

USING TRANSACTIONAL EXERCISES FOR FIRST-YEAR LEARNING ASSESSMENT

Carol Goforth* & William E. Foster**

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INTRODUCTION

It is widely understood that in most law schools, transactional skills instruction receives a fraction of the attention it merits.¹ This paper explores an avenue for law schools to begin correcting the relatively marginal status of transactional skills in a manner that simultaneously addresses a new challenge for law schools—assessment. It is unlikely that

* Carol Goforth is a University Professor and the Clayton N. Little Professor of Law at the University of Arkansas School of Law.

** William E. Foster is the Associate Dean for Academic Affairs and the Arkansas Bar Foundation Associate Professor at the University of Arkansas School of Law.

¹ See generally Carol Goforth, *Prescriptive Writing: Evidence Justifying and Options for Implementing Change*, 67 J. LEGAL EDUC. 904 (2017) (advocating for more transactional skills to be introduced to first-year law students).

most schools will devote significant resources to either transactional instruction or assessment, so change in both cases is almost certain to be incremental. History also suggests that incremental change is more likely to be accepted and successful.²

Here, we suggest viewing the implementation of changes to address assessment of learning objectives, whether voluntary or as a result of external factors such as amendments to the accreditation standards, as an opportunity to add transactional experiences for law students. The relatively recent (and perhaps daunting) requirement that all accredited law schools engage in assessment of learning outcomes provides a platform for law professors to advocate for incorporation of skills exercises at strategic points in the law school curriculum to both increase the opportunities for students to gain exposure to transactional practice and to address the need to assess learning.³ Transactional skills advocates who are prepared to proffer workable solutions to the assessment quandary are perhaps more likely to be heard at this juncture in legal education. In the following pages, we present a few ideas for seizing this moment to elevate

² More than twenty-five years ago, the MacCrate Report suggested that legal education needed to evolve to produce practice-ready graduates. AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). “In the wake of the publication of the MacCrate Report, a number of observers suggested that sweeping change was unlikely. . . . These observers argued that the Report could successfully be used to foster ‘incremental’ changes, designed to integrate the teaching of skills and values into the curriculum and modestly shift the balance in the curriculum toward skills and values training.” Russell Engler, *From 10 to 20: A Guide to Utilizing the MacCrate Report over the Next Decade*, 23 PACE L. REV. 519, 525 (2003). There are a number of reasons why incremental change may be more successful. “Curriculum change requires time, resources, and intellectual commitment. Done well, it calls for coordination Those at the beginning of their careers similarly might question whether time spent on curriculum reform could be better devoted to writing and scholarship.” Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 480 (2006) (advocating incremental change in Civil Procedure courses).

³ Changes to the ABA’s standards for accreditation have prompted a wide number of proposals for change in the legal academy. See, e.g., Charles P. Cercone & Adam Lamparello, *Assessing A Law School’s Program of Legal Education to Comply with the American Bar Association’s Revised Standards and Maximize Student Attainment of Core Lanyering Competencies*, 86 UMKC L. REV. 37 (2017); Margaret Moore Jackson, *From Seminar to Simulation: Wading Out to the Third Wave*, 19 J. GENDER RACE & JUST. 127, 128 (2016); Adam Lamparello, *The Integrated Law School Curriculum*, 8 ELON L. REV. 407, 410 (2016); Lee Sims, *Evolution and Opportunity: Collection Development of Skills-Specific Resources in the Wake of the ABA’s Revised Standards*, 108 L. LIBR. J. 251, 252 (2016).

transactional skills in the law school curriculum as a mechanism to assess learning objectives typically tied to first-year courses.

I. LEARNING ASSESSMENT?

In August of 2016, new standards for the approval of American Law Schools went into effect. These new requirements, spurred by the Department of Education,⁴ included the rather vague requirement that all law schools “conduct ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.”⁵ The purpose behind these new requirements was apparently to encourage schools to improve their programs of education by taking into account how well they were actually preparing their students for the practice of law.⁶

⁴ As stated on the ABA’s website, “[s]ince 1952, the Council of the ABA Section of Legal Education and Admissions to the Bar of the American Bar Association has been recognized by the United States Department of Education as the national agency for the accreditation of programs leading to the J.D. degree in the United States.” *Frequently Asked Questions*, Frequently Asked Questions, AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html (last accessed April, 2018). As part of this recognition, the ABA is subject to the requirements embodied in the Code of Federal regulations, which explicitly require the agency to evaluate student achievement and programmatic objectives. 34 C.F.R. § 602.16(a) (2009). Not surprisingly, “[t]his has been a major driving force behind some of the changes to the ABA Standards.” Anthony Niedwiecki, *Prepared for Practice? Developing A Comprehensive Assessment Plan for A Law School Professional Skills Program*, 50 U.S.F. L. REV. 245, 248 (2016).

⁵ *Standard 315, ABA Section of Legal Education and Admissions to the Bar, 2016-2017 STANDARDS AND RULE OF PROC. FOR APPROVAL OF L. SCHS.* at 23 [hereinafter “2016 ABA Standards”], available online at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf (last visited Apr. 2018). The same language appears in the current 2017-2018 ABA Standards. Chapter 3 of the current ABA Standards (which includes Standard 315) is available online at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf (last visited Apr. 2018) [hereinafter “ABA Standards”].

⁶ According to one commentator, “the standards are meant to better prepare students for the practice of law while establishing assessment techniques that evaluate the actual preparation level of the students.” Anthony Niedwiecki, *Law Schools and Learning Outcomes:*

1.1 What Is Meant by “Learning Assessment”?

To the consternation of many law school administrators and faculty, very little official guidance has been offered about what this requirement means. The only official interpretation offers “examples” of how a school might measure “the degree to which students have attained competency in the school’s student learning outcomes.”⁷ The examples include a variety of options, such as “student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools.”⁸

Despite this listing of possible assessment tools, the ABA intentionally declined to require “any particular type of assessment for testing the degree of student achievement of learning outcomes.”⁹ This means that schools are required to come up with their own assessment plans, and they must do so without much formal guidance about what is needed to comply with the new accreditation standards.

