses that the study data suggested provided substantial skills instruction. 91 Confidential reports provided to the faculty during the spring and fall terms of 2007 summarized the data in a manner that reflected both our understanding of the requirements of Standard 302 and our intention to promote excellence in our skills program.

We learned much from this review. With leadership, faculty members will join an effort to share information about skills teaching. A written report can both explain principal concerns about skills education and document a very well-developed program of skills courses with very capable instructors. It can provide a persuasive factual basis for further development of the lawyering skills curriculum, helping all parties to communicate and have a foundation of factual information. At Rutgers, for example, our study revealed a very interesting diversity of lawyering courses, with skills-focused courses taught by both full time and adjunct faculty, and a range of practice-context courses taught by talented practitioner-adjuncts. In addition, the study revealed that a large number of doctrinal faculty make thoughtful use of skills-related themes and problems.

Moreover, the study results revealed some areas of uncertainty, which I suspect are due in part to problems with the wording of our survey. We learned that we need to work harder to meet the challenge of defining the terms we use to describe skills pedagogy so that respondents' answers are comparable. We also need to more thoroughly

^{90.} My colleagues Ann Freedman, Victoria Chase, Ruth Anne Robbins, Robert Williams, John Beckerman, and other members of the Legal Research and Writing Committee and the Lawyering Programs Committee contributed significantly to drafting the survey and the resulting reports to the faculty. Professors Chase and Freedman were helpful in carefully analyzing the skills curriculum survey results.

^{91.} Registrar Maureen Aguilar and technology director Tom Ryan were instrumental in developing data for enrollment analysis regarding skills and writing course participation by students.

explore the educational goals set by instructors in some courses so that we can better understand their pedagogy. These findings also suggest interesting new areas to investigate as we continue to develop lawyering skills education. One example was an apparent inconsistency between clinicians and some adjunct faculty members about the number of simulations per term an instructor can critique individually. This inconsistency may have resulted not only from a different understanding of what constitutes individual critique, as discussed above, but also from a different judgment about educational goals and the pedagogy appropriate to achieve those goals.

These initial efforts have helped identify our next steps. The lawyering skills reports themselves have informed the faculty about key issues in evaluating the quality of the skills curriculum. A new academic rule has been adopted requiring each graduating student to complete one upper level skills course selected from courses certified as meeting skills education requirements. A skills course suitable for fulfilling the new requirement will provide repeat opportunities for performance and critique of a lawyering skill or series of skills. The proposal also adjusts our already extensive writing requirements to document more carefully our compliance with ABA standards for rigor and coordinates overlap between the writing and skills requirements.⁹²

While our new upper level skills requirement appears to be achievable with relatively modest changes in resources, as our enrollment analysis showed that the vast majority of our students already meet at least this minimum, we believe it will lead to other interesting and positive consequences. Implementing the new requirement means designating courses that meet its definition. In order for this process to be successful, many members of the faculty, both full time and adjunct, will review and share skills pedagogy.

VI. CONCLUSION: FOLLOWING THROUGH

A program of education for professional skills is always a work in progress. Our skills and clinical curriculum is the foundation for the apprenticeships of practice and of professional formation called for by the Carnegie Report. Review of these course offerings helps faculty to recognize the pedagogy that is already in place and to be thoughtful about what is being accomplished. The process described here can provide a foundation for several continuing tasks. Principal among these

^{92.} Adopted by the faculty on February 20, 2008, Topic 7, Upper Level Writing Requirements, and Topic 7A, Upper Level Skills Requirements, of the *Academic Rules and Regulations* provide for these changes.

will be increasing communication about skills teaching methods among the various instructors of skills courses, including the practitioners who will be bringing the best current practice experience to our students; strengthening the relationship between teaching methods and goals; and informing the process of approving new courses relating to skills to maintain relevance and balance. Students should benefit as the skills curriculum becomes more coherent and is communicated more clearly. In addition to this rich and fruitful conversation among faculty, individual instructors can think more deeply about their own pedagogy.