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A.A.L.S. Clinical Legal Education Panel: Evaluation and Assessment of Student Performance in a Clinical Setting

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A.A.L.S. CLINICAL LEGAL EDUCATION PANEL: EVALUATION AND ASSESSMENT OF STUDENT PERFORMANCE IN A CLINICAL SETTING

I. INTRODUCTION

THE FOLLOWING ARTICLE IS ADAPTED FROM a panel discussion held under the auspices of the Section on Clinical Legal Education of the Association of American Law Schools, presented at the annual meeting in Phoenix, Arizona on January 5, 1980. The participants were H. Russell Cort, Jack L. Sammons, Robert S. Catz, Ralph S. Tyler and Terence J. Anderson.*

II. REMARKS OF H. RUSSELL CORT

This panel discussion will present an approach for looking at and evaluating lawyering skills, particularly in clinical settings. This approach has been developing at Antioch[1] for some time and has increasingly made sense to some of us, but we want to set forth the methodology in such a way that, perhaps, will raise more questions than it will answer. We all are great advocates of the approach in one form or another, although we tend to argue among ourselves about it. Entering into such critical dialogue is undoubtedly a healthy endeavor.

One concept that has struck me in several of the preceding presentations is the use of a cost-benefit analysis in regards to clinical legal education. From my point of view, the problem of using cost-benefit analysis is in quantifying the benefit side. It is not hard to arrive at a cost, but the calculation of the benefit necessarily requires some kind of measurable outcome that one can relate to costs. What we want to concentrate on is the question of evaluation, measurement and diagnosis in law school clinics. I will briefly describe Antioch's model of lawyering competencies. Following my remarks, Professor Jack Sammons of Mercer University will go into more detail in showing how a system has been developed for evaluating student performance.

At Antioch we started working some years ago on questions of lawyering competency through a vehicle called the Competency-Based Task

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[1] The development of the clinical program at the Antioch School of Law—founded in 1972 by Co-Deans Edgar and Jean Camper Cahn—is described in Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U.L. REV. 695, 862-866.

Force. We were fortunate to have funding from a number of sources, including CLEPR,[2] FIPSE,[3] and the National Science Foundation.

Initially, we took a task-oriented approach and started defining basic lawyering skills, such as interviewing, counseling, negotiating, discovery, depositions and the elements of trial practice—direct and cross examination. For each task a distinction was made between the process of doing the task and the product of the task. Trying to distinguish between process and product was an interesting exercise. At first, we were bogged down on the question of process: how should one go about interviewing? Should one be supportive, warm and encouraging, or should one be professional and aloof? We tried to focus on how to recognize a good interview by asking: What's the outcome of a good interview? What are the products? We reached agreement on what some products of a good interview ought to be, and then boiled these desired products down into a limited number of observable consequences. The next step was to develop task situations and instruments for evaluating task performance.

The testing procedure was based on simulations, called Professional Boards, where an actor or actress played the part of client and a student was assigned the role of attorney. The student would conduct a simulated intake interview and then be evaluated by observers using instruments we developed. The evaluations made using our methodology and instruments were fairly reliable and reasonably valid. We also found, however, that if we limited ourselves to a task approach and continued trying to develop instruments and methods for measuring standardized tasks, the methodology really did not adapt itself to clinics.

Clinical instructors are not dealing with a situation in which they can control all the variables. They encounter a much more fluid situation. They do not really have the time, the inclination or the wherewithall to try to develop their own instrumentation and specific methods of formal assessment and evaluation.

It, therefore, was necessary to take a different look at the problem of lawyering competency. We avoided a pure task-oriented approach, opting instead for a more functional tack. Essentially, we asked what is it that lawyers do and do we have some concept or model of what lawyers do? Our conclusion was that lawyers act as communicators through both the oral and written modes. They also act as legal analysts, problem-solvers, and, practically speaking, as managers in various capacities. They act as responsible professionals within a structure of norms, values, attitudes and expectations.

We set about trying to define six major areas of functioning which we labelled general competencies: oral communication, written communica-

[2] The Council on Legal Education for Professional Responsibility, Inc.

[3] Fund for the Improvement of Secondary Education (supervised by the Dept. of Health, Education and Welfare).

tion, legal analysis, problem solving, professional responsibility and practice management. In our opinion, one could look at almost any lawyering act as drawing, in one way or another, upon some array of these major functions. Having developed a general definition for each of these six areas, we then identified more specific skills within these areas, a list of "specific competencies." The specific competencies were essentially a more detailed delineation of the types of skills or abilities one would look for under a particular major competency. Thus, we ended up with an array of skills which could be applied to any task. Name a task and we hypothesized that it could be analyzed in terms of some subset of skills involved by use of what will be called the Antioch Competency-Based Task Force model.

Criteria were then defined for each of these specific competencies or skills. The specific competency criteria helped answer the question: how does one recognize competencies? The underlying premise of the model is that skills are generic in the sense that they are common to many tasks. For example, the ability to express thoughts in an organized manner is surely a skill that is needed in all kinds of tasks. Another example is the ability to identify relevant facts. It is something that appears in any number of different skills, tasks and competency in that the existence, or lack thereof, can facilitate or impede the further performance of a task.

