

Outcomes Assessment & Professional Responsibility

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In the practice of law, how do we typically measure success? If an advocate, is success measured by the strength and creativity of advocacy? Or is a successful advocate one whose advocacy achieves fair and just results? If a transactional lawyer, is success measured by the exactitude of planning and drafting? Or do we consider a transaction successful if it works for the client? If an attorney's advocacy or planning isn't constructive or successful, is the fault always that of the judge or the client? Or should attorneys who find themselves unable to achieve the results their clients need or desire stop and ask themselves what went wrong with their own approach and do something to change it?

In teaching, for too long, faculty have measured their success by their inputs – the carefully chosen course materials, the meticulously planned learning activity, the brilliantly delivered lecture – without asking whether all this teaching is actually resulting in learning. When we read the exams or papers at the end of the semester, and see that some percentage of the students didn't learn what we expected them to learn, we may be inclined to blame the students. And it certainly is true that students are ultimately responsible for insuring their own learning. But in the end, if students aren't learning, simply blaming them for the failure is about as successful as blaming clients or judges for an unsuccessful practice.

There is a different mindset when it comes to teaching – one that is not unfamiliar to law professors, as I suspect that it is the mindset that drives every successful attorney's practice. That is mindset in which outcomes count. Now that's not to say the process doesn't count as well. As Professors of Professional Responsibility know from plenty of studies of malpractice, patients and clients will forgive doctors and attorneys even fundamental errors if they believe

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their professional cares about them and is working hard on their behalf. So, yes, in a fundamental way, it is important that the students know that you like them and care about them and are working hard on their behalf. It is your malpractice insurance.

But if we want to turn from avoiding malpractice and instead focus on improving student learning, we must approach our teaching from an assessment perspective. The first step in an assessment process is to think deeply about destinations. Where do we want our students to arrive after the journey through our course? In educational parlance, what are our learning outcomes? Second, we must think about checkpoints – how will we know if students are on course or if they’ve gotten waylaid or detoured along the way? Again, this is what educational literature would characterize as assessment. After planning outcomes and assessments, an assessment mindset uses that planning to drive the selection of subject matter, course materials, and learning activities.

This monograph is designed as a practical tool for helping professional responsibility teachers to develop effective and efficient assessment practices. A carefully structured program of assessment: the identification of discrete legal research skills outcomes, with defined levels of proficiency, and tools for assessing those proficiencies, can provide both incentive and structure necessary to effecting preparing students for the daunting responsibilities and challenges of becoming ethical balanced attorneys. The assessment approach to teaching can give faculty and students alike an energy and confidence that will fundamentally change how we think about teaching and learning in law school.

I. The Role of Assessment in Professional Responsibility Education

The professional responsibility curriculum shares many learning goals with the rest of the curriculum. We want students to be able to read and analyze a complex set of rules; be able to articulate and use foundational concepts (in our courses those might be confidentiality, conflicts of interest, fair play, and access to justice), and to be able to discern and navigate the power struggles implicit in multiple layers of regulation, to name a few.

However, professional responsibility education presents some unique demands and opportunities in the curriculum. As a required course, one could expect that the professional responsibility class has certain responsibilities to deliver core learning outcomes for all graduates. Indeed, professional responsibility the only course in the curriculum that is generally regarded as required by accreditation standards. Moreover those standards describe a breathtakingly broad set of learning goals. Standard 302(a)(5) provides that law schools require that “each student receive substantial instruction in... the history, goals, structure, values, rules and responsibilities of the legal profession and its members.” Interpretation 302-9 does little to provide more guidance on how instructors are to accomplish this goal, adding only the detail of content required by this instruction: “the law of lawyering and the Model Rules of Professional

Conduct of the American Bar Association.” By adding this detail to the interpretations, perhaps originally designed to emphasize that hortatory lecture series on “professionalism” would not substitute for doctrinal instruction, the ABA singled out mastery of certain black-letter law among the many objectives listed in the standards.

While not all of our students would agree that the course should be required, most would concur that its focus should be the law of lawyering. More so than any other course in the curriculum, the looming presence of the Multi-state Professional Responsibility Examination in many schools drives the learning goals of many students. Since the MPRE can test only those areas of regulation that have relatively clear and consistent answers, students want to direct their energies toward mastery of those topics. Many faculty members find these topics the least interesting and important aspects of the course. Of course that tension is present in any course subject to bar examination. However, unlike the bar exam to which students direct their energies primarily after graduation, students often take the MPRE during law school. Bar review courses and the students’ own experience teaches them that the most efficient way to master content is not to work from the original sources but to study pre-digested summaries of the law: transforming challenging exercises in critical reading and analysis into rote learning.

At the same time, pressures have increased on law schools to broaden their objectives – covering more subjects and more skills to a higher level of proficiency than ever before. Some of this pressure comes from practice, where the decline in mentoring and the economics of practice put pressures on law schools to deliver students ready for practice. Some comes from our students, who by their third year of law school have become bored by the same drill of survey and exam, and are hungry to have a greater connection between their studies, their future career, and their own personal identities. Some of the pressure comes from within the academy. The Carnegie Report on Educating Lawyers, for example, urges contextualizing the classroom’s legal analysis and doctrine² The study challenges law schools to give great emphasis to these practice contexts and skills. Since Professional Responsibility is the one course in the curriculum which nearly every student will be using in practice regularly, professors are increasingly called upon to extend learning outcomes to include the skills necessary to insure compliance with professional standards.

Finally, the professional responsibility curriculum is also called upon to address “the apprenticeship of professional identity”³ helping students to refine their ethical and moral reasoning.⁴ As explained by the authors of that report, “Professional identity is in essence, the individual’s answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? and What place do ethical-social values have in my core sense of professional identity?”⁵

² WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 56-57 (The Carnegie Foundation for the Advancement of Teaching 2007).

None of this is to say that the professional responsibility course bears responsibility for all these learning outcomes alone,⁶ but it does emphasize the significant demands on the course. How do teachers of professional responsibility begin to think about structuring their courses and teaching to meet these demands? While it may seem backwards to begin with outcomes assessment, it is nonetheless a powerful point at which to begin. Educational researchers have demonstrated that students learn more and better when learning goals are clear,⁷ when they are given opportunities to practice what they are learning,⁸ and when they receive feedback on their learning.⁹ These are the essential elements of outcomes assessment-driven education.¹⁰ All

³ *Id.* at 135.

⁴ *Id.* at 57-58. ⁵

Id.

⁶ Indeed there have been ongoing calls for teaching ethics across the law school curriculum have Professor Rhode is a leading exponent of the pervasive method. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

⁷ Okianer Christian Dark, *Statement of Good Practices in Legal Education: Principle 6: Good Practice Communicates High Expectations*, 49 J. LEG. ED. 401 (1999); B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89 (2002/03).

⁸ Gerald F. Hess, *Statement of Good Practices in Legal Education: Principle 3: Good Practice Encourages Active Learning*, 49 J. Leg. Ed. 401 (1999); R Lawrence Dessem, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Emphasizes Time on Task*, 49 J. LEG. ED. 401 (1999)..

⁹ Terri LeClercq, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Gives Prompt Feedback Learning*, 49 J. LEG. ED. 401 (1999).

¹⁰ Outcomes assessment has been an important part of university accreditation systems since the 1980s when a series of studies of higher education raised issues of accountability. Development of assessment for learning in professional schools did not respond as quickly as undergraduate programs, primarily because licensing exams, such as the bar examination, were seen as acceptable summative assessments of graduates. To read more about the history of outcomes assessment in legal education, see GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS (2000).

While recent attention has been given to proposed ABA standards focusing on outcomes assessment, the Standards have provided for this assessment for some time, albeit at a very high level of generality. In 1996, Standard 302 required “an educational program designed to provide its graduates with basic competence.” AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE, Standard 302(a)(2) (1996). Without measures for defining competence, the standard did little to further learning-centered measures and three years later this bold step forward took one step back, when the outcome-focused “competence” requirement of Standard 302 was removed and replaced with an input measure: “substantial instruction.”

Assessment of knowledge and analytical skills has retained this inputs or instruction driven model. In contrast, two recent amendments to the ABA Standards were significant as they relate to developments in good teachers regularly undertake outcomes assessment, though they may not name the process as assessment. Whenever we give a test or assign an essay, look at the responses to see where students have done well or not so well, and reconsider our approach to teaching in light of that information, we’re doing a form of assessment. Outcomes assessment simply makes that process more explicit and systematic.

II. *Choosing destinations*

The assessment process requires beginning with outcomes – with the destinations we plan for our student’s journey through law school. Why do we begin with these destinations? Think about planning a vacation for your family. “Where shall we go?” has to be the first question. And that question is, of course, one that must be answered with the resources and preferences of the family in mind. Likewise, choosing and communicating the educational destinations you have planned for students is critical to the success of the journey. A professor need only utter the magic phrase “on the exam...” to confirm decades of educational research that emphasizes how much assessment drives student learning.

There are several ways in which we might not plan our educational journeys very well right now. To continue to travel analogy, some of us know where we are going and how we will get there and we’re hoping our students will follow along, but we don’t often check in the rear view mirror to see if our students are with us. Some of us might take such a scenic route to our destination that our students are actually misled about where we are headed. Some of us are so concerned about being in control of the trip that we don’t give our students an opportunity to let us know that we need to go a little faster, a little slower, or for that matter, that they’ll meet us (or even beat us) there.

So how do we improve how we think about these destinations – how do we choose and articulate these learning outcomes?

assessment of skills. In 2004 the ABA adopted some of the most significant amendments to the ABA standards for skills instruction. For the first time, the Standard 301 Interpretations referred to assessment of student learning apart from the bar examination. In 2006, an interpretation of Standard 302 gave very explicit definition to what would be considered “rigorous” writing instruction: including multiple assignments, multiple drafts, conferencing, and assessment methods. Interpretation 302-1 (2006-07.) This micromanaging of legal writing instruction contrasts with the following interpretation that law schools were encouraged to “be creative” in instruction of other professional skills. Interpretation 302-2 (2006-07.) Finally, in the 2008-09 Standards amendments, an extensive interpretation of Standard 301 for the first time gave detailed guidance for demonstrating compliance with that part of the Standard requiring that law schools maintain “an educational program that prepares its student for admission to the bar.” Standard 301(a) and Interpretation 301-6 (2008-09). An appendix to the standards provided additional commentary on the interpretation.

The most current amendments being considered for standards for approval of law schools would bring law schools into assessment conversation, by requiring law schools to identify learning outcomes, design assessments of those outcomes, and use that data to improve learning. American Bar Association Section of Legal Education and Admissions to the Bar, Standards Review Committee, CHAPTER 3 PROGRAM OF LEGAL EDUCATION (Draft July 2012).

A. *Choose Significant Learning Outcomes*

In *Making Learning Whole*, educational specialist David Perkins emphasizes that learning is most effective if learners “work on the hard parts.”³ Similarly, Grant Wiggins and Jay McTighe, in their work on *Understanding by Design*, emphasize beginning the search for course goals by looking for the “Big Idea” in the course. These are the ideas that can be used throughout a legal career and that require a lot of work to really understand the complexities of the concept. Concepts about which there is a great deal of controversy are often good themes for significant learning goals. However, the value of this notion of a “big idea” is not limited to doctrinal or theoretical concepts – skills and clinical courses have thematic structures as well. Think about ideas such as the role of empathy in effective legal practice, a client-centered approach to counseling, or a particular model for approaching legal research. These big ideas that may form the theme of a skills-focused course can easily meet the qualifications above.

Thus learning goals might include subject matter goals, skills goals, or values and attitudes goals. The divisions here are artificial of course. Any worthwhile theme is likely to require students to have a core body of knowledge, to apply or develop some set of skills relevant to the theme and to reflect a set of values and attitudes. Even in a purely knowledgedriven course, students cannot acquire knowledge in law school without having also acquired some analytic skills and some (often implicit but nevertheless present) values about that knowledge. The question is one of emphasis – you must in all your teaching determine the priorities of learning goals.

