Chapter Four
Best Practices for Delivering Instruction, Generally

A.   Know Your Subjects Extremely Well.

Principle: The teachers know their subjects extremely well.

Comments:

This almost goes without saying. "Without exception, outstanding teachers know their subjects extremely well."[299]

The most knowledgeable teachers, however, are not necessarily excellent teachers.

> [The best teachers], unlike so many others, have used their knowledge to develop techniques for grasping fundamental principles and organizing concepts that others can use to begin building their own understanding and abilities. They know how to simplify and clarify complex subjects, to cut to the heart of the matter with provocative insights, and they can think about their own thinking in the discipline, analyzing its nature and evaluating its quality. That capacity to think metacognitively drives much of what we observed in the best teaching.[300]

So, although one cannot become a great teacher without knowing the subject extremely well, more than knowledge is required to excel.

B.   Continuously Strive to Improve Your Teaching Skills.

Principle: The teachers continuously strive to improve their teaching skills, aided by the school's teacher development program.

Comments:

This principle is consistent with the accreditation standards for law schools which require law schools to have a faculty that "possesses a high degree of competence, as demonstrated by its . . . Experience in teaching . . ., teaching effectiveness . . . ." The standards also require law schools "to ensure effective teaching by all persons providing instruction to students."[301] An interpretation of the standards provides that:

> Efforts to ensure teaching effectiveness may include: a faculty committee on effective teaching, class visitations, critiques of videotaped teaching, institutional review of student evaluation of teaching, colloquia on effective teaching, and recognition of creative scholarship in law school teaching methodology. A law school shall provide all new faculty members with orientation, guidance,

---

[299] Ken Bain, What The Best College Teachers Do 15 (2004).

[300] *Id.* at 16.

[301] Standard 401, ABA Standards, *supra* note 28, at 28.

mentoring, and periodic evaluation.[302]

The skills, values, and commitment of the people who deliver instruction to law students are, more than any other factor, the essential ingredients for preparing students for law practice. The accreditation standards require a law school to "have a faculty that possesses a high degree of competence, as demonstrated by its education, *classroom teaching ability*, *experience in teaching or practice*, and scholarly research and writing."[303]

> The most effective teachers have the following characteristics:
> • they exhibit genuine enthusiasm for teaching,
> • they follow good practices in planning and preparing entire courses and individual classes,
> • they stimulate student thought and interest,
> • they ascertain when their students are confused and use examples to diffuse students' confusion, and
> • they know and love their subjects and communicate that love to their students.[304]

Susan Hatfield described some of the attributes of effective teachers.

> The substantial body of research on effective teaching, upon which most systems for evaluating college teaching are based, emphasizes teacher behavior that actively engages students in learning. In addition to other traits such as command of subject matter, clear communication of expectations, enthusiasm, and expressiveness, effective teachers are often identified as those who encourage classroom interaction, establish rapport with students, and provide individualized feedback and reinforcement of student performance. Good teachers are further described as approachable, interested in students' learning and well-being, accessible, open to students' ideas and questions, and concerned about students' progress.[305]

Although the core mission of most law schools is to educate students, virtually no legal educators have educational training or experience when they are hired, and few law schools provide more than cursory assistance to help new faculty develop their teaching skills. As Deborah Rhode observed, "[w]e do not effectively educate legal educators. Most law professors get no formal training in teaching. Nor have legal academics shown much interest in building on broader educational research about how students learn."[306]

Some law schools organize sessions for their faculty where learning theory and teaching techniques are discussed, but these are generally minimal in scope and non-mandatory. At most law schools, new professors' classes are observed once or twice a year during their first few years of teaching by some of their more

---

[302] Standard 403(b), *id.* at 30.
[303] Interpretation 403-2, *id.* (emphasis added).
[308] Gerald F. Hess & Steven Friedland, Techniques for Teaching Law 12-14 (1999).
[305] The Seven Principles in Action: Improving Undergraduate Education 11-12 (Susan Rickey Hatfield ed., 1995) [hereinafter Seven Principles in Action].
[306] Rhode, *supra* note 109, at 196-97.

experienced colleagues who also had no formal education in teaching. While some peer reviews are very helpful, their value depends on the commitment and skills of the reviewers. After achieving tenure in six or fewer years, most law professors' classroom performances are seldom, if ever, evaluated again other than through end-of-the-semester student evaluations.

As a consequence of legal education's traditions of putting untrained teachers into classrooms, not establishing teacher development programs, and not effectively monitoring what occurs in classrooms, the quality of law students' educational experiences can vary greatly from teacher to teacher.

Despite many calls from the profession for law schools to give more weight to a person's potential and performance as a teacher in making hiring, retention, and tenure decisions and in rewarding faculty achievements,[307] most law schools continue to place more value on a new faculty member's potential for scholarly research and writing and to reward law professors almost exclusively for their scholarly activities. Many law schools assert that they expect excellence in both teaching and scholarship, but the primary criterion for tenure and promotion is usually scholarship, and most faculty make the perfectly rational decision to commit more time to scholarship than teaching.[308]

> There is much evidence that, institutionally, law schools care little about the quality of teaching. No overseeing body measures whether individual law schools have met previously defined factors regarding what constitutes effective teaching. Neither the ABA nor the AALS have defined what constitutes effective teaching. Moreover, law schools have not developed reliable methods to assess teaching. To the extent that schools engage in teaching assessment, they rely almost exclusively on student evaluations. Tellingly, hiring and promotion decisions in law schools are almost exclusively based on scholarship, and "most schools make no adverse decisions on the basis of teaching." In a perverse way, law schools' emphasis on scholarship further diminishes the already compromised quality of teaching by diverting faculty investment of time and effort away from the schools' teaching mission.[309]

It is not clear why this situation persists at so many law schools. Most law professors sincerely want to be good teachers, and many are, but too few study and practice effective educational philosophies and techniques. Tom Drummond's hypothesis about why good teaching in college is not adequately rewarded seems to fit legal education as well. "Instead of directly addressing learning to teach well, we often erroneously assume new teachers

---

[307] One task force recommended "that law school appointments, promotion, and tenure should place substantial emphasis on teaching performance." American Bar Association, Task Force on Professional Competence, Final Report and Recommendations of the Task Force on Professional Competence 12 (1983). This was consistent with the recommendation of an earlier task force's recommendation that "[l]aw school policies and practices of faculty appointment, promotion, and tenure should pay greater rewards for commitment to teaching, including teaching by techniques that foster skills development." Cramton Report, *supra* note 275, at 26.

[308] Gerald F. Hess, *Seven Principles for Good Practice in Legal Education: Principle 3: Good Practice Encourages Active Learning*, 49 J. Legal Educ. 401, 403 (1999).

[309] Lasso, *supra* note 133, at 56 n.281 (citations omitted).

know how to teach because they used to be students."[310]

    If law schools really want their faculties to be excellent teachers, law school deans and faculties would "readjust institutional priorities so that teaching and scholarship have equal value."[311] In fact, law schools that are serious about teaching would reward professors whose students demonstrate greater levels of mastery on examinations.

>   High expectations for teaching is a necessary prerequisite to increasing the expectations of students. For example, how would our teaching change if we defined ourselves by quality teaching and then set about to measure it in ourselves and others? What if, along with student evaluations of our teaching, we measured student mastery of course material against external, objective standards? What if our own professional success as teachers was measured by our students' success? How would our decisions about salary, promotion, and tenure, endowed chairs, or other tangible benefits be affected if we expected great teaching from all faculty? How would the curriculum structure change? Many faculty who care deeply about teaching become mired in negative expectations about the status of teaching in legal education.[312]

    An important part of becoming an effective teacher is to learn how to conduct valid, reliable, and pedagogically meaningful assessments of student learning, but very few law professors receive any training in assessment theory or practice. We agree with Ron Aizen that such training should be provided, even mandated.

>   Although any training would be welcome, the more extensive and formal the training, the more effective it likely would be. To truly maximize their abilities to assess students, professors should probably complete at least the equivalent of one college-level course in assessment design and grading. Law schools could work together to develop such a course, thus allowing the schools to share expertise and resources. Perhaps a group such as the AALS could coordinate such an effort – the association already offers educational workshops and conferences to its members.

>   Training in assessment construction and grading should probably be made mandatory for both new and experienced law professors, and it should perhaps even be required as a condition of law school accreditation. Alternatively, the training could be kept voluntary, in which case it would be helpful to award a certificate to those who successfully completed the training. Certification would not only serve as proof that the training participants had acquired basic competency in crafting and grading assessments, but it also would provide one measure of the quality of a law school's assessments. This information would help prospective students, who might prefer to attend a school with a relatively high proportion of

---

[310] Drummond, *supra* note 143.

[311] Hess, *supra* note 308, at 403.

[312] Barbara Glesner-Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89, 112 (2003) (citation omitted).

certified professors.[313]

Improving the quality of teaching in United States' law schools will not happen quickly or easily. A collective national effort is required as well as collaborative efforts within each law school.[314] Law teachers should seek "consensus on an ever-evolving definition of what constitutes best practices in this amorphous and complex endeavor"[315] and employ best practices in teaching, such as those set out in this document.

Ken Bain considered how to fashion a better summative evaluation of teaching.[316] He concluded that properly constructed "teaching portfolios" would be the best approach. The teaching portfolios envisioned by Bain would include student and peer evaluations, but the key component would be an analysis by the teacher of his or her goals and strategies, degree of success, and plans for the future.[317] The portfolio would be "the pedagogic equivalent of the scholarly paper, a document intended to capture the scholarship of teaching."[318]

> In short, a teacher should think about teaching (in a single session or an entire course) as a serious intellectual act, a kind of scholarship, a creation; he or she should then develop a case, complete with evidence, exploring the intellectual (and perhaps artistic) meaning and qualities of that teaching. Each case would lay out the argument in an essay.[319]

In this vision of teacher development, student learning drives legal education and faculty training, and evaluation is crucial. This vision also finds support from the American Association of Colleges and Universities (AACU). The AACU believes that faculty development has a critical role in the future of higher education; however, the AACU makes it clear that educational institutions must themselves invest in faculty development.

> Colleges and universities with learning as the center of their work provide professors with every means possible to teach, advise and mentor their students well. User friendly and extensive programs of faculty development help them become professional educators.[320]

Many of the principles for excellent teaching of students apply with equal force to training novice teachers. For example, communicating high expectations

---

[313] Ron M. Aizen, *Four Ways to Better 1L Assessments,* 54 DUKE L.J. 765, 790-91 (2004).

[314] Pace University regularly updates a list of resources related to teaching effectiveness on its Faculty Development Collection web page, http://www.pace.edu/library/pages/links/facevcollection.html. A promising resource is the International Journal for the Scholarship of Teaching & Learning (IJ-So TL), http://www.georgiasouthern.edu/ijfotl/, that will be published by the Center for Excellence in Teaching at Georgia Southern University with the inaugural issue scheduled for January, 2007.

[315] Drummond, *supra* note 143.

[316] BAIN *supra* note 299, at 166-72.

[317] For the specific questions that Bain proposes, see *id.* at 168-69.

[318] *Id.* at 169.

[319] *Id.*

[320] GREATER EXPECTATIONS, *supra* note 270, at 36.

to new teachers, providing them with high quality and frequent feedback, creating opportunities for new faculty to work with peers, and encouraging self-efficacy and mastery goals are all more likely to produce master teachers.

There is no quick and easy way to improve the quality of teaching in law schools, but we owe it to our students, their clients, and their employers to take our teaching responsibilities seriously.

C.   Create and Maintain Effective and Healthy Teaching and Learning Environments.

Principle: The teachers create and maintain effective and healthy teaching and learning environments.

Comments:
We are indebted to Gerry Hess for synthesizing four models of effective teaching and learning environments and providing the organizational structure and much of the content of this section.[321] Hess describes eight components of effective and healthy teaching and learning environments: respect, expectation, support, collaboration, inclusion, engagement, delight, and feedback."[322] We added one that is implicit in Hess' components – do no harm to students.[323]

Hess' conclusions are similar to Ken Bain's who wrote that the best teachers often try to create a "natural critical learning environment." The environment is "natural" because students encounter the skills, habits, attitudes, and information they are trying to learn embedded in questions and tasks they find fascinating – authentic tasks that arouse curiosity and become intrinsically interesting. The environment is "critical" because students learn to think critically, to reason from evidence, to examine the quality of their reasoning using a variety of intellectual standards, to make improvements while thinking, and to ask probing and insightful questions about the thinking of other people.[324]

The learning environments in the best teachers' classrooms provide "challenging yet supportive conditions in which learners feel a sense of control over their education; work collaboratively with others; believe that their work will be considered fairly and honestly; and try, fail, and receive feedback from expert learners in advance of and separate from any summative judgment of their effort."[325]

The practices described in this section will help law teachers construct healthy, effective teaching and learning environments, but [t]he magic does not lie in any one of these practices. I cannot stress enough the simple yet powerful notion that the key to understanding the best teaching

---

[321] Hess, *supra* note 84, at 87.

[322] *Id.*

[323] Law teachers would also benefit from studying Tom Drummond's summary of best practices in teaching which gives specific examples of useful techniques related to the following topics: lecture practices, group discussion triggers, thoughtful questions, reflective responses to learner contributions, rewarding learner participation, active learning strategies, cooperative group assignments, goals to grades connections, modeling, double loop feedback, climate setting, and fostering learner responsibility. Drummond, *supra* note 145.

[324] Bain, *supra* note 299, at 99.

[325] *Id.* at 18.

can be found not in particular practices or rules but in the *attitudes* of the teachers, in their *faith* in their students' abilities to achieve, in their *willingness* to take their students seriously and to let them assume control of their own education, and in their *commitment* to let all policies and practices flow from central learning objectives and from a mutual respect and agreement between students and teachers.[326]

In the end, therefore, the single most important keys to effective teaching are a teacher's desire to be an excellent teacher and a willingness to work hard at becoming one.

1. Do No Harm to Students.

Principle: **The teachers are aware of the potential damage they can do and they try not to harm students.**

Comments:
James Banner and Harold Cannon described various aspects of ethical teaching, the first rule of which is to do no harm to students.

> *The first rule of ethical teaching is to do no harm to students.* This is not merely, in the spirit of Hippocrates' admonition to doctors, a negative admonition. Instead, it implies teachers' obligations to protect students actively from threats to their well-fare arising from such appealing blandishments as popularity or peer pressure. Students' sense of self and image is easily injured by embarrassment or punishment that appears excessive, or by teachers' abuse of their authority, and this is as much the case with older as with younger students. The abuse of authority, which can take many forms, such as prejudice, favoritism, and intimacy, is especially threatening to students' welfare.[327]

As established in Chapter One, there are clear and growing data that legal education is actually harmful to the emotional and psychological well-being of many law students.

> A growing body of research suggests that the highly competitive atmosphere of law schools, coupled with the inadequacy of feedback and personal support structures, leaves many students with personal difficulties that set the stage for problems in their future practice. Although the psychological profile of entering students matches that of the public generally, an estimated 20 to 40 percent leave with some psychological dysfunction including depression, substance abuse, and various stress-related disorders. These problems are not inherent by-products of a demanding professional education; medical students do not experience similar difficulties.[328]

---

[326] *Id.* at 78-79.

[327] BANNER & CANNON, *supra* note 80, at 37.

[328] RHODE, *supra* note 109, at 197 (citations omitted). The harm that the abuse of the Socratic dialogue and case method can cause to students is discussed more fully in Chapter One in the section on "Law Schools Should Attend to the Well-Being of Their Students" and in

It is important, therefore, for law teachers to be aware of the potential harm they can do to students and to reexamine their educational philosophies and practices to reduce the likelihood that they will unnecessarily harm students.

Although a teacher can harm students using any method of instruction, complaints about classroom abuse of students primarily involve misuse of the Socratic dialogue and case method. Deborah Rhode complained that the Socratic dialogue and case method leaves students confused, teachers often use it poorly, and it contributes to a hostile, competitive classroom environment that is psychologically harmful to a significant percentage of students.

> Under conventional Socratic approaches, the professor controls the dialogue, invites the student to "guess what I'm thinking," and then inevitably finds the response lacking. The result is a climate in which "never is heard an encouraging word and . . . thoughts remain cloudy all day." For too many students, the clouds never really lift until after graduation, when a commercial bar review cram course supplies what legal education missed or mystified. Highly competitive classroom environments can compound the confusion. All too often, the search for knowledge becomes a scramble for status in which participants vie with each other to impress rather than inform. Combative classroom styles also work against cooperative collaborative approaches that can be essential in practice. That is not to suggest that Socratic techniques are entirely without educational value. In the hands of an adept professor, they cultivate useful professional skills, such as careful preparation, reasoned analysis, and fluent oral presentations. But large class Socratic formats have inherent limits. They discourage participation from too many students, particularly women and minorities, and they fail to supply enough opportunities for individual feedback and interaction, which are crucial to effective education.[329]

The Socratic dialogue and case method has been a fixture in legal education in the United States for over 100 years. When properly used, it is a good tool for developing some skills and understanding in law students. If used inartfully, it can harm students.