After giving a student an assignment, the specific competency criteria allow the instructor to recognize whether the student is doing that particular function, or experiencing a problem with it. Thus we find that the model provides a consistent framework for analyzing behavior. In this way, the model is product oriented. It enables one to look at a written product or an oral performance in terms of some array of specific abilities, and to make some decisions about the adequacy or inadequacy, absence or presence of different behavioral products, given the different skills manifested within the overall performance.

If an instructor finds a problem, there is a reference point for diagnosis of the insufficiency. Why did the student miss relevant facts? Why did the student, for example, fail to establish the client's objectives and priorities? This approach also facilitates the initiation of dialogue with the student. Did the student err because he or she did not know the law or because he or she did not have enough time? The model serves as a focal point for diagnosing the reasons for inadequate performance. It also provides a uniform language for evaluation.

One of the major problems with evaluating students in the clinic, especially if a systematic approach is desired, is that one can be overwhelmed with observations or data. The instructor will initially question whether he must evaluate every conversation he has with a student according to all these specific competencies. Obviously, the answer is no. There must be some discretion. The approach that we have experimented with at Antioch is for each clinic to determine in advance two

criterion tasks which (1) the students would be assured the opportunity to practice, (2) would be recognized as important, integral tasks in that area of law as viewed by practitioners, and (3) which the supervisor has the opportunity to observe a student performing, either in terms of action or product. Part of the clinical evaluation of the student is based on performance of these two assignments. These criterion tasks are announced to the students at the beginning of the clinic period so that they can form a focal point.

The evaluation is done on a Basic Clinic Report Form. This form simply compresses the whole set of specific abilities into the six major competency areas. We use a six point scale to evaluate each applicable area. If the criterion task is written, obviously oral communication skills are not involved and the supervisors merely modify the total points available to correspond to the applicable areas. On the basis of a six point scale, students must get a four or better on each task in order to get credit for the clinic. The supervisors are free to evaluate anything else the student does, but they must evaluate these two criterion tasks. This systematic evaluation procedure yields a data base for tracking the skills development in students over a three year period.

III. REMARKS OF JACK L. SAMMONS

Russ Cort and I have been working together on the Competency-Based Task Force for about four years and have developed our own very specialized vocabulary. This peculiar jargon is helpful to us, serving as an efficient way of describing concepts on which we agree. Because we use it freely with each other, it is sometimes difficult to avoid slipping into it when we are speaking with others. I promise that I will try to avoid that, and apologize in advance for what I know will be my failure to do so.

I would like to start my contribution to this discussion by expanding one of Dr. Cort's comments. The model he was describing provides a standardized language to be used in recording information about students' learning of lawyering functions. The educational potential of such a language is as broad as it is obvious. For example, Professor Dean Rivkin[4] in his thoughtful presentation on the future of clinical legal education, referred to several pressing problems facing clinicians. He mentioned the difficult problem of defining the subject matter of clinics using generalizations about learning. The standardized language of the evaluation model responds to this problem by allowing clinicians to record data upon which educational generalizations could be based. Professor Rivkin lamented our inability to express the enormous

[4] Associate Professor of Law, Dean Hill Rivkin, of the University of Tennessee and Co-chairperson of the American Association of Law Schools, Section on Clinical Legal Education addressed the convention on the subject of future developments in the clinical education area.

benefits of clinical education in terms which could be used to justify the high costs of such programs. The model's language, which allows for learning accomplishments to be described in measurable terms, offers one mode for that expression. Professor Rivkin also addressed the problem of how clinicians can best contribute to legal scholarship and stressed empirical behavioral research as one important area where clinicians are especially competent. The standardized language of the model could facilitate research in this area.

The model described by Dr. Cort is a system for analyzing errors in the performance of lawyering tasks. The errors, or sometimes lack of errors, are classified in terms of lawyering functions which have been identified by the Competency-Based Task Force.[5] Generic lawyering functions are divided into "specific functions," and "specific functions" are given criteria to help the teacher in the classification process. For example, oral competency is viewed as a generic function. "The ability to express a thought with precision, clarity and economy" is viewed as one of many specific competencies, or subfunctions, under the generic term "oral competency." The question of whether a student used "correct vocabulary" is given as one criterion for determining when this specific competency is being manifested in some lawyering task.[6]

This system carries very little baggage along with it, since it is unconcerned about the source of errors. Errors are usually identified by a teacher comparing a student's performance of some particular lawyering task with a performance model. Initially, for the purposes of the system, any model and lawyering task will suffice. The system is model free, not task specific, and merely translates identified errors, however perceived, into indications of deficiencies in a student's ability to perform chosen lawyering functions.

One of the implications of this lack of baggage is that a clinician can conceivably make difficult comparisons. One can compare a student's performance in a negotiation session with the same student's performance in an interview. Evaluations by different teachers of the same student's performance of different tasks may also be compared. For example, a particular clinician whose belief is that the *sine que non* of all lawyering is to be authoritative with clients, can evaluate a particular student's performance in a counseling session. The same student can be evaluated in an interviewing session by another clinician, who happens to have a more Rogerian view of the lawyer's role with a client.[7] These

[5] *See* Competency-Based Task Force, Antioch School of Law, Catalogue of Definitions of Generic Lawyering Competencies (May, 1978).

[6] Consider the way errors are handled in this process of classification as being similar to the way facts are handled in the process of legal analysis. The reader is warned not to pursue the analogy too far. It is used primarily to describe the way in which errors are characterized and then grouped around concepts.