This is especially so in the professional responsibility course, where values underlie nearly every topic. For example, most courses in professional responsibility address topics such as formation of or withdrawal from the attorney-client relationship. We expect that students can identify the elements of an attorney-client relationship and restate accurately the rules governing withdrawal. However, we are very likely to expect students to have the skills of reading these rules and deriving their meaning, and the analytical skills necessary to apply these to resolve difficult client representation situations. We might also extend these subject to integrate skills instruction such as drafting non-engagement or disengagement letters into this subject. Regardless of how we teach these rules, however, we will be teaching values about client representation in the very ways in which we pose questions and the viewpoints from which we approach these rules. A discussion of the steps necessary to withdraw upon client non-payment, for example, raises implicit values about the balance between earning a living and representing clients. Being aware of the values that rules implicate and making conscious choices about how we frame those values in our assignments and learning activities is yet another aspect of choosing learning outcomes.

One very effective way to think about learning outcomes is the concept I think of as *unlearning outcomes* – focusing major learning outcomes on preventing and addressing

³ DAVID N. PERKINS, *MAKING LEARNING WHOLE: HOW SEVEN PRINCIPLES OF TEACHING CAN TRANSFORM EDUCATION* 83-89 (2010).

predictable misunderstandings in the course.⁴ Thus, for example, much of the first year of law school is devoted to “unteaching” the positivist philosophy of students who believe the law is resolutely determinate.⁵ These fundamental misunderstandings block learning.⁶ Students construct knowledge by building on prior understandings. If those prior understandings are incomplete or incorrect, new learning will be flawed as well. Thus, “teachers need to pay attention to the incomplete understandings, the false beliefs, and the naive renditions of concepts that learners bring with them to a given subject.”¹⁵

Some of the most fundamental misconceptions that students bring to a subject from their own experience (or from bad course outlines passed around from prior semesters) must be discovered in the classroom. Brief classroom assessment devices such as “minute papers” or statements for the students to complete can easily generate a range of incorrect or incomplete understandings for any given topic.⁷

Here, for example, are some misconceptions I have regularly found among my students in Professional Responsibility that drive many of my learning outcomes.

- The (often unconscious) belief that being a professional is about education, status, and power rather than about service to clients, the courts and the public. (thus making it difficult to understand rules that require an attorney to subjugate his or her self interest to a client, especially a non-paying client)
- The continuing belief that law can provide clear and predictable answer to all legal solutions, rather than recognizing that some legal doctrines are simply fraught with too many internal tensions to be predictable (thus impeding progress in understanding of concepts like “unauthorized practice of law” or in appreciating the role of an attorney’s discretion)
- The idea that all an attorney needs to do to avoid discipline and liability is “do the right thing” (in a generalized moral sense). In other words, I want the students to appreciate that there is indeed law – that the legal profession is a regulated industry with complex law from many competing sources that governs their conduct, so that they will always

⁴ Id.

⁵ James Maule, *Crumbling Myths and Dashed Expectations*, in *TECHNIQUES FOR TEACHING LAW II*, supra note 58, at 90-91.

⁶ M. Suzanne Donovan and John D. Bransford, *Introduction*, in *NATIONAL ACADEMY OF SCIENCE, HOW STUDENTS LEARN: SCIENCE IN THE CLASSROOM* (M. Suzanne Donovan and John D. Bransford, eds., 2005) <http://www.nap.edu/catalog/11102.html>. (“Students come to the classroom with preconceptions about how the world works. If their initial understanding is not engaged, they may fail to grasp the new concepts and information, or they may learn them for purposes of a test but revert to their preconceptions outside the classroom.”)¹⁵ NATIONAL RESEARCH COUNCIL, COMMITTEE ON DEVELOPMENTS IN THE SCIENCE OF LEARNING, *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL: EXPANDED EDITION 10-11* (2000).

⁷ For more complete description of how to use classroom assessment techniques, see Barbara Glesner Fines, *Classroom Assessment Techniques in Legal Education* (2001), at <http://law2.umkc.edu/faculty/profiles/glesnerfines/cats.htm>.

research ethics questions (even if it is just to look up the rule) rather than simply knock on their colleague's door and ask "Joe, whaddya think?"

- The attitude that attorneys work alone and that being able to collaborate is not an essential skill for professionals.
- The assumption that just because an attorney doesn't have the authority to take certain actions (such as waive privilege) doesn't mean he or she doesn't have the power to do that. A variation on this misconception is believing that an individual is not an attorney's client because the attorney would have a conflict of interest.
- The confusion that arises when two different sources of law regulate the same conduct, even using similar language, but with much different rules and policies (e.g., ethical duties of confidentiality and attorney-client privilege; ethical duties of competence and negligence standards of care; conflict of interests for purposes of discipline and for purposes of disqualification).
- The understanding that just because a practice is widespread among attorneys doesn't mean it complies with the rules of professional conduct.
- The observation that different attorneys can have very different notions about what constitutes an ethical and effective relationship between attorney and client regarding allocation of decision-making authority and that the rules leave room for those differences.

What does it take to "unlearn" an idea? There are certain basic instructional elements necessary for a course to effectively help students overcome foundational misconceptions. First, students must be provided a framework for concepts and multiple representations of those concepts, rich in detail and authentic in setting. Beyond this framework, however, the students must be provided with appropriate challenge, that is, "...classroom norms that encourage the expression of ideas (tentative and certain, partially and fully formed), as well as risk taking. It requires that mistakes be viewed not as revelations of inadequacy, but as helpful contributions in the search for understanding."⁸ Frequent assessment provide this challenge, particularly when students understand the purpose of this assessment and do not perceive it as high stakes testing.

Students need frequent and meaningful feedback on their progress toward learning outcomes, but not necessarily frequent and multiple grades. I have found that it is unnecessary to assign any more than nominal points to assessments throughout the semester in order to reinforce student effort and attention. Awarding some point values to certain assessments can be important for signaling the importance of the learning outcomes being assessed. Some learning outcomes are easily assessed through testing and can be assigned distributed grades. Testing knowledge, research and analytical skills are among these learning outcomes assessed through

⁸ M. Suzanne Donovan and John D. Bransford, Introduction, in National Academy of Science, *How Students Learn: Science in the Classroom* (M. Suzanne Donovan and John D. Bransford, eds., 2005) <http://www.nap.edu/catalog/11102.html>. ("Students come to the classroom with preconceptions about how the world works. If their initial understanding is not engaged, they may fail to grasp the new concepts and information, or they may learn them for purposes of a test but revert to their preconceptions outside the classroom.")

testing or written assignments. Others learning outcomes – particularly those related to development of professional identity -- are more difficult to translate into graded activities, but if we place a high priority on those outcomes, then our assignments and assessments should all reflect that priority. Because of this, I do assign some grade value to journaling essays, drafting exercises, and other professional skills and identity assessments. Moreover, especially in the Professional Responsibility class, I want to emphasize the importance of sustained effort and deemphasize the high-stakes, time-pressured end of semester exam as the sole measure of a student's achievement.

However, grading is not assessment. For grades to provide students with meaningful feedback about their learning, the grades must reference defined criteria that describe and differentiate student achievement of the knowledge and skills objectives being tested on each question or portion of a question. Likewise, ungraded formative assessment activities are valuable only to the extent students can understand how to improve their learning as a consequence of these assessments. For this reason, use rubrics for many of the more formal assessments I assign to students.

Providing students these rubrics ahead of time insures that students understand the criteria by which their work will be assessed. This facilitates student self-assessment. This self assessment is yet another critical component in helping students to remove roadblocks to understanding as it leads students to think about their own learning processes and progress. This is what educational theorists term “metacognition” and is critical to a student's ability to unlearn foundational misunderstandings.⁹

B. Prioritize

After you have narrowed down some priorities for learning goals, you must then depend on the level of proficiency you will expect for student learning. Will this class introduce this knowledge, skill or value or will your class be building on prior learning so that you can expect greater mastery? The choice here, of course, is that of depth v. breadth. The bias implicit in the “big idea” approach to course planning is toward depth. An idea big enough to stand the test of time, to be controversial and subtle, to yield long-lasting insights, is likely one that must be revisited class after class, in ever deepening circles.

Integrating these learning outcomes into a standard curriculum may seem impossible because there is so much content to be “covered” in our courses. “Too often, classes aspiring to skill development morph into classes about the substantive legal framework of a particular

⁹ *Id.*

subject, with professors expressing concern about whether they have covered enough of the substantive framework during the course of the semester”¹⁰

The problem is not confined to legal education. “The curse of coverage” has bedeviled curriculum development throughout academia. Harvard Education Professor David N. Perkins, refers to this phenomenon as “aboutitis” creating “endless learning about something without ever getting better at doing it.”¹¹

This drive for coverage persists, despite the research on learning that establishes that teaching more content does not necessarily result in more learning. “If learning is to endure in a flexible, adaptable way for future use, coverage cannot work. It leaves us with only easily confused or easily forgotten facts, definitions, and formulas to plug into rigid questions that look just like the ones covered.”¹² Research at many different levels of education has reinforced this essential understanding: more content does not necessarily translate into more learning. Studies of student learning in undergraduate and high school support this finding.¹³ For example, in a study of 8,310 undergraduates, researchers found that students whose high school science classes emphasized depth over breadth achieved better grades in their freshman college science courses than students whose high school courses were more balanced.¹⁴ The advantage for students whose high school teachers choose depth over breadth was “equal to two thirds of a year of instruction over their peers who had the opposite high school experience.”¹⁵

The explanation from cognitive science for this increased learning is important to legal educators. For learning to occur, students must be able to build new concepts on the schema they bring to a course. However, the schema that students bring to a course are often incomplete and inaccurate. To displace that framework and build new understandings takes time. “It takes focused time for students to test their ideas and find them wanting, motivating them to reconstruct their knowledge.”¹⁶

¹⁰ Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 279, 287 (2012), at <http://lawdigitalcommons.bc.edu/jlsj/vol32/iss2/4>.

¹¹ DAVID N. PERKINS, *MAKING LEARNING WHOLE: HOW SEVEN PRINCIPLES OF TEACHING CAN TRANSFORM EDUCATION* 6 (2009).

¹² GRANT P. WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN* 46 (2nd ed. 2005)(Lee Shulman, *Taking Learning Seriously*, 31(4) CHANGE 10, 12 (July/August 1999).)

¹³ Jay Mathews, “Will Depth Replace Breadth in Schools?” *Washington Post*, February 27, 2009 available online at http://voices.washingtonpost.com/class-struggle/2009/02/will_depth_replace_breadth_in.html A 2005 study of 46 countries found that those whose schools had the best science test scores covered far fewer topics than U.S. schools.

¹⁴ Marc S. Schwartz, et. al., *Depth Versus Breadth: How Content Coverage in High School Science Courses Relates to Later Success in College Science Coursework*, The authors are Marc S. Schwartz of the University of Texas at Arlington, Philip M. Sadler and Gerhard Sonnert of the Harvard-Smithsonian Center for Astrophysics and Robert H. Tai of the University of Virginia.

¹⁵ *Id.* at 819.

¹⁶ *Id.* at 820.

Medical schools, for example, face the same pressures for coverage as do law schools. Researchers have noted that “The information density problem in medical schools is being compounded annually as the biomedical literature expands.”¹⁷ Yet research studies in medical education have demonstrated that, here too, “Students tend to retain high levels of learned materials only briefly unless the information is frequently reviewed or applied.”¹⁸

In the choice between depth and breadth, the ever-present drive for “coverage” implicit in the growing size of course books consistently lends advantage to the “breadth” side of the equation. Likewise pressures for bar exam preparation may drive teachers of professional responsibility to emphasize more doctrine in the belief that this emphasis will improve student preparation for the MPRE.¹⁹ However, there is little evidence to support this hypothesis.²⁰ Some anecdotal evidence suggests that students who have failed the bar tend to avoid courses on bar-tested subjects while in law school.²¹ That observation does not prove that it is the absence of “coverage” that has handicapped these students on the bar but the absence of the demands on academic skills development that these courses may present. Research has pointed to few factors that can significantly predict bar passage, but the most consistent factor identified has been law school grades.²² That this correlation is significant even based on first-year grades, indicates that it is not the substantive knowledge advantage, but the acquired skills of disciplined study, legal reasoning, and legal writing (especially in the context of final examinations), that make the difference on bar exams. Professors who routinely work with bar applicants, and especially bar repeat takers, testify to the principle that “A school need not design a curriculum around the specific topics tested on the bar exam.... Learning to think like a lawyer is the key to passing the bar.”²³

The objection regarding coverage, then, resolves itself in recognizing that one must always necessarily choose to forgo some breadth if one wishes to set learning outcomes at a level of proficiency above mere rote learning. Can you not conceive of a particular case, statute, doctrine or theory that could occupy all of your student’s learning for fourteen weeks if you set

¹⁷ I. Jon Russell, M.D., Ph.D., et. al, Effects of Lecture Information Density On Medical Student Achievement, 59 J. Med. Educ. 881-882 (1984).