On the other hand, despite the lack of official word from the ABA, there is plenty of material out there dealing with assessment in higher education. It is, for example, well understood that “[a]ssessments are tools used to obtain and document information about student achievement, skills, and ability.”¹⁰ The objective of such assessment in the educational setting “is to determine whether students are learning what we, as teachers, believe they should be learning.”¹¹ At least in theory, if the assessment piece is done properly, the information gained from the process should

Developing A Coherent, Cohesive, and Comprehensive Law School Curriculum, 64 CLEV. ST. L. REV. 661, 664 (2016).

⁷ Interpretation 315-1, 2016 ABA Standards, *supra* note 5, at 24.

⁸ *Id.*

⁹ Abigail Loftus DeBlasis, *Building Legal Competencies: The Montessori Method As A Unifying Approach to Outcomes-Based Assessment in Law Schools*, 42 OHIO N.U. L. REV. 1, 27 (2015).

¹⁰ Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 76 (2010).

¹¹ *Id.* at 78.

result in integrated learning outcomes and assessment that improve student learning.¹²

1.2 *Why Should Law Schools Care about “Learning Assessment”?*

In order to give context to this, it is necessary to consider what schools have been saying about their learning outcomes. Not surprisingly, schools differ widely in how they frame and organize their learning outcomes, and even in what they choose to include. This variation is expected, and it is completely consistent with the ABA accreditation standards, so long as certain minimum skills are included.

For the purposes of this article, consider how the following law schools have chosen to identify and articulate their learning outcomes relating to written communication. The schools were chosen somewhat arbitrarily, although an effort was made to include a range of different kinds of schools in terms of size, national reputation, location, etc.

Some of the listed learning objectives are very short. Cornell Law School states that students “receive substantial instruction in,” among other things, “writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.”¹³ Georgetown Law lists the following as one of its “specific institutional learning outcomes:” the “[a]bility to communicate effectively in the legal context, orally and in writing.”¹⁴ And at the University of Arkansas, one of our learning objectives is that “[o]ur graduates will be able to communicate the law.”¹⁵ We expand on that broad concept a little by adding that “[g]raduates should demonstrate effective oral and written communication skills in the context of predictive, persuasive, and prescriptive application of the law.”¹⁶

¹² Niedwiecki, *supra* note 4, at 245–46.

¹³ *General Information in the Law School*, CORNELL U., OFFICE OF THE REGISTRAR, http://www.lawschool.cornell.edu/registrar/aba_standards.cfm (Last visited April, 2018).

¹⁴ *Institutional Learning Outcomes*, GEORGETOWN LAW, <https://www.law.georgetown.edu/admissions-financial-aid/aba509/Learning-Outcomes.cfm> (last visited April, 2018).

¹⁵ *J.D. Program: Learning Outcomes*, U. OF ARK. SCH. OF L., <https://law.uark.edu/academics/jd/index.php> (Last visited Apr., 2018).

¹⁶ *Id.*

Other schools expand even further on the learning outcome relating to written communication skills. For example, the University of Dayton School of Law lists among its learning outcomes the expectation that “[g]raduates will communicate effectively and efficiently to individuals and groups.”¹⁷ Dayton is more specific with regard to how it expects graduates to demonstrate achievement of this outcome, specifying that they will be capable of “[w]riting documents that are clear, concise, well-reasoned, organized, professional in tone, appropriate to the audience and the circumstances, and if appropriate, contain proper citation to authority.”¹⁸

Emory Law specifies that graduating students must demonstrate “[c]ompetence in written and oral communication and advocacy in a legal setting.”¹⁹ This is expanded upon with a list of requirements including the ability to analyze the basic elements of a legal idea by examining particular facts, to synthesize and organize information, ideas, or experience, and to apply legal authority or concepts to new situations.²⁰

What all of these schools have in common is an explicit recognition of the need for graduates to be competent legal writers, able to produce minimally satisfactory written documents that satisfy legal goals. Precisely because transactional writing often is not emphasized elsewhere, it makes sense to consider whether students have learned the skills necessary for effective legal communication by presenting them with a transactional problem. Because most students have not received intensive instruction in transactional drafting, this kind of assessment can allow a school to assess the extent to which students possess the ability to apply new information, to analyze new materials to solve legal problems, and to communicate effectively in writing in this new context. By singling transactional drafting out for a special assessment law schools can use this as an incremental step towards improving training in this critical skill.

¹⁷ *Learning Outcomes and Performance Criteria*, U. OF DAYTON SCH. OF L., https://www.udayton.edu/law/_resources/documents/academics/learning-outcomes-and-performance-criteria.pdf (last visited Apr., 2018).

¹⁸ *Id.*

¹⁹ *Juris Doctor (JD)*, EMORY L., <http://law.emory.edu/academics/jd-degree-program/index.html> (Last visited April, 2018).

²⁰ *Id.*

1.3 *What can be assessed with Transactional Exercises?*

Although the cited materials on law school learning objectives focus on written communication skills,²¹ law schools are likely to include in their learning objectives concepts like a student's ability to apply doctrine to real world situations, to demonstrate the ability to engage in effective problem-solving, and to demonstrate competence at professional skills. In fact, under the ABA's current standards for accreditation of law schools, they are required to do so.²²

Because schools are required to assess all of these abilities, transactional drafting offers some particularly valuable opportunities for assessing student achievement. Not only can it be used to assess written communication skills, but it can also be used to determine whether law school is preparing students in other ways. How effectively do students assimilate new legal tools? How effective are they at problem-solving? Can students use legal doctrine effectively? Because transactional drafting is not generally a skill that is explicitly taught in most first semester classes,²³ a drafting problem can assess these other skills as well.