Law teachers need to create and maintain student-friendly climates in their classrooms and other interactions with students. Students need to feel safe and free from fear of in-class humiliation. Only then will they be willing to take academic risks. The atmosphere in the classroom should be one of mutual respect and collaborative learning.

Many of the best practices described in this section and throughout the document will help create healthier classrooms and enhance student learning.

Chapter Four in the section on "Use Multiple Methods of Instruction and Reduce Reliance on the Socratic Dialogue and Case Method."

[329] *Id.* (citations omitted).

2.   **Support Student Autonomy.**

Principle: **The school and teachers support student autonomy.**

Comments:
Law schools that value the opinions and priorities of their students give students as much autonomy as possible and explain why students do not have autonomy in some things. These schools are likely to have students who are happier, healthier, more motivated, and more successful than schools that are less supportive of student autonomy.

The self-determination theory of human motivation holds that the development of positive motivation is importantly forwarded or impeded by the characteristics of the social environment.

> Specifically, when authorities provide "autonomy support" and acknowledge their subordinates' initiative and self-directedness, those subordinates discover, retain and embrace their intrinsic motivations and at least internalize non-enjoyable but important extrinsic motivations. In contrast, when authorities are controlling or deny the self-agency of subordinates, intrinsic motivations are undermined and internalization is forestalled.

> . . . . .

> According to self determination theory, all human beings require regular experiences of autonomy, competence, and relatedness in order to thrive and maximize their positive motivation. In other words, people need to feel that they are good at what they do, or at least can become good at it (competence); that they are doing what they choose and want to be doing – i.e., what they enjoy or at least believe in (autonomy); and that they are relating meaningfully to others in the process – i.e., connecting with the selves of others (relatedness). These needs are considered so fundamental that Ryan (1995) has likened them to a plant's need for sunlight, soil and water.[330]

Ken Sheldon and Larry Krieger completed a longitudinal study of law students in 2006 which suggests that students who perceive that the school and faculty support their autonomy experience "less radical declines in need satisfaction, which in turn predicted better well-being in the third year, and also a higher GPA, better bar exam results, and more self-determined motivation for the first job after graduation."[331]

Sheldon and Krieger explain that autonomy support has three features:
1.   *Choice provision*, in which the authority provides subordinates with as much choice as possible within the constraints of the task and situation;
2.   *Meaningful rationale provision*, in which the authority explains the situation in cases where no choice can be provided; and
3.   *Perspective-taking* in which the authority shows that he/she is aware of,

---

[330] *Id.* at 5.
[331] *Id.* at 2.

and cares about, the point of view of the subordinate.[332]

Law schools and teachers that want to provide autonomy support should, therefore, involve students in curricular and other institutional decisions that affect students; give students as much choice as possible within the constraints of providing effective educational experiences; explain the rationale for teaching methodologies and assignments, assessments, school policies and rules, and anything else that affects students' lives in which they have no choice; and demonstrate in word, deed, and spirit that the point of view of each student is welcomed and valued.

The reported autonomy support at one of the schools in the Sheldon/Krieger study was significantly greater. The students at the more supportive school were less negatively affected psychologically by their law school experience and had greater self-determined motivation to start their careers.[333] The statistical analysis demonstrated that the increased autonomy support was responsible for all of these better outcomes, as well as for providing greater satisfaction of fundamental psychological needs (for competence, relatedness, and autonomy).

The study also suggests that students who attended the more supportive school actually learned better than students at the other school. When law school grades were standardized for grade curves and for undergraduate grade point average, they were found to be higher for students experiencing higher autonomy support. Also, although students at both schools had equivalent academic qualifications upon entering law school, the students at the more supportive school scored substantially higher on the Multi-State Bar Examination.[334] "While these results are institution-wide, they are strongly suggestive that the teaching and learning at LS2 may be more effective. In sum, although it appears that the more autonomy-supportive teaching at LS2 may ultimately have produced better learning mastery among LS2 students, further research is needed to conclusively determine this."[335]

3.   Foster Mutual Respect Among Students and Teachers.

Principle: The students and teachers have mutual respect for each other.

Comments:
The key component of a positive teaching and learning environment is for teachers and students to have respectful and caring attitudes. "A fundamental feature of effective facilitation [of learning] is to make participants feel that they are valued as separate, unique individuals deserving of respect."[336] "It is difficult to define caring and respect, but most people know when they are present and when they are not."[337]

---

[332] *Id.* at 5-6.

[333] *Id.* at 31.

[334] *Id.* at 25.

[335] *Id.*

[336] Stephen D. Brookfield, *Adult Learners: Motives for Learning and Implication for Practice, in* Teaching and Learning in the College Classroom 137, 143 (Kenneth A. Feldman & Michael B. Paulsen eds., 1993).

[337] Hess, *supra* note 84, at 87.

A respectful environment is one in which teachers and students participate in a dialog, explore ideas, and solve problems creatively. Intimidation, humiliation, and denigration of others' contributions are disrespectful, cause many students to withdraw from participation, and hinder their learning. But mutual respect does not mean that the participants avoid conflict, hard work, and criticism. To grow, teachers and students must engage in critical reflection and be willing to challenge and be challenged.[338]

Certain behaviors can help establish and maintain respect. These include:[339]

Learn students' names. This is perhaps the single most important thing a teacher can do to create a positive climate in the classroom. Call students by name in and out of the classroom. Do not allow them to be anonymous, to feel they can fade out without anyone's knowing or caring.

Learn about students' experiences and use them in class. Ask students to provide you with information about themselves: where they are from, undergraduate school and major, graduate degrees, work experience, other experience related to the course, hobbies, and anything else they want you to know. Ask students to share their experiences at relevant times in the course.

Let students get to know you. Introduce yourself at the beginning of the course, letting students know about your professional and personal interests. Fill out the same informational survey you ask the students to complete. Go to lunch with students and attend student events.

The results of the 2006 Law School Survey of Student Engagement reinforced the importance of student-faculty interaction. The report stated that "[p]rofessors are important role models. The nature of the student-faculty relationship affects students' perceptions of the degree to which they have developed a sense of professional ethics, how much they study, and their overall satisfaction with law school." The report reached the remarkable conclusion that "[s]tudent-faculty interaction was more strongly related to students' self-reported gains in analytical ability than time spent studying, cocurricular activities, or even the amount of academic effort put forth."[340]

Be considerate of students' time. Treat their time as a precious commodity. Come to class early and stay late to enable students to talk to you at a time convenient for them. Starting and ending class on time demonstrates your cognizance of students' busy lives. Set convenient office hours and do not miss them.

Define and model respect in the classroom. At the beginning of the course, you can articulate the critical role of mutual respect in the classroom and define with students "respectful behavior."

---

[338] *Id.*

[339] This list and most of the accompanying text come from *id.* at 88-90.

[340] LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, ENGAGING LEGAL EDUCATION: MOVING BEYOND THE STATUS QUO 13 (2006) [hereinafter 2006 LSSSE].

As Ken Bain put it, "[a]bove all, [the best teachers] tend to treat students with what can only be called simple decency."[341]

4.   Have High Expectations.

Principle: The teachers have high expectations.

Comments:
"A teaching and learning environment steeped in mutual respect between teachers and students does not imply low standards and minimal expectations. Indeed, high expectations are an important element of respect."[342]

The premise behind this principle is that we tend to get what we expect from students. Our expectations become self-fulfilling prophecies.

> Expect more and you will get it. High expectations are important for everyone – for the poorly prepared, for those unwilling to exert themselves, and for the bright and motivated. Expecting students to perform well becomes a self-fulfilling prophecy when teachers and institutions hold high expectations of themselves and make extra efforts.[343]

Having high expectations does not mean piling on the work. Assigning excessive work is likely to produce low student ratings and probably less learning because the students will become exhausted and alienated.[344] A combination of things goes into high expectations, most notably an appreciation of the value of each student and great faith in each student's ability to achieve.[345]

> The best teachers we encountered expect "more" from their students. Yet the nature of that "more" must be distinguished from expectations that may be "high" but meaningless, from goals that are simply tied to the course rather than to the kind of thinking and acting expected of critical thinkers. That "more" is, in the hands of teachers who captivate and motivate students and help them reach unusually high levels of accomplishment, grounded in the highest intellectual, artistic, or moral standards, and in the personal goals of the students. We found that the best teachers usually have a strong faith in the ability of students to learn and in the power of a healthy challenge, but they also have an appreciation that excessive anxiety and tension can hinder thinking.[346]

"[I]f the students' learning is a priority for the teacher, it will be a priority for the students themselves. They can achieve high expectations only if they believe that learning is important enough to invest time, energy, and commitment."[347] In

---

[341] Bain, *supra* note 299, at 18.

[342] Hess, *supra* note 84, at 90.

[343] Seven Principles in Action, *supra* note 305, at 79.

[344] Bain, *supra* note 299, at 71.

[345] *Id.* at 72.

[346] *Id.* at 96.

[347] Okianer Christian Dark, *Seven Principles for Good Practice in Legal Education: Principle 6: Good Practice Communicates High Expectations*, 49 J. Legal Educ. 441, 442 (1999).

fact, law teachers must emphasize learning over grades, precisely because it will help students learn better. Studies of student goal setting show that students who set narrow, challenging and well-defined mastery learning goals obtain higher grades than students who set grade goals. And students who set grade goals get higher grades than students who set no goals or simply set goals focused on completing an assigned task.[348]

Law teachers' expectations of their students can be negatively influenced by two biases: the credential bias and the generational bias.[349] The credential bias is triggered by prior experiences with students and mandatory grade curves. These can lead us to expect that entire classes as well as individual students will perform similarly to their prior academic achievement. "When teachers speak of students' grades as though they have become immutable characteristics, they condition themselves to look for similar achievement in the future, thus sustaining and even amplifying the performance outcomes of their students."[350] Teachers should continue believing we can reach all of our students, even those who have not previously excelled.

The generational bias is created by opinions that Generation X students are disengaged, disrespectful, and suspicious of authority, and thus arrive in law schools unmotivated and lazy. Barbara Glesner-Fines encourages us to keep in mind that, though law students may arrive with poor study habits, as a group they are the most successful undergraduate students and do not necessarily fit the stereotype of Generation X. Most want to learn. Even if some students fit the Generation X stereotype, we should maintain high expectations for their academic performance.

> To create a positive expectancy effect, we must reconsider the assumption that past behavior and attitudes will continue in the law school setting. There is good reason to assume that students will undergo significant cognitive and social development during law school. Once again, however, we are best situated to believe that our students can be engaged as active learners if we believe we know how to teach them to do so.[351]

Gerry Hess explains that it is important to have high expectations of all students, clearly communicate expectations, and model high expectations.[352]

> *Have high expectations of all students*. You can show students you believe all of them can succeed by seeking participation from many students each class, by spreading difficult questions and assignments to all students, and by finding opportunities to celebrate student accomplishments publicly and privately.
>
> *Clearly communicate expectations*. In the first class, you should inform students orally and in writing of the course goals and your expectations

---

[348] *See* Wood & Locke, *supra* note 191, at 1013; Hagan & Weinstein, *supra* note 190, at 44-45.

[349] Glesner-Fines, *supra* note 312, at 104-09.

[350] *Id.* at 106.

[351] *Id.* at 108 (citation omitted). This article includes many simple, helpful techniques for communicating and maintaining high expectations of students.

[352] Hess*, supra* note 84, at 91-92.

regarding preparation for class, attendance, class participation, respect in the classroom, and teaching and evaluation methods. On daily assignments, tell students what focus questions to consider while reading the assigned materials.

Model high expectations. Give students models of outstanding student work. Be demanding on yourself. Be prepared; work hard.

We encourage law teachers to have high expectations of all students and try not to give up on any student's ability to practice law effectively and responsibly.

5.   Foster a Supportive Environment.

Principle: The teachers foster a supportive teaching and learning environment.

Comments:
         "A supportive teaching and learning environment is tied closely to respect and expectations. . . . Elements of a supportive environment include teachers' attitudes, student-faculty contact, and role-model and mentor relationships."[353]

         Teachers' supportive attitudes. The most helpful attitudes are *concerned, caring, encouraging, and helpful.* "Those teacher attitudes have strong positive effects on student motivation to excel."[354]

         Frequent student-faculty contact. Substantial research documents the importance of student-faculty contact.

                 Frequent student-faculty contact in and out of class is the
         most important factor in student motivation and involvement.
         Faculty concern helps students get through rough times and keep on
         working. Knowing a few faculty members well enhances students'
         intellectual commitment and encourages them to think about their
         own values and future plans.[355]

         Contact with faculty can also have a positive impact on students' intellectual and personal development. "Students who were identified as having more frequent contact with faculty scored higher on tests designed to measure intellectual development, defined as including a higher tolerance for ambiguity and uncertainty as well as intellectual independence."[356] "Informal contact with faculty . . . may be particularly helpful in moving students away from notions of black-letter law to the more nuanced process of legal analysis. Contact with faculty may also motivate a student to think more deeply."[357]

         Law teachers may find it beneficial to initiate contact with students themselves. "An offer to meet with groups of students may attract students who

---

[353] *Id.* at 92.

[354] *Id.*, citing JOSEPH LOWMAN, MASTERING THE TECHNIQUES OF TEACHING 29 (2d ed. 1995).

[355] SEVEN PRINCIPLES IN ACTION, *supra* note 305, at 9.

[356] Susan B. Apel, *Seven Principles for Good Practice in Legal Education: Principle 1: Good Practice Encourages Student-Faculty Contact,* 49 J. LEGAL EDUC. 371, 374 (1999).

[357] *Id.* at 378.

think of themselves as too shy to maintain a one-to-one conversation."[358] Also, it may be helpful to initiate contact via the computer. "[M]any students prefer e-mail, either as an initial contact or for ongoing purposes."[359] Course web page discussion boards provide another, non-threatening, low workload mechanism for student-faculty contact.

Faculty time constraints are another impediment to faculty-student contact. "Teachers who signal their availability often find themselves overwhelmed with student demands for their time."[360] However, resolving time constraints often involves little more than simple planning, both short and long-term. Teachers can plan to arrive in class early or stay late to talk with students. Additionally, keeping regular office hours helps ensure that time is available for students.[361]

Role-model and mentoring relationships. "Role models and mentors are crucial for students' professional development. Through their actions, law professors teach students legal ethics and values."[362] They also teach students about the culture of the legal profession.

> For law students, understanding the legal culture is as important as learning any doctrine; it requires a form of learning that is less deliberate, more subtle, characterized to some extent by observation and osmosis . . . . Contact with faculty can help students learn the nuances of a life in the legal profession. . . . [N]ot only do law teachers disseminate the norms of the law school, they communicate the norms of the legal profession as well.
>
> . . . . .
>
> Values are difficult if not impossible to teach in the abstract. Individual contact with faculty not only allows for more intimate discussion of these issues, it also provides the student with a positive model . . . of the values that the law professes: "our students watch us to see whether we mean what we say."[363]

The importance of modeling professional behavior is also discussed in Chapter Three in the section, "Teach Professionalism Pervasively Throughout all Three Years of Law School."

6.   Encourage Collaboration.

Principle: The teachers encourage collaboration among students and teachers.

Comments:
Encourage collaboration among students. "An extensive body of research documents the benefits of cooperative learning methods. Over the past 100 years,

---

[358] *Id.* at 384.
[359] *Id.* at 385.
[360] *Id.* at 380.
[361] *Id.* at 383.
[362] Hess, *supra* note 84, at 93.
[363] Apel, *supra* note 356, at 379.

more than 600 studies have demonstrated that cooperative learning produces higher achievement, more positive relationships among students, and psychologically healthier students than competitive or individualistic learning."[364]

This principle is consistent with a recommendation of the Cramton Task Force. "Since lawyers today commonly work in teams or in organizations, law schools should encourage more cooperative law student work."[365]

Engaging pairs or teams of students in activities such as group projects, presentations, papers, study groups, peer tutoring, peer teaching, and peer evaluation can improve learning. "Learning is enhanced when it is more like a team effort than a solo race. Good learning, like good work, is collaborative and social, not competitive and isolated. Working with others often increases involvement in learning. Sharing one's ideas and responding to others' reactions improves thinking and deepens understanding."[366]

Carole Buckner documented the benefits to students of all races, ethnicities, and of both genders from highly structured cooperative learning experiences. Buckner reported on the hundreds of studies showing that cooperative learning "leads to higher achievement at all levels of education . . . higher quality problem solving . . . more higher level reasoning, more frequent generation of new ideas and solutions, . . . greater transfer of what is learned within one context to another . . . more in-depth analysis of the material and a longer lasting memory of the information processed."[367]

One of the values associated with encouraging student collaboration is academic excellence. Collaborative learning involves placing students in a wide variety of team projects and group assignments which allows the students to "compare and challenge perspectives, add insights, and strengthen their grasp of academic material. In the role of law firm partners and supervisors, they put pressure on each other to meet deadlines, to produce their best work, and to be accountable to affected third parties."[368]

Collaborative learning also heightens student awareness of the need for public service and the value of pro bono work. Collaboration helps students realize "the discrepancy between the reality of the legal system and the dream of social justice in our pluralistic American Culture. Students better understand legal rules and procedures as cultural phenomena, as complex compromises between competing social, political, and economic agendas."[369]

---

[364] Hess, *supra* note 85, at 94 (citing DAVID W. JOHNSON ET AL., COOPERATIVE LEARNING: INCREASING COLLEGE FACULTY INSTRUCTIONAL PRODUCTIVITY 1 (1991); Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T. M. COOLEY L. REV. 201, 218 (1999)).