¹⁸ *Id.* at 888.

¹⁹ *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446 (2002). See also, Tamara Lawson, *Teaching Civil Rights: Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS L.J. 837, 840 (2010)(“A reality of teaching required courses is that they are subjects tested on the bar exam, and towards that end, coverage is a legitimate concern”).

²⁰ “Although law school professionals routinely advise students to take bar-tested courses, there does not appear to be any statistically verifiable support for the practice.” Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 344, n. 307 (2007).

²¹ *Id.* at 344, n. 309 (collecting reports from academic support professionals at several schools).

²² Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 J. MARSHALL L. REV. 517, 523 (1991).

²³ Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 452 (2004)

the level of expected proficiency high enough? Is there a course in the curriculum for which all the doctrine, rules, policies and context could be covered – even in cursory fashion – in fourteen weeks? For deep and transferable learning, for developing collaborative and independent learners, we must aim for higher levels of proficiency, which requires thoughtful choices about the knowledge and skills in using that knowledge for which we desire that proficiency.

As a practical matter, many of us choose a proficiency goal for student learning that allows us to land somewhere in between becoming experts on the minutiae and becoming acquainted with the field. We may choose to dig deep on one topic in the course but provide a cursory survey of others. But if we have chosen a theme carefully, we find these choices of depth and breadth become less troublesome. Planned carefully, learning can re-emphasize and develop a thematic understanding while surveying a diverse and broad range of topics. To revisit the example of authority, for example, one might decide that a core theme for students to master is the difference between power and authority in law. Teaching from the beginning from this theme can give the concept of primary and secondary authority context and meaning far beyond knowing which court governs which type of law, but can allow students to develop a framework into which they can place those rules and understandings.

C. Think of the Students

Just as expectations management is important in representing clients, so too it is important that you understand your student's expectations, abilities, and preferences in planning learning outcomes. If you don't talk to your students ahead of time about the outcomes you have for the course and give due respect to their own expectations, you may simply be leading where they do not want to follow. Be realistic about how much time and effort both you and the students can bring to the learning task.

My own experience is that students come to my course with two primary learning goals: they want to learn enough to pass the Multi-state Professional Responsibility Exam and they want to learn enough to keep from getting disbarred. Yet they often come to the course with a notion that a course in legal ethics is one that is basically contentless – a bunch of sermonizing about a professional ideal from ages past – or that its content boils down to “everything I need to know about legal ethics I learned in kindergarten.” I cannot ignore their fears or distrust in planning the course. I cannot say to them “This is not a bar review course!” as though they will all nod and sagely agree that such an expenditure of their tuition dollars would be a waste of time. I cannot begin to lecture about the “values of the profession” from a vantage point that is lacks both humility and realism about the many ways in which “values” are a cover for market protection. I must acknowledge their fears and honor their diverse experiences and viewpoints. But that doesn't mean I have to turn the course into an MPRE course or refrain from exploring difficult issues of values, ethics, politics and emotion. Just like clients come to attorneys with unrealistic expectations that require a conversation and reality check, so too may our students. But you will not know unless you ask.

One problem in teaching professional responsibility, no matter what the learning goals, is generating student motivation to achieve these goals. For at least some law schools, the student response to professional responsibility is less enthusiastic than for other courses. I believe that an important aspect of that motivational problem is the tension between the learning goals of the students and the teaching goals of the faculty. One way I address this tension is by asking students before the class begins to identify their own learning goals for the course. The distribution of answers vary from semester to semester (often as a product of the relative percentage of second or third-year students in the class), but in general I find that student responses divide into three basic categories: One or two students will admit that they have no learning goal – that they are simply taking the class because they have to and they want only to pass it. A small percentage (10-30%) of the class state short-term learning goals related to extrinsic standards, (getting an A, passing the MPRE). I have had as many as 10% of the students state that passing the MPRE is their only learning goal. A fairly sizable group of students (40-60%) will phrase their learning goal as “to stay out of trouble” (avoid getting disbarred, avoid malpractice, etc.) A slightly smaller percentage (30-50%) will mention a desire to learn for excellence or highly ethical practice. A few students will identify a particular issue of interest to them (how to deal with conflicts of interest being a very common one).

During the first class, I share these results with the students. I note that we agree on many of the learning goals for the course. I emphasize that I too want them to pass the course and the MPRE, but suggest that neither of these are difficult hurdles and that they can all accomplish this learning goal with a bit of self-discipline and attention to monitoring their own learning. I do that I expressly including multiple choice exam questions and a guide to study and preparation for the MPRE in the text for their use but that I will not be taking much class time to coach them on those parts of the law governing lawyers that is easy enough for them to master on their own. Through this approach, I hope to meet the immediate learning goals of students for mastery of "black letter" and, at a minimum, remove a motivational "distraction" from the core of the class, while showing the respect for student needs that creates an atmosphere of trust.

I emphasize that I share with the majority of the class their desire to use the course as a learning opportunity that will help them in practice – whether to avoid getting into trouble or to become excellent and ethical attorneys. That all sounds well and good, but including skills and values goals in the course requires learning time in and out of class. I can't do justice to my core goals for the course and also expect students to master the entirety of the Model Rules of Professional Conduct, much less that vast array of statutes, administrative regulations, common law doctrines and court rules that regulate attorney conduct. I have to ask myself what is core and what is nice to know but not critical to the core. The answer is that a class and a half is devoted to a client interviewing and counseling simulation rather than the 5 or 10 minutes it would take to lecture on the content of Rule 1.4's requirement of communication. A portion of several classes are devoted to research methods and materials, with exercises for the students to complete out of class, which I then must review and critique. In exchange, the whole of attorney

advertising and solicitation is relegated to one class, as is trial tactics, while judicial ethics are cut entirely.

Do I worry about what I don't "cover"? Sure -- but however important the ideas that I don't address might be, they are not as important as having all the students ultimately arrive at the destination we have set out to reach.

Once you have chosen some goals and levels of proficiency that develop your overall theme, you must state those goals in concrete, measurable terms – what will you see and hear that will let you know the students have achieved the desired learning? It is very easy to say that you want the students to “know the law” or “be able to communicate clearly” – but those generalized goals are not likely to guide you in developing activities and assessments. Aim for statements of objectives that the students themselves will be able to use to assess whether they are achieving. Often it is helpful to frame your objectives as questions you want students to be able to answer at the end of the course.

D. Make Outcomes Count

Once we have established our outcomes, we must design assessments if we want those outcomes to count. “Assessment methods and requirements probably have a greater influence on how and what students learn than any other single factor. This influence may well be of greater importance than the impact of teaching materials.”³³ However, we are often inclined to skip the step of planning assessments and move from our declaration of a destination to hop in the car and head off in our caravan. But how will we know whether our students are coming along with us? This is what assessment is all about. There's a lot of talk these days about outcomes assessment in law school and I think a lot of misunderstanding about what that means, but in the end, it's really nothing more or less than knowing whether our students are learning what we want them to learn and using that information to improve our teaching. Outcomes assessment doesn't mean the ABA or the bar or even the law school faculty need to decide out destinations or that we all have to agree on the same destination. What we do need to agree on is where we want our students to go and how we will know if they get there.

This requires a subtle but important shift in our thinking as we plan each class. Instead of asking “what will we do today?” we ask ourselves “how will I and the students know what they have learned?” Grant Wiggins and Jay McTighe provide us a useful comparison by contrasting thinking like an assessor with thinking like an activity designer.³⁴

Thinking like an Assessor	Thinking Like an Activity Designer
What would be sufficient & revealing evidence of understanding	What would be interesting and engaging activities on this topic?
What performance tasks must anchor the unit and focus the instructional work?	What resources and materials are available on this topic?

How will I be able to distinguish between those who really understand and those who don't (though they may seem to)?	What will students be doing in and out of class? What assignments will be given?
Against what criteria will I distinguish work?	How will I give students a grade (and justify it)?
What misunderstandings are likely? How will I check for those?	Did the activities work? Why or why not?

Assessment is an on-going process. Often when faculty hear “assessment” they think “final exam” – but that form of assessment (termed in the educational literature “summative

³³ Best Practices at 235, quoting Bone at 2)

³⁴ Wiggins and McTighe, *Understanding by Design*, supra note ___ at ___. assessment”) is too late. The other form of assessment (which is called “formative assessment” in the educational literature) is designed to help both the professor and the student determine where the student is on their learning journey in time to make course corrections. Apart from skills-focused classes such as legal writing or clinic course, most law school classes provide little formal assessment of student learning while that learning is taking place. In most law school classrooms, the ongoing assessment of learning is limited to an informal process of observation in the day-to-day classroom teaching. This is valuable, no doubt, but is not nearly reliable or sufficient enough to truly generate learning gains.

We know from decades of research about learning at every level that frequent, timely and focused assessment is critical to improving student learning. Frequent assessment can also result in metacognitive gains, as students develop the skills for self-assessment of learning. As awareness of learning motivates further learning, a cycle of success can increase student learning in sometimes dramatic fashion. While most faculty are aware of the need for frequent feedback to improve student learning, what faculty sometimes recognize only intuitively is that they too need frequent and timely feedback on student learning in order to improve their teaching.

So how do you undertake this formative assessment throughout the semester without taking home a pile of bluebooks every week? (Not that critiquing a pile of bluebooks every week wouldn't result in some significant learning gains, but one must respect one own limits and those of the students. If a professor is too ambitious in assessment activities, they will set themselves up for failure and the students for frustration.)

To design assessments, first choose what you want to assess. Hopefully you will be motivated by your core themes to choose to assess aspects of learning that are critical to that core. The key here is to choose a very specific context and very specific information you want to

gather about student learning. In a professional responsibility class, assessing whether students understand conflicts of interest is not the kind of assessment one can undertake in a single classroom assessment. One can, however, determine whether students can articulate the “same or substantially related” test or explain a conflict that would exist if two individuals were current clients that would not exist if the representation of one of those clients had ended.

After a specific outcome is identified, choose a method for assessing learning. There are many methods of obtaining that feedback on student learning throughout the semester that can provide students feedback and inform your own teaching. Thomas Angelo and K. Patricia Cross in their book *Classroom Assessment Techniques*²⁴ provide a host of useful devices for gaining information about student learning. The techniques those authors gathered shared several characteristics: “learner-centered, teacher-directed, mutually beneficial, formative, contextspecific, ongoing and firmly rooted in good practice.”³⁶

In the remainder of this paper, I suggest a number of assessment techniques, with examples from the professional responsibility class, that can provide important information about student progress in achieving the learning outcomes I have set for a course.

The final step in the assessment process is to use the data one gains from assessment to improve learning. Sometimes the very process of assessment provides the critical feedback that helps students learn. In other instances, assessment reveals fundamental misunderstandings that will take more concerted effort by both teacher and student to correct. In either case, if faculty do not critically examine their assessment data and use it to either reconsider learning outcomes or restructure learning activities, the entire point of the assessment process is lost.

²⁴ THOMAS ANGELO AND K. PATRICIA CROSS, *CLASSROOM ASSESSMENT TECHNIQUES* (2d Ed., Jossey-Bass 1993).

³⁶ Id. at 4.