[7] The psychologist Carl Rogers views counselors as passive interactors

evaluators, each using the competency-based system, can directly compare their evaluations since each has evaluated the student on the same criteria.

Continuing with the metaphor, the system leaves other potential baggage behind. There is nothing in the system dictating a particular method of teaching. It can be used in the classroom as well as the clinical setting. Clinical teachers can teach from particular models, such as the Binder-Price interview,[8] or they can allow students to discover their own models by trial and error. Classroom teachers can teach Socratically, use the problem approach, or lecture. Such pedagogical choices are not important, for the system does not depend on them. It is believed, however, that the use of the system will eventually generate an understanding of the learning process which will bear upon such choices. The system also does not dictate teaching objectives. Nothing in the system says that we are only in the business of training technically proficient lawyers, or that we must try to instill social values. In fact, the only baggage which accompanies the system is the implication that we teach for generalization and transference.

The range of potential applications of this system is extremely broad. Today, each one of us will describe some particular applications of this system within the limited range of clinical legal education. These applications alone vary enormously,[9] as they should if the system is to have any potential for widespread use by clinicians. About all that these applications have in common is that each results in the spotting of errors, or in the absence of errors, in the content of a student's performance in a clinical setting; that this information is then subjected to a prescribed system of analysis; and that the resulting information is then used by the teacher to assist the student in learning. As can be seen from the generality of this statement, the applications have very little in common. In fact, all they need have in common for the system to work is that each must include a good faith effort on the part of the clinician to be careful and consistent in the process of classifying errors, and the absence of errors, into generic or specific competencies.[10]

At Mercer,[11] the system has been used in a combination of controlled and uncontrolled applications to diagnose and evaluate the performance

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whose job it is to react to the client's feelings on a matter. *See generally* C. ROGERS, CARL ROGERS ON ENCOUNTER GROUPS (1973).

[8] *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING (1977).

[9] The applications differ from very generalized to very specific and from relatively controlled to formal. The decision is one of cost-benefit; *i.e.*, how much time and effort are you willing to invest to get more reliable and more valid information about the student.

[10] *See* R. Cort & J. Sammons, Diagnosis and Evaluation of Lawyering Competencies in Law School Clinics—A Manual (draft), Antioch School of Law (Aug., 1978).

[11] The Walter F. George School of Law, Mercer University, Macon, Georgia.

of third year students in an all-year clinical course. This course is a field placement clinic, where the students are placed in outside offices under the supervision of a practicing attorney and a clinical instructor.

In the fall semester of this course the system is used in a controlled application for diagnosis and evaluation. The students receive classroom training in various lawyering tasks such as interviewing, counseling, fact investigation and negotiation. At the end of the training on each task the students perform that task in controlled simulated situations. For example, in evaluating interviewing, an actress would be hired to play the role of a client for each student. In reviewing these simulated interviews, the instructor first attempts to identify those specific competencies which he expects to be observable. Next, the performance is matched against the list of specific competencies to see which competencies were in fact observed in the performance. At this stage, the instructor is ready to begin the process of spotting errors in each performance, noting the absence of errors where such appears to be meaningful, and classifying all of this data according to the criteria for each specific competency and the rules for classifiction.[12] Up to this point, the instructor is still involved only in analysis. The diagnosis and evaluation of the performance are still to come.

In order to understand the difference between this analysis and its use for diagnosis and evaluation, we can draw an analogy to the practice of medicine. This system of analysis is simply a system for recording symptoms. A clinician, like a doctor, has to have a valid and reliable description of the symptoms before he or she can begin to develop hypotheses about the illness. Carrying the analogy further, in medicine the symptoms can be viewed as the product of some underlying pathological process. The same is true in clinical studies. We record deficiencies in an attempt to understand the underlying process which produced those deficiencies.

After completing the analysis of the student's performance, diagnosis is begun by trying to form an hypothesis which would explain the recorded deficiencies. For example, one hypothesis to explain some deficiencies in an interview is that the student might be involved in the premature identification of problems. Such an hypothesis would have to be subjected to later testing and should be discussed with the student. After the performance of one task, an instructor knows very little about a student. At best, he only has some suspicions about problem areas and an hypothesis or two to explain them. After numerous performances, however, a working "profile" of the student's strengths and weaknesses begins to form, and this profile and the hypotheses which flow from it can be used as a basis for decisions about a particular student's training. For example, it can be determined what type of assignments should be

[12] Most of the rules of classification have been incorporated in the Catalogue of Definitions of Generic Lawyering Competencies, *supra*, note 5.

given; which placement would be most helpful; what should be discussed at conferences; what type of feedback is needed and so on.

In the spring semester, we continue to use the system, but in a much less controlled fashion. Now the students select the particular lawyering tasks that are to be observed. In such circumstances, the instructor has no control over the variables which might affect a student's performance. Nevertheless, the information is still useful, and, as each task is completed, the instructor continues to use the information to refine understanding of the needs of each particular student. All of this information and the hypotheses are discussed with the student's supervising attorney, and, of course, with the student.

Up until this point, I have only discussed diagnosis. My reason for delaying any mention of evaluation is that all that needs to be added to this system of analysis in order to convert it into an evaluation system is a set of standards. The system of analysis does not provide these standards. The one that I use is a six point scale based on the amount of risk involved to a client.[13] Dr. Cort has done some statistical analysis of the results of these evaluations and has found acceptable statistical validity.

