

# Outcomes-Based Education One Course at a Time: My Experiment with Estates and Trusts

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## Introduction

Over the last five years, the legal academy has been under pressure to “reform,”<sup>1</sup> with the three most prominent and widely cited sources of this criticism charging that legal education does not adequately prepare students to be lawyers.<sup>2</sup> The three sources are the Carnegie Foundation for the Advancement of Teaching,<sup>3</sup> a description by various members of the legal academy of “best practices” in legal education,<sup>4</sup> and a report issued by the Outcome Measures Committee of the American Bar Association Section of Legal Education and Admissions to the Bar.<sup>5</sup>

In the aggregate, these reports challenge law schools to radically rethink the delivery of legal education by starting at the end and working backwards. The current buzzword for this kind of education is “outcomes-based”

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1. See e.g., Catherine L. Carpenter, et al., American Bar Association Section of Legal Education and Admissions to the Bar, Report of the Outcome Measures Committee (2008) [hereinafter ABA Report]; Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map (Clinical Legal Education Association 2007) [hereinafter Best Practices]; William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass 2007) [hereinafter Carnegie Report].
2. ABA Report, *supra* note 1, at 3-6, 8; Best Practices, *supra* note 1, at 11; Carnegie Report, *supra* note 1, at 6.
3. Carnegie Report, *supra* note 1.
4. Best Practices, *supra* note 1.
5. ABA Report, *supra* note 1.

education.<sup>6</sup> Such an approach would require law schools to (1) identify knowledge, skills and professional attributes that graduates should possess,<sup>7</sup> (2) design curriculum based on such educational outcomes,<sup>8</sup> (3) communicate these outcomes to students,<sup>9</sup> (4) provide feedback on student progress toward achieving these outcomes<sup>10</sup> and (5) measure student proficiency in terms of the outcomes.<sup>11</sup>

The three reports encourage law schools to evaluate their programs based on demonstrated student learning, with emphasis on what students learn (output measures) rather than what students are taught.<sup>12</sup> In fact, the ABA Report recommends that output measures substantially replace input measures for the purpose of law school accreditation<sup>13</sup> and the ABA is considering amendments to its accreditation standards that would adopt outcome measures as part of the accreditation process.<sup>14</sup>

The genesis of this article is two-pronged: first, for two years, I have been an active member of two distinct but related committees having to do with “the future of legal education.” On William Mitchell’s Future of Legal Education Task Force, my colleagues and I wrote a lengthy report on “outcomes-based

6. See ABA Report, *supra* note 1, at 55; Mary Crossley & Lu-in Wang, Learning by Doing: An Experience With Outcomes Assessment, 41 U. Tol. L. Rev. 269, 272 (2010).
7. Future of Legal Education Task Force: Status Report (April 20, 2009) (on file with author) [hereinafter TF Report]; ABA Report, *supra* note 1, at 7; Best Practices, *supra* note 1, at 51-53; Carnegie Report, *supra* note 1, at 22.
8. ABA Report, *supra* note 1, at 16-19; Best Practices, *supra* note 1, at 93-94; Carnegie Report, *supra* note 1, at 8-9. See Grant Wiggins & Jay McTighe, Understanding by Design 29 (2005).
9. Best Practices, *supra* note 1, at 130; Carnegie Report, *supra* note 1, at 9-10.
10. See, e.g., ABA Report, *supra* note 1; Best Practices, *supra* note 1; Carnegie Report, *supra* note 1; Gregory S. Munro, Outcomes Assessment for Law Schools 11 (Institute for Law School Teaching at Gonzaga University School of Law 2000).
11. See ABA Report, *supra* note 1, at 7; Best Practices, *supra* note 1, at 51-53; Carnegie Report, *supra* note 1, at 22; Michael Hunter Schwartz, Teaching Law by Design, 38 San Diego L. Rev. 347, 404 (2001).
12. See TF Report, *supra* note 7, at 2.
13. ABA Report, *supra* note 1, at 1.
14. ABA Section of Legal Education and Admissions to the Bar Standards Review Committee, Student Learning Outcomes Committee, May 5, 2010, Draft, Chapter 3 Program of Legal Education. (2010). As of April 2012, the new standard had not yet been adopted, but discussion was ongoing. For more information on the process, as well as the draft itself, see [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html); <http://www.abanet.org/legaled/committees/comstandards.html>; see also [http://www.albanylaw.edu/sub.php?navigation\\_id=1845](http://www.albanylaw.edu/sub.php?navigation_id=1845). Much of the debate around this proposal is centered on how to determine appropriate outcomes and how to assess the achievement of those outcomes. Since that is slightly beyond the scope of this article, see instead the multitude of materials on the above-cited websites.