Examples of Learning Outcomes and Assessment Methods in the Professional Responsibility Course

A. Socratic Dialogue as Assessment

Along with pure lecture, the overwhelming majority of law school classes are taught by a dialogue method.²⁵ Faculty can obtain a good deal of assessment information about the student or students participating in the dialogue, though the validity of that information may depend on the student's response to the stress of "the hot seat." Given the pervasive use of this teaching

²⁵ Steven I. Friedland, *How We Teach: A Survey Of Teaching Techniques In American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996).

technique, it would seem that time spent in developing dialogue as assessment would be most productive as well as comfortable to all concerned.

One problem with using classroom dialogue as assessment is that we are sometimes unsure what it is we are assessing with any set of questions. Often we are not truly trying to assess student learning as much as promote thought or organize learning. However, if we carefully design questions with assessment in mind, we can gather information about the student's knowledge, skill, attitudes or preparation.

The second problem with dialogue as assessment, is that it only assesses the learning of those students participating in the dialogue. To gather information about the learning of the class as a whole, we need to find a way to broaden the dialogue. One easy way to broaden dialogue is to simply poll the class. Students can vote by raising hands, displaying cards or signs you have distributed ahead of time, or – if the classroom is equipped – providing electronic “votes.” Using methods that do not require students to display their answer to others may provide more accurate assessment. Audience response systems (clickers) are especially useful for this assessment technique because they provide immediate data which you can also save and compare to the data from assessments of that same learning outcome at a later date in order to measure progress. However, the same can be accomplished by simply counting hands.

This is the type of assessment data that you can use immediately. If the vast majority of the class answers correctly, you can simply provide a brief explanation and then move on. If, however, the majority of the class is incorrect, you can backtrack, address the misconception (to a more an audience whose attention has been sharpened by being “wrong”) and then move forward again. If the class is divided, you can also provide explanation and move ahead or, for more active learning for all participants, ask students to turn to someone who gave a different answer and convince that person of the “correct” response. The ensuing dialogue will, often as not, replicate the one-on-one dialogue you would be having with the student who did not understand.

B. Quizzes and Worksheets

Short multiple choice or short-answer quizzes can be powerful tools for assessing and promoting student learning and improving the quality of teaching. So long as the quizzes do not count for the final grade (or count only a minimal amount) students appreciate the clear, timely feedback these quizzes can provide. Since most students are comfortable with quizzes, they require less introduction and meet with less student resistance than other methods might. Quizzes can be used to assess student's background knowledge or understanding in order to plan approaches to lessons, to establish a baseline to measure student learning, and to assess student understanding. They can also serve a number of purposes beyond assessment, such as guiding student learning and discussion of a subject, setting up class discussion, or reviewing

materials already learned. Quizzes can, of course, be part of summative evaluation process as well.

I most often use individual quizzes as out-of-class assessment devices, rather than taking class time. If one provides students with quizzes that permit students to self-assess their mastery of basic concepts and vocabulary, class time can be turned toward learning activities for which face-to-face meeting is more critical: simulations and practice of lawyering skills or creative and exploratory dialogue and debate for example. For example, rather than spend class time in Professional Responsibility on doctrinal details of admission to practice, I assign my CALI lesson on the subject, which provides interactive opportunities for students to test their understanding.²⁶ I then spend class time on an interviewing exercise in which the students conduct an interview of a law student who has been denied permission to take the bar examination.²⁷

A second assessment device straight from the halls of elementary and secondary schools is the worksheet. I find worksheets can be especially useful tools for focusing student attention on the most difficult parts of a doctrine or for gathering perceptions about skills exercises. For example, Students are often confused by their initial reading of Rule 1.16's permissive withdrawal rules. I find that there are two permissive withdrawal situations that cause students the most difficulty, so I assign the following worksheet for the students to prepare for class.

Firing A Client Review Questions

Client Nonpayment: In situations in which clients don't pay their fees, you may want to withdraw before you incur any further losses. How do you go about doing that?

1. Which rule permits withdrawal when a client won't pay?
2. How do you withdraw when your client won't pay? Can you just simply quit working for them?
3. Can you say "I won't work until you pay?" - no, either you work or you withdraw!
4. Might a court refuse to permit your withdrawal even if the client hasn't paid?
5. Can you put a clause in your agreement that the client consents to your withdrawal if he or she falls behind in payment of fees?

Client Crime Or Fraud: In situations of client fraud, when is your withdrawal mandatory and when is withdrawal permissive? Go through the following examples. Assume in each that withdrawal would work a material adverse effect on the client. Decide whether you must, may, or may not withdraw.

²⁶ Barbara Glesner Fines, *The Law Governing Admission to Practice Law*, (2010) at <http://beta.cali.org/lesson/656>.

²⁷ Barbara Glesner Fines, *Teaching Empathy Through Simulation Exercises - A Guide and Sample Problem Set* (2008) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304261.

1. You are defending a client charged with criminal fraud; you believe that the client probably did engage in the fraud
2. You represent a plaintiff in a civil action and there is a counterclaim filed alleging fraud. Given the client's description of her statements and actions, you believe that the client did engage in fraud and will probably lose on the claim.
3. You know that your client is or has engaged in fraud in the past that has nothing to do with your representation and your continued representation would not assist in that fraud
4. You believe that your client is planning a fraud which will not involve your services
5. You know that your client is planning a fraud using your services
6. You know that your client has used your services to commit a fraud that is now complete
7. You know that your client has used your services to commit a fraud that is continuing.
8. You reasonably believe but do not know that your client is engaged in a fraud using your services

In class, I ask students to compare their answers with those of the students sitting in their area, so students get one level of feedback through this peer review process. I then go over the answers with the students. I gather data on how the students performed by either collecting the worksheets or, less precisely, by simply monitoring the number and types of questions that students raise after reviewing the worksheet. Not all assessment requires that faculty gather the data on learning – students can monitor their own learning as well.

C. Graphics

Often in mastering any particular area of law, students are most confused by the need to find the appropriate organization or categorization for doctrines. Assessment devices can be specifically geared toward viewing student's "maps" of a subject. You can ask students to sketch a flowchart of a concept or you can provide students structures for them to fill in. To make the assessment device efficient, you should focus on content or structure but not both.

To use this strategy effectively, you must ask yourself why a structural overview would be useful to the students' learning at this point. Do students need to learn to break down and analyze a rule? Are students losing the "big picture" in the midst of learning a doctrine or concept? Do students need assistance in seeing relationships between ideas? Are the students at the point in their learning that synthesis and condensation of material is critical to their ability to

use the information? Obviously, the incomplete outline or graphical map at the end of the semester will be geared more toward synthesis and overview than in-depth analysis and organization of any particular set of ideas.

Earlier in the semester, outlines and graphical maps can help students identify main ideas or see the overall organization of one topic, identify relationships between ideas and rules, or guide the students through a process of problem solving in a particular area of law.

Review the assessments for common misconceptions and areas of uncertainty. Follow up with additional clarification. Design problems against which students can “test” their matrix.

Here is an example of a graphics assessment I use to determine whether students have carefully read complex rules:

Placing ideas on a spectrum: Diagramming Rule 5.5

This rule contains lists but the lists are safe harbors nested within prohibitions. The rule can be seen as a continuum from clearly permissible to clearly prohibited. In this assessment activity, I ask students to place a number of behaviors on this spectrum

Read Rule 5.5 carefully and then, place the following behaviors on the spectrum from clearly permitted by the rule to clearly prohibited by the rule.

- a) Open an office in the other state
- b) Target ads to clients in the other state
- c) Represent multiple clients from the other state
- d) Appear in the other state for legal transactions at least once a week over several months
- e) Represent only one client on a single matter in the other state
- f) Represent many clients from your own state about the law of the other state
- g) Have a systematic and continuous presence in the state
- h) Obtain *pro hac vice* admission in the state



Clearly Permitted

Clearly prohibited

I review the students’ graphs, noting in particular those students whose answers bunch all in the middle (and so do not understand the safe harbors of the rules) and those whose answers are only at the ends of the spectrum (and so do not understand the remaining ambiguities in the rule). This allows me to know where to focus my attention in classroom discussion of the rule.

Graphics can even be used to assess attitudes. For example, in professional responsibility class, I have regularly asked students to draw a picture or some symbols that represent a “professional.” The pictures inevitably show either a professional sports figure or an iconic

lawyer – symbols of education (briefcase, diploma), pressure (watch or clock), wealth (money, fancy cars), and status (suit and tie). This exercise provides insight into and extraordinarily rich discussion of student attitudes toward their chosen career path. I knew I had begun to get the message across to my students when clients began to appear in those pictures as often as other symbols.

D. The Minute Paper

Perhaps the easiest way to assess student learning is simply to ask. Many of the techniques described in educational literature are simply a variation on stopping class for a moment, asking a question, and then having student provide a short written response. Described by Angela & Cross as “The Minute Paper” and introduced to law professors as “Free writes”²⁸ the technique has a number of variations depending on the information one is soliciting from the students. To use the technique, the professor simply stops the class and asks students to respond (on an index card or half-sheet of paper) to a limited question.

I have found brief short answer or minute paper assessments especially helpful in assessing student understanding of rules. I ask students to write in their own words (or chart, graph, fill-in-the blank) a rule from memory. For example, before we begin discussing Rule 1.6(b) exceptions for fraud, I ask the students to close their books and notes and write the rule in their own words. A certain percentage of students always leave out the “used the lawyer’s services” part of the rule. The first time I collect a rule summary, I will have the students put their names on these responses, as identifying themselves to their work will motivate more preparation in future classes. After that I do not have students put their names on their responses, as the purpose is to assess the understanding of the class as a whole rather than assess individual responses. I collect these brief summaries and after class sort them into groups according to the degree of understanding reflected. After collecting the responses, I will give the class feedback by providing them with one or two examples of an accurate and complete response. At the beginning of the next class, after I have had a chance to review the response, I report to the class the percentage of the class with complete and accurate responses and I correct any misunderstandings I saw in the statements.

I like to use these “state a rule in your own words” minute papers several times during the semester. First, these reinforce the close reading of the rules the text emphasizes. Second, they are an efficient way to assess and reinforce class participation. Third, they model one of the most effective ways to learn: that is, through retrieval practice.²⁹

²⁸ David Dominguez Laurie Zimet Fran Ansley Charles Daye Rod Fong, *Inclusive Teaching Methods Across The Curriculum: Academic Resource And Law Teachers Tie A Knot At The AALS*, 31 U.S.F. L. REV. 875 (1997).

²⁹ See Jeffrey D. Karpicke & Janell R. Blunt, *Retrieval Practice Produces More Learning than Elaborative Studying with Concept Mapping*, 11 Science 772-775 (February 2011).

Some other effective minute papers have been open-ended “what else” questions. For example, at the end of our class on Rule 1.5 fees, I ask the students “what questions or confusion about fees do you still have that you would like me to address? Fix the false statement questions can also be effective. For example, I provide a short hypothetical raising a confidentiality issue and then provide a concluding statement which incorrectly uses the language of privilege rather than the ethical duty.

It takes only a moment to sort these questions into the categories of misunderstandings so I know how to follow up with the students but the insights into student learning are very powerful.

E. Issue Spotting Exercises

Sometimes we simply want students to be able to spot a red flag. Traditional essay exams often focus on issue spotting, but take reading through pages of narrative to assess the student’s understanding and analytical skill. The same results can be achieved by a simple issue spotting exercise in which all students are required to do is “flag and label” the issues. For examples, after the unit on forming the attorney-client relationship, I distributed the following exercise. To evaluate the results I need only scan for the number and type of issues spotted. I can see which issues are most likely to be overlooked or confused and give additional reinforcement to these matters before moving on to the next unit.

Review the following engagement letter. Using the paragraph numbers in the left hand column, identify those portions of the letter that raise potential issues of discipline or liability and briefly label the issue raised by the language in that paragraph.