At the beginning of this discussion, I referred to the standardized language which this system of analysis provides. It is our hope that through this standardized language, clinicians can start to develop more meaningful and less subjective standards of lawyering competency. To develop general standards clinicians need to be able to share all of the information about lawyering which they acquire through teaching, supervision, observation and legal practice. It is our hope that this model offers a way for that sharing to begin.

When that sharing does begin, it is my belief that we will discover that there is no such thing as lawyering competency *per se*; there are just dimensions of performance that imply certain underlying structures of thought, knowledge, values and attitudes. Given the opportunity to learn specific content, characteristics of performance, different environments and different situations, these structures will manifest themselves in consistent levels of performance. That is my belief, and that is the assumption behind my teaching. It is this assumption which forms the basis for my use of the model.

IV. REMARKS OF ROBERT S. CATZ

In recent years, legal educators have begun to recognize that the clinical experience, when structured in an organized and supervised set-

[13] The scale is built on the amount of supervision which the supervising attorney believes is necessary in order to protect the interest of the client. For example, a student who usually performed a task in an acceptable manner with average supervision would be considered to have minimum competence and would receive a rating of four (4) on the six (6) point scale. *See*, appendix A, *infra*.

ting, provides an essential and necessary component of a law student's education. The institutional response at Cleveland State University has been to establish a small in-house legal clinic which provides direct client service.[14]

In our clinical program, objective assessment of student performance in basic lawyering tasks is a significant part of the student's educational experience. We have adopted a limited and modified version of the diagnostic and evaluating criteria previously discussed. Since our students participate in the clinic for only two quarters, we simply do not have sufficient opportunity for extensive and prolonged evaluation, nor is there sufficient redundancy in any particular lawyering task to permit measuring and evaluating a student's progress over time. However, one of the more positive features of the evaluating criteria described by Professors Cort and Sammons is that they are freely adaptable to any clinical setting, regardless of the particular institutional restraints, models or limitations. In addition, the use of the criteria evaluation method compels our instructors to define and express to the students, in objective terms, our teaching goals at the outset of the course.[15] This effectively communicates to the students that they will be involved in something more than a short, undefined legal experience.

The criteria evaluation method provides an objective, nonarbitrary approach to conventional grading. It is important for the students to understand that there are specific lawyering tasks that will be evaluated in arriving at a final grade. I feel this is important because students often sense that there is an element of arbitrariness involved in clinical grading. As clinicians, we have to begin to create an atmosphere of fairness in arriving at grades. In my experience, students often enroll in the clinic with an attitude that if they basically show up and do the assigned tasks, then they are entitled to a superior grade regardless of the actual quality of their performance.[16]

One of the problems in using the criteria evaluation method is that it is often difficult, given the pressures of clients, cases, students and other law school responsibilities, to use the evaluation forms in measuring student performance on a daily basis. Use of the evaluation forms presents numerous management and administrative problems.

When we begin to think about case assignments, one of the several steps that goes into the determination is to identify a case in which you can predict, over a ten to fifteen week period, that there will be at least

[14] The development of the clinical program at Cleveland State University, first established in 1972 with a grant from CLEPR, is described in Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 79-92 (1979).

[15] *See* C. ARGYRIS AND D. SCHON, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS, at 156-172 (1976).

[16] *See* Carr, *Grading Clinic Students*, 26 J. LEGAL EDUC. 223 (1976).

two or three major lawyering tasks which can be evaluated. On that basis, the student is assigned a particular case and the instructor is provided with the opportunity to perform several major evaluations to be quantified and used as a major component of the grade.

One of the major teaching elements included in the six competenciese[17] that were presented is the element of professional responsibility. Because of the short durational period of our clinic, we especially emphasize the teaching of professional responsibility. I find that a grade is determined by an evaluation of the major lawyering tasks performed *plus* some very general notions of a student's performance in areas related to professional responsibility, the attitudes of lawyering and the manner in which students approach their assigned tasks. Professional responsibility is one of the areas in which a student can be effectively evaluated in a ten to fifteen week period, as opposed to some of the other competencies involved, because other lawyering tasks may not necessarily arise with any frequency in the course of a short clinical experience.

At the end of the clinical experience we require every student to arrange an exit conference with his or her supervisor. This exit conference serves two purposes. First, the clincial supervisor is presented legal memoranda which facilitate the transfer of case responsibility before the student leaves the clinic. This permits the instructor to identify exactly what the status of a case is prior to assigning it to another incoming student. Second, at that meeting the student must present a written self-evaluation of his performance. The evaluation forms are handed out two or three weeks before the conference and the student is asked to evaluate his own performance in the six lawyering competencies outlined on the criteria task evaluation form. The evaluation document then serves as a discussion vehicle for arriving at the final grade.

One final observation needs to be stressed. I think that the most difficult problem I have in terms of adapting the materials developed at Antioch to our clinic is the short durational period of our clinical experience. In a course of ten to fifteen weeks there is simply a lack of the repetition necessary to fully measure student progress. If a student does one deposition, for example, that may be the only opportunity that the student will have to perform this activity while enrolled in the program. As a result, unless the student does two or three depositions, we do not have the benefit of measuring his progress in the performance of the same lawyering task.

V. REMARKS OF RALPH S. TYLER

Two essential characteristics of any reasonably valid system for evaluating student performance are: (1) a stated expected standard of

[17] *See* appendix A *infra.*

performance, and (2) objective criteria to identify and measure deviation from that standard. A system for evaluating students in a clinical program must also possess these two characteristics. Thus, the starting point in developing such a system is an explicit statement of the academic objectives of the program, followed by criteria for evaluating student performance.