This does not, of course, mean that this is the only way to assess student learning. One commentator has observed that "if the law school has a stated learning outcome that the student will achieve competency in legal writing, the law school could choose to assess achievement of that learning outcome either across the curriculum in all writing products of a particular student through a particular point in the student's education, through a capstone course, or even within the confines of a single legal writing class."²⁴ This article suggests that an abbreviated transactional writing experience is yet another alternative for such assessment. Moreover, because the kind of assessment suggested in this article comes early in a law student's academic career, the information gained from such

²¹ See *supra* notes 1–4, 6, 9–12, and accompanying text.

²² Standard 302 requires law schools to establish standards that, "at a minimum" include competency in each of these. See ABA Standards, Standard 302 *supra* note 5, at 15.

²³ The class most likely to include this kind of instruction, legal writing, does not focus on this kind of writing, and most first-year contracts classes do not focus on teaching drafting either. See Goforth, *supra* note 1 at 904 (most first-year legal writing courses are focused on predictive or persuasive writing) and at 926 (explaining why contracts classes generally do not focus on actual drafting).

²⁴ DeBlasis, *supra* note 9, at 27.

an assessment might allow for increased opportunities to intervene in the case of a student who is struggling with these kinds of skills.

II. SAMPLE ASSESSMENT IDEAS

Once there is consensus that assessment of student learning through a transactional drafting problem is appropriate, the question still remains about how such assessment should be conducted. There are a number of options, each with relative advantages and limitations. Some of those options are presented here.

2.1 *MPT Type Project*

One option for assessment would be to use a project modeled on the kinds of problems sometimes included in the Multistate Performance Test (MPT).²⁵ The MPT is developed by the National Conference of Bar Examiners (“NCBE”) and consists of two 90-minute items.²⁶ Its stated purpose is “to test an examinee’s ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge.”²⁷ Prior questions are available from the NCBE, with a charge being assessed to access materials used within the past five years.²⁸

The structure of the MPT is different from a traditional law school essay, short answer, or multiple-choice exam, and even from other parts of the bar exam. Instead, as described by the NCBE, “[t]he materials for each MPT include a File and a Library.”²⁹ The File includes a variety of facts in a range of formats, which can include materials such as transcripts, depositions, lawyers’ notes, client materials, contracts, or excerpts from such materials. Instructions state that the provided “facts” may be

²⁵ The MPT was first offered to jurisdictions in 1997. Judith A. Gundersen, *Happy Birthday, MPT!*, B. EXAM’R, Nov. 2007, at 18, 20. It has gradually been gaining acceptance, and as of the date this was written, only ten American jurisdictions do not include it in their assessment of applicants to the bar. See *Multistate Performance Test*, NAT’L CONFERENCE OF BAR EXAM’R, available online at <http://www.ncbex.org/exams/mpt/> (last visited Apr., 2018).

²⁶ *Id.*

²⁷ *Id.*

²⁸ NAT’L CONFERENCE OF BAR EXAM’R: STUDY AIDS STORE, <http://store.ncbex.org/mpt> (last visited Aug. 25, 2018).

²⁹ *Preparing for the MPT*, NAT’L CONFERENCE OF BAR EXAM’R (Aug. 29, 2018), <http://www.ncbex.org/exams/mpt/preparing/> (last visited Apr., 2018).

incomplete and may include irrelevant data,³⁰ which is an effort to mimic the kinds of situations an attorney may face in the real world. In addition to the File, the Library includes all of the legal materials that an examinee is expected to use in order to “extract . . . the legal principles necessary to analyze the problem and perform the task.”³¹

On past exams, the MPT has included items based around contractual language. One of the items used in July 2013 provided examinees with excerpts from a proposed contract, a transcript of a client interview, a statute, and two cases. Examinees were expected to draft corrected language for the proposed contract in order to achieve the client’s objectives and to explain why those changes were reasonable and necessary given the legal authorities provided.³²

This kind of problem set could be used to assess a student’s learning after their contracts class. The work product would allow a reviewer assessing student learning to determine the clarity and caliber of a student’s writing. The reviewer could determine the extent to which the student was able to extract relevant legal doctrine from both statutory and case authority, and to evaluate whether the student correctly applied the relevant law to the problem of amending the contract to accommodate client wishes. The drafted language would be evaluated to determine whether the student could write prescriptively in a manner designed to govern future behavior of the parties according to the stated desires of the client. It would also demonstrate whether the student had acquired sufficient problem-solving skills to be able to apply legal doctrine in a novel way (because transactional writing has not yet been taught as a discrete skill in most schools).

The use of this kind of project to assess student learning has the benefit of being an isolated, discrete project that would be relatively simple to administer and evaluate, and it could reveal areas in which students might need additional instruction in either contracts or legal writing. It could introduce the concept of transactional skills into the first-year (depending on when the assessment is administered) and could be very helpful in focusing students on the prescriptive nature of some

³⁰ *Id.*

³¹ *Id.*

³² NAT’L CONFERENCE OF BAR EXAM’R, MPT-2: *Palindrome Recording Contract*, July, 2013, available online at <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F46>.

transactional writing. It is, of course, a very limited kind of project and would not fully assess the range of transactional skills needed to become proficient at drafting contracts, but it would at least be a start. It would require some instructional resources, because to be effective, each response would have to be individually evaluated. Nonetheless, the cost of this alternative would be relatively low.

Purely by way of example, consider an MPT-type file that includes the following documents: (1) a transcript from a client interview and (2) excerpts from a lease. The corresponding library includes: (1) a city ordinance and (2) excerpts from two court opinions (or the opinions in their entirety). The interview transcript shows that the client has asked for legal advice about a lease on a house that he and three friends would like to rent for the upcoming year when they will be sophomores at a local college. The four boys range in age from 19 to 21. Two of them, James and Timothy, were foster brothers in the same home for 8 years before they moved out to go to college and call each other "brother." They use the same last name following their time in that foster home. The four boys want to lease a four-bedroom, single-family house close to the campus they will be attending. The landlord has verbally assured the boys that he sees no reason why the four of them cannot rent the house.