¶ 1

Barbara Glesner Fines & Associates
25088 West Shawnee Mission Parkway

Shawnee Mission, Kansas

¶ 2 September 20, 20xx
Clarence Client
500 East 52nd Street
Kansas City, Missouri Re:
Engagement Letter Dear
Clarence:

¶ 3 We are pleased to have the opportunity to speak with you about your property ownership dispute today and to discuss our filing suit on your behalf. We look forward to working with you and we promise to provide you the highest quality legal services in a responsive, efficient manner.

¶ 4 The purpose of this letter is to clarify and confirm the terms and conditions of our representation. You asked us to represent you in connection with your ownership interest in land located in Clay County, Missouri, which is currently occupied by Mr. John Jones, who has operated a farm on that property for the past five years. You believe that a substantial portion of the land Mr. Jones is occupying in fact belongs to you, under the terms of your recent inheritance from your mother. You would like us to represent you in securing your claim to this property.

¶ 5 I will be the attorney primarily responsible for the representation, with the assistance of my paralegal Paula Para. You authorize us to incur all reasonable costs and to retain any investigators, consultants, or experts necessary in our judgment to pursue your claims. We may engage the services of another attorney if we feel that their assistance is called for.

¶ 6 When questions or comments arise about our services, staffing, billings, or other aspects of our representation, please contact Paula. Her direct telephone number is 816-5005474. It is important that you are satisfied with our services and responsiveness at all times. We will return your phone call within 24 hours.

¶ 7 To enable us effectively to represent you, you agree to cooperate fully with us in all matters relating to the preparation and presentation of your case, to disclose all facts fully and accurately to us, and to keep us informed of new developments. You agree that we have the sole discretion to determine negotiation, discovery and litigation strategy and approve causes of action and parties to any litigation. We will send you copies of any legal documents filed on your case that reflect these decisions. You agree to cooperate with us in determining acceptable terms of any compromise, settlement, or agreement.

¶ 8 Our fees will be based primarily on the amount of time spent by attorneys and paralegals on your matter. Your attorney, Barbara Glesner Fines, has an hourly billing rate of \$350 an hour based generally on her experience and special expertise in this area. Barbara's paralegal Paula has a billing rate of \$150 an hour. The rate multiplied by the time spent on your behalf, measured in quarter of an hour, will be evaluated by the billing attorney as the basis for determining the fee. From time to time, I will confer with Paula or with any other attorney I engage on your behalf and two or more of us may attend meetings or proceedings on your behalf.

¶ 9 These rates may be adjusted from time to time generally to reflect increased experience and special expertise of the attorneys and paralegals and cost increases affecting our practice, and the adjusted rates will apply to all services performed thereafter. In addition to our fees, we will expect payment for any disbursements we make on your behalf.

¶ 10 Before we will begin your representation, you will deposit \$2,000 with us to secure our services. No part of this deposit will be used for disbursements or charges or shall represent security for payment of our fees. You agree that, upon our review of the case, we will have the right to request additional deposits as advances on our fees based on our estimates of future work to be undertaken.

¶ 11 Once a trial or hearing date is set, we will require you to pay all amounts then owing to us and to deposit with us the fees we estimate will be incurred in preparing for and completing the trial, as well as jury fees likely to be assessed. If you fail to timely pay any additional deposit requested, we will have the right to cease performing further work. Your failure to pay required fees or deposits constitutes your consent to our withdrawal from the representation.

¶ The fees and charges billed to you are your responsibility whether or not a court awards
12 attorneys' fees against an opposing party. Courts may award attorneys' fees which they
consider reasonable under the applicable statutes, but which are less than the amounts billed
to you. In such cases, you continue to be obligated to pay us for our actual fees and charges
even though the court awards less.

¶ If a monetary judgment or award is made in your favor, we shall have a lien on the
13 proceeds to the extent of any unpaid fees, disbursements, or other charges.

If you agree to these terms and conditions of our representation, please confirm your
acceptance by signing the enclosed copy in the space provided below and return it and the
required retainer to me. If this letter is not signed and returned, you will be obligated to pay us
the reasonable value of any services we may have performed on your behalf. We are pleased to
have this opportunity to be of service and to work with you.

¶ Very truly yours,
14 Barbara Glesner Fines

¶ I/we read and understand the terms and conditions set forth in this letter (including the
15 attached General Provisions) and agree to them.

Client

F. Peer-Assessed Drafting Exercises – a Checklist Approach

Exposing students to common documents necessary for ethical practice is an important objective of my professional responsibility course. I integrate skills exercises to reinforce the importance of these documents and to place the substantive doctrine in context. The primary learning outcomes are knowledge and attitude (appreciating the importance of written communication and documentation). A very minor learning outcome is that students will gain some familiarity with basic principles of drafting. I do not expect students to achieve a very high level of proficiency in drafting and do not teach more than twenty minutes or so of drafting basics. Nonetheless, having the students review a document for both substantive content and drafting reinforces both learning outcomes.

Since I do not want to take the time to assess mountains of drafted documents, I instead assess student's knowledge of the substantive doctrine and the principles of drafting by providing the students with a draft of a document with numbered sentences and ask them to work in groups to evaluate the document, using the following checklist. I then ask students to report (orally or in writing) the single best and worst parts of the document substantively and as a matter of clear communication. This helps me to identify whether they are able to recognize doctrinal issues in context and whether they have gained an appreciation for the worst of drafting errors.

Here is the checklist I distribute with a limited representation agreement (I often use documents from the state bar associations as samples. This reinforces the central message that I want

students to learn about drafting – that no form is perfect and must be tailored to the individual needs of the representation.)

Representations regarding nature of limited representation

- ✓ Are any necessary background statements or representations included and are they clearly phrased as statements of fact rather than statements of obligation? Or are necessary factual representations absent, confused or written in language that confuses their purpose?
- ✓ In particular, does the agreement include a clear explanation of limited representation, particularly explaining:
 - that the work will be limited in both type and amount, ○ that the attorney is not promising a particular outcomes,
 - that the attorney is relying entirely on the client’s disclosure of facts and will conduct no additional investigation?
 - that the attorney will suggest additional representation if necessary.

Purpose and effect

- ✓ Does the agreement appropriately create obligations (shall), rights/options (may), or conditions (must)? Or does it imply rather than express obligations, rights or conditions or does it create obligations, rights or conditions that are not likely to be what was intended?
- ✓ In particular, does the agreement identify clearly, specifically, and consistently the work that would and would not be included in the representation? Or does the agreement only generally indicate the work that would be done and imply, in recitals of other terms (expenses anticipated, timing, etc.) that other work might also be included?

Consistency with law

- ✓ Is the provision a permissible term for negotiated agreement? Or does the provision attempt to create obligations, rights or conditions that the law does not permit or that would be unenforceable?
- ✓ In particular, does the agreement appropriately limit the scope of representation in such a way that the attorney can provide competent representation? Or does it limit the scope of representation to such a degree that no competent representation is possible?
- ✓ If the agreement requests an initial payment from the client, does it accurately identify this payment as an advance on fees to secure payment? Or does it speak of these payments as retainers to secure representation?

- ✓ if the agreement discusses the attorneys right to withdraw, does it accurately restate the legal standard? Or does the agreement attempt to expand the attorney’s right to withdraw by securing the client’s advanced consent or by defining conditions for withdrawal that would not meet the standards of Rule 4-1.16?

Clarity of language

- ✓ Is the provision written grammatically correct, in plain English, using active voice, with concrete and well-defined terms? Or does the provision use legalese, vague terms, convoluted construction, and poor grammar?

Consistency

- ✓ Is the provision internally consistent – are the same terms used for the same idea throughout the provision? Or does it make representations or create obligations, rights or conditions that are inconsistent with one another or confuse the reader in an attempt to create “elegant variation”?

Depth

- ✓ Does the provision provide sufficient detail, at the appropriate level of generality, to guide performance and ensure enforceability? Or does the provision inappropriately omit key issues, speak in such general terms as to be unenforceable, or provide unnecessary detail that interferes with overall readability?
- ✓ In particular, does the agreement avoid unnecessarily restating obligations provided by the rules? Or does the agreement include boilerplate provisions that are unnecessary given a limited representation?

Organization

- ✓ Is the provision organized in a way that the structure aids understanding and the relationship between items is clear (especially in the use of numbering, punctuation, and connector words)? Or does the provision lack clear organization or create ambiguity because of incorrect punctuation or vague use of connector words?

Separate Client Consent

- ✓ Consistent with Rule 4-1.2, does the agreement include a separate client consent statement restating the clients understanding and agreement to the essential terms of the agreement with a separate signature line?

IDENTIFY (the same sentence might qualify for more than one category)

Single best sentence in terms of ethical practice

Single best sentence in terms of clarity of communication

Single worst sentence in terms of ethical practice

Single worst sentence in terms of clarity of communication

G. Assessing Reflection

Assessing attitudes and the formation of professional identity is perhaps the most difficult area of assessment because these outcomes are difficult to reduce to concrete objective criteria. Student self-assessment is especially important to achieving true attitudinal change.

Personal written reflection can be very effective for assessing student learning from experience if the students are reflecting on genuine experience and observations, rather than reflection that is merely an academic exercise. Reflection gives meaning to experience; it turns experience into practice, links past and present experiences, and prepares the individual for future practice. It is the “hallmark of professional behavior.”⁴²

As our clinical colleagues have taught us, personal written reflection can be very effective if the students are reflecting on genuine experience and observations, rather than reflection that is merely an academic exercise. (I know my reflection assignment is not very effective when students ask “Do you want us to use footnotes?”). Assessing these reflections requires some dialogue in response, sometime simply asking further questions about what the student has written, sometimes sharing your own perspective, always thanking the students for their effort.

As critical as reflective writing is to experiential learning, assessment requires being more clear about what are we looking for in that reflective writing. Often in reflective writing, faculty are looking for the ability to capture experience (description), to critically reflection on the thoughts and feelings associated with that experience (reflection), and to turn that into insights and plans (product of reflection). One of the reasons that reflection in writing is so important is the precision that writing demands in our thinking. However we can also direct our students to incorporate into their written reflections evidence that they had also engaged reading and speaking as modes of reflection. One might even include art as a mode of reflection. For years I incorporated a first-day assignment in Professional Responsibility in which I asked students to “draw a picture of a professional.” I would then show these to the class using the document camera. The pictures inevitably showed a professional sports figure or an iconic lawyer – symbols of education (briefcase, diploma), pressure (watch or clock), wealth (money, fancy cars), and status (suit and tie). The pictures showed a collective Rorschach-type assessment of student values and attitudes toward themselves and their chosen career. It has been telling to what these pictures change over the years – clocks and computers have become more prevalent and indications of wealth less so. I am gratified that clients now appear in some

⁴² Margaret M. Plack, Maryanne Driscoll, et. al., *A Method for Assessing Reflective Journal Writing*, 34:4 J. ALLIED HEALTH 199, 200 (2005)(quoting Shepard KF, Jensen GM (eds): *Handbook of Teaching for Physical Therapists*. Boston, MA: Butterworth-Heinemann; 1997).

of the pictures (though perhaps students have caught on to the idea behind the exercise – that clients are what make attorneys “professionals”).

Developing values or professional identity is an important goal for professional responsibility professors, so reflective writing should assess that development, in addition to simply assessing the student’s facility with reflective writing. One might actually have several categories of reflection one might be looking for in journals, depending on whether you have set for students specific learning goals beyond merely the skill of reflection. Students might be very good at reflection on client relationships, for example, but their reflections might net them few insights into leadership. If I wanted to see patterns in students’ abilities to get some depth on certain topics, you would likely want to include separate criteria or some other method of tracking depth of reflection on various topics.

The following rubric³⁰ provides examples of some of the criteria one might use in assessing reflective writing, depending on the conditions one sets for the reflection:

	UNDEVELOPED	DEVELOPING	SKILLED
DESCRIBING EXPERIENCE Student provides a description of the experience, observation, activity, reading, etc. upon which he or she is reflecting	Unclear and vague	Clear but general	Clear and focused on the specific aspects that challenge the student
DESCRIBING RESPONSE Student provides a description of their intellectual and emotional response to the experience	Unclear and vague	Some response but limited to one domain (e.g., only emotional, intellectual) or to reflection only, without indication of conscious contemporaneous reflection.	Clear and focused description of the feelings, thoughts, and questions raised by the student at the time of the experience and upon reflection.