education,” parts of which have made their way into this article.<sup>15</sup> In addition, I am a member of the Clinical Legal Education Association’s Best Practices Implementation committee, which is charged with identifying ways to both implement and enhance the suggestions made in Roy Stuckey and others’ *Best Practices for Legal Education*<sup>16</sup> and to gather information about current education innovations taking place in particular law schools. I am a regular contributor to the *Best Practices* blog<sup>17</sup> and have participated in the development and production of workshops on various aspects of *Best Practices* at education conferences around the country.<sup>18</sup> In other words, ideas about the design and delivery of legal instruction in new and more effective ways have been much on my mind over the last two years.

The second inspiration for this article comes from the fact that I learned in the spring of 2009 that I would be teaching an estates and trusts course for the first time the following spring. At that time, the Mitchell task force was completing its report, and the Best Practices Implementation Committee was finishing a survey on outcomes-based education. It occurred to me that I had a great opportunity to put these ideas to the test.

Instead of doing what I had always done when teaching a course for the first time—talk to colleagues about their courses, collect several syllabi and maybe

15. TF Report, *supra* note 7. The Future of Legal Education Task Force began meeting during the fall of 2008 to identify issues and proposals for consideration by the faculty. In addition to the author, members of the task force were: Mary Pat Byrn, Ann Juergens, Bert Kritzer, Raleigh Levine, Deborah Schmedemann, John Sonsteng, Nancy Ver Steegh (chair) and Sally Zusman. The task force charge:

This Task Force is charged with developing strategic goals aimed at retaining (or regaining) Mitchell’s pioneering position in legal education, in the next five to ten years. The plan should be consistent with Mitchell’s Mission and should grow out of its historic engagement with the community and the profession, its commitment to rigorous practical education, and its commitment to accessibility. As a general matter, it should build on the principles expressed in the Carnegie Report. The [t]ask [f]orce should refer to the Best Practices work that has been done in legal education. The [t]ask [f]orce should identify key areas of opportunity that might allow Mitchell to improve its legal education most dramatically. These might include areas where we are not as strong and intentional as we ought to be (e.g., assessment and accountability—how we assess student performance, how we assess our own performance as teachers, and as an educational enterprise), as well as areas where we are strong and have the know-how to excel (e.g., clinical, integrated skills, extended simulations).

Members surveyed and discussed literature on educational trends and considered how Mitchell might advance its educational program.

16. Best Practices, *supra* note 1.
17. Best Practices for Legal Education Blog, <http://bestpracticeslegaled.albanylawblogs.org>.
18. See, e.g., Legal Education at the Crossroads—Ideas to Accomplishments: Sharing New Ideas for Integrated Curriculum (University of Washington, School of Law, Seattle 2008, Denver 2009) (on file with author); Answering the Call for Reform: Using Outcomes Assessments, Critical Theory and Strategic Thinking to Implement Change (Baltimore 2010) (on file with author).

some class notes, put together my own syllabus and then start planning my classes—this time, I would start from the end point. I would ask myself: what are my goals for this course? Or, put another way, what do I want my students to be able to do when they have completed the course? From there, I would work backwards, through assessment methods (what evidence will I need to know whether they have achieved these goals or outcomes?), to delivery of instruction (how do I put together a syllabus and class activities that will facilitate the students' meeting of these goals?), and finally to evaluation.