Ideally, clinical faculty and students will agree upon a program's academic and client service goals. Absent such agreement, the clinical teacher has the same academic obligations as his classroom colleagues and must accept responsibility for setting and maintaining standards.

In the clinical program at Cleveland State University, program goals are discussed at the beginning of each academic quarter in a meeting between clinical teachers and new clinic students. The major topic of discussion in this meeting is the standard of legal practice expected in the office. Two themes are developed: One, that a lawyer's primary ethical obligation is to provide competent representation to each and every client; and two, that the academic goal of the clinic is to practice law in a manner consistent with this ethically compelled standard.

Abstract lofty goals are easily stated, but somewhat harder to define precisely and harder yet to achieve. Nevertheless, as with any law office representing clients, a clinical program lacks ethical justification unless it demonstrates through its practice of law proper respect for the rights of clients and the craft of law. Likewise, as an intellectual endeavour worthy of pursuit by a law school, a clinical program loses academic validity unless its model of practice is one of rigorous excellence.[18]

The first challenge is to define competent legal representation with sufficient precision so that it can serve as a basis for evaluating student performance. At a minimum, excellence in the practice of law means that every possible legal issue in a client's case is identified, researched and pursued once it is determined to have merit and the client has expressed an informed judgment authorizing its pursuit.[19] It also means that factual issues are developed prior to advising a client on whether a claim or defense exists, and if present, how best to assert it.

Ultimately, the quality of legal representation is tested under the cold light of result. The crucial result-oriented questions concern

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[18] This image of the standard of legal practice in a clinical program has implications for the structure, staffing and caseload of the program. The theory of clinical education assumes that students will have primary client and case responsibility as the method of instruction. *See generally* Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979). To provide students with this type of education in a high quality form, both the student-faculty ratio and the caseload-student ratio must be low.

[19] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY. EC 7-5; Clarion Corp. v. American Home Products, 494 F.2d 860, 864 (7th Cir. 1974). *See generally* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS (1978).

whether the client's rights were maximized or whether they were compromised by less than effective representation. These questions will be answered by considering whether the civil client received a lower verdict, or had a higher judgment entered against him or whether a criminal defendant received a stiffer sentence than he would have had he been more effectively represented.

Some lawyers, and at times clinical students, tend to promote the self-protective view that lawyering involves purely subjective judgments and is, therefore, virtually impossible to evaluate. I disagree. While it is true that the practice of law does not lend itself to controlled experiments in which the result achieved by student A can be compared with the result achieved by student B, where all facts and circumstances of the cases are substantially identical, A and B can be compared and evaluated by examining their performance of specific lawyering tasks. For example, a student's skill in issue identification, factual development, witness preparation and the quality of written work *can* be evaluated. While luck and uncontrolled factors influence outcomes in cases, there is a direct relationship between the competency with which specific lawyering tasks are performed and the likelihood of a client's rights being maximized.[20]

When a student is asked to evaluate the performance of a lawyer he has opposed, the student readily comes to understand that objective standards for evaluating lawyering do exist. This capacity to evaluate other lawyers is itself a lawyering skill which students innately possess, but which needs to be refined. During the course of their clinical work, students should be asked to evaluate the performance of every lawyer, including judges, with whom they come into contact, as well as to evaluate their own performance.[21] After opposing a lawyer in a case, I frequently ask the student whether he would retain that particular lawyer if the student had a serious legal problem. Responses to this inquiry have been generally intelligent and well reasoned. Students correctly differentiate between a sophisticated advocate and a journeyman, a thoroughly prepared lawyer and an unprepared one, and an effective negotiator and an ineffective one. These examples suggest that objective standards of lawyering do exist and are shared within any given legal community. Trial lawyers in a particular community, for example, generally will know and agree on the names of the great trial lawyers, the good ones, and the rest.

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[20] This approach is a rough application of Peter Drucker's theory of supervision and management of "knowledge workers," such as lawyers. He argues that the supervisor should only evaluate whether the knowledge worker had sufficient facts or information upon which to base a judgment or decision, but does not attempt to "second guess" the decision itself. P. DRUCKER, MANAGEMENT CASES—TASKS, RESPONSIBILITIES, PRACTICES (1977).

[21] Kelso & Kelso, *The Future of Legal Education for Practical Skills: Can the Innovations Survive?*, 1977 B.Y.U.L. REV. 1007, 1021-23.

Thus, asking students to evaluate their opponents teaches that lawyering can be evaluated against agreed upon objective criteria of professional competence. The lawyering competencies by which students should be evaluated are those used constantly by lawyers in the representation of clients: legal analysis, oral and written advocacy, problem solving, practice management and professional responsibility.[22] Student performance in each of these areas should be judged against the objective standard of how the particular task must be performed if the client's rights are to be maximized.