[365] CRAMTON REPORT, *supra* note 275, at 4.

[366] SEVEN PRINCIPLES IN ACTION, *supra* note 305, at 24.

[367] Carole J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity" – Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. REV. 877, 924-25 (2004). On pages 939-46 Buckner describes in detail how she integrates cooperative learning experiences into her first-year Civil Procedure classes.

[368] David Dominguez, *Seven Principles for Good Practice in Legal Education: Principle 2: Good Practice Encourages Cooperation*, 49 J. LEGAL EDUC. 386, 387 (1999).

[369] *Id.*

Involve students in collaborative course design with the teacher.[370] Invite students to help make decisions about course goals, learning activities, and evaluation methods. Consider giving students options on due dates for assignments, and choices of writing assignments. Design a simple form to gather feedback from students about the effectiveness of your instruction, e.g., what activities work best for you? These steps will enhance student commitment and foster mutual respect. They can also reduce student stress associated with feelings of powerlessness and paranoia. "Empirical research demonstrates that student-and-teacher collaboration in deciding classroom policies, course objectives, instructional methods, and evaluation schemes enhances student learning and student attitudes toward the course, the law school, and the teacher."[371]

7.   Make Students Feel Welcome and Included.

Principle: The teachers make students feel welcome and included.

Comments:

Making all students feel welcome and included enhances their motivation.

The quality of a student's learning is closely tied to their motivation. Motivation is enhanced more by the chance to achieve rewards than the desire to avoid punishment. For example, students whose primary motivation is to avoid a bad grade tend to exert less effort and perform less well on exams than students with positive motivation. Motivation can be extrinsic (motivation for grades, money, or other rewards) or intrinsic (motivation based on curiosity, interest, and the desire to learn). Although both types of motivation can aid learning, students perform better when their motivation is intrinsic.[372]

Feeling welcome and included is an important motivator for all students, but particularly for women, older students, minorities, and others who may tend to feel unwelcome or excluded for whatever reasons. Teachers can help students feel more welcome and included by responding to their goals and interests, valuing diverse perspectives, and teaching to a wide variety of learning styles.[373]

Responding to students' goals and interests. Students are motivated by knowing and sharing the educational goals of the course. "You can increase students' motivation by having them participate in generating goals for the course and by having them articulate their personal goals as well. Then you can shape your course to help students achieve course goals and personal goals."[374]

It also enhances motivation if the course includes topics and skills that match students' interest and values. "You can increase students' motivation and improve

---

[370] These ideas are developed more fully in Hess, *supra* note 84, at 96-98.

[371] *Id.* at 97 (citing GERALD F. HESS, *Student Involvement in Improving Law Teaching and Learning*, 67 UMKC L. REV. 343, 355-61 (1998)).

[372] *Id.* at 99 (citing Cameron Fincher, *Learning Theory and Research, in* TEACHING AND LEARNING IN THE COLLEGE CLASSROOM 47 (Kenneth A. Feldman & Michael B. Paulsen eds., 1993)).

[373] *Id.* at 99-101.

[374] *Id.* at 99.

their learning by finding out about their backgrounds, interests, and experiences and using that information when designing learning activities."[375] At least do not downplay issues that are important to students' lives.

Valuing diverse perspectives. Students come from a variety of backgrounds and life experiences. Having a diverse community with diverse ideas, experiences, and values enriches the entire learning environment.[376] "You can facilitate and welcome diverse perspectives by choosing material that reflects a variety of viewpoints, by acknowledging at the beginning of the course the value of differing opinions, and by validating students who raise divergent views in class."[377]

Teaching to a wide variety of learning styles. "Theories about learning styles indicate that learners have a preferred mode of learning, that people learn in different ways, that a variety of learning styles will be present in any classroom, and that no one teaching method is effective for all students."[378]

> There are many roads to learning. People bring different talents and styles of learning to college. Brilliant students in the seminar room may be all thumbs in the lab or art studio. Students rich in hands-on experience may not do so well with theory. Students need the opportunity to show their talents and learn in ways that work for them. Then they can be pushed to learning in ways that do not come so easily.[379]

The majority of law schools emphasize and measure only the logical-mathematical type of intelligence rather than any other forms of intelligence. This is because "the usual method of evaluating student performance is a single exam that asks students to analyze a complex set of facts, in a limited time period, in writing."[380] Effective teachers find ways to teach and evaluate a larger range of intelligences, while encouraging their students to master more than merely one type. Effective teachers consider the various learning styles of students and employ a variety of teaching and learning methods.[381]

---

[375] *Id.*

[376] Paula Lustbader, S*even Principles for Good Practice in Legal Education: Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 J. Legal Educ. 448, 453 (1999).

[377] Hess, *supra* note 84, at 100 (citing *id.* at 456; Wilbert J. McKeachie, McKeachie's Teaching Tips; Strategies, Research, and Theory for College and University Teachers 218-24 (10th ed., 1999)).

[378] Lustbader, *supra* note 376, at 455.

[379] Seven Principles in Action, *supra* note 305, at 93.

[380] Lustbader, *supra* note 376, at 455.

[381] Vernellia Randall describes how cooperative learning methods can improve the effectiveness of teaching groups of law students with diverse abilities and characteristics in Randall, *supra* note 364, at 102.

8.   Engage Students and Teachers.

Principle: The learning environment engages teachers and students.

Comments:

Students learn better when they are interested in what the teacher wants them to learn.

> Investigators have also found that performance – not just motivation – can decrease when subjects believe that people are trying to control them. If students study only because they want to get a good grade or be the best in the class, they do not achieve as much as they do when they learn because they are interested. They will not solve problems as effectively, they will not analyze as well, they will not synthesize with the same mental skill, they will not reason as logically, nor will they ordinarily even take on the same kinds of challenges.[382]

"Teachers demonstrate their engagement through their attentive presence with students in and out of the classroom. Students become engaged in learning when they actively participate in their own education."[383]

Teacher presence. Teaching and learning is enhanced by teacher immediacy. "Immediacy refers to verbal and nonverbal communication that brings teacher and students close together."[384]

Verbal behaviors that enhance learning include "soliciting alternative viewpoints and opinions from students; praising student work; calling on students by name; posing questions and encouraging students to talk; using humor; having discussions outside of class; and asking students how they feel about assignments."[385]

"Two nonverbal behaviors significantly affected learning for all four ethnic groups: maintaining eye contact and smiling at students."[386] Carefully listening to students is also important.

> Active listening takes effort. After asking a question or posing a discussion prompt, listen to what students actually say, rather than look for the responses you expect. When students ask questions and make comments, listen actively by waiting till the student is finished talking (rather than interrupting), by responding directly to the student's questions, and by checking with the student to be sure you have understood the student's comment or question.[387]

Engage the students in active learning. "Students learn better when they are actively engaged in the learning process."[388] "It has long been known that active

---

[382] Bain, *supra* note 299, at 34.

[383] Hess, *supra* note 84, at 101.

[384] *Id.*

[385] *Id.*

[386] *Id.*

[387] *Id.* at 102.

[388] *Id.*

methods of learning are more effective than passive ones. Indeed, conference papers demonstrating that fact no longer reach the research journals."[389]

Active learning requires students to share responsibility for acquiring knowledge, skills, and values. "The object of active learning is to stimulate lifetime habits of thinking."[390] "[Students] must make what they learn part of themselves."[391] "Active learning recognizes that, during classroom time, students should be engaged in behavior and activities other than listening. Active learning requires students to undertake higher order thinking, forcing them to engage in analysis, synthesis, and evaluation."[392]

> There are several levels at which active learning can occur,
> ranging from a particular approach to completing an assignment in
> a class to the overall design of a college. . . . A common element in
> all of these diverse events is that something happens to stimulate
> students to think about *how* as well as *what* they are learning and to
> increasingly take responsibility for their own education.
>
>   . . . .
>
> Among the many dimensions of active learning are writing,
> discussion, peer teaching, research, internships, and community
> experiences. These kinds of active experiences help students
> understand and integrate new information.[393]

There are many values associated with active learning. For instance, active learning helps law students develop and improve thinking skills by teaching critical thinking and higher-level cognitive skills.[394] Active learning also enhances content mastery.

> Active learning helps students grasp, retain, and apply
> content. The more frequently students work with content and ideas in
> new situations, the more likely they will retain their understanding
> and be able to apply it on exams and in real life. By "discovering"
> ideas and knowledge through active learning . . . students often reach
> a deeper level of understanding.[395]

Socratic dialogue does not promote active learning, except for the student who happens to be on the hot seat, and perhaps not even then. Other students do not participate in the dialogue but are expected to learn vicariously by watching the interchange. This is not active learning.[396]

---

[389] Donald A. Bligh, What's The Use of Lectures? 254 (2000).

[390] Seven Principles in Action, *supra* note 305, at 40.

[391] *Id.* at 39.

[392] Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. Legal Educ. 551, 552 (2004) (explaining how technology can enhance active learning and why Socratic dialogue does not).

[393] Seven Principles in Action, *supra* note 305, at 40.

[394] Hess, *supra* note 308 at 402.

[395] *Id.*

[396] For additional discussion of the absence of active learning in many traditional law classes, see Caron & Gely, *supra* note 392, at 554-55; Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teach-*

9.   Take Delight in Teaching.

Principle: The teachers take delight in teaching.

Comments:

Gerry Hess explained the importance of showing that we are delighted to be teaching students.

> The teacher's attitude, enthusiasm, and passion are main ingredients of an effective teaching and learning environment. Students regularly identify teacher enthusiasm as the most important component of effective instruction. In Lowman's model of exemplary teaching, the most common descriptor of excellent teachers from students and other faculty was *enthusiastic.* A teacher's passion for both teaching and the subject is a critical factor in student motivation.
>
> Personal attitudes tend to produce reciprocal attitudes in others. When teachers display their delight in teaching and in the subject, students pick up that positive attitude. But when teachers appear bored and disengaged, students will too. If teachers convey to students that they love to be with them in and out of the classroom, students will not only reflect that attitude back to the teacher, they will be receptive to learning and will forgive many mistakes in the classroom.[397]

You can communicate your enthusiasm for teaching by expressly describing your interest in the subject and teaching and what energizes you. Enthusiasm is also communicated by "speaking in an expressive manner; using humor; not reading from notes or texts."[398] Nonverbal behavior can also demonstrate enthusiasm, for example, by moving while teaching, smiling at students, walking up the aisles, hand and arm gestures, and facial expressions.[399]

10.   Give Regular and Prompt Feedback.[400]

Principle: The teachers give regular and prompt feedback.

Comments:

Educational theorists agree on the importance of providing prompt feedback. Prompt feedback allows students to take control over their own learning by obtaining necessary remediation for identified deficiencies in their understanding and to adjust their approaches to future learning endeavors.

> Knowing what you know and don't know focuses learning. Students need appropriate feedback on performance to benefit from courses. In getting started, students need help in assessing existing

---

ing, 38 SAN DIEGO L. REV. 347, 351-53 (2001).

[397] Hess, *supra* note 84, at 104 (citations omitted).

[398] MARYELLEN WEIMER, IMPROVING YOUR CLASSROOM TEACHING 19 (1993).

[399] *Id.*

[400] The importance of giving prompt and regular feedback is also discussed in Chapter Seven: Best Practices for Assessing Student Learning.

knowledge and competence. In classes, students need frequent opportunities to perform and receive suggestions for improvement. At various points during [the semester], and at the end, students need chances to reflect on what they have learned, what they still need to know, and how to assess themselves.[401]

Students who are called on in a typical law school class receive prompt feedback on their performance. However, such opportunities are infrequent because of the large size of most law school classes, and the nature of the feedback is only minimally helpful in assessing a student's existing knowledge and competence. Law students seldom receive any feedback after taking final examinations. They are given a grade, but few law teachers encourage students to review their exams or provide any other feedback that would help a student understand how to improve.

The 2005 report of the Law School Survey of Student Engagement found that "students who frequently receive prompt oral or written feedback from faculty were more positive about their overall law school experience," but it also reported that "[a]bout one in six students 'never' received prompt written or oral feedback from faculty members."[402] The 2006 report concluded that "[s]tudents who have more opportunities to assess their own progress and refocus their studying in light of feedback tend to gain more in higher level thinking skills."[403] The report indicated that students who receive feedback reported greater gains in their ability to synthesize and apply concepts and ideas, spent more time preparing for class, and were more likely to say they worked harder than they thought they could to meet the expectations of faculty members.

Although providing prompt feedback is important, not everything a student receives feedback about needs to be graded.

First, the research on teaching methods that use frequent quizzes suggests that immediate feedback is superior to delayed feedback, whether the feedback comes from faculty grading of quizzes or students' grading of quizzes. It may be that this principle is most applicable to situations in which students' primary task is assimilating information, as opposed to problem-solving. Second, the research on intrinsic motivation suggests that informational feedback "provided in the context of relative autonomy" is more useful for maintaining intrinsic motivation than controlling, externally oriented feedback "intended or experienced as pressure to perform, think, and feel in a particular way," such as grades. Research suggests that feedback should be "(1) informative in terms of pinpointing the probable source of students' errors, (2) encouraging, and (3) provided in a natural context that displays performance recognition by a source student respects." Third, some research suggests that feedback coming from "the self is more valued and better recalled than feedback from any other source," implying that self-guided self-assessment may be a desirable strategy. Finally, more is not always better. Large quantities of feedback may be excessive, simply

[401] Seven Principles in Action, *supra* note 305, at 55.

[402] Law School Survey of Student Engagement, The Law School Years: Probing Questions, Actionable Data 7, 18 (2005).

[403] 2006 LSSSE, *supra* note 340.

overwhelming students. I suspect this may be particularly true of students who are struggling.

What implications can we draw from this research? I suggest the following. Prompt feedback is important, but grading each exercise is not necessarily the most useful way to provide it. The feedback should be encouraging where possible; if errors must be corrected, an explanation should be given. If private feedback is not possible, feedback in a small group is better than feedback in front of a large class, and might come in part from self-assessment or from peers.[404]

"To be most helpful, feedback normally should be prompt, indicate the direction of change desired, be specific to the particular circumstances and be given in a quantity that can be understood and acted upon by the learner."[405] Feedback can come from other students, faculty, and even self-evaluations.

11.   Help Students Improve Their Self-Directed Learning Skills.

Principle: The program of instruction is designed to help students improve their self-directed learning skills throughout their law school experience.

Comments:
Law school graduates will continue learning for the rest of their professional careers. After graduation, however, students will not always be able to depend on others to provide critique and feedback. For this reason, law schools must produce graduates who possess excellent self-directed learning skills.

This skill set is referred to self-directed learning, self-regulated learning, or autonomous learning. It involves a cyclical process in which self-directed learners appropriately classify the demands of a learning task, plan strategies for learning what needs to be learned, implement those strategies while self-monitoring the effectiveness and efficiency of the chosen strategies, and reflect on the success of the process afterwards, especially how the learner will handle a similar, future task.[406]

Within British legal education self-directed learning is one of the seven skills with which all undergraduate law students are expected to graduate. "A student should demonstrate a basic ability, with limited guidance, to reflect on his or her own learning, and to seek and make use of feedback."[407] "A student should be able not only to learn something, but to reflect critically on the extent of her or his learning.

---

[404] Deborah Maranville, *Infusing Passion and Context Into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 73 (2001) (citations omitted).

[405] SEVEN PRINCIPLES IN ACTION, *supra* note 305, at 59.

[406] *See* MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS (2005). Schwartz' text explains the self-regulated learning cycle in detail and demonstrates its application to law school learning.