The goal of this article, then, is to explore and demonstrate the effectiveness of outcomes-based education in the context of the planning and delivery of one course: estates and trusts. This article is not meant to convince educators to drink the Kool-Aid of outcomes-based education.<sup>19</sup> But requiring clarity and transparency about my goals for this course and gearing the class toward helping students meet those goals resulted in a course that felt more intentional, contextual and capable of reproduction than any I had taught before. I believe the students benefitted from my planning and delivery by gaining more understanding both of the material itself and of the process of learning. Their ability to self-assess throughout the semester improved measurably, allowing me to refine and adjust the materials much more than I had done previously. In short, this way of designing and implementing a course worked beautifully for me and I believe it worked for my students.

Nor is this article meant to be an exhaustive description or analysis of outcomes-based education. There is a universe of resources both within and beyond the walls of the legal academy that explore various aspects of adult learning theory and other educational theories from all angles.<sup>20</sup> My analysis throughout depends a great deal on many of these resources.

19. Although it is not my purpose to enter into the debate about whether outcome measures should be used in determining accreditation standards, it is worth noting that there is, indeed, an active and lively debate within the academy and the legal profession about whether legal education should be outcomes-based. *See, e.g.*, Memorandum from the Clinical Legal Education Association (CLEA) to the ABA's Standards Review Committee, Comments on Outcome Measures (July 1, 2010), *available at* [http://www.albanylaw.edu/sub.php?navigation\\_id=1845](http://www.albanylaw.edu/sub.php?navigation_id=1845); Letter from Deborah Waire Post, Co-President, Society of American Law Teachers, to Donald Polden, Dean of Santa Clara Law School (Oct. 2, 2009), *available at* [http://www.albanylaw.edu/sub.php?navigation\\_id=1845](http://www.albanylaw.edu/sub.php?navigation_id=1845); Memorandum from the Society of American Law Teachers, Comments on the Interim Report of the Outcome Measures Committee of the ABA Section of Legal Education and Admissions to the Bar (July 21, 2008), *available at* [http://www.albanylaw.edu/sub.php?navigation\\_id=1845](http://www.albanylaw.edu/sub.php?navigation_id=1845).
20. *See, e.g.*, the following sources, and sources cited therein: ABA Report, *supra* note 1; Best Practices, *supra* note 1; Stephen D. Brookfield, *Becoming a Critically Reflective Teacher* (1995); Stephen D. Brookfield, *Developing Critical Thinkers* (1987); Carnegie Report, *supra* note 1; Karen Clanton, *Dear Sisters, Dear Daughters* (1994); Steve Friedland & Gerald F. Hess, *Teaching the Law School Curriculum* (2004); Steven Keeva, *Transforming Practices—Finding Joy and Satisfaction in the Legal Life* (1999); Deborah Kenn, *Lawyering from the Heart* (2009); Robert MacCrate, et al., *Legal Education and Professional Development—An Educational Continuum* (American Bar Association 1992) [hereinafter *MacCrate Report*]; Julie MacFarlane, *The New Lawyer* (2007); Munro, *supra* note 10; Donald A. Schon, *Educating the Reflective Practitioner* (1987); Donald A. Schon, *The Reflective Practitioner—*

Rather, this article is meant as a reflection on the process of outcomes-based education from one teacher's perspective. I hope other teachers find it useful as they plan their own courses. And I hope those who are engaged in their own outcomes-based curriculum and course planning will contribute to this dialogue with their ideas, experience and reflection on the process.

### What is Outcomes-Based Education?

The idea of “outcomes-based education” is hardly new. Indeed, in other fields of graduate study, as well as across the board in undergraduate education, teaching toward outcomes is the default practice.<sup>21</sup> Moreover, many institutions of lower-education—e.g., elementary schools—follow a four-step structure for curriculum design and review developed by K-12 scholars, Grant Wiggins and Jay McTighe.<sup>22</sup> They describe this system, which they call “backward design,” this way:

First, the educator identifies his goals for the course. What measurable results does he want? This is the outcomes identification phase. Second, the educator determines what achievement of those outcomes would look like. What is evidence of student proficiency? This is the assessment phase. Third, the educator develops teaching methods and materials that are designed to help students achieve the identified outcomes in a way that the educator can assess. This is the delivery phase (what we think of as “teaching”). Finally, the educator evaluates how well his design worked. Did the teaching result in measurable evidence that students achieved the outcomes and did students achieve the outcomes? This is the evaluation phase.<sup>23</sup> This design process, beginning with the end in mind and designing toward that end, may be used to plan an entire curriculum or to plan and deliver an individual course.<sup>24</sup>

Although such an approach seems logical, it is viewed as backward because many legal educators begin designing their courses in Stage III: planning the classes. What textbook and materials will I use, what homework will I assign, what classroom activities will I construct?<sup>25</sup> Somewhere toward the end of the unit, the educator develops a final exam designed to test whether those teaching methods and activities resulted in students' learning the material.