The ordinance included in the library reads as follows:

Smallville City Ordinances (as currently enacted)

14.01 - Definitions

For the purpose of Title XIV, Smallville Unified Development Code, the following definitions shall apply, unless the context clearly indicates or requires a different meaning:

Dwelling, single-family (zoning). A detached residential dwelling unit other than a manufactured home, designed for and occupied by one (1) family only.

Family (zoning). In all single family Planned Zoning Districts, a "family" is no more than three (3) persons unless all are related and occupy the dwelling as a single housekeeping unit. In all other zoning districts where residential uses are permitted, a "family" is no more than

four (4) persons unless all are related and occupy the dwelling as a single housekeeping unit. Persons are "related" for purposes of this definition if they are related by blood, marriage, adoption, guardianship, or other duly-authorized custodial relationship. The definition of "family" does not include fraternities, sororities, clubs or institutional groups.

The first case included in the library decided (perhaps in a context not involving a lease, such as rights under intestate succession) that foster children are not legal members of the same family even in the presence of verbal assurances that they will be or are regarded as such. The second case determined that both the statute of frauds and parol evidence rule prohibit the use of outside communication or evidence to vary or interpret the terms of a written lease that appears to be complete on its face.

Within that context, the students could be asked to review the following proposed lease terms:

Lease Provisions

This Residential Lease Agreement is made between the Landlord _____ and the Tenant(s) named on attached Exhibit "A", each of who will have signed this lease, which is deemed to be effective as to each of them on the _____ day of _____, 20____.

1. **Agreement to Rent.** The Landlord hereby agrees to rent the Premises to the Tenant and Tenant hereby agrees to rent the Premises from the Landlord.

2. **Premises.** The Premises is described as the single-family house and yard located at 21 June St., Smallville, state of Metropolita, USA.

7. **Use of Premises.** The Premises shall be used and occupied by Tenant(s), for no more than the maximum number of persons allowed by law, as a private individual dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Tenant(s) for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than private

dwelling. Tenant(s) shall not allow any other person, other than Tenant's immediate family or transient relatives and friends who are guests of Tenant(s), to use or occupy the Premises without first obtaining Landlord's written consent to such use. Any guest staying in the property more than 7 days in any 3-month period will be considered a tenant, rather than a guest, and must be added to the lease agreement. Landlord may also increase the rent at any such time that a new tenant is added to the Premises. Tenant(s) and guest(s) shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises.

Students would be instructed to assume that there are no other provisions in the lease limiting the occupancy of the Premises of relating to the location, description, or use of the Premises.

Students could then be asked first to evaluate whether the suggested lease terms are satisfactory for the four boys, and to provide a brief explanation of why they have reached that conclusion, citing the authorities that they believe to be relevant based solely on the library. They could then be asked how to fix any problems they see with the proposed lease as simply as reasonably possible.³³

[Although this is probably abundantly obvious to everyone who would be reading this article, the problem potentially created by the ordinance is that the four boys might not be allowed to legally occupy the premises. If the home is in a "single family Planned Zoning District," pursuant to Smallville ordinances, only three persons not related to each other are allowed to live together. Case law also suggests that being "foster brothers" does not create a familial relationship, and in any event, there

³³ In addition to using this kind of exercise to assess student learning in terms of ability to read and understand cases, analyze legal authorities, apply legal doctrine and principles to new situations, and to communicate legal rules clearly and concisely, this approach has another benefit. Law Schools are under increasing pressure to ensure that a majority of their students pass the bar exam. *See* ABA Standards, Standard 316, *supra* note 5, requiring that average pass rates for first-time takers to be at least 75%, with certain caveats and exceptions. Introducing students to the MPT could help with this objective as well, since as of May 2018, it is a part of the bar exam in all American jurisdictions except for nine states and Puerto Rico. *See* NCBE, *Jurisdictions Administering the MPT*, available online at <http://www.ncbex.org/exams/mpt/> (last accessed May, 2018).

are clearly two other individuals not part of the same family group. Oral assurances are insufficient to remedy omissions in a real estate lease. If the Premises are indeed not located in the restricted district, a simple representation that the home is not in a “single family Planned Zoning District,” but is in another area of Smallville where residential uses are permitted, would be the easiest way to remedy the problem.]

Note that this kind of project offers a range of assessment possibilities. As a starting point, this kind of project should allow assessment of a student’s ability to derive and understand legal principles, and to communicate an understanding of the rules to others. This necessarily includes information that could be used to assess a student’s ability to clearly and concisely communicate legal principles. In addition, this kind of project would allow the reviewer to assess the student’s ability to apply those rules to novel situations (given that most students will not yet have had substantial exposure to transactional drafting). It will also allow assessment of the student’s bar skills readiness. Finally, if the materials do not include a detailed understanding of what is meant by parol evidence or the statute of frauds, substantive understanding of those basic doctrines (or whatever other issues may be embedded in a project) could also be assessed.

2.2 *A One-Credit Course*

An even more ambitious alternative would be for a school to add a one-credit course specifically aimed at assessment of transactional skills to the first-year curriculum. This could be a condensed class taught between semesters, or a front-loaded offering during the students’ second semester. Alternatively, it could be a one-credit offering spread out over the entire semester, or even a course offered at the end of the traditional first-year classes. This option would give the instructors additional time to both teach new skills and to evaluate student performance.

Such a class could be structured in a number of ways. A single-credit course offered in a condensed one-week format could provide an opportunity for students to engage in an in-depth exploration of a set of facts and to perform a variety of legal tasks related to the representation of parties to an agreement or a controversy. The condensed nature of the course could more accurately simulate an actual practice environment with a relatively heavy workload in a compressed time frame. The lack of time for contemplation and review would necessarily impact the complexity of

the material given to the students, but this could still provide an extremely valuable learning and assessment opportunity.