[407] Quality Assurance Agency for Higher Education, Draft Statement Benchmark Standards for Law (England, Wales, N. Ireland), at Guidance Note for Law Schools on the Benchmark Standards for Law Degrees in England, Wales and Northern Ireland, item 5, http://www.qaa.ac.uk/academicinfrastructure/benchmark/evaluation/law.asp (last visited August 31, 2006).

At a minimum, a student should have some sense of whether s/he knows something well enough or whether s/he needs to learn more in order to understand a particular aspect of the law."[408]

Students should, therefore, be taught to value self-reflective evaluation and acquire essential habits and techniques for engaging in self-reflective evaluation. Students should be given explicit instruction in self critique and provided with opportunities to practice self critique, which then is itself the subject of peer and instructor critique and feedback. Michael Schwartz's "Expert Learning for Law Students" curriculum is one of the first attempts by a United States law professor to explain how to teach first year students these skills.[409]

In the context of experiential education courses in law schools, the value of helping students develop their self-directed learning skills has long been recognized. As Paul Bergman, Avrom Sherr, and Roger Burridge explained, "[l]earning does not result only from experience: 'Only experience that is reflected upon seriously will yield its full measure of learning . . . . Our duty as educators is both to provide the experiential opportunity and . . . a framework for regularly analyzing the experience and forming new concepts.'"[410] The value of experiential education for helping students develop self-directed learning skills is developed further in Chapter Five.

Students should be required, or at least encouraged, to keep journals in which they regularly record their reactions to their experiences and try to articulate what they are learning. By taking time to organize their thoughts and write them down, they will improve their self-reflective skills. Gary Blasi explained that "[j]ust as there is a sound and empirical basis for requiring law students to engage in the active process of extracting the common patterns in appellate cases, there is an equally sound basis for requiring clinical students to keep and maintain journals reflecting on the initial experience of practice."[411]

Although Blasi was focusing on the use of journals to enhance the development of problem-solving expertise in experiential education courses, journals can also help students organize and better understand what they are learning in any course. After all, law school itself is a life-altering experience. It would be useful for students to keep a reflective journal in at least one course during the first semester of law school.

Ideally, teachers would review the journals and provide feedback on them. If this is impractical, a teacher may want to offer to review journals at the students' option. Even if no feedback is provided, however, the act of keeping reflective journals can help students improve their self-directed learning skills.

---

[408] *Id.* at Guidance Note for Law Schools on the Benchmark Standards for Law Degrees in England, Wales and Northern Ireland, item 18.

[409] SCHWARTZ, *supra* note 406.

[410] Paul Bergman, Avrom Sherr & Roger Burridge, *Learning From Experience: Non-legally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 547 (1987) (quoting Austin Doherty, Marcia Mentkowski & Kelly Conrad, *Toward a Theory of Undergraduate Experiential Learning, in* LEARNING BY EXPERIENCE: WHAT, HOW 25 (Morris Keeton & Pamela Tate eds., 1978)).

[411] Blasi, *supra* note 15, at 360.

12.   Model Professional Behavior.

Principle: The teachers, administrators, and staff model professional behavior.

Comments:

Law schools will be unable to instill a commitment to professionalism in their students if a commitment to professionalism is not evident in the words and conduct of the faculty, administration, and staff, especially the faculty. Members of the faculty influence students' perceptions of what the profession stands for and what qualities are important for a member of that profession. They inadvertently convey explicit and implicit messages in their teaching and also by the values and standards they personally exhibit.

Students not only perceive what the people who run the law school say and do relative to the legal profession but also relative to basic moral attitudes and values, including how to treat other people.

> Perhaps the most significant quality faculty demonstrate over and over to students is how to use power and authority. From the first day of class onward, law students are vividly aware of the power faculty wield over their future prospects. There are real analogies here to the attorney-client relationship that faculty ignore to the detriment of law school's formative mission. Inspiration is an important part of moral motivation, and faculty have many opportunities to inspire their students toward ethical and socially responsible practice, beginning at home, so to speak.[412]

We join Tom Morgan in calling on law teachers to model the six qualities that TEACHING AND LEARNING PROFESSIONALISM[413] labeled the "essential characteristics of professional lawyers:" (1) learned knowledge, (2) skill in applying the applicable law to the factual context, (3) thoroughness of preparation, (4) practical and prudential wisdom, (5) ethical conduct and integrity, and (6) dedication to justice and the public good.[414] We, like Morgan, recognize that modeling professional life as a task is difficult if not impossible to do perfectly, but as Morgan concluded, "[i]t is impossible to model *life* and *living* in an entirely satisfactory way, but it is a challenge worth a professional lifetime."[415]

---

[412] SULLIVAN ET AL., *supra* note 7, at 195.

[413] TEACHING AND LEARNING PROFESSIONALISM, *supra* note 134, at 6.

[414] Thomas D. Morgan, *Law Faculty as Role Models, in* PROFESSIONALISM COMMITTEE, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR AND STANDING COMMITTEES ON PROFESSIONALISM AND LAWYER COMPETENCE OF THE ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS 37, 41 (1997).

[415] *Id.* at 52.

D.   Explain Goals and Methods to Students.

Principle: The school and teachers explain the educational goals of the program of instruction and each course, and they explain why they use particular methods of instruction and assessment.

Comments:

Students are more motivated to learn as part of a community of learners if they understand the long term and intermediate objectives of the program of instruction. Learning is also enhanced when students understand why certain instructional and assessment methods are employed. It is especially important that new law students understand that the development of professional expertise is the ultimate objective and that it will take time and hard work to achieve it.

> It is important that novices understand at the outset that they are embarking on a long and difficult path, but that the reward is great. The end point is expertise, the ability to achieve goals dependably without either working through complex problem-solving or devising explicit plans. Since this level of performance cannot be fully reduced to rules and context-free procedures, it often appears to the novice – or lay person – as a kind of magical know-how. It is in fact the result of long training and practice, during which feedback and coaching are essential. The expert, such as the skilled surgeon, the great painter, the respected judge, or the successful negotiator, has made the tools and techniques his or her own, incorporating them into skilled performance, a smooth engagement with the world.[416]

We should take every opportunity to engage our students in a discussion of what we are trying to accomplish and how it is intended to enhance their professional development.

E.   Choose Teaching Methods That Most Effectively and Efficiently Achieve Desired Outcomes.

Principle: The teachers use the most efficient and effective methods available for accomplishing desired outcomes.

Comments:

Student learning is enhanced when we have clear educational objectives and use the most effective means to make learning possible. In legal education in the United States, most law teachers use a limited range of teaching methods that are not always carefully chosen for their effectiveness.

The selection of the most appropriate instructional tools depends largely on having clearly articulated educational goals. The best method for imparting information is not likely to be the best method for teaching analytical skills. Some tools may be better for developing basic understanding and abilities, whereas others would be better for developing in depth mastery of subjects. Although a particular technique may be unquestionably more effective, it may not be sufficiently efficient to warrant its use.

---

[416] SULLIVAN ET AL., *supra* note 7, at 137.

> Determining what constitutes the 'best' teaching method requires two steps. The first step is to determine which method . . . best meets the instructional objectives of the course . . . defined as the method that would contribute most to student achievement in mastering the professor's objectives as measured by performance on [the assessment method]. The second step involves a cost-benefit analysis to determine whether the benefits of the method are sufficiently great to warrant the associated costs – [for example] the time demands on students and on the institution. From a cost-benefit perspective, a method that produces a modest grade enhancement at nominal costs might be a better method than one that provides greater grade enhancement but at substantial cost.[417]

Law teachers should thoughtfully reexamine our assumptions about teaching and learning. We should especially consider the benefits of making our classrooms student-oriented instead of faculty-oriented, that is, we should keep in mind the guiding principle of education: "[t]he aim of teaching is simple: it is to make student learning possible."[418] Judith Wegner made the following observations about the differences between traditional law school instruction and instruction that frequently occurs in legal writing programs.

> Some discomfort may stem from hitherto unrecognized assumptions about teaching and the educational process, perhaps reflecting the legal academy's love affair with the case-dialogue method and its powerful success in the first-year core. This prototype places emphasis on the teacher, in a heavily populated, theatrical classroom, where the dynamic is often imperial as the teacher drives the conversation, and the focus is on deconstruction of arguments and text. Effective instruction in legal writing arena is different in virtually every respect from that model. It focuses more on *learning* than teaching, attends very closely to the *individual* student in a sustained fashion that large classes tend to ignore. Students are required to take responsibility rather than allowed to be *passive* observers. They must *collaborate* and work in teams with their classmates and their teachers, rather than benefitting by keeping to themselves and going it alone. They are asked to *construct* written products through an ongoing *process* with a *social* dimension, rather than dismember others' statements that lie dead on the page. Good teaching in such a setting is often *invisible*, conducted through one-on-one conversations or small group caucuses, rather than captured by rave reviews for the "sage on the stage." None of this is to say that the case-dialogue method and its enshrined place in the first-year pantheon is unwarranted, but only to suggest that it may influence faculty imaginations about what is educationally important and how other sorts of instructional goals might best be achieved.[419]

---

[417] Steven Hartwell & Sherry L. Hartwell, *Teaching Law: Some Things Socrates Did Not Try*, 40 J. Legal Educ. 509, 510 (1990)

[418] Diana Laurillard, Rethinking University Teaching: A Framework for the Effective Use of Educational Technology 13 (1993) (quoting Paul Ramsden, Learning to Teach in Higher Education 5 (1992)).

[419] Wegner, Theory and Practice, *supra* note 48, at 31-32.

We encourage law teachers to reassess their reliance on the Socratic dialogue and case method, reexamine assumptions about all teaching methods, and employ instructional techniques that are best suited for achieving the educational objectives of our programs of instruction. Best practices for using a variety of teaching methods are discussed later in this document.

Members of a law school faculty should base their teaching decisions on research about effective teaching, or at least hypotheses grounded in research. Faculty members should apply to their teaching the same standards they apply to their scholarship. For example, a professor who wishes to use certain materials or methods of instruction in a course should base the decision on evidence (for example, studies of student learning) that the material or method is likely to achieve the educational goals of the course more effectively and efficiently than other methods of instruction. Curriculum committees should request this evidence before approving new courses.

F.   Use Multiple Methods of Instruction and Reduce Reliance on the Socratic Dialogue and Case Method.

Principle: The teachers employ multiple methods of instruction and do not overly rely on the Socratic dialogue and case method.

Comments:
Law teachers need to be multi-modal in our teaching and reduce our reliance on the Socratic dialogue and case method. There are many more tools for reaching students than one finds in the typical law school classroom. In a seminal work on teaching methodologies,[420] Donald Bligh summarized the reasons why excellent teachers vary their teaching techniques in every class session. These include encouraging deep processing, maintaining high levels of attention, fostering motivation, matching the mix of student learning styles within the classroom, and providing students with opportunities for feedback.[421]

Best practices for utilizing the most common methods of law teaching, including the Socratic dialogue and case method, are discussed later in this document, but law teachers should be conversant with a much wider range of techniques such as those on the following list taken from Bligh's book:[422]
> • *brain-storming.* An intensive discussion situation in which spontaneous suggestions as solutions to a problem are received uncritically.
> • *buzz groups.* Groups of 2-6 students who discuss issues or problems for a short period, or periods, during a class.
> • *demonstrations.* The teacher performs some operation exemplifying a phenomenon or skill while the students watch.
> • *free group discussion.* A learning situation in which the topic and direction are controlled by the student group; the teacher observes.
> • *group tutorial.* The topic and general direction is given by the tutor, but the organization (or lack of it), content and direction of the discussion depends on the student group of up to 14 students.
> • *individual tutorial or "tutorial."* A period of teaching devoted to a single

---

[420] BLIGH, *supra* note 389.
[421] *Id.* at 252-57.
[422] *Id.* at 150-54.

student.

• *problem-centered groups.* Groups of 4-12 students discussing a specific task.

• *programmed learning.* Usually a text or computer program containing questions each of which must be answered correctly before proceeding.

• *syndicate method.* Teaching where the class is divided into groups of about 6 members who work on the same or related problems with intermittent teacher contact and who write a joint report for the critical appraisal of the whole class.

• *synectics.* A development of brain-storming in which special techniques, such as choosing group members from diverse backgrounds, are used to produce a creative solution to a problem.

• *T-group method.* A method of teaching self-awareness and interpersonal relations based on therapeutic group techniques in which individual group members discuss their relationships with each other.

We owe it to our students to try to be excellent teachers who skillfully employ a wide range of teaching methods. While poor instructional techniques may not particularly affect the very best students, the average and below average students depend on the quality and effectiveness of our instruction to succeed in law school, on the bar exam, and in practice. Law teachers should expertly employ a wide variety of teaching methods. Unfortunately, many of us do not.

The main impediment to improving law school teaching is the enduring over reliance on the Socratic dialogue and case method. Typical classroom instruction at most law schools today would be familiar to any lawyer who attended law school during the past hundred thirty years. Certainly, there have been some innovations,[423] but the basic method of instruction is for the instructor to engage in one-on-one dialogues with individual students in which the instructor questions students about the facts and legal principles involved in appellate court decisions. This is the Socratic dialogue and case method.

The Socratic dialogue and case method was introduced into the law school curriculum by Christopher Columbus Langdell in the 1870s. Langdell's goal in using the method was not primarily to prepare his students for practice, because law schools of the time were intended to complement apprenticeships, not replace them. Langdell's objective was to engage in the "scientific" study of law by distilling its principles from the study of cases. In his mind, "cases, that is to say, the opinions of judges comprise the matter of the science of law."[424] Langdell articulated a vision of the law as an organic science with several guiding principles rather than as a series of facts and rules to be memorized. It was the law professor's job to mine the language of appellate cases for general principles of law.[425]

As it turned out, Langdell was wrong both about the usefulness of the case

---

[423] More doctrinal teachers are using problem-solving techniques, clinical education is expanding and becoming more diverse, more specialty tracks are being developed, and some schools are introducing students to the history and values of the legal profession in the first year and even allowing first year students to participate in simulated lawyering activities.

[424] Martha Rice Martini, Marx Not Madison: The Crisis of American Legal Education 58 (1997).

[425] Mark Bartholomew, *Legal Separation: The Relationship Between the Law School and the Central University in the Late Nineteenth Century,* 57 J. Legal Educ. 368, 378 (2003).

method for discovering the basic principles of law and about the similarities of his approach to German scientific inquiry. "Later academics, like William Keener, were more sophisticated and saw the law as more complex, with an infinite variety of principles."[426] It became "clear to a rising generation of young academics that the Langdellian claims that all law could be found in the books and that law was a series of logically interwoven objective principles were, at most, useful myths."[427]

> This led Keener and others to place less emphasis on the genius of the case method as a means of teaching the substantive principles of law, but to stress more strongly the case method's unique ability to instill a sense of legal process in the student's mind. In other words, the main claim for the case method increasingly became its ability to teach the skill of thinking like a lawyer. Methodology rather than substance became the nub of the system.[428]

The avowed primary purpose of law school in the United States henceforth was not to teach the law but to teach how to think like a lawyer.[429]

> When properly used, the Socratic dialogue and case method is a good tool for developing some skills and understanding in law students.

> The case-dialogue method is a potent form of learning by doing. As such, it necessarily shapes the minds and dispositions of those who apprentice through it. The strength of the method lies, in part, in how well it results in learning legal analysis, and in part in its significant flexibility in application. As our examples suggest, it is a highly malleable instructional practice. It encourages, at least for skillful teachers, the use of all the basic features of cognitive apprenticeship. It seems well suited to train students in the analytic thinking required for success in law school and legal practice. In legal education, analysis is often closely integrated with application to cases. The derivation of legal principles, such as we witnessed in our classroom examples, generally occurs through a process of continuously testing, using hypothetical fact patterns or contrasting examples to clarify the scope of rules and reasoning being distilled. This central role of analysis and application, then, is well served by the method.[430]

The potential value of the Socratic dialogue and case method is diminished, however, because we use it in large classroom settings, over rely on it in the first year, continue using it long after students "get it," and sometimes harm students by abusing the method.

The Socratic dialogue and case method has significant defects as an instructional tool. Its impact on individual students is sporadic, it emphasizes certain steps of the cognitive process while ignoring others, and it does not provide a

---

[426] STEVENS, *supra* note 2, at 55.
[427] *Id.* at 134.
[428] *Id.* at 55.
[429] MARTINI, *supra* note 424, at 59.
[430] SULLIVAN ET AL., *supra* note 7, at 77.

feedback mechanism to address and correct skills deficiencies.[431]

Let us briefly examine a typical first year torts class taught Socratically using the case method. The student must read each case and become familiar with its facts (knowledge). When called upon, he or she may be asked to summarize these facts (comprehension), to comment on the issues, arguments and *ratio decidendi* (analysis), and, occasionally, to discuss the case critically (evaluation). Although application is to some extent involved within both analysis and evaluation, and although synthesis is involved within the latter, it is significant that neither application nor synthesis are often dealt with independently in the course of a Socratic dialogue; yet these are probably the two most crucial skills required for exam writing and, indeed, for lawyering.