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How Professionals Think in Action (1983); Schwartz, *supra* note 11, John O. Sonsteng, A Legal Education Renaissance: A Practical Approach for the Twenty-First Century; David I. C. Thomson, Law School 2.0—Legal Education for a Digital Age (2009); Wiggins & McTighe, *supra* note 8.

21. See Wiggins & McTighe, *supra* note 8, at 346. See generally Ken Bain, What the Best College Teachers Do (2004) (explaining that outcomes-based education has been hailed in undergraduate education for decades and legal education is way behind the ball).
22. See Wiggins & McTighe, *supra* note 8, at Chapter 1.
23. See TF Report, *supra* note 7 (citing Wiggins & McTighe, *supra* note 8, at 338).
24. *Id.*
25. *Id.*

With outcomes-based education, course planning happens in reverse. The educator starts by identifying the desired results and then the evidence necessary to determine that the results have been achieved.<sup>26</sup> Only after the results and assessment tools have been clearly specified does the educator plan the teaching needed to equip students to successfully meet assessments of whether the outcomes have been achieved.<sup>27</sup>

Thus in planning and ultimately delivering my Estates and Trusts course for the first time, I started by identifying my desired outcomes. What did I want students who completed my course to be able to do? In Stage II, I identified what evidence I would need to determine whether students had achieved these goals. What would student proficiency look like? Having identified such evidence, I designed assessment tools and activities that would measure it and help me determine the level of proficiency. Stage III involved designing instruction tools and teaching activities geared toward helping students gather the evidence necessary to allow me to assess whether they were achieving the outcomes. I planned to teach toward my goals. And finally, in Stage IV, I reviewed the whole process—one goal at a time, one class at a time, one assessment tool at a time—to figure out how I as an instructor had succeeded—or not—at designing and delivering the course from end to beginning.

### **Stage One: Outcomes**

The first in the four-stage curriculum or course design protocol I am calling “outcomes-based teaching” is identifying curricular or course outcomes. What, in other words, does the educator want her students to learn? Most teachers have a basic, maybe even intuitive, sense of goals for a particular course: We want students to learn the material. Maybe in addition we want them to be able to write well, perform complex analysis or engage in oral communication effectively. But very few of us are in the habit of articulating these goals clearly and explicitly, even to ourselves and our colleagues, let alone to our students. Outcomes-based teaching requires that we do just that. This method depends on educators’ intentionality and transparency about their teaching goals and the connection between those goals and everything that follows—the assessment tools, the classroom activities, the instruction.

#### *A. The Theory*

To be useful as a course or curriculum planning tool, the identification of outcomes should be broken down into specific abilities that can be taught and measured.<sup>28</sup> Outcomes-based education is non-normative: an educator or educational institution can pick whatever goals seem appropriate or desirable

26. *Id.*

27. *Id.*

28. See, e.g., ABA Report, *supra* note 1, at 1-8, 10-20, 54-56, 61-64; Best Practices, *supra* note 1, at 39-40; Carnegie Report, *supra* note 1, at 22, 95-97, 126-40; Wiggins & McTighe, *supra* note 8, at 338.

and work backwards from them.<sup>29</sup> Wiggins describes outcomes in terms of students being able to know, understand and do particular things related to the subject matter.<sup>30</sup>

The identification of outcomes requires exploration of a number of factors, ranging from broad-based cultural norms to quite personal teaching and learning styles. One starting point for an inquiry into outcomes would be an inquiry into the professional norms of the world which the learners will be leaving the class to join.<sup>31</sup> Thus, determining outcomes for a law school course or curriculum, requires consideration of the professional identity and attributes of a good lawyer.<sup>32</sup> What, in other words, should a graduate from a law school—or from a particular course—know, understand and be able to do?<sup>33</sup>