³⁰ Thanks to Margaret Reuter, Visiting Professor, Indiana University- Maurer School of Law for her collaboration in building this rubric.

<p>GENERAL REFLECTION Evidence that the student has questioned or evaluated their prior perceptions, actions, or beliefs</p>	<p>Minimal reflection – No personal reflection or limited to description of general opinions and behaviors without reflection on underlying</p>	<p>Reflection – Making connection between student’s personal assumptions, habits, or values and the opinions or behaviors upon which the student is reflecting.</p>	<p>Critical reflection – Critical evaluation (questioning, examining more closely) student’s personal assumptions, habits, or values and their</p>
	<p>assumptions, habits, or values driving those opinions or behaviors.</p>		<p>connection to the opinions or behaviors upon which the student is reflecting in light of other perspectives.</p>
<p>DIRECTED TOPIC REFLECTION Evidence that the student has questioned or evaluated their prior perceptions, actions, or beliefs about (Collaboration, Professionalism, Autonomy, etc.)</p>	<p>Minimal reflection – No personal reflection or limited to description of general opinions and behaviors without reflection on underlying assumptions, habits, or values driving those opinions or behaviors.</p>	<p>Reflection – Making connection between student’s personal assumptions, habits, or values and the opinions or behaviors upon which the student is reflecting.</p>	<p>Critical reflection – Critical evaluation (questioning, examining more closely) student’s personal assumptions, habits, or values and their connection to the opinions or behaviors upon which the student is reflecting in light of other perspectives.</p>
<p>USING INSIGHTS Student’s reflection leads to plans for future action</p>	<p>Students reflection is entirely backward looking, with no indication of how the student will use the insights and skills gained.</p>	<p>Student has generalized statements regarding how the reflection will direct future actions or beliefs</p>	<p>Student provides concrete plans for further action or reflection for a specific purpose such as developing skills, improving selfunderstanding, or refining belief systems</p>

<p>CONNECTIONS TO READING/RESEARCH Student uses coursework, reading, or independent research to advance reflection as appropriate.</p>	<p>Does not include any reference to outside reading or research to inform reflection</p>	<p>Reflection refers to past readings or research in a descriptive or citation fashion with little indication of motivation to use reading or research to inform reflection</p>	<p>Connects reflection to past readings and research and indicates efforts to re-read or conduct additional research to learn more about aspects of the experience upon which reflection occurs. Describes specific insights or extensions of reflection gained from that reading and research.</p>
<p>CONNECTIONS TO PEOPLE Student engages instructors, mentors, colleagues, and others in conversations about reflection as appropriate.</p>	<p>Demonstrates no effort to engage others in reflecting on the experience or insights.</p>	<p>Describes some conversations or interviews regarding the experience or reflection but only in an incidental fashion, rather than as an effort to test ideas or gain insights</p>	<p>Demonstrates meaningful conversations with others to test ideas and gain insights on the experience and reflection.</p>
<p>WRITING QUALITY Quality of writing indicates careful attention to reflective practice by providing clear topic, using concrete and precise language, organizing thoughts for the reader, and proofreading essay for grammar, punctuation, and spelling</p>	<p>Unfocused, unorganized, vague, and sloppy</p>	<p>Some focus and organization. Language has some precision. Essay was proofread</p>	<p>Topic(s) are clear and specific, descriptions use concrete and precise language and insights are precise and clear, Organization is apparent and effective. Essay has been proofread for grammar, punctuation, and spelling errors.</p>
<p>Format and timing</p>	<p>Fails to meet minimum page requirements Submitted late</p>	<p>Barely meets the 15 page minimum requirement.</p>	<p>Total page count over 20.</p>

In addition to providing students with the rubric and my assessment of their effort, I also try to provide individual feedback on each assignment, even if it is simply “Thank you for your reflection “with some acknowledgement of the content, such as “you were not alone in concluding that _____” or “I agree that _____” If questions or reflection appear shallow or insincere, I primarily ask additional questions to prompt more thoughtful responses in future reflection.

F. Short analytical problems

At the end of unit or chapter, I might assign a short essay problem for students to complete. With a detailed scoring rubric, students can often assess one another’s answer, we can work together as a class to “score” one or more random answers from the class (anonymously), or I can give students efficient feedback.

In our Business Organizations class, students are assigned a video consultation assignment in which they are instructed (orally) by their “senior partner” to determine whether they can ethically represent a couple who have come to them to form a business. They have a limited period of time to research the answer and then upload to the web a video of their oral report to the senior partner.

Here is an example of a generalized rubric I developed with the faculty who teach that course so that we could divide the grading of the assignment but maintain consistency. One of us first wrote a sample answer and tested the rubric by each scoring the answer. We talked about any differences in our scoring and amended the rubric to better guide our review. We then distributed the rubric to the students along with the assignment (without question and scoring grid only – the italicized “notes to the graders” were for our own additional guidance). When the students completed the assignment, we divided up the class and scored a group of the students.

Ethical Issues in Business Organization Problem Rubric

1. Did the student identify the relevant issues raised by the problem and within the scope of the question asked? Score

1	2	3	4	5
The student missed several important issues and communication of other issues was confused, vague or irrelevant to the question.	The student missed at least one important issue and communication of other issues was confused, vague or irrelevant to the question.	The student identified all major issues though the communication of some was vague or irrelevant to the question.	The student communicated all relevant issues, although with some lack of clarity or appropriate weight and did not include irrelevant issues.	The student communicated all relevant issues precisely, clearly and confidently, with appropriate weight to the significance of the issue, and did not include irrelevant issues.

Notes to the graders : Issues the students must be able to:

- Flag the possible but unlikely former client conflict of interest issue
- Identify the formation stage as involving joint representation conflicts.
- Identify the shift in identity of the client once the entity is formed.
- Identify the confidentiality issue raised by joint and entity representation

2. Did the student accurately apply the relevant legal principles to the issues presented? Score

1	2	3	4	5
The student's analysis of all issues contained errors in the law or was at such a level of generality that it was unhelpful to understanding how the issues would be resolved.	The student's analysis of several issues contained errors in the law or was at such a level of generality that it was unhelpful to understanding how the issues would be resolved.	The student's analysis was accurate, though somewhat general, insecure, and incomplete	The student's analysis was accurate, precise, confident, and complete as to most issues.	The student's analysis was clear, accurate, precise, confident, and complete as to all issues.

Notes to the graders:

Rule 1.7 – students should identify the relevant standards as the “material limitation” standard and the most relevant question

of limitation being the differential powers and risks among the three. They should demonstrate awareness that conflicts analysis is not a one-time decision but must be monitored throughout the representation. They should also demonstrate awareness that conflicts analysis is not resolved solely through client consent, but that unreasonable conflicts are non-waivable and that waivers must be based on an informed consent model of client counseling. Rule 1.13 – students should recognize that once the entity is formed, the individuals are no longer clients and the attorney’s direction would come from the decision-making authority created by the entity formation documents.

Rule 1.6 – students should recognize that privilege is waived among the clients but that a waiver of confidentiality must be obtained to reduce the possibility of future conflict and provide competent representation.

Rule 1.9. – students should recognize that the fact that the former client is also a current client makes this type of conflict very unlikely.

3. Did the student accurately identify additional facts that needed to be gathered or tasks to be completed in order to resolve the questions asked? Score

1	2	3	4	5
The student did not identify any additional facts to be gathered or steps to be taken. Some facts may have been assumed for which there was no basis for the assumption.	The student identified some general additional facts to be gathered or steps to be taken but did not explain the significance of these.	The student identified some general additional facts to be gathered or steps to be taken and generally explained why those facts or steps would be important or helpful.	The student identified the most important specific additional facts to be gathered, how to gather those facts, and any other specific steps to be taken. The student explained the significance of most of these.	The student identified all critical, specific additional facts to be gathered, how to gather those facts, and any other specific steps to be taken. The student explained the significance of each of these.

Notes to the graders:

Some facts the student should have identified as important to resolving these issues include:

- More detail about the relationship among the three clients – how long have they known one another? In what capacity? What does Dad want to do with the business besides put in his money? What do each of the other clients contribute to the business?
- Degree to which the parties have already thought about and agreed to issues of risk, control, and rights
- Degree to which the parties can operate with equal authority – evidence that there are not gross imbalances in bargaining power
- What exactly does the business want the attorney to do after formation? Just help with initial tasks or act as ongoing counsel to the business.

Some steps the students should identify include:

- Meeting with each client separately to discuss confidentiality and conflicts.
- Obtaining written consents to joint representation and waiver of confidentiality
- Payment method- resolution of that issue before proceeding.

Overall comments:

F. Using client interviews as Summative Assessments

In my ethical issues in family representation course, which is one of the courses students can take to fulfill their professional responsibility course requirement, a core learning outcome is that students will be able to ethically manage their own and their client's emotions.³¹ Thus, throughout the course, we practice client communication and listening skills and discuss how to assess credibility and hold difficult conversations. This skills training is intertwined with instruction in core doctrine. So, for example, we practice withdrawing from difficult clients when we study Rule 1.16; explaining our fees to a client when we look at Rule 1.5 (which often gives more meaning to the term "reasonable fees" than volumes of reading can do); explaining confidentiality to a child client when we learn Rule 1.6; and conducting an interview of two parents who come to the attorney for a joint representation in a stepparent adoption case when we study Rule 1.7. Accordingly, I use an initial client interview as the final examination. The students all interview the same client (I hire a drama student to play the role of the client for all interviews). The substantive issues raised by the client might include possible conflicts of interest, questions about confidentiality or requests for the attorney's assistance in illegal behavior.

The following materials include the instructions to the students and the rubric I use to score their interview.

³¹ See Barbara Glesner Fines & Catherine A Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. Rev. 965 (2007)

Ethical Issues in Family Representation

Instructions for Final Examination

For your final examination, you will be conducting an initial client interview. The memorandum making the referral for the interview is attached below.

You will all be interviewing the same client, with the same facts. Therefore it is imperative that no one discuss their interview with anyone else until all interviews are completed. This means no discussing the interview with members of the class, no discussing the interview with other law students (even if they are not in the class), no posting to Facebook, etc.

Here is how the interview will be structured:

- ✓ Each interview begins on the hour in the Family Law library in the Holmes Suite and will last 45 minutes. You may not bring any other person to the interview.
- ✓ I will act as your paralegal/administrative assistant during the interview. This will include keeping track of your time and interrupting you to let you know that the interview time is up. Nonetheless, you should be prepared to keep track of your time as well so you can pace your interview appropriately.
- ✓ You may take up to 5 minutes at the beginning to discuss the case with your paralegal and ask any questions she might be able to answer about the case or our office procedures.
- ✓ You then have up to 35 minutes to interview your client. Your purpose should be to decide whether you will be able to represent her, gather some basic information about the case, and give some basic information. You are welcome to bring any materials or supplies you think would be important for an initial client interview (business cards, documents, coffee cup – whatever) but you will not be specifically graded on these.
- ✓ When your interview is over, you may then use any remaining time to discuss the case with your paralegal and give her any instructions for next steps in the matter.
- ✓ I will not give you your “grade” immediately after your interview, but I will provide some general feedback and answer questions about what occurred during the interview. I will provide more specific feedback when all interviews are completed, using the attached scoring rubric to grade your interview. I will video or audio tape each interview, but this will be for my own review purposes and to have an archived copy. I will not use these recordings for any other purpose or

distribute them. When you graduate, the recordings will be destroyed. If you would like a copy for your own further education, let me know.

✓ Please sign up for an interview time with my administrative assistant.

MEMORANDUM

TO: Lawyers
FROM: Senior Partner RE:
Patricia Smith

I would like you to help the daughter of one of our law firm's largest clients Joe Jones of JJ Construction, Inc. Don't worry about the fees – we'll write this one off to client development – but do keep your hours. Apparently Ms. Smith's husband Samuel Smith is a chronic gambler and she has finally decided to divorce him. They don't have any children but there are may be some fairly significant financial considerations.