Having argued that objective evaluation of clinical students is possible, and indeed is necessary in preparation for entry into a profession where peer evaluation become the basis for one's professional reputation, certain unique features of clinical work which interfere with the clinical teacher's claimed objectivity should be noted. The most direct source of interference is the complete lack of anonymity at the moment when the evaluation is made. Currently, in classroom courses, the common practice is for the classroom teacher to receive an examination book bearing a student's number, rather than a name. This practice is designed to avoid any prejudice in the determination of a grade which may be due to knowledge of the writer's identity. When evaluating a clinical student, not only is his identify known, but, to make matters worse, the student is a person with whom the clinical teacher has worked directly. The result is something more than a teacher-student relationship. This may be either a good and productive working relationship or a mutually antagonistic one. The teacher's obligation to the student and to the academic enterprise is to isolate biases produced by personal compatibility or incompatibility. Quite clearly, total objectivity in this sense is not possible to achieve.

A second major problem in evaluating clinical students is the direct relationship between student performance and teacher performance. To some extent in every relationship between a student and a teacher, poor academic performance on the part of the student reflects something about the teacher. In the clinical setting, however, the reflection is immediate and direct. For example, if a student fails to listen during a client interview and thereby does not hear why the client has taken the trouble to come to the office, perhaps it is not the student who has failed. The failure may rest on the teacher who did not adequately prepare the student for the task. When this is the case, it is a teaching failure and the teacher should share the burden of the negative evaluation.

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[22] Discussion of techniques for evaluating students' work in each of these competencies appear elsewhere in this symposium. *See* Cort and Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980).

The very novelty of lawyering to the student demands that the clinical teacher recognize the special and profound teaching responsibility that is owed to the student and the client. Students should not be allowed to fail at a task because they did not understand it or because it had never previously been attempted by the student. The clinical teacher's responsibility is to be certain that the student understands what is expected. All tasks should be "mooted" or simulated before the actual task is performed. The student is entitled to this degree of preparation to increase the likelihood of a successful performance. The client, who no doubt will be a low-income person for whom the clinical program serves as lawyer of last resort,[23] is entitled to at least this much protection.

Rational, non-arbitrary evaluation of students in law school clinical programs is not impossible, it is merely very difficult. To reduce the difficulties, the instructor must begin by stating the academic goals of the program and defining the lawyering competencies which must be mastered to achieve that goal. This much should be objective. Thereafter, the teacher must teach with enough care so that the student can competently represent the client. Finally, the teacher must be wary of personality-based biases in evaluating student performance.

VI. REMARKS OF TERENCE J. ANDERSON

In my presentation I will attempt to accomplish two things. First, I will report on the ways I have used the Antioch competency-based education system at Miami. Second, I will draw upon my own experience at Antioch and Miami and upon those of my colleagues to suggest some different and broader applications for the competency-based approach in the field of legal education and research.

The panel for this session has illustrated a broad spectrum of clinical programs. At one end is Antioch, designed to be the law school equivalent of a teaching hospital. Every student is required to work for three years in faculty-supervised clinics. As Dr. Cort reported, the student's work and performance is evaluated in six separate clinics, typically by at least six different faculty-attorneys. Because these evaluations are now being recorded in a standard format, Antioch is accumulating a large body of data. Obviously, if we are serious about clinical research, Antioch is an incredible laboratory in which to study the learning process, teacher performance, and lawyering behavior. As I understand Dr. Cort, the data is presently being circulated and used by individual teachers to assist individual students; it is not being subjected to systematic analysis. Clearly, such data provides opportunities for serious research in clinical education, including opportunities to begin to document the benefit side of the clinical education cost-benefit problem.

Cleveland State represents a typical "in-house" clinical program. A

[23] Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U.L. REV. 695, 884-85.

relatively small number of third-year students engage in the limited practice of law for two quarters under the supervision of full-time faculty members. Because the time for teaching and evaluation is short, I understand Professors Catz and Tyler use the competency-based system primarily as an educational device—to set out objective performance criteria that students are expected to meet and to introduce students to a system of self-evaluation. If research validates the Antioch model, this may be a highly effective teaching method.

Mercer's program illustrates the small, closely supervised "farm out" clinic. Third year students who wish to participate commit themselves to a year-long simulation training course which addresses specific lawyering skills. Their actual practice experience is acquired under the supervision of practicing attorneys who are not members of the faculty. Professor Sammons has described how he uses the competency assessment system to analyze and diagnose student performances in simulation exercises and as a vehicle to monitor actual field performances. Because the student's simulation and field performances are evaluated by the same observer, the data generated could also be useful for research.

Miami is at the other end of the spectrum. Approximately eighty third-year students devote at least 220 hours per semester in a two semester program working outside the law school under the supervision of assistant public defenders, assistant state attorneys, legal services attorneys, or other public agency attorneys. A few clerk for federal or state judges.[24] Before enrolling, students must have completed the first year courses and advanced civil procedure and evidence. Either before or during their first semster in the clinical program, they must take a one semester professional methods course which employs simulation

[24] The following table illustrates the distribution of students and hours worked among agencies.

Intern Hours Recorded: 1979/80

	Summer, 1979		Fall, 1979		Spring, 1980	
	No. Students	Hours Recorded	No. Students	Hours Recorded	No. Students	Hours Recorded
Pub. Defender	16	4,410	33	8,450	15	4,380
State Attorney	13	3,610	23	5,370	12	3,270
Legal Service	2	470	8	1,930	5	1,290
Federal Agencies	4	830	4	900	1	250
Judicial Internship	—	—	7	1,620	7	1,710
Other State	1	240	2	500	1	220
	36	9,560	77	18,770	41	11,120

Total Hours: 39,450

"The University of Miami School of Law: Application for Continued and New Support for 'A Demonstration in Cost Effective Clinical Legal Education,'" p. III-4, (Proposal submitted to the Office of Education under the Law School Clinical Experience Program, June, 1980).

techniques and focuses upon professional responsibility and litigation skills. To document their experience, students must submit detailed weekly Time and Activity Reports approved by their supervising attorneys.