Furthermore, when a skill deficiency is revealed through a student's response, the Socratic technique does not lend itself to focusing on that student in order to explore and identify the source of his or her problem. Rather, in order to continue the dialogue, the instructor is more likely to provide the correct response or move on to another student. And given the sporadic involvement of students within the dialogue, there is no telling when that student will get another chance to participate at that skill level.

There are those who defend the Socratic dialogue by claiming that it teaches intellectual skills by example as well as by direct involvement of the student, but we have already seen why that is not the case. The responses of a classmate who is engaged in the dialogue can provide the listening student with knowledge of that classmate's comprehension, analysis, and evaluation, and may indicate to the listening student whether his or her answer would have been right or wrong, but what they cannot do is to show the listening student where his or her intellectual deficiencies lie nor can they give him or her the feedback required to correct those deficiencies.[432]

Michael Schwarz refers to the Socratic dialogue and case method as the Vicarious Learning/Self-Teaching Model.[433] It involves vicarious learning because most students in the class are not engaged in the professor-on-student dialogue and must experience vicariously what the speaking student actually experiences. It involves self-teaching because law professors expect students to figure out on their own, or through study groups, what they need to know and be able to do to succeed in the class.

Moreover, while most professors critique the selected students' classroom attempts to perform legal analysis, law professors fail to state explicitly what students need to know, or to explain how to spot legal issues or to perform legal analysis. In fact, law professors devote considerable time to critiquing students'

---

[431] Andrew Petter, *A Closet Within the House; Learning Objectives and the Law School Curriculum, in* Essays on Legal Education, *supra* note 225, at 76, 86.
[432] *Id.* at 86-87.
[433] Schwartz, *Teaching Law by Design, supra* note 396, at 351-53.

case reading and case evaluation skills even though, ironically (or, perhaps, perversely), law professors seldom test case reading skills explicitly.[434]

Schwartz concludes that "law teaching is neither effective, efficient, nor appealing" and that it is out of step with "the explosive evolution of learning theory throughout the twentieth century and the rise, in the second half of the century, of the field of instructional design, a field devoted to the systematic and reflective creation of instruction."[435]

The Socratic dialogue and case method has been criticized on many levels by many people. John Elson summarized five criticisms.

> (1) Appellate opinions' reduction of the real world of factual complexity and indeterminacy into a set of seemingly clear-cut, independent variables which appear to foreordain the outcome of cases conveys an inaccurate sense of the indeterminacy and manipulability of the factual reality that lawyers must organize and create. The case method's formal criteria for analyzing and distinguishing cases are necessary elements of lawyering that students must master to become effective practitioners. Nevertheless, when that methodology is applied outside the context of a problem situation, it distorts students' understanding of how lawyers actually analyze cases in order to solve a specific problem. By repeatedly leading students through a highly routinized set of analytical rules and distinctions, the traditional case method tends to dampen creative problem-solving by instilling an essentially passive thought process, one that is inflexible and ill-suited to the inchoate factual world lawyers must actively try to manipulate.

> (2) The case method is an inefficient and, often haphazard, way to convey to students the doctrinal knowledge that is necessary for effective problem-solving and the ways lawyers must identify and acquire the doctrinal knowledge they will need to solve problems in unfamiliar areas.

> (3) The case method is also an ineffective, and likely misleading, approach toward helping students understand the underlying social forces that are interacting to determine the outcome of events in a field of law. This misplaced focus on case law as the primary medium for understanding the dynamic of an area of practice retards students' ability to develop an effective approach toward practice.

> (4) The teachers who rely principally on case books to develop an understanding of, and a pedagogical approach to, a field of law are being distracted from engaging in readings and experiences that will give them a more coherent and penetrating vision of the social and legal processes that are governing the field.

---

[434] *Id.* at 352.

[435] *Id.* at 358. Schwartz is joined by many others in criticizing current law school instructional approaches. *See id.* at 357 n.36.

(5) The case method's exclusive focus on the outcomes of
litigation diverts students' attention from the many other arenas of
lawyering with which competent practitioners should be familiar,
such as alternative dispute resolution, administrative practice,
legislative advocacy and client counseling.[436]

Deborah Rhode points out the shortcomings of using appellate casebooks as
the vehicle for teaching students about law and the legal profession.

The dominant texts are appellate cases, which present
disputes in highly selective and neatly digested formats. Under this
approach, students never encounter a "fact in the wild," buried in
documents or obscured by conflicting recollections. The standard
casebook approach offers no sense of how problems unfolded for the
lawyers or ultimately affected the parties. Nor does it adequately
situate formal doctrine in social, historical, and political context.
Much classroom discussion is both too theoretical and not theoretical
enough; it neither probes the social context of legal doctrine nor offers
practical skills for using that doctrine in particular cases. Students
get what Stanford professor Lawrence Friedman aptly characterizes
as the legal equivalent of "geology without the rocks . . . dry arid logic,
divorced from society." Missing from this picture is the background
needed to understand how law interacts with life.[437]

Some scholars believe that claims about the effectiveness of the Socratic
dialogue and case method are overstated and that problem-based instruction would
be more effective.

[I]nflated claims for the effectiveness of the case method
are based on flawed premises, and are demonstrably false. It is
time for law school teaching to relegate the case method to its
appropriate position - as only one analytical tool among many which
can be employed in the resolution of a client's problems. The skills
developed by the case method are at best rudimentary; the much
touted "legal analysis" of the case method is little more than a narrow
articulation of rather obvious adversarial positions, accompanied by
the selective matching of factual data with so-called legal elements
to justify the positions advanced. Compared to more sophisticated
methods of problem-solving, case analysis is a blunt instrument.
Even worse, as a methodology it is antithetical to the effective

---

[436] John Elson, *The Regulation of Legal Education: The Potential for Implementing
the MacCrate Report's Recommendation for Curricular Reform,* 1 CLINICAL L. REV. 363, 384-85
(1994). Other critics include SULLIVAN ET AL., *supra* note 7, at 80-81 (concluding that the case-
dialogue method can have a corrosive effect on the development of the full range of under-
standing necessary for a competent and responsible legal profession and can lead to lawyers
who are more technicians than professionals invested with a sense of loyalty and purpose);
Aaronson, *supra* note 33, at 6-7 (pointing out that the method narrows students frame of
reference to legal issues alone and creates a cognitive bias that recurringly under-emphasizes
the nonlegal, intellectual, or emotive dimensions of a problem situation); Moskovitz, *supra* note
160, at 244 (suggesting that "[i]t might be time to go back to the drawing board").

[437] RHODE, *supra* note 109, at 197-98. Paul Brest also noted that appellate cases em-
body static situations with determinate facts. Paul Brest, *The Responsibility of Law Schools:
Educating Lawyers as Counselors and Problem Solvers,* 58 LAW & CONT. PROBS. 5, 7 (1995).

resolution of most clients' problems.[438]

Other critics question whether the adversarial skills developed by Socratic dialogue are even the skills that most students will need for modern law practice, echoing concerns raised by lawyers since the late 1800s.

> Conservative pedagogical theory prevails in the law school classroom. This is most evident in the reluctance to depart from the Socratic method, which, as traditionally practiced in law schools, is meant to groom students for an adversarial role. Arguably, however, the lawyer-as-adversary model better reflects the notions of popular culture than the reality of law practice today. According to a 1991 publication by the ABA Young Lawyers Division, most lawyers spend more time in client contact, research and memo writing, and negotiation than they do in courtroom activities. Supplementing classroom teaching with more discussion and collaborative work could better include students whose natural learning styles are undervalued by traditional legal pedagogy and promote the development of practical team-oriented skills.[439]

Practicing lawyers seem to agree that the Socratic dialogue and case method is not a particularly effective tool for preparing lawyers for practice. "[D]ata suggest that case-dialogue teaching is not seen by recent law graduates as particularly helpful in enabling them to move from school to professional practice."[440]

The bottom line is that whatever one believes about the utility of the Socratic dialogue and case method, it can only partially prepare most students for the jobs that await them. The skills and knowledge that can be acquired through the Socratic dialogue and case method are only a small part of the skills and knowledge needed to practice law effectively and responsibly. Judith Wegner concluded that the Socratic dialogue and case method has some positive effects in teaching students to "think like lawyers," but "key intellectual tasks receive much less attention, so that students receive more limited instruction in application of the law to complex fact patterns, synthesis of ideas, and evaluation against criteria relating to fairness or justice."[441]

> While well-adapted to instruction that focuses on knowledge, comprehension, analysis and simple application, the case-dialogue method does not, in itself, provide ready means for developing the capacity for applying the law to more complex problems, synthesizing ideas broadly, or engaging in evaluation that involves external rather than internal critique. Neither does it, in its traditional form, meet

---

[438] Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie the Pooh Meets Mrs. Palsgraf*, 34 Cal. West. L. Rev. 351, 352 (1998). Similar conclusions are reached by Peggy Cooper Davis and Elizabeth Ehrenfest Steinglass in Davis & Steinglass, *supra* note 281.

[439] Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, A Deeper Commitment,* 52 J. Legal Educ. 491, 503 (2002) (citation omitted). Additional critics of Socratic dialogue include, *inter alia,* Martini, *supra* note 424, at 2 (criticizing the method, particularly for its proclivity for humiliating students); Fernand N. Dutile, *Excerpt from Introduction: The Problem of Teaching Legal Competency, in* Legal Educ. and Law. Competency 1-6 (1981) (discussing the weaknesses of traditional case method of teaching law).

[440] Sullivan et al., *supra* note 7, at 79.

[441] Wegner, Theory and Practice, *supra* note 46, at 33.

the needs of diverse learners or provide the opportunity to tap into the heightened level of engagement that is found when learning in context is explored.[442]

The Socratic dialogue and case method "implicitly asks the student to assume a perspective outside, or above, the controversy in the cases – the perspective of the judge (or judicial clerk, or law professor) rather than that of the lawyer."[443] The result of our over reliance on the Socratic dialogue and case method is that "[w]e have a system quite well designed to produce judicial clerks and appellate advocates, notwithstanding that very few law graduates ever play those roles."[444] "For example, of the more than 100,000 California lawyers, 'no more than 200 . . . practice more than 50 per cent of the time in the appellate courts.'"[445] Janeen Kerper expands on this theme:

> [W]e should recognize the truth about the case method: it does not teach law students to think like lawyers; it teaches them to think like judges – with all of the constraints that role implies. This is not a bad thing. In order to be competent advisors, lawyers must understand how judges think. But they also need to understand that, as lawyers, their available options are greater, and therefore their own thought processes can be much broader. They will be much more effective in representing their clients if they think more as creative problem-solvers, and less like the ultimate decision maker.[446]

The most important reason to reconsider our use of the Socratic dialogue and case method, however, is not because of its limitations as a teaching tool. The main reason is that too many law teachers abuse it and contribute to the damage that the law school experience unnecessarily inflicts on many students. Traditional teaching methods and beliefs that underlie them undermine the sense of self-worth, security, authenticity, and competence among students.

Law students get the message, early and often, that what they believe, or believed, at their core, is unimportant – in fact "irrelevant" and inappropriate in the context of legal discourse – and their traditional ways of thinking and feeling are wholly unequal to the task before them."[447]

> [T]he traditional law school pseudo-Socratic method of instruction, [emphasizes] "hard" cases and supposedly rigorous and rational cognitive processes at the expense of students' emotions, feelings, and values. These traditional techniques desensitize students to the critical role of interpersonal skills in all aspects of a professionally proper attorney-client relationship and, for that matter, in all aspects of an ethical law practice. They also set students' moral compasses adrift on a sea of relativism, in which all positions are viewed as "defensible" or "arguable" and none as "right"

---

[442] *Id.* at 44.

[443] Blasi, *supra* note 15, at 359-60.

[444] *Id.* at 386-87 (citation omitted).

[445] *Id.* at n.211 (citing Gerald F. Uelmen, *Brief Encounters: The New Demands of Appellate Practice*, 14 CAL. LAW. 57, 60 (1994)).

[446] Kerper, *supra* note 438, at 371.

[447] Krieger, *Institutional Denial, supra* note 76, at 125.

or "just," and they train students who recognize and regret these developments in themselves to put those feelings aside as nothing more than counter-productive relics from their pre-law lives.[448]

The Carnegie Foundation's report on legal education concluded that the devaluing and demoralization of individual students contribute to the demoralization of the legal profession. "In so far as law schools choose not to place ethical-social values within the inner circle of their highest esteem and most central preoccupation, and in so far as they fail to make systematic efforts to educate toward a central moral tradition of lawyering, legal education may inadvertently contribute to the demoralization of the legal profession and its loss of a moral compass, as many observers have charged."[449]

> In law school, students learn from both what is said and what is left unsaid. There is a message in what the faculty addresses and what it does not. When faculty routinely ignore – or even explicitly rule out of bounds – the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice. This message shapes students' habits of mind, with important long term-effects on how they approach their work. Conversely, when faculty discuss ethical-social issues routinely in courses, clinics, and other settings, they sensitize students to the moral dimensions of legal cases.[450]

The authors of the Carnegie Foundation's report acknowledged that there is a possible pedagogical justification for flipping off the switch of ethical and human concern to focus on helping students master the central intellectual skill of thinking like a lawyer. They concluded, however, that the failure of law schools to explain what was happening and why, coupled with the fact that substantive and moral concerns were seldom reintroduced in advanced courses, created a "danger for second and third year students that the analytic binders they have laboriously developed may never come off when they deal with the law – or with clients."[451] "A more effective way to teach is to keep the analytical and the moral, the procedural and the substantive in dialogue throughout the process or learning the law. This approach is not new to legal education. It is just too infrequently practiced, perhaps because the issues are too rarely thought through rigorously."[452]

Unfortunately, many law teachers continue to rely exclusively on the Socratic dialogue and case method, not just in the first year, but also in second and third year courses long after students become competent in case analysis and "thinking like a lawyer." This contributes to student boredom and loss of interest in learning. Deborah Maranville described the situation at many law schools when she wrote:

> Many law students are so bored by the second year that their attendance, preparation, and participation decline precipitously; by graduation they have lost much of the passion for justice and

---

[448] *Id.*
[449] SULLIVAN ET AL., *supra* note 7, at 170.
[450] *Id.* at 171.
[451] *Id.* at 173.
[452] *Id.* at 174.

enthusiasm for helping other people that were their strongest initial motivations for wanting to become lawyers. And even in the first year, when most students remain engaged, many fail to learn even the black-letter law at a level that faculty consider satisfactory.[453]

Judith Wegner's field research for the Carnegie Foundation verified Maranville's conclusions. She found that by the end of the first year most students have "got it," that is, they have mastered the ability to "think like a lawyer" and they are bored by continued use of the method. Even students who are still struggling to master the skill tend to tune out.

> The first year of law school derives its power in large part from the development of advanced levels of cognitive skill rather than from the introduction to new subject matter. As discussed earlier, most students experience a wrenching and largely unrecognized shift from an epistemology that relies on receiving and internalizing information from outside experts to one that emphasizes construction of knowledge for oneself. By the end of the year, they have come to expect much more than the transmittal and reception of knowledge that may have characterized many prior academic experiences, and instead assume that law school courses will incorporate some additional mental stretch to higher levels of cognitive functioning or other modalities of learning and knowing. Absent such progression in the nature of learning or knowing, students who have mastered introductory "thinking" are apt to be bored, while those who are still struggling are apt to tune out and relinquish expectations of becoming engaged.[454]

If law schools are to become dynamic, effective educational institutions, law teachers need to diversify their teaching methods, improve their teaching skills, and reduce their reliance on the Socratic dialogue and case method.

G.   Employ Context-Based Education Throughout the Program of Instruction.

Principle: The teachers use context-based education throughout the program of instruction.

Comments:
Legal education would be more effective if law teachers used context-based education throughout the curriculum. As explained more fully in the following sections, law teachers should use context-based education to teach theory, doctrine, and analytical skills; how to produce law-related documents; and how to resolve human problems and cultivate practical wisdom.

"Context helps students understand what they are learning, provides anchor points so they can recall what they learn, and shows them how to transfer what they learn in the classroom to lawyers' tasks in practice."[455]

---

[453] Maranville, *supra* note 404, at 51.
[454] Wegner, Theory and Practice, *supra* note 46, at 6-7.
[455] Maranville, *supra* note 404, at 52.