I've run the conflicts check and, apart from our representation of Joe Jones, nothing comes up as a conflict. I've spoken to Joe and he understands that he can't be involved in our representation of his daughter.

Ethical Issues in Family Representation Scoring Rubric for Client Interviews.

1. The attorney clearly and appropriately established the terms of the relationship. This item is designed to assess the lawyer's understanding of the essential terms of the attorney client relationship and the ability to communicate the lawyer's approach to their practice. At a minimum, the attorney should discuss the scope of the representation, confidentiality, fees, whether the client is otherwise represented, and the attorney's role.

1	2	3	4	5
No attempt to establish the terms of the attorney/client relationship.	Communicated some elements of the relationship, but communication was unclear and incomplete. Client was given no opportunity to confirm understanding.	Communicated some elements of the relationship, but communication was unclear or incomplete. Uncertain client understanding.	Communicated all elements of the relationship, but some communication was unclear or incomplete. Confirmed minimal client understanding.	Communicated all elements of the relationship, clearly and completely. Client confirmed understanding.

2. The attorney obtained the client's story. This item is designed to assess the lawyer's ability establish rapport with the client and listen effectively and actively in order to obtain necessary information in order to diagnose the client's legal problem or issues (including jurisdiction, timing and factual basis and potential evidence for key elements of potential claims and defenses)

1	2	3	4	5
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Attorney's questioning and listening technique interfered with client communication. Attorney did not listen actively to client. Attorney did not obtain all important and relevant information for the representation.	Attorney's questioning technique limited client's incentive and opportunity to provide all relevant information. Attorney did not listen actively to client. Attorney did not obtain all important and relevant information for the representation.	Attorney's questioning technique was effective and attorney listened actively much of the time. Attorney obtained some, but not all details of, the relevant information for the representation. Attorney did not follow up to confirm that the information was correct and complete.	Attorney's questioning technique was effective in generating information and attorney listened actively. Attorney obtained most of the relevant information for the representation, but did not follow up to confirm that the information was correct and complete.	Attorney's questioning technique was effective in generating information and attorney listened actively. Attorney asked all key questions for critical background. Attorney obtained all relevant information for the representation and clarified its accuracy and completeness.
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3. The attorney assessed the client's emotions and expectations of process and outcomes. This item is designed to establish rapport with the client and listen effectively and actively in order to establish an effective working relationship with the client. The attorney acknowledges the client's emotions and moderates the client's expectations to match realistic outcomes and processes. In representing the victim, the attorney respects the client's view of the circumstances and conveys messages of empowerment and worth.

1	2	3	4	5
Attorney's questioning technique discouraged client trust and confidence. Client expectations were unknown or unrealistic.	Attorney's questioning technique did little to establish trust and attorney did not employ any active listening. Attorney asked few key questions regarding client motivations and goals. Client expectations were unknown or unrealistic.	Attorney's questioning technique established some trust and attorney appeared to be listening but did not reflect emotional content in an active way. Attorney asked few key questions regarding client motivations and goals. Client expectations were assumed or unclear.	Attorney's questioning technique established some trust and attorney listened actively. Attorney asked some but not all key questions regarding client motivations and goals. The attorney acknowledged the client's emotions generally. Client expectations were only generally addressed.	Attorney's questioning technique established trust and attorney listened actively. Attorney asked all key questions regarding client motivations and goals. The attorney acknowledged the client's emotions and moderated the client's expectations to match realistic outcomes and processes.

4. The attorney clarified the attorney's legal and ethical obligations. This item is designed to insure that the attorney understands his or her own limitations in the representation and the communication of those limitations to the client. Issues of professional boundaries are especially important component of this item.

1	2	3	4	5
The attorney did not give the client any guidance regarding the attorney's obligations to either the client or to the	The attorney gave the client guidance regarding the attorney's obligations to the client but no	The attorney gave the client general guidance regarding the attorney's obligations to the client and the	The attorney gave the client guidance regarding the attorney's obligations to the client and the	The attorney gave the client guidance regarding the attorney's obligations to the client and the

legal system as a indication of the limitations of those limitations of those limitations of those

whole.	limits of those obligations.	obligations, but it was either boilerplate or vague and confusing.	obligations, as called for by the client's situation, but did not confirm the client's understanding.	obligations, as called for by the client's situation, and confirmed the client's understanding.
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5. The attorney provided the client with clear guidelines based on law regarding past and future conduct. This item reflects the attorney’s understanding of the procedural and substantive law aspects of the client’s problem and the ability to effectively communicate those to the client.

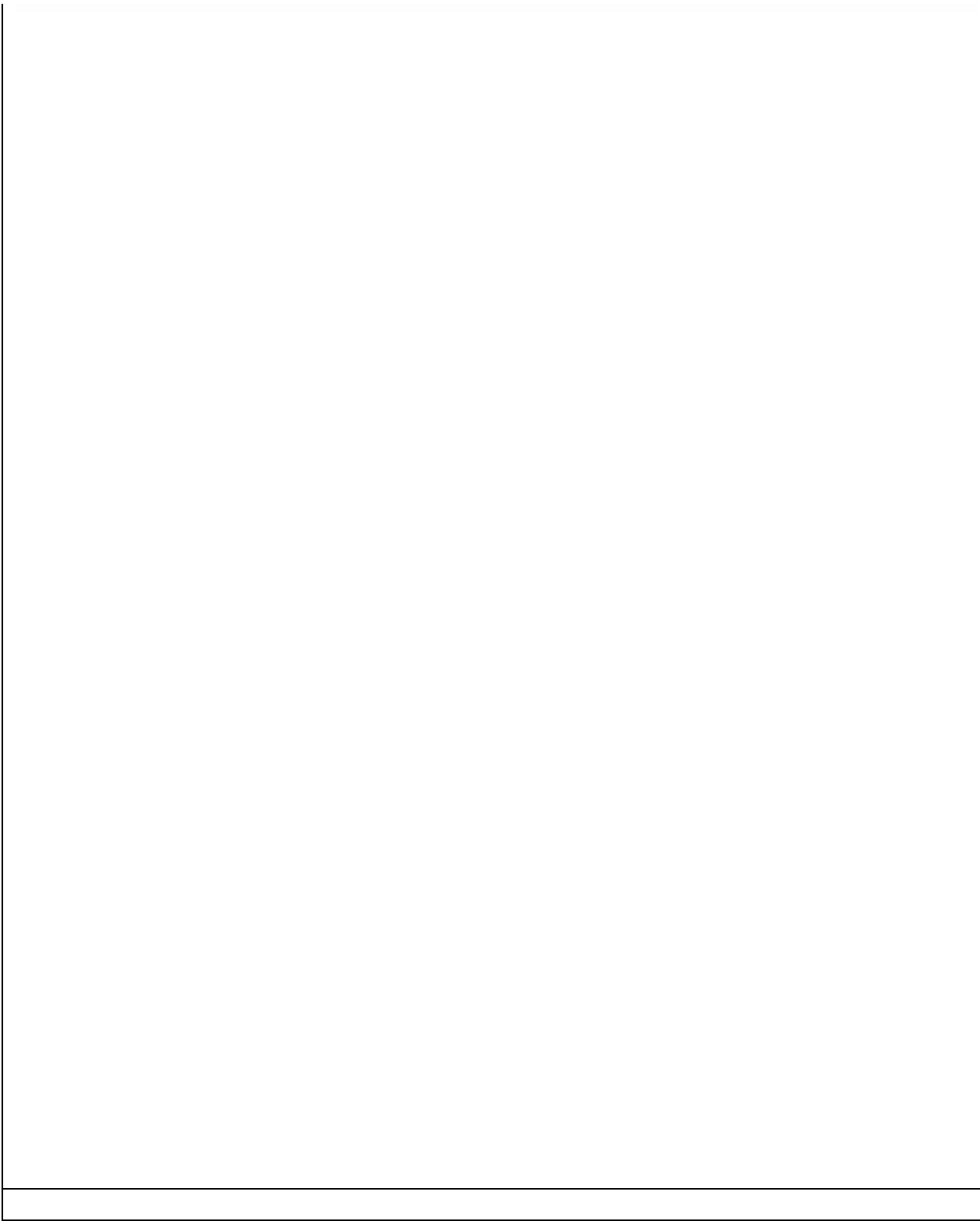
1	2	3	4	5
The client left knowing no more (or even less where inaccurate information was conveyed) about their legal rights and obligations than they did when they came in and had no promise of learning more.	The attorney did not give the client feedback on past conduct where appropriate nor did the client answer client questions about future conduct or provide guidance for how and when the client might obtain that guidance.	The attorney did not evaluate the client’s past or future conduct or gave only general information about rights and risks of conduct.	The attorney gave the client general instruction on the client’s legal rights and risks based on their past conduct and their future intended conduct and provided clear guidelines for how and when additional guidance, if any, would be provided.	The attorney gave the client clear instruction on the client’s legal rights and risks based on their past conduct and their future intended conduct and provided clear guidelines for how and when additional guidance, if any, would be provided.

6. The attorney counsels client on options This item assesses the attorney’s ability to counsel the client on a range of legal and non-legal options and consequences in the representation, including the client in that assessment as appropriate, and providing realistic evaluation and advice. In representing victims, this item includes conducting appropriate safety planning regardless of any other options that are explored.

1	2	3	4	5
The attorney did not review options for client – either directs the client to one option only or leaves decision- making up to client without any counseling. No consequences of options were explored.	Attorney presented limited options to client with minimal explicit assessment or connection to the client’s goals.	Attorney presented options to client and provided some assessment of each of the options; however, options are presented in legal terms only with very little client input into the process or connection to the client’s goals.	Attorney presented options to client and provided some assessment of each of the option, including assessment of legal and nonlegal consequences; minimal client input or connection of options to client goals	The attorney reviewed the options for the client, the risks and advantages of each, and solicited client input in this process. Attorney provided accurate assessment of feasibility and likely outcomes of options, with both legal and non-legal consequences considered, and connects options to client goals.

7. The attorney made the next steps clear.

1	2	3	4	5
The client had no idea what would happen next in this case.	The client had a confused idea of what would happen next in this case.	The client had a general idea of what would happen next in this case.	The client had clear direction for some next steps for either attorney or client, but other choices or next steps were left unclear.	A clear timeline of tasks and responsibilities regarding the case was developed for both attorney and client and communicated effectively.



G. Using Peer Assessment to Evaluation Collaborative Skills

Over the past ten years on a regular basis I have taught the professional responsibility course using a team-based learning method, in which 70% of class time is spent working in small groups. I do so both because the method is engaging and effective but because it also teaches the skills of collaboration, which I consider necessary to effective and ethical practice. I believe that teaching collaboration in the Professional Responsibility course is especially appropriate. Traditional legal education trains students to work independently and competitively.³² Rules that prohibit collaboration on papers and explicit “ranking systems” may lead students to believe that this is the world of practice as well—every person for him or herself. While there is no denying the degree of individual responsibility an attorney has in law practice and the amount of competition there may be for clients or cases, it is simply not true that attorneys never collaborate. Most attorneys practice in firms, where increasingly work is shared among a team of attorneys and other professionals.

How do I assess student skills in collaboration. One method is simply by examining the effectiveness of the group. Because I quizzes, which students take first individually and then as a group, are part of the method, I can see the extent to which the group score is outpacing the average score of the individuals in the group. Over time, as students improve their ability to work as a team, the group score becomes disproportionately better. I report these improvements to the class so that student teams that are not functioning optimally will have incentives to work harder on their team process.

Assurance that individual accountability is built into the system will boost confidence that the group will operate free from social loafing and dominance. For this reason, an essential component of team-based learning is the final peer evaluation process. Teaching students to provide feedback or critique is an essential skill for professional responsibility. I introduce the skill to the students first out of the context of peer evaluations by posing a problem in which students need to confront another attorney regarding that attorney’s unethical behavior. I assign a summary of the ideas in the “Difficult Conversations” text from the Harvard Negotiation project.⁴⁶ I have the students practice the conversation they would have with their colleague and then write a short reflection on their experience in having a difficult conversation.