Obviously, the Miami program is a fiscal administrator's delight. The clinical program generates some 640 student credits earned with an allocation of some 30 percent of a single faculty member's time for administration and monitoring. Participating agencies benefit from some 40,000 hours of student lawyering time. Because Florida has a liberal student practice rule,[25] the benefits significantly outweigh the supervisory and training costs. The larger agencies also acquire an annual pool of students who are gaining experience and competing for job opportunities. Students, wisely or unwisely, also view the program as valuable. They acquire substantial experience, they are practicing law, and the job opportunities are there.

The contrast between the Antioch and Miami programs illustrate what many perceived as the central cost-benefit issues. How do we determine whether the educational benefits from a faculty supervised clinical experience, such as Antioch's, justify the costs—not only when compared with the costs and benefits of traditional classroom education, but also when compared with those of an externally supervised clinical program such as Miami's? The development of objective and comparable evaluation systems such as that described by my colleagues may provide one approach for measuring the differences in a way lawyers and academicians will accept.

Let me turn briefly to other uses for such a system. For me, the competency-based system has always been at least as useful as an educational planning tool and as a vehicle for assessing my own performance as a teacher, as it has been for analyzing and evaluating student performances. I will illustrate this by comparing how I used it when I was a true clinician at Antioch and how I use it now as a classroom teacher and clinical manager at Miami.

At Antioch, I developed the School's landlord and tenant clinical section. I chose the area because I wanted a finite area of law in which the cases raised repetitive tasks that students could master and in which I could effectively supervise the handling of a large number of cases. During each three month rotation, I would have approximately twelve to sixteen basic students (first-year and first-semester second year students) and four or five advanced students (students certified to prac-

[25] INTEGRATION RULE S. CT. FLA., Art. XVIII. Under this rule, there are no limitations upon the kinds of cases students may handle, and trial court judges have discretion to waive the requirement that a supervising attorney be present when a student intern appears. This requirement is typically waived in County Court and on routine motions in Circuit Court. In addition, once a student has successfully completed the clinical program, the agency may continue his or her certification for up to twelve months following graduation.

tice under the District of Columbia student practice rules[26]). For my basic students, I accepted only basic tenant defense cases—a landlord suing an individual tenant for possession based upon either nonpayment of rent or termination of the tenancy by notice. The section would carry thirty or more active cases. Each team of two basic and one advanced student would be responsible for approximately four cases.

We would meet as a group for two hours each week. We would discuss the basic cases in traditional classroom fashion with one critical difference: in every discussion on every issue, there were students who had a real client for whom they were attempting to raise a related issue, and a case that might be at any stage from the initial client interview to final trial preparation. For example, if we were discussing *Brown v. Southall Realty*,[27] at least one pair of students would be immediately and directly concerned with the questions of whether we had to prove and how we could prove the landlord knew the violations existed when the lease was signed. The case under discussion took on new meaning.

In this environment, I found the competency-based approach useful in two ways. First, it required me to articulate my objectives for the section in terms of a product. I chose two: each student knew in advance that he or she would be required to produce (1) a significant memorandum on either a complex problem in a particular case[28] or on a recurring issue in landlord-tenant practice;[29] and (2) to prepare at least one case for trial. Second, the competency-based approach also required me to think through my criteria for evaluating these and other tasks with greater rigor. I could not observe every initial interview, and I could and did specify a format for an initial intake memorandum. Like Professor Sammons, it then became necessary for me to determine the criteria that led me to develop the format and the criteria I was applying in evaluationg the product. From my analysis of the products, I developed hypotheses not only about the individual student's strengths and weaknesses, but also about deficiencies in my own teaching. These in turn were fed back into the classroom.

I quickly became convinced that this approach was equally significant in classroom courses. I began to think more rigorously about what I meant by "thinking like a lawyer" and to re-examine my own materials and teaching methods to determine what I was in fact teaching and what I might reasonably expect students to learn. I began to design my examinations and other assignments to measure specific outcomes and to use the results not only to grade students, but also to diagnose my own performances. I have found this extremely useful.

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[26] *See* Appendix *Student Practice Rules*, 29 CLEV. ST. L. REV. 817 (1980).

[27] 237 A.2d 834 (D.C. Ct. App. 1968).

[28] *E.g.*, the proper criteria for establishing the admissibility of computer printouts to establish rent due in suits by the public housing authority.

[29] *E.g.*, the proper criteria for establishing a client's eligibility to proceed without payment of costs.

When I moved to Miami, I suffered through minor withdrawal pains. The idea of trying to monitor eighty students practicing in twelve separate agencies and in virtually every field of law was frightening. However, I have found the competency-based system useful in this environment also.