Adult learning theory suggests that our students will learn best if they have a context for what they are learning. Context is arguably important for three reasons. First, students are more interested in learning when the information they are studying is placed in a context they care about. Second, when teachers provide context for their students, they increase the likelihood that students will understand the information. Third, and especially significant for the law school context, in learning information, we may organize and store it in memory differently for the purpose of studying for a test than we do in order to retrieve it for legal practice.[456]

Judith Wegner believes that "greater openness to the modalities of knowledge and the potential differences in thinking and problem-solving within specific content-oriented contexts could foster a deeper level of engagement among faculty and students and significant new dimensions that could add a sense of momentum and progression beyond the first year."[457]

As discussed in Chapter Two, the core educational goal of law schools should be to help students develop competence, which is the ability to resolve legal problems effectively and responsibly.

It takes time to develop expertise in legal problem-solving. Problem-solving skills can be developed only by actually working through the process of resolving problems.[458] Developing problem-solving expertise requires "repetitions of 'training' as against the hard world of consequences, of repeated success and failure, and some inductive efforts at understanding what works and what does not, what seems important and what does not."[459]

> [I]f one conceives of lawyering as problem-solving in a much broader range of activities [than expertise in learning to "read cases" and extract and apply legal rules by analogy to new situations], more is required [than teaching students how to analyze appellate cases]. In every other human endeavor, expertise in problem-solving is acquired by solving problems. There may be better and worse ways to learn to solve problems, but there appears to be no substitute for context. Legal education has completely internalized the lesson that in order to learn to solve problems of doctrinal analysis, one must actually engage in solving doctrinal problems. But the lesson has not been everywhere extended to the other areas of lawyering. We often teach civil procedure as if one can learn about making decisions in litigation by reading about how a few such decisions were made. This seems no more likely a possibility than that we could learn how to

---

[456] *Id.* at 56.

[457] Wegner, Theory and Practice, *supra* note 46, at 29.

[458] Of course, giving students opportunities to practice solving problems is not all that needs to be done. As noted earlier in the section encouraging law schools to make teaching problem-solving the primary goal of legal education, in addition to experience, students can more rapidly develop problem-solving expertise by studying problem-solving theory, 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.

[459] Blasi, *supra* note 15, at 378.

solve doctrinal problems by reading The Paper Chase.[460]

Simply providing opportunities to engage in problem-solving activities is not enough. The development of problem-solving expertise is enhanced by studying theories related to problem-solving and by receiving assistance from teachers. 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."[461] 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.[462] In other words, "students do not get better through practice alone. If their performance is to improve, they need practice accompanied by informative feedback and reflection on their own performance. And their learning will be strengthened further if they develop the habit of ongoing self-assessment."[463]

Even if everyone can agree that law schools should try to give students opportunities to practice and refine their legal problem-solving skills as early as possible in their legal education and throughout all three years of law school, the challenge is to figure out how to accomplish this.

Law schools can provide opportunities for students to engage in context-based learning in hypothetical as well as real life contexts. Ideally, law schools should present students with progressively more challenging problems as their self-efficacy, lifelong learning skills, and practical judgment develop.

One way to create contexts for teaching is to present students with specific legal problems and have them discuss how they would try to resolve them. Many legal scholars have encouraged law schools to use the problem method more extensively, including former AALS President Judith Areen who wrote, "[o]ne of the best changes to legal pedagogy in recent years is that more of us are moving beyond the case method to problem-based teaching. Bain[464] strongly supports this development by noting that people learn best when they are trying to solve problems that they find intriguing or important, something clinical faculty have long understood."[465] "[A] person with an engaged, active stance and the perspective of a problem-solver inside the problem situation acquires an understanding quite different from that of a person with a passive stance and the perspective of an observer. It is not only that an engaged problem-solver learns more from both instruction and experience, but also that she learns something quite different."[466]

---

[460] *Id.* at 386-87 (referring to JOHN J. OSBORN, JR., THE PAPER CHASE (1971)) (citations omitted). In one of the omitted footnotes, Blasi wrote, "[t]here is a growing body of evidence that all learning is highly situated and context-dependent. JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (1991); D. N. Perkins & Gavriel Salomon, *Are Cognitive Skills Context-Bound?*, 18 EDUC. RESEARCHER 16 (1989)." *Id.* at n.213.

[461] *Id.* at 355.

[462] *Id.* at 355-59 and 378.

[463] SULLIVAN ET AL., *supra* note 7, at 178.

[464] BAIN, *supra* note 299, at 18.

[465] Judith Areen, *President's Message: Reflections on Teaching,* AALS NEWS 1 (April 2006).

[466] Blasi, *supra* note 15, at 359.

Another way to provide context for teaching students how to resolve legal problems is to present them with actual cases. In every law school in the United States, students study appellate case decisions. Appellate cases help students distill principles of law and give insights into judicial decision-making. They do not help students understand why litigation was necessary to resolve a dispute, the decision-making processes of lawyers and clients, why settlement efforts failed, or why the judicial process failed to resolve the dispute before the appellate level.

Other than having students read appellate case decisions, law teachers do not frequently use actual cases for instructional purposes, for example, by presenting students with case histories. In recent years, some law teachers have begun using books and movies about actual cases to engage students, especially first year students, in discussions about various aspects of the judicial system, law practice, and other issues. Two of the books that are most frequently used for this purpose are A Civil Action,[467] and The Buffalo Creek Disaster.[468] We encourage law teachers to expand their use of actual cases and case histories, including transactional as well as dispute resolution cases.

Some law students become involved in ongoing actual cases by enrolling in in-house clinics and externship courses where they represent clients or observe lawyers and judges at work.

Whether the case is historical or ongoing, the use of actual cases can enhance students' understanding of law and law practice.

> When legal educators set out to introduce students to the intricacies of legal analysis, they turn to cases. When clinical professors lead students toward addressing clients' needs they are perforce dealing with cases, though in coaching students struggling to develop a "theory of the case" they are also helping to shape the case as well as analyze it. When law school faculty take up issues of jurisprudence and professionalism, they are again very likely to approach these themes through the medium of case discussion. Clearly this is deeply related to the nature of the law itself; that legal thinking, even the creation and application of doctrinal principles, proceed by cases. But could it also reflect more than that? Case teaching may be powerful pedagogy because it distills into a method the distinctive intellectual formation of professionals.[469]

We encourage law schools to follow the lead of other professional schools and transform their programs of instruction so that the entire educational experience is focused on providing opportunities to practice solving problems under supervision in an academic environment. This is the most effective and efficient way to develop professional competence.

> Demonstrations of appropriate problem-solving processes are not very effective in bringing about actual problem-solving competence. [Educational researchers] show that only small gains are attained in critical thinking when merely a single course in a

---

[467] Jonathan Harr, A Civil Action (1995).

[468] Gerald Stern, The Buffalo Creek Disaster (1977).

[469] Sullivan et al., *supra* note 7, at 255.

college program aims to develop this type of competence. On the other hand, when the entire curriculum is devoted to this same purpose (i.e., when these objectives become the theme that plays through a large number of courses) the students' gains in critical thinking become very large. In effect, the entire educational environment must be turned toward the achievement of complex objectives if they are to be attained in any significant way.[470]

Problem-based education is consistent with pedagogical trends in undergraduate education as well as in professional education. Problem-based education has been the norm in graduate schools of business for many years (at Harvard since 1911), and more recently it has become the norm in medical and other professional schools.[471] In medical schools, the adoption of problem-based instruction required overcoming some of the same hurdles that impede its adoption by law schools.[472]

> Medical schools too have been staffed by people who had no training in teaching and simply adopted the teaching methods (mainly lectures) used on them as students. Many medical professors have viewed problem-solving as a vocational skill, inappropriate for academic study. Others have imagined the problem method to be more expensive and time-consuming than conventional medical education.

> But the realities of what medical students need to learn overcame these obstacles. Doctors (like lawyers) spend their careers trying to solve problems, and to do so they must "learn how to learn." . . . [The problem method] helps students retain knowledge: knowledge acquired to help solve a problem is remembered better than knowledge acquired without such a motivation. "Knowledge used is better remembered." And the problem method motivates medical students to work harder, for it "challenges them with the very situations they will face in their elected professional field."[473]

Creating a curriculum that focuses on developing professional problem-solving expertise will take some reconceptualizing of the law curriculum and the faculty's roles in it.

> A problem-solving curriculum is different from a traditional knowledge-based curriculum. In the knowledge-based approach,

---

[470] Benjamin Bloom, Taxonomy of Educational Objectives: Cognitive and Affective Domains 77-78 (1956).

[471] "The most notable example is the evolution of problem-based instruction in medicine. For two recent surveys, see Mark A. Albanese & Susan Mitchell, *Problem-Based Learning: A Review of the Literature on Its Outcomes and Implementation Issues*, 68 Acad. Med. 52 (1993); Geoffrey R. Norman & Henk G. Schmidt, *The Psychological Basis of Problem-Based Learning: A Review of the Evidence*, 67 Acad. Med. 557 (1992). For a survey of efforts to introduce problem-based instruction into other professions (in Australia), including mechanical engineering, social work, optometry, architecture, informatics, management, and law, see The Challenge of Problem Based Learning (David Boud & Grahame Feletti eds., 1991)." Blasi, *supra* note 15, at 387 n.215.

[472] Moskovitz, *supra* note 160, at 247.

[473] *Id.* at 247-248 (citations omitted).

the curriculum is organized into subjects and teachers are regarded as experts in their subject. They impart their subject knowledge to learners who are expected to remember, understand, and apply it.

In the problem-centered approach, the curriculum is organized around problems; students are active learners who work on problems, or simulate problem solving [or solve real life problems]. Teachers are facilitators who guide students in the process of learning by doing. During this process students work, usually in small groups, discovering solutions on their own, gaining insights into their own performance, and acquiring skills and knowledge as they solve problems.[474]

Although it will require some adjustments to our attitudes and practices, the proven benefits of context-based education compel our attention. We encourage law schools to explore as many ways as possible to expand their use of context-based education throughout the curriculum.

1.   **Use Context-Based Instruction to Teach Theory, Doctrine, and Analytical Skills (problem and case-based learning).**

Principle: The school uses context-based instruction to teach theory, doctrine, and analytical skills.

Comments:

Aristotle described three forms of knowledge. One is theory.

Theory ("theoria") derived from contemplation, and involved the search for truth through contemplation in order to attain knowledge for its own sake. Theory generally took the form of abstract, general rules, guided by pure reason and particular forms of intellectual activity (episteme). Certain disciplines were associated with theory (such as philosophy and pure mathematics). A life devoted to theory was regarded as the best and the intellectual virtues as the most valued. Educators, who impart theoretical knowledge and inculcate intellectual virtues, are thus engaged in the highest and most "God-like" of callings ("theo," the root of "theory" referring to God). Theory is often associated with declarative knowledge that can be readily transferred from teacher to student. It has also increasingly been associated with the written word.[475]

Hypothetical problems can provide contexts for helping students develop their analytical skills and attain knowledge and understanding of theory and doctrine. They can also be used as springboards for discussing justice, professional roles, and other important concepts.

---

[474] Stephen Nathanson, *Designing Problems to Teach Problem-Solving,* 34 CAL. W. L. REV. 325 (1998).

[475] Wegner, Theory and Practice, *supra* note 46 at 7 (citing Aristotle, Nichomecean Ethics).

Judith Wegner and other scholars[476] encourage law teachers to make greater use of hypothetical problems, even in first year courses.

> Although the traditional unit of analysis under the case-dialogue method is the case itself or a series of cases, an important alternative exists – to concentrate on a presenting problem, in much the way that alternative forms of "case method" such as those used in business schools commonly do. This approach assumes (or expressly states) that the relevant conceptual unit for analysis is a "problem," even though it may continue to use a case or cases as illustrations or as resources for reaching a solution. In effect, this form of "problem/case" method embeds cases in the problem – rather than treating a judicial decision as itself the problem to be solved, or pondering problems embedded in such a decision – performing what amounts to a figure-ground shift.[477]

Wegner observed first year law teachers using the problem and case approach successfully at very different schools located far apart. She found that the method "resonates quite powerfully with aspects of the theory of 'cognitive apprenticeship'" that is one of the strengths of the Socratic dialogue and case method.[478]

> The professors each asked questions that were clearly genuine, not rhetorical. They functioned in unison with their students as they approached a shared task, and modeled the role of "senior partner" working with more junior associates. They involved students in the performance of analytical routines, but these routines were not solely critical, designed to take apart someone else's argument or a judicial text. Instead, they presented lucid examples of constructive thinking, that is, how to foresee and avoid problems, how to understand the potential views of a range of real or potential disputants, and how to look behind positions to interests and search for common ground. Both professors also created space for and demanded discussion of client viewpoints, as they gave their students an opportunity to picture the people whose lives and livelihoods were in truth at stake.[479]

Wegner concluded that the classes she observed using the problem and case method "illustrate what a full-blown effort to implement the theory of 'situated' learning and cognitive apprenticeship might look like. By introducing more challenging intellectual tasks and building a collaborative culture, they fueled a heightened sense of engagement and motivation by helping students see how their 'thinking' could benefit people who might actually exist. A tangible sense of

---

[476] *See, e. g.,* Davis & Steinglass, *supra* note 281, which is discussed at length in Chapter Six in the section on best practices for using the Socratic dialogue and case method; Moskovitz, *supra* note 160, at 247 (describing how he uses problems to stimulate discussion of cases and lead into Socratic dialogue); William Shepard McAninch, *Experiential Learning in a Traditional Classroom,* 36 J. Legal Educ. 420 (1986) (explaining how experiential education can be employed as an adjunct to traditional methodologies regardless of class size).

[477] Wegner, Experience*, supra* note 50, at 39.

[478] Wegner's description of "cognitive apprenticeship" is in Chapter Six in the section on best practices for using the Socratic dialogue and case method, use the Socratic dialogue and case method for appropriate purposes.

[479] Wegner, Experience, *supra* note 50, at 39-40.

professional pleasure was evident as students and professors worked together to construct critical knowledge and imagine problem resolutions that addressed not only the needs of clients but also broader values of fairness and the collective good."[480]

The problem and case approach may provide a good vehicle to "engage issues of professional identity (roles, obligations, clients) that may prove stumbling blocks to learning if continually ignored. This 'problem/case' method may also legitimate and build upon a range of insights in a collaborative manner, reducing the sense of risk in speaking out in front of strangers. Even for faculty who do not select this type of teaching option, there is food for thought that should not be ignored."[481]

The problem and case approach also more closely approximates the structure of most law school and bar examination essay exams than the Socratic dialogue and case method. Thus, teachers who use this approach in the classroom are improving their students' odds of success on bar examinations as well as in law school.

2. Use Context-Based Instruction to Teach How to Produce Law-Related Documents (legal writing and drafting).

Principle: **The school uses context-based instruction to teach how to produce law-related documents.**

Comments:

A second form of knowledge described by Aristotle is "productive action."

> *Productive action* ("poiesis") has a distinctive purpose – the creation of a product through the process of "making" something, be it poetry, art, or "products" of other sorts (sometimes referred to as "artifacts"). Such action was thought to be guided by an underlying idea or plan regarding the desired outcome, and was executed through technical skill ("techne") associated with the particular craft. This form of knowing or reasoning has been described as instrumental, since it involves the interplay between idea and capability. It inevitably has three components, however – the idea, the techniques used in the "making" and the "product" or performance that results. Technique improves through repeated production, and production is in turn improved by enhanced technique. Productive action is sometimes associated with disciplines such as engineering.[482]

Law students are initially introduced to productive action in legal contexts in legal writing courses where they are required to write legal memoranda, briefs, motions, and other documents. In the upper class curriculum, all students produce at least one research paper, and students may choose to enroll in drafting, clinical, and other practice-oriented courses that help them learn how to produce various legal documents.

In each of these settings, the educational objectives are much broader than developing students' technical skills. They also aid the students' understanding of theory and doctrine, sharpen their analytical skills, improve their understanding of

---

[480] *Id.* at 40.

[481] *Id.* at 41.

[482] Wegner, Theory and Practice, *supra* note 46, at 8.

the legal profession, and in some instances cultivate their practical wisdom.

Unfortunately, law schools have not created comprehensive programs for teaching students how to produce the documents that lawyers typically use in practice. Law schools should determine what types of legal documents their graduates will be expected to produce when they begin law practice and provide instruction in how to produce such documents. After all, it does no good to teach a student to think like a lawyer if the student cannot convey that thinking in writing.

3. Use Context-Based Instruction to Teach How to Resolve Human Problems and to Cultivate "Practical Wisdom" (role assumption and practice experience).

Principle: The school uses context-based instruction to teach how to resolve human problems and to cultivate "practical wisdom."

Comments:

The third form of knowledge described by Aristotle is "practice."