Likewise, a narrowly-focused simulation course that stretches throughout the semester can highlight the skills necessary to take concepts addressed in doctrinal courses and translate them into the work product a transactional lawyer would be expected to generate. This would offer more time for review and reflection and would also permit an instructor to provide one-on-one feedback, which might not be feasible on a shortened schedule.

Perhaps the most straightforward way to structure such a course is around the timeline of a typical transactional representation. Such an approach might begin with a mock client interview in which the client explains her objectives, after which the students are tasked with performing a sequence of increasingly detailed tasks based on information provided (at least in part) on that interview. These tasks could include drafting a summary of options for the client's consideration, constructing a term sheet for the proposed transaction, drafting a simple confidentiality agreement, developing a time and responsibility schedule for a larger transaction, and drafting a basic transactional document (like a real estate purchase agreement, which could combine concepts from both Property and Contracts courses) incorporating the terms of the deal, possibly along with correspondence (e-mails or letters) to the client explaining the most significant provisions of the agreement.

Such practice-based assignments easily would lend themselves to inclusion in a student learning portfolio, and to assessment of student performance by attorneys, as suggested by the ABA's interpretation of Standard 315.³⁴ By reviewing student work in planning and drafting tasks, professors can assess students' comprehension of relevant legal concepts, their understanding of the relative significance of certain facts, and their ability to use the facts and legal authority to carry out client objectives. Writing skills would obviously be an important part of this kind of assessment process, and problem-solving ability and research skills could also be evaluated. It should also be possible to identify students with on-going writing issues, as well as those with problems understanding or applying legal doctrine to particular facts and circumstances. This creates

³⁴ Standard 315. *Evaluation of Program of Legal Education Learning Outcomes, and Assessment [sic] Methods*, 2017 ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 23.

another opportunity for early intervention to help resolve academic problems for students struggling with the material.

It would also be possible to draft learning objectives for such a course that are in line with the assessment function that the assignments will serve. For example, such a course could easily have objectives that look like the following:

Course Objectives. At the conclusion of this course, students will be able to:

1. Identify the parts of a contract and understand the general function of each distinct part of an agreement;
2. Analyze the substantive effect of contract language and (depending on the course content) explain the effects of such language to a client clearly and concisely;
3. Evaluate whether suggested contractual language is likely to effectuate a client's expressed desires; and
4. Revise or draft contractual language to effectuate a client's expressed desires.

Given these as course objectives, each could also be assessed at the conclusion of the course. Moreover, students could be expected to understand and apply legal doctrines learned in other courses. This kind of offering could be used to assess understanding of essential doctrine as well as the skills mentioned above.

2.3 *Structure of Contract Followed by Single Drafting Assignment*

This alternative is one that is likely to involve less in the way of faculty resources. It would entail providing students with material about how contracts are structured, followed by an assessment of the student's understanding of the material and then a drafting exercise. Although contracts are ubiquitous in modern life, even after having completed the introductory course in Contracts,³⁵ most students are likely to have had

³⁵ One lawyer complained some years ago that “[d]uring a full year of Contracts, the first year student does not draft a single contract.” Stephen W. Owens, *Provisional License for the New Bar Admittees Not the Answer*, 11 UTAH B.J. 15 (1998). Some academicians have suggested that students do not know enough about contracts to tackle drafting until after “they have completed their doctrinal course in contracts.” Lucia Ann Silecchia, *Legal Skills Training in the First-year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 277 (1996).

relatively little exposure to the process of reviewing full agreements or carefully considering the implications of contractual provisions. Thus, a reasonable starting point, even for students who have studied contract law for a semester, is identifying the parts of a contract and understanding the architecture of a typical agreement. Once students have been exposed to the function and form of preambles, recitals, payment provisions, representations, covenants, conditions, general or “boilerplate” provisions, and so on, they should be able to effectively scrutinize these parts of a contract in order to determine whether the written agreement satisfies certain objectives and is consistent with relevant law.

One can easily assess student comprehension of contractual provisions by extracting sections from contracts available on OneCLE, EDGAR, or other publicly available databases, and then asking students to label individual provisions or respond to multiple choice prompts that examine the substantive effect of each provision.

As one example, students might be asked to identify each of the following provisions by specifying whether they are preambles, recitals, payment provisions, representations, covenants, conditions, merger clauses, choice of law clauses, arbitration clauses, signature blocks, or something else.

Provision 1. **Title.** Seller owns the Real Property, beneficially and of record and has and will convey to the Purchaser on the Closing Date, good, marketable and valid title to the Real Property, free and clear of all liens, claims, encumbrances and adverse rights or interests whatsoever.

Answer: Representation

Provision 2. **New Debt.** Borrower will not incur any debt which, in the aggregate, exceeds Five Thousand Dollars (\$5,000) without first obtaining the written permission of Lender.

Answer: Covenant

Provision 3. This document, together with the exhibits and schedules hereto, constitutes the entire agreement of the parties and supersedes any and all other prior agreements, oral or written, with respect to the subject matter contained herein.

Answer: Merger Clause

Provision 4. The addresses of the parties are as follows:

| | |
|-----------------|-------------------|
| Seller | Buyer |
| Little Inc. | Bigg Co. |
| 001 Short Drive | 1000 Center Ave. |
| Smallville USA | Capital City, USA |

Answer: Something Else

Another kind of question might ask not whether the student can identify the parts of the contract, but whether they can read and understand the substantive effect of a provision. Consider the following two possible multiple-choice questions, which ask a student to look at the effect of a provision from an employee agreement:

(1)(b) **Full Time.** Employee agrees that throughout Employee's employment with Company, Employee will (i) faithfully render such services as may be delegated to Employee by Company, (ii) devote substantially all of Employee's entire business time, good faith, best efforts, ability, skill and attention to Company's business, and (iii) follow and act in accordance with all of the rules, policies and procedures of Company, including but not limited to working hours, sales and promotion policies, and specific Company rules. During the term of her employment, Employee may engage in outside activities, provided those activities do not interfere or conflict with her duties and responsibilities hereunder, provided, Employee will not serve as an officer or on the board of directors of another for-profit entity without the prior written consent of the Corporate Governance Committee of the Company.