When we turn to a discussion of the peer evaluation process, some students make the connection to this exercise and recognize that many of the same principles apply to providing helpful feedback. Before I have the students conduct individual peer assessments, I ask each team to assess themselves as a team. Group processing provides feedback to group members regarding their participation, provides an opportunity to enhance the members collaborative

³² *Id.* at 913. Vernellia R. Randall, *Increasing Retention And Improving Performance: Practical Advice On Using Cooperative Learning In Law Schools*, 16 T.M. COOLEY L. REV. 201, 213 (1999). ⁴⁶ DOUGLAS STONE, BRUCE PATTON, SHEILA HEEN, & ROGER FISHER, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2010).

learning skills, helps to maintain a good working relationship between members, and provides a means of celebrating the group's successes. One strategy is to ask each team to list three things the group has done well and one that needs improvement.³³

To help students learn to provide evaluative feedback, I have provided students the following rubric to discuss and rank their group process. I ask the students to individually rate their team using the rubric and then discuss and come to consensus on their ratings. I then ask them to agree on one concrete example of the group's greatest strength and one suggestion for how they would improve group process for continuing to work with this firm. Alternately, I have asked students to take a portion of the class to assess their team using the law firm rules they had developed and consider whether those rules needed amendment or elaboration.

These preparatory peer evaluation exercises are never calculated into a grade, but are designed to help the team members become more comfortable with the process of peer evaluation and to help me assess their increasing skills in collaboration.

³³ Smith, K. A, *Cooperative Learning: Making 'Group work' Work*, Sutherland, T. E., and Bonwell, C. C. (Eds.), *Using active learning in college classes: A range of options for faculty*, *New Directions for Teaching and Learning* No. 67. (1996).

Group Focus	We did not share a common purpose	We appeared to have similar purposes but sometimes with different levels of commitment to the purpose	We worked toward a shared purpose that respectfully balanced the goals of individuals in the group
Group Cooperation	We did most of the work by ourselves, we talked a little among our group members	We worked together most of the time, sharing information regularly	Everyone worked together using his or her abilities and knowledge to contribute to the learning of all and to the quality of assignments
Distribution of Group Tasks	Some group members did not contribute	Everyone contributed something but some contributions were sporadic or incomplete	Work was shared fairly according to the abilities and interests of the members
Group Leadership	We had no leader so we just did our own thing	No one person was a leader so we usually helped each other get the job done	One or more persons took a leadership role and gave good directions that kept us going
Communication among group members	We only talked when we thought we needed to, but received little feedback	We talked about what we were doing	We usually asked each other for help and showed our work to each other and provided feedback
Individual Participation	A few people tried very hard, but most didn't do much	Each person did some work and tried to do a fair share	Everyone did a good job, I would work with these people again
Listening to other points of view	We usually listened to what others were saying but some either did not share ideas or argued	We usually listened to each other and tried to use to improve our learning and our assignments	We listened while others talked, we learned about different viewpoints, and used what we heard to improve our learning and assignments

Showing respect	No one was courteous and opinions were not valued	Some were courteous and some opinions were valued	All were courteous and valued each other's opinions
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At the end of the semester, I have the students submit peer evaluations to me as part of their final project. I use the following instructions for that assignment.

Professional Responsibility Law Firm Peer Evaluation

For each one of your firm partners, rate that partner on a scale of 1-10 on the degree to which he or she contributed to your learning and complied with the firm rules you set at the beginning of the semester. You must distribute your scores – that is, you may not give all partners the same score without a very clear justification for why that would be appropriate.

For each partner, give one example of how that partner was helpful to your learning and one suggestion for how that partner could improve their professional collaboration. The more concrete your examples and suggestions, the better. Keep in mind that helpful evaluation balances positive and critical comments and is concrete. It focuses on behaviors rather than persons.

Your peer evaluations are due the last day of class. If you do not provide sufficient examples, explanations, or a distribution of scores among the team without clear and convincing evidence, I will return your evaluation for further work. All returned peer evaluations must be completed by the first day of the exam period.

I will be collating the scores and comments and returning them to each person in your firm. The compilation will not identify who made which comments. Individuals may but need not respond to their peer evaluation within 5 days after I have distributed the compilations.

SUBMIT YOUR EVALUATIONS INDIVIDUALLY TO THE TWEN DROP BOX FOR PEER ASSESSMENTS. DO NOT SHARE YOUR EVALUATIONS WITH EACH OTHER.

For each partner, then, complete the following:

Name of partner _____

Rating _____

Positive contribution to your learning:

Suggestion for improvement in collaboration

One of the most common questions I get about this process is whether students are honest in their evaluations. That is, will students hold one another accountable? The answer is yes. Each semester there have been a small number of students who have clearly not been as engaged or prepared as their peers. In all but one instance, the peer evaluations of all students in the firm, including the underperforming student, reflect that poor performance. I have more commonly noted groups in which one student appears to be working harder and contributing more to the group than his or her peers and the peer evaluations do not reflect this as clearly as underperformance. What I often discover from the peer evaluation comments, however, is that the students I had perceived as “over-performing” are, in fact, dominating the team and interfering with the ability of other students to contribute.

One method to improve peer evaluations is to “grade” the evaluations themselves, based on criteria of specificity of feedback, descriptions of behaviors rather than judgmental statements, constructive tone and usefulness to receiver of feedback.

H. Using Traditional Final Exams as an Assessment Device³⁴

Traditional final exams and papers have a wealth of assessment information for us to mine if we only take the time to gather, reflect and use that information. Many faculty gather holistic impressions as they grade the performance of the students overall and the areas of difficulty and strength. To transform this grading process into systematic assessment, faculty can take a few more simple steps:

Improve your data collection.

Rather than gathering general impressions as we grade bluebooks, we can mine the bluebooks for some more concrete data. Examine the distribution of performance on individual questions or issues. Note that you need not gather every data point possible from the bluebooks. Often it is helpful to begin with two or three items to analyze. For example, what is the one thing that nearly every student did well on the exam? What were the one or two questions/issues/approaches that many students had problems on? What percentage of the students had these problems?

Analyze your data.

For issues students appear to have learned well, look again at your questions. How confident are you that the question truly tested the student understanding? In this respect, essay questions are often easier to evaluate than multiple choice questions, because you can see the students reasoning on the former, whereas consistently correct answers on the latter can be the result of

³⁴ This section is reprinted from my blog post “Assessment Tales: The Bluebooks that Stayed” at <http://bestpracticeslegaled.albanylawblogs.org/2012/01/17/assessment-tales-the-bluebooks-that-stayed/>

distractors that are patently wrong. What materials and techniques did you use to prepare the students for that question? When during the semester did you teach those matters? If the student performance is improved from prior exam administrations, what, if anything, did you change that may have caused this improved learning?

For issues or questions on which a significant percentage of student performance was deficient, again, begin by reexamining the question, its placement in the examination and the time allocated for responses, to identify other possible reasons for poor performance that are less related to student learning and more related to exam conditions. Look for patterns in the student errors or misconceptions that can help you diagnose what learning conditions led to the student poor performance. What materials and methods did you use to teach this doctrine?

Plan for the next semester

When students are performing well on a doctrine or concept, especially when that competent performance appears to have been the result of your prior efforts to target and improve learning activities for that material, you may be tempted to rest on your (and your students') laurels. However, consider that any change to one part of a course can affect other parts and each class brings with it different experiences and preparation.

To improve student learning on areas that have presented difficulties for students, consider not only improving teaching materials or methods related to that area, but also incorporate more formative assessments during the term to help you and the students identify earlier and more clearly the learning deficiencies.

What my bluebooks told me this semester:

To illustrate this process of mining bluebooks for assessment, I will discuss this semester's Professional Responsibility exam. From this semester's bluebooks, I gathered a range of data on materials well understood and poorly understood. I will share three examples of data to illustrate the process of using bluebooks for an assessment process.

The doctrinal winner this year in terms of student performance was multijurisdictional practice of law. Is this because the students understood these aspects of the course better than others? Reviewing the exam, I noticed that the question testing this subject called for a fairly low level of mastery (basic issue spotting and knowledge of rule) without any sophisticated analysis required. This was a topic for which I had provided a number of practice problems to the students and I had tested the issue in a similar fashion on a prior year's exam, which I had made available for student review. Moreover, it is a subject that, because my law school is located on a state line, with dramatically different variations on this rule, the students understood that this was a rule that would impact their immediate future, as they chose which state bar exam to take first. What I learned from this is the fairly unremarkable understanding that my law students can and will

master at a knowledge-level those topics for which they know they will be tested and for which they also have a more personal motivation to learn well. I concluded that I would and could generalize these understandings to not only raise the bar on testing this doctrine, requiring a more sophisticated understanding, but also would look for other areas in which I could improve

student motivation by identifying the specific need-to-know circumstances looming in their immediate future for other rules.

A second topic about which I have been tracking student learning performance for many semesters is the student understanding of the distinction between the evidentiary attorney-client privilege and the ethical duty of confidentiality (among other doctrine). When I first began tracking, as many as 30% of students were demonstrating fundamental confusion on this topic – using language of “privilege” when the subject was confidentiality (or vice versa) or confusing the exceptions to the ethical duty with the crime-fraud exception to privilege. I knew from speaking with other Professional Responsibility teachers that this is a common area of confusion for students. Over the course of several semesters, I worked to improve student learning in this area: including more problems in course materials, writing and assigning a CALI lesson on the subject, and explicitly telling the students that this is something that I am tracking and cheering them on to “make this the 100% mastery year.” The efforts are bearing fruit. This semester was the best yet – only four out of 72 students used the vocabulary of the two doctrines improperly and three of these applied the correct rule even though they were not using the correct terminology in doing so.

An area on which I had thought I was making progress in student learning turned out to be a continuing problem. Students commonly are confused by the rule governing an attorney’s right to withdraw from representation. I have made the same efforts on this doctrine as I have with the privilege v. confidentiality confusions: increasing problems, providing additional outside resources (again, I wrote a CALI lesson on the subject); and providing in-class quizzes to assess understandings while there was still time to improve learning. However, I was puzzled to see 13 of the students declare that an attorney may not withdraw from representation if it would harm the client. What could have been the source of this confusion? Searching through my course materials and lesson plans, I uncovered the problem. A powerpoint lecture on withdrawal from representation when the client fails to pay the attorney contained a page with a bulletpoint list of reasons that courts might deny an attorney permission to withdraw even though the rules would permit the withdrawal. One of the bullet points listed “degree of harm to the client” as a factor the court would consider. Obviously some students had transferred the powerpoint slide into their notes on the general withdrawal rule rather than recognize that these factors were connected only to the judicial discretion to deny an otherwise permissible withdrawal. Again, a well-worn lesson learned anew: as helpful as powerpoint slides can be for organizing discussions and providing visual cues for learning, students will study text of these slides as definitive statements of law rather than thumbnails of larger discussions and understandings. Conclusion: no shortcut summary slides!

Conclusion

If you use an assessment process to design your course, you will first choose a theme or two for your course, and for each class you will have objectives that feed into that theme. You will next design regular formative assessments into the course that build toward a final summative assessment. You will find that the rest is then easy. What reading to assign? How to spend class time? These choices that tend to be the places we start in our course planning become the wrap up questions that often tend to answer themselves once you have an outcomes assessment framework in place.

It's the power of a destination. I urge you to try this "backwards design" approach to your teaching. If re-vamping an entire course through this method seems too much, just choose one segment of your course – one week, one topic. Ask yourself: what do I want the students to learn this week and why is it worth learning? Free yourself from thinking about what you will assign them to read or how you plan to cover the topic in class. For this one class or one week or one topic, allow yourself to focus on one clear, worthwhile destination. Then ask yourself how you will assess whether the students have learned what you want them to learn. Remember to think of the student – the question is not how you will know if you've taught what you wanted to teach – it's what and how well have they have learned. Then go back and look at the readings you have assigned and the way you have planned to spend class time. You may find that you will not change anything in any significant way – or you may decide to throw out everything and try something entirely new. Either way, the journey will have more energy, focus and excitement for you and for your students.