> *Practice* ("praxis") has as its goal the resolution of human problems and the cultivation of "practical wisdom" or "judgment." This way of knowing was associated by Aristotle with ethical and political life (such as the exercise of governmental leadership) – the life of action. It quintessentially concerns an individual's encounter with a question or problem rooted in a specific context, for which no known answer is readily apparent. Instead, the individual needed to be guided by a moral disposition and a capability to interpret the unclear and fluid setting ("phronesis"), while engaging in detached analysis and observation. The ultimate outcome was guided by a complex interplay of detachment and action – understanding, interpretation, reflection, application and skill. At one time, "practice" was thought to entail mere application of previously encountered theories in a relatively passive sense. Over time, it was reinterpreted, however, and its relation to theory has commonly been seen in different terms. In many arenas, theory can only be derived from information and experience with real-life problems encountered in the "practical" realm, just as "practice" should be guided by the continuing evolution of cutting-edge theory.[483]

Law schools cannot help students cultivate practical wisdom or judgment unless they give students opportunities to engage in legal problem-solving activities. "'[P]ractical judgment' in the useful sense described by Aristotle, is context-dependent, linked to intensive interplay between theory and a human problem, as relevant knowledge is developed through reflection in light of the surrounding circumstances and brought to fruition through action."[484]

---

[483] *Id.*

[484] *Id.* at 29.

The authors of the Carnegie Foundation's report concluded that law students should have significant involvement in the experience of performing the tasks of practicing lawyers throughout law school.

> The essential dynamic of professional practice, especially in fields such as law, in which face-to-face relationships with clients are typical, proceeds in the opposite direction from the logic of academic specialization. Practice requires not the distanced stance of the observer and critic but engagement with situations. The sort of thinking required to meet the challenges of practice blends and mixes functions, so that knowledge, skill, and judgment become literally interdependent: one cannot employ one without the others, while each influences the nature of the others in ways that vary from case to case. In counseling or advising a client, it is difficult to know what and how much legal knowledge to apply without also gaining a sure grasp of the complexities of the client's situation and outlook and coming to some determination about the appropriate professional response. For this reason, we believe laying a foundation for the development of practitioners requires that legal education expand along the continuum to include significant involvement in the experience of performing the tasks of practicing lawyers. Beginning students' legal education almost entirely at one end of the pedagogical continuum is simply not the best start for introducing students to the full scope and demands of the world of the law.[485]

While lawyers certainly need to be skilled at analytic thinking, they also need to be skilled at narrative thinking, and this can only be developed by teaching in context. Law schools are familiar with the task of helping students develop analytic thinking skills. "Analytic thinking detaches things and events from the situations of everyday life and represents them in more abstract and systematic ways."[486] The other mode of thinking is based on narrative. "Here, things and events acquire significance by being placed within a story, an ongoing context of meaningful interaction. This mode of thinking integrates experience through metaphor and analogy."[487]

> Actual legal practice is heavily dependent upon expertise in narrative modes of reasoning. Indeed, in all legal reasoning, as Bruner points out, the analytic and paradigmatic models depend upon narrative and metaphor for their sense. Hence, both judicial decisions and law teaching must invoke cases in order to give intelligibility to abstract legal principles. It follows that the formation of the habits of mind needed for legal practice also demand fluency in both the engaged mode of narrative thinking characteristic of everyday practice and the detached mode of analytical thinking emphasized in case-dialogue teaching.

> This twofold aspect of professional expertise is captured by Eliot Freidson when he describes medical education's aim as forming a "clinical" habit of mind so that physicians could "work

---

[485] SULLIVAN ET AL., *supra* note 7, at 87-88.

[486] *Id.* at 108.

[487] *Id.* at 107.

as consultants who must intervene [with specialized, esoteric knowledge] in everyday, practical affairs." In order to treat the patient, the clinician must be able to move back and forth between detached analysis of the medical condition and emphatic engagement with the distressed patient. Medical education clearly demonstrates that this clinical habit of mind can, like analytic thinking, also be developed within a formal education program.[488]

Law schools provide students opportunities to learn how lawyers resolve human problems to some extent in many law school courses, particularly those that emphasize problem-based instruction. But students actually perform as lawyers in resolving problems in simulation-based courses where students perform lawyering tasks in hypothetical situations and in externships and in-house clinics where students represent clients or observe lawyers and judges performing in their professional roles.

Simulation-based courses can help cultivate students' practical wisdom and professional values. For example, students who conduct initial client interviews will consider how to develop rapport with clients and whether and how to obtain personal information from clients. Students who counsel clients will gain insights into how clients' cultural backgrounds and personal values affect their decisions. And students who negotiate with each other must decide whether to lie to gain an advantage. Thus, simulated experience can give students experiences where they can be guided by their personal values and their capability to react to fluid situations, while engaging in a detached anaylsis of the legal problem embedded in the simulation.

Even the best simulation-based courses, however, provide make believe experiences with no real consequences on the line.

As early as possible in law school, preferably in the first semester, law students should be exposed to the actual practice of law. Exposure to law practice may be the only way through which students can really begin to understand the written and unwritten standards of law practice and the degree to which those standards are followed. Students need to observe and experience the demands, constraints, and methods of analyzing and dealing with unstructured situations in which the issues have not been identified in advance. Otherwise, their problem-solving skills and judgment cannot mature.

Experience exerts a powerful influence over the exercise of discretion. Experiential learning is critically important to moral development. Aristotle stated that one had to practice virtuous behavior, modeling oneself on the good, and then reflect on it for such behavior to become a part of one's character. As Justice Holmes said: "We learn how to behave as lawyers, soldiers, merchants or what not by being them. Life, not the parson, teaches conduct."

. . . .

In other words, it is not until students actually experience the reality of practice that they begin to internalize and make their own

---

[488] *Id.* at 109.

moral and ethical judgments that are at the core of practice.[489]

Providing some exposure to actual law practice throughout law school is not only important for helping students develop well-rounded and more realistic perspectives about the legal profession, it also helps students appreciate the importance of other subjects taught in law schools.

Providing exposure to law practice, even in the first semester, does not have to be expensive or time-consuming. Deborah Maranville and others believe that instruction even during the first year "ideally should include some real-life experiences, preferably experiences involving contact with clients."[490] The education of first year students would be enhanced by having each student participate in some straightforward, easy-to-arrange activities during the academic year such as the following.
> • take a jail tour or participate in a police ride-along while taking Criminal Law, and engage in a plea bargaining exercise in class.
> • observe two hours of the local court motion calendar while taking Civil Procedure (perhaps with an opportunity to see the papers filed by the attorneys in one or more of the cases), and draft a complaint and answer for class.
> • negotiate a personal injury claim while taking Torts and collect, compare, and analyze release of liability forms from a range of organizations sponsoring sporting activities.
> • interview a client about a contract for a business transaction while taking Contracts and analyze the same release of liability forms as in Torts.
> • take pictures of easements, and spend four hours helping interview unrepresented litigants in connection with a bar association project to provide legal advice to pro se litigants in landlord-tenant cases while taking Property.[491]

Students who have opportunities to work on cases as law clerks or to observe lawyers and judges at work learn valuable lessons that are difficult to replicate in the classroom or in simulated environments

Increasing law students' exposure to law practice was the primary anecdote proposed for law student lethargy by Mitu Gulati, Richard Sander, and Robert Sockloskie.[492] They collected data about law students' opinions of legal education and the reasons why they existed. They determined that most law students find the substance of the third year remote and largely irrelevant, and that a surprising percentage of third year students are profoundly disengaged from the educational experience. Among their specific recommendations for reform are for schools to invest more in the depth, evaluation, and comparison of clinical programs, including the expanded use of externships. They also propose that law schools should consider establishing community law practices to provide vehicles for students to practice and study in real-world situations along the lines of upper level medical education.

Law students in the United States became isolated from the legal profession

---

[489] Eleanor Myers, *"Simple Truths" About Moral Education,* 45 Am. U. L. Rev. 823, 835-36 (1996) (citations omitted).

[490] Maranville, *supra* note 404, at 61.

[491] *Id.* at 64.

[492] Gulati et al., *supra* note 3, at 234 n.4.

when law schools adopted the case method and hired recent graduates as teachers, and when admitting authorities dropped apprenticeship requirements.[493] The emergence and growth of clinical education has removed some of the isolation, and many students work in law firms while attending law school. Legal educators in the United States, however, have not yet fully considered and embraced the roles that supervised practice experience should play in the pre-admission education of lawyers.

Law schools can provide exposure to law practice through externships,[494] in-house clinics, or even co-curricular activities. Externships and in-house clinics can provide significant opportunities to experience practice supported by faculty oversight. In externships, the students' direct mentors and supervisors are practicing lawyers and judges, and the practice settings are in established legal offices and judicial chambers, providing opportunities for understanding and critique of those institutions. In campus-based clinics, the students' direct mentors and supervisors are members of the law faculty, and students have opportunities to undertake primary responsibility for the representation of clients, team with other students, and help manage an independent law office. In any format, clinical education can provide individualized feedback on each student's professional behavior and development.

> Within clinical legal education, the principal theoretical objectives are to describe and explain the dynamics of legal practice. Sometimes these theories embrace a critical perspective. They point out the limitations, shortcomings, contingencies, and contradictions inherent in the practice of law and in theories about the practice of law. At other times, their function is principally prescriptive. Their purpose is to highlight conceptually what ought to be considered and weighed before lawyers act or proceed. Prescriptive theories about legal practice provide a perspective on what needs to be done but not a mechanical how-to-do-it approach. The details and choices have to be worked out in the particular context.

> Pedagogically, clinical legal education seeks not just to impart legal skills, but to encourage students to be responsible and thoughtful practitioners. There is considerable emphasis on problem-solving approaches, such as ends-means thinking; on skills training in addition to legal reasoning; on making ethically responsible decisions, particularly when obligations are in conflict; and on being continually self reflective and critically analytical about one's own experiences.[495]

---

[493] According to a person who lived in those times, apprenticeships went out of favor because modern inventions rendered the services of law students of no value to law firms. "The general introduction, since 1880, of telephones, stenographers, typewriters, dictating and copying devices, and improvements in printing, in connection with changes in practice already noted, has made *students* not only unnecessary but actually undesirable in most of the active law offices. Plainly speaking, they are considered to be a nuisance." Rowe, *supra* note 2, at 600.

[494] *See* James H. Backman, *Where Do Externships Fit? A New Paradigm is Needed: Marshaling Law School Resources to Provide an Educational Externship for Every Student*, 56 J. LEGAL EDUC. (forthcoming Spring 2007) (arguing that externships providing valuable educational benefits can and should be provided to all law students).

[495] Aaronson, *supra* note 176, at 249.

In the United Kingdom and other places, supervised real life experience is considered an essential part of legal education, though it takes place after graduation from undergraduate law school and completion of a professional training course. The Law Society of England and Wales discussed the importance of real life experience in its statement of proposed educational outcomes:

> It is suggested that it would not be possible for an individual to develop and demonstrate effectively all of the required outcomes, e.g., that they could work with clients, organise work effectively, or maintain files, unless they had actually worked within a legal practice environment. The review group also considers it essential that all new entrants to the profession have had an opportunity to experience the culture of the profession before they become full members of it, and to have had some exposure to the economic, social and business context in which law is practised. This requires that individuals should have worked alongside other solicitors, learned how the values, behaviours and attitudes required of the profession apply (and are sometimes challenged) in practice and how risks should be managed.[496]

Supervised law practice plays important symbolic and functional roles in the preparation of lawyers that are quite different from any role played by the Socratic dialogue and case method, problem discussion, or simulated role-playing. While supervised practice is not the most effective method for imparting information about the law or legal processes, supervised practice is more effective than classroom instruction for teaching the standards and values of the legal profession and instilling in students a commitment to professionalism.

"Clinical teaching resonates well against the well-documented importance of active learning in role. Its most striking feature, however, is perhaps the power of clinical experiences to engage and expand students' expertise and professional identity through supervised responsibility for clients."[497]

The positive impact of supervised practice experience on professional identity is why most countries in the world, including those in the United Kingdom, require lawyers to engage in a period of supervised practice before allowing them to be fully licensed. In explaining why English solicitors and barristers have always highly valued articles and pupillage, Michael Burrage wrote:

> By forcing clerks and pupils to submit to a period of hardship, drudgery and semi-servitude, it necessarily conveyed a due appreciation of 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.

---

[496] Law Society Second Consultation, *supra* note 138, at § 4, ¶ 68.
[497] SULLIVAN ET AL., *supra* note 7, at 142.

> . . . 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 the newcomer to belong, to empathize with its aspirations
> and concerns and to share its sense of honour.[498]

In the United States, it is only in the in-house clinics and some externships where students' decisions and actions can have real consequences and where students' values and practical wisdom can be tested and shaped before they begin law practice.

> Responsibility for clients and accountability for one's
> own actions are at the center of clinical experiences. Assuming
> responsibility for outcomes that affect clients with whom the student
> has established a relationship enables the learner to go beyond
> concepts, to actually become a professional in practice.[499]

It is especially important for students to have opportunities to engage in supervised client representation during law school because most law school graduates will become fully licensed to practice law as soon as they pass a bar examination without any requirement that their work be supervised until they demonstrate competence.[500]

In 1917, William Rowe argued that clinical education during law school was necessary to instill professional values in law students.

> The real need . . . is education, training and discipline in the
> conduct of professional life – the development of what may be called
> the professional character, spirit and savoir faire, in the only possible
> way, that is to say, by placing the student in a proper law office,
> which we will call *a clinic, under systematic instruction and training,*
> and in constant touch with reputable practitioners of high character,
> who, in a *general practice*, are applying the law in the concrete, as
> a living force, to the living problems of our people. The student
> thus *lives* in an atmosphere of the law, and absorbs the spirit of its
> practice, day by day, in the course of actual dealings between the
> lawyer and client.

> As in the case of the Inns of Court and the English barristers'
> and solicitors' offices, the student unconsciously develops in such
> an atmosphere, under the influence and contact of character
> and personality working in the harness of the law, the trained
> professional conscience and practical sense – the instinct for right
> and the consciousness of wrong, which constitute the true spirit of
> the profession, and lead, regardless of rewards, to that necessary self-
> sacrificing devotion to the vindication of the good and true and the

---

[498] 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 (1996).

[499] Sullivan et al., *supra* note 7, at 143.

[500] As mentioned at the beginning of the document, we consider the failure to require supervised practice before full licensure to be the biggest shortcoming of the United States' method of producing lawyers.

punishment of evil and the false, upon which, with us, must largely rest the welfare of our profession and much of our advancement in social development and organized government. This is the spirit of the real law office which the law schools must now supply.[501]

Unfortunately, Rowe's arguments for making clinical education a significant component of legal education went unheeded. One can only speculate as to whether law practice in the United States would be conducted more professionally today if clinical education had been embraced in 1917.

Much more recently, the authors of the Carnegie Foundation's report also recognized the critical importance of supervised practice experience to the preparation of law students for entry into the legal profession.

The development of competence in novice lawyers requires more than teaching knowledge, skills, and values. It also requires helping students form habits of ethical practice and a commitment to self development. This requires giving students opportunities to experience practice under supervision.

In actual professional practice, it is often not the particular knowledge or special skill of the lawyer or physician that is critical, important as these are. At moments when judgment is at a premium, when the practitioner is called upon to intervene or to react with integrity for the values of the profession, it is the quality of the individual's formation that is at issue. The holistic qualities count: the sense of intuitive engagement, of habitual disposition that enable the practitioner to perform reliably and artfully. Thinking about how to train these capacities inevitably calls up words such as "integration" and "focus" to describe deep engagement with knowledge, skills, and defining loyalties of the profession.

Ultimately, the goal of formative education must be more than socialization seen as molding human clay from without. Rather, formative education must enable students to become self-reflective about and self-directing in their own development. Seen from a formative perspective, law school ought to provide the richest context possible for students to explore and make their own the profession's possibilities for a useful and fulfilling life. The school contributes to this process by opening apprenticeship to its students as effectively as its faculty is able. Concretely, this means enabling students to grasp what the law is as well as how to think within it, just as it means giving students the experience of practicing the varied roles lawyers play while coming to appreciate the engagements of self and the world that these entail.[502]

The authors of the Carnegie Foundation's report believe that actual experience with clients is "an essential catalyst for the full development of ethical engagement,"[503] and "there is much to suggest that ethical engagement provides a

---

[501] Rowe, *supra* note 2, at 597-98.
[502] SULLIVAN ET AL., *supra* note 7, at 92-93.
[503] *Id.* at 198.

pivotal aspect in the formation of lawyers."[504]

Perhaps this time the legal academy will give supervised client representation the place it deserves in legal education. There are signs that the accrediting body for law schools is beginning to recognize the value of supervised client representation experience during law school. The ABA accreditation standards now provide that "[a] law school shall offer substantial opportunities for 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."[505] It is not yet clear what impact this will have on legal education, but it is a positive development.