I viewed the experimental mission at Miami to be one of determining whether the educational benefits of a clearly cost-efficient external clinical program can be increased by directing faculty resources toward making field supervisors more effective educators. In effect, my hypothesis is that by using a comprehensive system, such as the Antioch model, I might be able to persuade agency training officers and individual supervising attorneys to do two things. First, the comprehensive system could help them think about their teaching responsibilities to students, as well as their supervisory responsibilities to clients, and to think about those responsibilities in terms of the kinds of products and outcomes that they believe should be produced with respect to the recurring tasks which arise in the cases in which they specialize. I hope this will induce agency training officers and individual supervisors to design their training programs to develop the specific skills students need to perform these recurring tasks competently. Second, the system would introduce the supervisors to a common language that may improve their ability to communicate with students. To achieve this, I began to offer workshops in clinical legal education for supervising attorneys in which the materials of Dr. Cort and Professor Sammons serve as part of the curriculum.

Although I would not expect any agency or individual supervisor to adopt this system, I do think it may help them to think and organize their programs in terms of specific objectives and outcomes. For example, does a student need to spend two semesters in the juvenile division to master the required tasks in one context or will he or she become a better advocate by spending one semester in a juvenile division and the other in a felony division? Since no supervisor can observe or evaluate each task a student performs, the crucial questions become: Upon what tasks and what products should a particular supervisor concentrate, and what outcomes should he or she expect? What should be done, for the individual student and to the agency training program, if those outcomes are not satisfactory? These are the kinds of questions that must be addressed if we are to do away with subjective and arbitrary methods of clinical instruction and evaluation.

My experience at Miami has reinforced my belief that the competency-based approach to legal education and evaluation is at least as important in the classroon as in the clinical curriculum. Many clinicians are moving into the classroom, hopefully keeping one foot in the clinic. I believe that the perceived dichotomy between skills training in clinical and simulation programs and substantive law teaching in classroom offerings is both false and harmful. For these reasons, I will use my ex-

perience to illustrate one way clinicians might help to eliminate this perceived dichotomy.

In my ideal law school, each professor would identify a few specific criterion tasks that he would require students to perform in each course. The performances of these tasks would then be evaluated as part of the grading process. In torts it might be drafting in the context of jury instructions; in civil procedure, oral advocacy in motions. At a more traditional level, it might be legal analysis demonstrated in the specific context of being able to accurately frame the holdings in three cases and synthesize a rule which encompasses all three.

We think we do this now. All first-year teachers say they teach students to think like lawyers while they empart substantive knowledge. But ask these teachers to agree upon the components of this skill and to identify the specific criteria they use to design and evaluate their examinations, and the disagreements become evident. The bottom line seems to be: "We know it when we see it." I do not think this is necessary or sufficient.

My own experience in teaching a large introductory course in legal reasoning and small sections in legal writing has convinced me that I can offer a better course and be a better teacher by defining what I mean by legal reasoning, by identifying specific tasks and by developing specific evaluative criteria for each task. At a minimum, it improves my objectivity in grading. It also provides me with concrete diagnostic data for individual students. But more importantly, it enables me to identify apparent weaknesses common to the class' performance which suggest deficiencies in my materials, teaching, or criteria. From these I can develop hypotheses about how I might improve in succeeding performances; hypotheses to be tested next time around.

This experience suggests what I see as the true potential of a competency-based approach to legal education. If we could ever agree upon the skills and the substantive knowledge we expect a competent lawyer to have and the kinds of criteria by which performance should be measured, we might then be able to begin to develop a legal curriculum designed to produce competent lawyers. In effect we would be planning a curriculum backwards, in terms of the product we want to produce. In that process we would, I suspect, discover that there are certain objectives that can be achieved efficiently and effectively in classroom settings; others that can best be developed through simulation exercises; and still others which can only be achieved through certain kinds of clinical experiences. We might then be in a position to identify and allocate our resources to produce the product we seek: competent lawyers.

If this approach has value, I think the dialogue and the process must be initiated and developed by clinicians. We have begun. We now must find ways to continue. For it is here that we have an opportunity to make a lasting contribution to the whole of legal education and lawyering.

APPENDIX A

I. CRITERION TASK EVALUATION

COMPETENCIES & DEFINITIONS	RATING		COMMENTS
Criterion Task	1	2	
ORAL The ability to assess, control, and vary verbal and non-verbal communications with an audience(s) in a given situation to maximize the accomplishment of objectives.			
WRITTEN The ability to control and vary written communications with an audience(s) in a given situation to maximize the accomplishment of objectives.			
LEGAL ANALYSIS The ability to combine law and facts in a given situation to generate, justify, and assess the relative merits of alternative legal positions.			
PROBLEM SOLVING The ability to use legal analysis and other information to identify and diagnose problems in terms of client objectives and to generate strategies to achieve those objectives.			
PROFESSIONAL RESPONSIBILITY The ability to recognize the ethical considerations in a situation, analyze and evaluate their implications for present and future actions, and behave in a manner that facilitates timely assertion of rights.			
PRACTICE MANAGEMENT The ability to manage time, effort, available resources, and competing priorities in a manner which generates the maximum output of quality legal services.			
CRITERION TASK OVERALL RATING			

INSTRUCTIONS: For each criterion task, rate student on each applicable general competency using a number from the Competency Scale provided here:

1 = Serious Deficiency
2 = Deficiency
3 = Marginal Deficiency
4 = Minimal Competency
5 = Competency
6 = Superior Competency

II. CRITERION TASK SUMMARY	III. OVERALL CLINIC PERFORMANCE EVALUATION/ RECOMMENDATION
Task #1: Complexity: Simp. Ave. Comp. No. of times perf'd.	
Task #2: Complexity: Simp. Ave. Comp. No. of times perf'd.	