Question: Employee has been asked to serve on the Board of Directors of X Corporation, which is not a direct competitor of the Company, and indeed is in a completely different business altogether. X Corporation is barely profitable at this time and would like to use Employee's expertise to make it more efficient and produce a greater return for its shareholders. May Employee serve on the board?

- A.) Yes, as long as it is not a direct competitor to the Company.
- B.) Yes, with 30 days' written notice.
- C.) No, unless it is approved by the Corporate Governance Committee of the Company.

D.) Yes, Employee can serve on the Board of Directors of any company she desires.

Answer: C. Employee must receive the approval of the Company to be able to serve on the Board of another for-profit company.

Provision 15. **Assignments.** This Agreement shall be freely assignable by Company and shall inure to the benefit of, and be binding upon, Company, its successors and assigns and/or any other entity which shall succeed to the business presently being conducted by Company. Being a contract for personal services, neither this Agreement nor any rights hereunder shall be assigned by Employee.

Question: Six months into the contract (i.e., still in the term of the Agreement), Employee decides she would like to leave the Company and go to law school. However, she would like to name her successor by assigning her rights under the Employment Agreement to her friend, Y. Would Employee likely be successful in this attempted assignment?

A.) Yes, but only if Y also agrees to a delegation of Employee's duties.

B.) Yes, the Agreement is freely assignable by both parties.

C.) No. Although the Company can assign its rights under the agreement, Employee cannot assign her rights or obligations under the agreement.

D.) No. Neither the Employee nor the Company can assign any rights under the Agreement.

Answer: C. The Company is allowed to freely assign its rights and obligations under the Employment Agreement, but Employee does not have the ability to assign her rights and obligations.

After the student can identify the parts of a contract and has demonstrated an understanding of their function and effect, the student could be asked to draft a simple contract or portions of a contract designed to achieve a specified effect. This kind of project could be used to assess the student's writing skills and problem-solving ability, as well as the student's understanding, synthesis, and application of legal doctrine. Once the problems are developed, the amount of additional resourced needed to evaluate these kinds of multiple choice and very short drafting assignments can be minimized.

2.4 *Multiple Assessment Projects*

With more time and more resources, the assessment process could be more comprehensive. Instead of using a single exercise, or even a single transaction, students could also be exposed to a wider variety of documents with a larger range of drafting issues. Because students are unlikely to have had significant exposure to the organizational structure and functionality of basic contractual forms, it would probably still be ideal to begin such a process with at least an introduction to the nature of contracts. This would mean that students should first be exposed to the function and form of preambles, recitals, payment provisions, representations, covenants, conditions, general or “boilerplate” provisions, and so on. Then they could be exposed to different kinds of contracts, and in each case asked to correct or draft provisions to accomplish specific objectives.

By way of example, some common contracts and transactional documents include bills of sale, employment agreements, equipment rental agreements, non-compete agreements, non-disclosure agreements, partnership agreements, powers of attorney, promissory notes, purchase orders, residential real estate leases, and wills. Any of these could form the basis for an assessment exercise.

Consider an equipment rental arrangement. Students could be asked to revise an equipment rental agreement form to include new terms, where they have to describe the equipment, change the term of the lease and payment amounts, and revise the permitted uses. If they are working with an entire document, figuring out what provisions to change (particularly if a change would mean a change in the numbering that could affect internal cross-references) could be a valuable exercise.

Alternatively, they could be asked to draft a will. This is the kind of project that might also involve interviewing skills, with a simulated client interaction forming the basis for the information needed to draft appropriate provisions. Students might be given a single form with which to work or might be offered a range of options to choose from. Alternatively, this project might start with a drafting checklist, where the students are asked to go research appropriate provisions. This kind of project could be used to assess a student’s ability to collect and analyze facts, to assess legal issues, to perform appropriate research, and to draft workable provisions incorporating relevant legal doctrine.

Similarly, simple exercises could be created for all of these kinds of forms, or as many are deemed desirable. Students could be asked to revise particular sections of standard documents to accomplish particular client objectives, to review an older form to ensure it complies with a recent statutory update, to add new clauses (such as an arbitration provision or counterparts and electronic signatures clause), or even to draft entire documents (whether or not they start with a blank template or form).

There are multiple potential benefits of offering multiple drafting exercises. First, repetition enhances learning.³⁶ Second, a more extensive set of experiences with drafting helps solidify the notion that this kind of experience is important and valuable.³⁷ Third, as exercises are repeated over time, student learning portfolios based on these assessments would become more extensive and more accurate, providing a picture of learning over time. In addition, if a student's performance suddenly drops off or declines markedly, this may provide an indication that the school needs to intervene, or at least inquire into the student's situation. Each individual school will, of course, have to determine whether these kinds of benefits offset the cost of increased resource demands, since each new exercise has to be created and updated periodically, and every student's performance on each exercise will need to be assessed.

³⁶ Although most educators will probably have observed this firsthand, there are plenty of studies suggesting that repetition does in fact improve learning. For example, one recent study documented the powerful improvement in learning when subjects were encouraged to retrieve and use information repeatedly rather than a single time. Jeffrey D. Karpicke, *A powerful way to improve learning and memory*, PSYCH. SCI. AGENDA (June 2016), <http://www.apa.org/science/about/psa/2016/06/learning-memory.aspx> (last visited May, 2018). Another source simply concludes that repetition is “perhaps the most intuitive principle of learning.” C. J. Weibell, *Principles of learning: 7 principles to guide personalized, student-centered learning in the technology-enhanced, blended learning environment* (dissertation) (2011), <https://principlesoflearning.wordpress.com/dissertation/chapter-4-results/themes-identified/repetition/> (last visited May, 2018).