It is not difficult to recognize the value of real life experience. The difficult part is defining the type and extent of practice experience that law schools should provide to achieve educational goals that cannot be achieved more efficiently and effectively through other means. It is also difficult to determine how much and what types of practice experience are necessary to protect future clients' interests. These issues warrant careful study. It may be that some aspects of becoming a competent lawyer can only be learned and evaluated in the actual practice of law after graduation.

Although it is unlikely that any law school can provide students sufficient practice experiences to develop fully their practical wisdom, self-understanding, and professional values, law schools should develop as many opportunities as possible for students to practice resolving human problems and cultivating practical wisdom and judgment.

H.   Integrate Practicing Lawyers and Judges Into the Program of Instruction.[506]

Principle: The school properly integrates practicing lawyers and judges into the program of instruction.[507]

Comments:
The accreditation standards of the American Bar Association encourage law schools to include experienced lawyers and judges as teaching resources.

A law school should include experienced practicing lawyers and judges as teaching resources to enrich the educational program. Appropriate use of practicing lawyers and judges as faculty requires that a law school shall provide them with orientation, guidance,

---

[504] *Id.*

[505] Standard 302(b)(1), ABA STANDARDS, *supra* note 28, at 18.

[506] University of South Carolina law student Jodi Ramsey, class of 2006, researched and drafted this section.

[507] In 2005, the ABA Section of Legal Education and Admissions to the Bar published a comprehensive handbook on adjunct faculty. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ADJUNCT FACULTY HANDBOOK (2005) [hereinafter ADJUNCT FACULTY HANDBOOK], *available at* http://www.abanet.org/legaled/publications/adjuncthandbook/ adjuncthandbook.pdf. The book includes guidelines for everything from hiring to firing adjunct faculty. The handbook can be downloaded for free.

monitoring, and evaluation.[508]

Practicing lawyers and judges can be valuable assets to the faculty and students of law schools. They can give students a realistic view of the practice of law that they may not get from the full-time faculty, and they can bring diversity to the faculty.[509] In most law schools, practicing lawyers and judges currently play formal and informal roles in the educational process. Many visit law schools to speak to student organizations or to participate in formal co-curricular speaker programs. Some schools are integrating them into the orientation process as participants in small groups to discuss the legal profession, the roles that law schools play in preparing students for practice, and the importance of living a balanced life during and after law school. It is becoming frequent practice for schools to pair up incoming students with practitioners who agree to serve as informal mentors.

Practicing lawyers and judges also participate in legal education as adjunct faculty with full responsibility for teaching courses. This creates some special challenges and obligations for law schools, however, since adjuncts usually carry full caseloads in addition to their teaching responsibilities. This means their time in the school will be limited, court schedules will sometimes conflict with class, and their professional obligations to clients may conflict with class preparation.

Law schools have not done a good job, generally, in nurturing adjunct faculty. Adjuncts are not always included in law school events, and full-time faculty do not seek opportunities to interact with adjuncts regarding course design, teaching techniques, or other important matters.[510]

Most adjuncts are not "professional" teachers, and new adjuncts especially need some guidance about where and how to begin. Law schools should organize orientation programs for new adjuncts that cover such topics as the different methods of teaching (for example, problem method, case method, Socratic dialogue, discussion, lecturing), how exams should be structured and graded, how to prepare a syllabus, and how to evaluate themselves.[511] It is helpful for the school to prepare an adjunct handbook that covers such topics as how to cancel or re-schedule classes, when grades are due, and people to contact for help.[512] Schools should consider providing each adjunct with a full-time faculty mentor, but at the least, adjuncts should be informed of which full-time faculty members teach classes in similar subjects.[513]

 In addition to providing orientation or workshops before school starts, the school should have an ongoing system for facilitating communication between the adjuncts and the law school.[514] An administrator or faculty committee can

---

[508] Standard 403(c), ABA Standards, *supra* note 28, at 30.

[509] Marcia Gelpe, *Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors,* 25 Wm. Mitchell L. Rev. 193, 194 (1999).

[510] Karen Tokarz, *A Manual for Law Schools on Adjunct Faculty*, 76 Wash. U. L. Q. 293, 298 (1998).

[511] *Id.* at 297. Specific suggestions for adjunct orientation are included in Adjunct Faculty Handbook, *supra* note 507.

[512] Gelpe, *supra* note 509, at 213. Specific suggestions for handbooks are included in Adjunct Faculty Handbook, *supra* note 507.

[513] Tokarz, *supra* note 510, at 298.

[514] *Id.* at 297. Specific suggestions for communicating with adjunct faculty are included in Adjunct Faculty Handbook, *supra* note 507.

be designated to keep adjuncts informed about law school events, facilitate their integration into the law school community, and encourage full-time faculty to get to know their adjunct peers.[515]

It is important to provide adjuncts with feedback[516] and to evaluate and reward them when appropriate.[517] "Especially because the financial remuneration is so meager, the gratitude of the faculty and administration should be loud and clear, and repeated often."[518] The evaluation of adjuncts should include clearly identifying standards for teaching, assisting adjuncts in meeting the standards, and dismissing adjuncts who do not meet the standards.[519]

> The full time faculty should adopt a statement of standards for adjunct teaching that should be furnished to all adjuncts. Full-time faculty should then sit in on classes taught by adjuncts. This can be done in the same way as full-time faculty sit in on classes of untenured faculty. Class visits should be followed by detailed feedback, based on the stated standards, with specific suggestions on what to keep, what to change, and how to make needed changes.[520]

To maximize the benefits of using adjunct professors, full-time faculty need to participate every step of the way, from the hiring process to the evaluation of adjuncts' performance, and hopefully to a continuing relationship that benefits the adjunct, the school, and the students.[521]

I.   Enhance Learning With Technology.

Principle: The teachers effectively use technology to enhance learning.

Comments:
If technology is not the future of legal education, it is at least part of the future.[522] Proven and experimental uses of technology will continue to grow, and some components of legal education will be transformed by it.[523] Distance learning

---

[515] *Id.* at 298.

[516] Gelpe, *supra* note 509, at 220.

[517] Tokarz, *supra* note 510, at 303-04.

[518] *Id*. at 304.

[519] Gelpe, *supra* note 509, at 220.

[520] *Id.* at 221. Specific suggestions for evaluating adjunct faculty are included in Adjunct Faculty Handbook, *supra* note 509.

[521] *Id.* at 221.

[522] Articles that delve into the merits and specific details of using technology in law schools include Kristin B. Gerdy, Jane H. Wise & Alison Craig, *Expanding Our Classroom Walls: Enhancing Teaching and Learning Through Technology*, 11 Legal Writing 263, 263-66 (2005); Caron & Gely, *supra* note 392, at 552; Craig T. Smith, *Technology and Legal Education: Negotiating the Shoals of Technocentrism, Technophobia,* and *Indifference, in* Erasing Lines*, supra* note 38, at 247; Lasso, *supra* note 133. An article that raises concerns about overusing technology in legal education is David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. Legal Educ. 469, 477-85 (2001).

[523] For a growing collection of articles and reports on technology in legal education, including information and communications technology, virtual learning environments, curriculum design, and more, visit the blog site of Sefton Bloxham, Patricia McKellar, Karen Barton, and Paul Maharg, http://zeugma.typepad.com (last visited August 29, 2006).

is already becoming an accepted part of the landscape of legal education, and interactive computer programs are allowing students to acquire knowledge and skills outside of the classroom setting.[524]

Technology can make instruction and evaluation more efficient and effective, but technology is no more and no less than a tool for implementing best teaching practices. Current technologies allow law professors to implement many of the best practices described in this document. For example, course web pages can be used to disseminate instructional objectives; to encourage and reward reflection on students' learning processes; require students to adopt active learning practices, such as by posting graphic organizers or original mnemonics; create cooperative learning projects, such as analyses of hypotheticals or development of student-authored practice exams; increase student opportunities for practice and feedback, such as online multiple choice and short answer quizzes; and encourage student adoption of active learning practices. Likewise, PowerPoint can be a tool for responding to students' diverse ways of learning by integrating visual movement and imagery.

Other forms of technology being used in law schools include television, videotapes and DVDs, overhead projectors, digital recorders, electronic visual presentation cameras,[525] and classroom performance systems[526] to name a few.[527] Classroom performance systems use "clickers," in which each student is given a keypad to respond to in-class multiple choice questions. The software records and reports on the results as a tool for responding to students' diverse ways of learning and serves as a classroom assessment technique that informs the teachers whether the students are learning and informs the students whether their learning strategies are working productively. Another technological innovation is the use of recording systems that automatically make video and sound records of students' classroom answers and performances for subsequent review.

Digital technology is making it possible to record and broadcast classroom instruction over the internet, "podcasting." After running a pilot project, CALI announced on August 23, 2006, that it is offering free digital recorders and blog accounts for faculty who want to use podcasting in their courses.[528] In phase one of its legal education podcasting project, CALI found that "students will re-listen to classroom lectures or weekly summaries created by the instructor and because of the anytime, anywhere nature of podcasts, they do this at times that are not necessarily

---

[524] The Center for Computer Assisted Legal Instruction (CALI) offers many programs. The CALI website at http://www2.cali.org is organized into three sections – learning the law, teaching the law, and technology in law schools – and includes tools to help faculty evaluate CALI lessons.

[525] Electronic visual presentation cameras (sometimes referred to as document cameras) are devices that capture visual images by using a video camera mounted vertically on a base. Images of just about anything that can be placed on the base (objects, book pages, documents, etc.) are converted to an electronic signal that can be transmitted to an LCD projector, a video monitor, or a computer. *See, e.g.*, Elmo Electronic Imaging, *available at* http://www. pharmnet2000.com/ELMO/index.html (last visited November 28, 2006).

[526] Classroom Performance System (CPS) is an electronic application that permits instant assessment of classroom performance. More information on CPS can be found at http://www.einstruction.com (last visited November 28, 2006). A good discussion of CPS is included in Caron & Gely, *supra* note 392, at 560-69.

[527] Lasso, *supra* note 133, at 46-47.

[528] E-mail from John Mayer, jmayer@cali.org, to the LawProf list serve, lawprof@chica-gokent.kentlaw.edu, August 23, 2006 at 6:30 p.m.

dedicated to studying (for example, driving in the car during commutes, working out at the gym, and making dinner)."[529]

Technology exists to help prepare and deliver teaching materials and assessment tools. For example, there is a web-based platform called "Cyber Workbooks" that allows faculty to publish their course materials by integrating learning outcomes such as critical thinking, applied reasoning, and creative problem-solving. The platform consists of an authoring tool for developing course modules with lessons, questions, and answers; a user website accessible by students with a user name and password; and an administrative site for generating reports and allowing faculty to evaluate course modules. The platform has built-in assessment features that will identify, measure, validate, and report on learning outcomes and identify student weaknesses, without any special training. The program will time, grade, and record student responses to minimize faculty time and burden.[530]

Perhaps technology's greatest unused role in achieving learning outcomes is in helping students acquire core legal knowledge and understanding. Software programs exist that can generate a myriad of formative assessments, quizzing students on substantive law principles and other subjects using multi-state-type questions. The process of drill and practice enables students to know immediately if they are learning the assigned materials. "Behavioral adult educational philosophy from which the drill and practice technique emanates is highly regarded for its ability to develop competencies in areas where there are well established norms to which to teach."[531] Utilizing a variety of learning processes and providing feedback and reinforcement from such drills are often motivational for adult learners.[532]

J.   Establish a Learning Center.

Principle: The school has a learning center.

Comments:[533]

We agree with Judith Wegner that it would be a very positive development for law schools to establish learning centers.

The creation of learning centers is a logical step that would build upon the academic support and other special needs programs that many law schools developed during the past decade. Each of these developments suggests that students can benefit from individualized help, yet law schools and universities remain fragmented in how that help is provided and how broadly it is dispersed. Moreover, law schools have not yet grappled with potential organizational strategies that could enhance

---

[529] *Id.*

[530] For more information about "Cyber Workbooks" go to http://www.cyberworkbooks. com.

[531] E-mail from Jack R. Goetz, Dean Emeritus, Concord Law School, to Professor Roy Stuckey (Jan. 13, 2005) (on file with Roy Stuckey) (referencing J. L. Elias & S. B. Merriam, Philosophical Foundations of Adult Education (2d ed. 1995); L. M. Zinn, *Identifying Your Philosophical Orientation, in* Adult Learning Methods 37-72 (M. W. Galbraith ed., 2d ed. 1998)).

[532] *Id.*

[533] Except for the first paragraph, the comments in this section were copied verbatim from Judith Wegner's preliminary conclusions from her study of legal education with the Carnegie Foundation for the Advancement of Teaching. Wegner, Assessment, *supra* note 24, at 73-75.

student learning, faculty teaching, and program improvement in fresh and useful ways.

Law schools could create model "learning centers" that could address such needs in innovative, cost-efficient ways. Law school learning centers could have the following characteristics:

1.   A law school learning center would be directed by a faculty member with significant expertise in both law and educational issues, assisted by a student-faculty-administrative advisory committee, and appropriate additional personnel. Schools with a particular commitment to exploring the full potential of the model might appoint a faculty director who could function at the level of a specialized associate dean, working with a full-time director of academic support services, the director of legal writing, and requisite support personnel.

2.   Learning centers could be charged with a number of functions. Most significantly, they would provide a range of "educational" (rather than "evaluative") assessment services – intensive academic support programming for students who may face special challenges, broader diagnostic testing and informal programming to benefit all students interested in becoming more effective learners, tutorial programming especially geared to first year, training for teaching assistants and volunteer tutors, training for students interested in incorporating better approaches to self-assessment and peer-assessment as part of individual or study-group techniques; and optional formative assessment activities that allow students to get feedback on simple problems or other exercises that evidence their proficiency in legal reasoning. They would also be responsible for coordination of student advising, information and logistics related to development of student educational portfolios,

3.   In addition, "learning centers" could serve as "assessment centers" that provide assistance to faculty members wishing to use innovative approaches to "evaluative" assessment, for example by scheduling and administering timed and proctored assignments using a law school computer lab, videotaping performance-based assignments associated with certain kinds of "lawyering skills" or team-based tasks, or a variety of other sorts of "performance-based" tests.

4.   Learning centers could also serve as a resource for faculty interested in innovations in teaching and learning (perhaps in cooperation with campus teaching and learning centers and legal educators elsewhere), and might coordinate faculty professional development workshops on topics such as use of advanced technology or collaborative learning

techniques. In addition, learning centers could be charged with institutional research regarding educational innovations or student performance. . . .[534]

"Learning centers" of the sort imagined here would represent an important innovation in American legal education, although they build upon recent efforts to create effective academic support programs as discussed above. They could draw upon lessons learned by innovative programs such as that of Alverno College (which uses performance-based student assessments quite extensively), and the use of performance-based assessment strategies in an increasing number of medical and business schools.[535]

Law school learning centers could also gain insight from more than forty years' experience with "assessment centers" in industrial, educational, military, government, and professional contexts, as they have been used as an aid in recruiting and placing managerial level employees, diagnosing strengths and limitations to develop individual or corporate training plans, and certifying teachers.[536] Notwithstanding these useful analogues, learning centers would represent an important breakthrough for both law schools and their host universities, since they would address law schools' own significant needs relating to student learning, advising, assessment, and related research, while serving as a useful prototype for initiatives that could prove useful in other programs or on larger scales.

Learning centers would provide a clear and readily accessible source for education about learning for all students, making learning a visible part of the law school landscape in a personalized way that effectively supplements the instructional design of traditional large classes and provides advising services that most schools seem to lack. They would assist all learners, as individuals, to make demonstrable progress at their own pace, taking their own learning styles and goals into account without stigma, while empowering them to take personal responsibility for their professional development from the outset of their careers. They would serve as a flexible means of introducing new forms of "educational" (formative) assessment with minimal burden upon faculty, assisting first-year students and others who have difficulty mastering fundamental "thinking" skills. Finally, they would help law schools attend to their special institutional context and its implications for instruction and assessment, by providing a capacity for informed institutional research on important issues that most schools currently lack.

---

[534] *Id.* at 73-74.

[535] Ronald Riggio & Monica Aguirre, *The Use of Assessment Center Methods for Student Outcome Assessment,* 12 J. Soc. Behav. & Personality 273-89 (1997); Lynn K. Bartells, William H. Bonner & Robert S. Rusbin, *Student Performance: Assessment Centers Versus Traditional Classroom Evaluation Techniques*, 75 J. Educ. for Bus. 198-201 (2000).

[536] *See, e.g.,* Ann Howard*, A Reassessment of Assessment Centers: Challenges for the 21st Century,* 12 J. Soc. Behav. & Personality 13 (1997).