³⁷ One of the significant deficiencies in legal education at most institutions is the lack of appropriate training in transactional skills, and the over-emphasis on dispute resolution. See Goforth, *supra* note 1, at 907-11, notes 12-30 and accompanying text.

2.5 *Repetition of Assessment Exercise*

When repeated, a single exercise can provide a picture of a student's learning over time.³⁸ For example, at the very start of a student's law school experience, they might be provided with a simple contract such as an indemnification agreement for a corporate director. The agreement could exceed what is allowed by statute, and the student could be asked to attempt to improve the contract. Prior to law school, this might be a very daunting experience. After a course in contracts, however, where the student is exposed to statutory interpretation and notions of good faith and fair dealing, there is a much better chance that, armed with the same contract and same statute, the student could craft a workable document. And if the same student is given the same exercise near the end of their final semester, one would expect that the student's work product would be even better. Using the same exercise at multiple times over the course of the student's educational experience in this way would give both a baseline and a way to track progress throughout law school.

It would not even be necessary to use the same assignment in order to track improvement. Suppose law students are asked at the start of orientation to draft an agreement calling for a corporation, Intellectual Property, Inc., to authorize another company, Mighty Manufacturer, LLC, to make widgets under designs that were developed by and are owned by Intellectual Property, Inc.³⁹ Let the students take the project home and work on it overnight. We suspect that the work product would not be particularly impressive. The next time students are given the exercise, perhaps it does not have to be widgets that are being built, but possibly a commercial solvent that is being produced pursuant to a patented process. Again, one company could be granting a license to another to use its

³⁸ Repetition has been shown to be a particularly effective technique for improving learning when it is spaced over time. Sean H.K. Kang, *Spaced Repetition Promotes Efficient and Effective Learning: Policy Implications for Instruction*, 3 BEHAVIORAL AND BRAIN SCIENCES 12, 13–18 (2016).

³⁹ We would not want to send students out to draft a contract for which forms are readily available, which is why we suggest “widgets” and why we would stay away from using words like “license” or even “patent” or “copyright.” There are an amazing number of forms out there, but part of what law school will give to students is the ability to search effectively to find the right kinds of forms to work with. For an examination of the potential impact of on-line forms and “automated transactional drafting,” see William E. Foster & Andrew L. Lawson, *When to Praise the Machine: The Promise and Perils of Automated Transactional Drafting*, 69 S.C.L. REV. 597 (2018).

intellectual property. Upon graduation, students could be asked to draft a similar document, by which time they should be able to come up with a relatively comprehensive, workable document. The projects can even be made increasingly complicated by adding requirements to include certain kinds of provisions, such as an indemnification provision in the event that the process is found to infringe on another's patent.

A similar process could take place with a form provided to the students, where they are asked to revise specified provisions. Before they have had any instruction in the law, they may find such a task incredibly daunting. Hopefully, they will be better able to tackle such projects after a full course of legal study. By starting before or even near the beginning of the law school experience, students' ability to work with, revise, or create transactional documents can be tracked through a series of related exercises to show if a law school is in fact arming their students and graduates with legal skills necessary to succeed in the practice of law.

III. SPECIAL CONSIDERATIONS

3.1 *Timing of Assessment*

The timing of any such assessment plan is obviously a matter of some importance. Most first-year teachers will eagerly and insistently tell you that they already lack sufficient time in their courses to cover all of the important doctrine associated with their assigned subject matters. Most first-year students will tell you that they already feel overwhelmed by all they have to learn. At what point in time, then, is there room to add additional instruction and evaluation?

Obviously, the answer to that timing question is likely to vary significantly from school to school. Some schools operate on a trimester system. Some start earlier or later than most others or have first semester exams after the usual winter break around New Year's. Some have longer or shorter scheduled breaks between semesters. And, of course, some teach Contracts at a different point in time than most other schools.

A majority of schools, however, operate on a semester basis. In addition, most schools teach contracts either in the first or second semester, or perhaps over the entire first-year. In cases where contracts is not a first-year class, or where there are no meaningful breaks between semesters because classes are scheduled year-round, other options might have to be considered, such as using a real estate transaction as the basis for the assessment.

Most law schools have some sort of break between the fall and spring semesters. Regardless of whether it is called winter break, year-end break, holiday break, or otherwise, there is often at least one or two weeks after the start of the year between the fall and spring semesters. Obviously, this would not be the case if a school had first semester examinations after New Year's Day, and it might not be the case for schools operating on anything other than the traditional two-semester schedule.

For schools that fit into this pattern, however, first-year students could be required to participate in an intersession assessment between the semesters. This could be done on a pass/fail basis, so that students who do not perform satisfactorily would be required to repeat the experience at a future date. (This would provide an incentive for students to treat the exercise seriously.)

Other alternatives would be to have an assessment run concurrently with the start of the spring semester, or to have it at the end of the semester following the first-year final exams.

3.2 *Who will do the Assessment?*

As was true when considering the possible timing of an assessment based on transactional drafting, there are a variety of possibilities when it comes to who will do the assessment. To some extent, the list of viable options will depend on the nature of the assessment technique that is chosen. It would be one thing to ask full-time faculty members to assess a single exercise; it would be something else entirely to add an additional course to several professors' teaching loads (even if done on a rotating basis in small groups of students). For this reason, it makes sense to answer this question first by considering what kind of project or experience would need to be assessed.

First, consider the single exercise, perhaps based on the MPT model described earlier in this article.⁴⁰ Obviously, in order for students to understand the importance of the assessment (and the underlying skills that are being assessed), the ideal scenario would involve assessment by tenure-track faculty members. While contract faculty, adjuncts, or even teaching assistants could do the assessment, that would send a probably

⁴⁰ See *supra* Section 2.1.

unintended message to the students that the skills involved (and the assessment itself) is less important than it really is.⁴¹

If we assume that the task of assessment is to be divided among multiple individuals (regardless of the qualifications of the evaluators), it is important that the exercise include a standardized assessment rubric, including model answers and an explanation of the considerations in conducting the evaluation. In fact, unless the person doing the assessment is also charged with preparing the project as well as evaluating it, the merits of a standardized assessment tool are hard to ignore. In smaller schools, it might be possible to assign the task of assessment to a single individual, which would guarantee some standardization of the assessment scale, but the workload that this approach could impose might make this difficult in larger schools.

If we move away from a single project to a for-credit course, or even to multiple exercises, the work load increases significantly. This means that teachers might expect a reduction in their other obligations in exchange for participating in this process, or this might make it more likely that a school will turn to adjuncts or contract faculty in order to carry out this task. If the multiple exercises are conducted at two different points in time, ensuring that the same person conducts the evaluation for any given student serves to minimize subjective differences in grading.⁴²

⁴¹ There is plenty of data to suggest that students are well aware of the disparities in status between tenured and tenure-track faculty members and any of the other groups described here. See, e.g., Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the "Legal Writing Pathology:" Diagnosis Confirmed*, 5 N.Y. CITY L. REV. 115, 132 (2002):

[T]he issue of "status" in the legal academy may play a role in lower student evaluations for writing faculty. A number of legal writing professionals have commented on the status of legal writing faculty within the academy. There is no question that "[l]ibrarians, clinicians, and legal writing teachers are now well-established categories in legal education. All three, regardless of their importance to the educational mission of law schools, are at the bottom of the legal education hierarchy. And all three groups are predominantly female." The status of legal writing faculty is certainly communicating something to first-year law students about the relative "status" of legal writing as a course in their legal studies.

See also Jenny B. Davis, *Writing Wrongs: Teachers of Legal Prose Struggle for Higher Status, Equal Treatment*, 87 A.B.A.J. 24 (August 2001) (discussing the current controversy of status for legal writing professionals within the academy, highlighting Professor Molly Lien's plight at Chicago-Kent).

⁴² While grading rubrics can help move the evaluation process closer to being objective, it is hard to completely remove the subjective element when evaluating writing. See

Finally, it is almost impossible to ignore the reality that many law schools are feeling cash-strapped at this point in time.⁴³ This fact alone may lead institutions to carefully preserve their faculty resources, looking instead to less expensive adjuncts or teaching assistants to conduct the assessment. While an outsourced assessment seems preferable to no assessment at all, the assessment process is likely to be compromised by this choice. First, the assessment is less likely to be taken seriously by students. Second, the skills being assessed are more likely to be undervalued by the students as a result of the unintended message this option conveys. Finally, the information obtained from the assessment may be less accurate (particularly if students are used, as they themselves may lack sufficient experience to provide quality assessment).

3.3 *What Schools can do with the results*

The cost-benefit analysis of the extra burdens associated with conducting assessment also requires an understanding of the benefits of conducting this kind of exercise. Perhaps most obviously, this is one way in which law schools might demonstrate compliance with the ABA standards for accreditation. American law schools are required not only to adopt learning outcomes,⁴⁴ but also to include various assessment methods “in its curriculum to measure and improve student learning and provide meaningful feedback to students.”⁴⁵ A transactional drafting assessment exercise could demonstrate that the law school has assessed student ability to absorb new material, engage in problem-solving, and provide effective written communication in a prescriptive manner (and possibly predictive as well, if an explanation of drafting choices is called for). The school could also consider whether changes to its program of

Brenda D. Gibson, *Grading Rubrics: Their Creation and Their Many Benefits to Professors and Students*, 38 N.C. CENT. L. REV. 41, 79 (2015); Beverly Petersen Jennison, *Saving the LRW Professor: Using Rubrics in the Teaching of Legal Writing to Assist in Grading Writing Assignments by Section and Provide More Effective Assessment in Less Time*, 80 UMKC L. REV. 353, 360 (2011) (framed in terms of how rubrics are valuable for “keeping the professor honest”); Stephanie J. Thompson & Hether Macfarlane, *Using Calibration Sessions to Create Reliable and Fair Assessments*, 24 THE SECOND DRAFT 5, 6 (2010).

⁴³ See Mark Strasser, *Tenure, Financial Exigency, and the Future of American Law Schools*, 59 WAYNE L. REV. 269 (2013) (“Law school applications continue to decline, and commentators suggest that law schools across the spectrum will be affected by the decrease in the number of students seeking law degrees.”).

⁴⁴ ABA Standard 302, *supra* note 5 at 15.

⁴⁵ ABA Standard 314, *supra* note 5 at 23.

education are necessary to further the development of these skills as a result of information gained through the assessment. Of course, compliance with the ABA standards is not much of a goal in and of itself. The fact that information gleaned from the assessment may enable the school to adapt and improve its curriculum is the real advantage here.

Beyond that, participation in the program might encourage more faculty members (and particularly those involved in the program) to consider the merits and benefits of assessment and assessment techniques. Some faculty members might be exposed to grading rubrics or might gain a deeper of understanding of the value of the process of creating such tools. Others might use the data obtained from the participation in others to adjust their courses to better meet the learning objectives of the school

A third potential benefit of an early assessment of transaction drafting skills is that it is another early identification of students with potential problems. The problems might lay in writing, but may also be problem in understanding how to apply doctrine, issues in problem-solving, or elsewhere. Whatever weaknesses may be revealed by assessment, the fact that the proposals outlined in this article would all occur relatively early in a student's law school career gives the school another opportunity to intervene before it is too late for success.

Finally, but by no means least importantly, this kind of exercise is one more way to introduce students to the importance of under-emphasized skills such as those with a transactional focus rather than those oriented towards dispute resolution.