The Carnegie Report asserts that professional education “aims to initiate novice practitioners to think, to perform and to conduct themselves (that is, to act morally and ethically) like professionals.”<sup>34</sup> The authors discuss three dimensions of professional work, which they describe as “apprenticeships:” thinking, performing and behaving.<sup>35</sup> Based on these three apprenticeships,

29. Wiggins & McTighe, *supra* note 8, at 346 (defining an outcome: “In education, [an outcome is] shorthand for ‘intended outcomes of instruction.’ An intended outcome is a desired result, a specific goal to which educators commit. . . . To determine if outcomes have been attained requires agreement on specific measures—the assessment tasks, criteria and standards. Despite the controversies in past years about outcomes-based education, the word *outcome* is neutral, implying no particular kind of target or educational philosophy. It refers to the priorities of a curriculum or an educational program. An outcome-based approach focuses on desired outputs, not the inputs (content and methods). The key question is results-oriented (What will students know and be able to do as a result of instruction?) rather than input-based (What instructional methods and materials shall we use?).”).
30. See Wiggins & McTighe, *supra* note 8, at 82–85; ABA Report, *supra* note 1, at 1–6, 6–8, 10–20, 54–56, 61–64; Best Practices, *supra* note 1, at 39–90; Carnegie Report, *supra* note 1, at 22, 95–97, 126–40; MacFarlane, *supra* note 20, at 1–24, 66–95, 96–124, 125–64; Munro, *supra* note 10, at 12; Sonsteng, *supra* note 20, at 12, 46, 84–110, 186–210.
31. Indeed, much of the debate around the ABA proposal to replace “input measures” with “outcome measures” for purposes of accreditation centers around the question of what such outcomes would be and how they should be measured. See *supra* note 19.
32. Ann Shalleck, Sue Bryant, Muneer Ahmed, and Carmen Huertas presented a session at the 2009 AALS Clinical Conference called “Backwards Design: Forward Justice: Teaching Students to Develop Professional Identity and Purpose as Lawyers for Social Justice.” In that session, they described the need for a “Step 0,” or a preliminary step, before identification of outcomes. They identify that step as “Identify Key Components of the Good Lawyer & Professional Identity.” AALS Clinical Conference Events, available at [http://www.aals.org/events\\_clinical.php](http://www.aals.org/events_clinical.php). I think this is not necessarily a preliminary step, but one that belongs at the outset of the outcomes identification stage.
33. See ABA Report, *supra* note 1, at 1–6, 6–8, 10–20, 54–56, 61–64; Best Practices, *supra* note 1, at 39–90; Carnegie Report, *supra* note 1, at 22, 95–97, 126–40; MacFarlane, *supra* note 20, at 1–24, 66–95, 96–124, 125–64; Sonsteng, *supra* note 20, at 12, 46, 84–110, 186–210.
34. Carnegie Report, *supra* note 1, at 22.
35. Carnegie Report, *supra* note 1, at 27–28.

the Carnegie Report identifies six tasks necessary to train competent and effective professionals:

- Developing in students fundamental knowledge and skill, especially an academic knowledge base and research;
- Providing students with the capacity to engage in complex practice;
- Enabling students to learn to make judgments under conditions of uncertainty;
- Teaching students how to learn from experience;
- Introducing students to the disciplines of creating and participating in a responsible and effective professional community; and
- Forming students able and willing to join an enterprise of public service.<sup>36</sup>

Twelve years earlier, the MacCrate Report<sup>37</sup> identified ten fundamental lawyering skills and four fundamental values of the profession. The fundamental lawyering skills are problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.

The four fundamental values of the legal profession are, providing competent representation, striving to promote justice, fairness and morality, striving to improve the profession, and professional skill development.<sup>38</sup>

And finally, *Best Practices* talks about identifying outcomes whose aim is to develop competence, i.e., “the ability to resolve legal problems effectively and responsibly.”<sup>39</sup> Thus, choosing outcomes consistent with a sense of the culture in which the graduates from the program or course will be operating results in outcomes geared toward producing competent and ethical professionals.

The next layer in the process of identifying outcomes is to examine the particular culture of the educational institution in which the course or curriculum is offered. Much of the work I did on the William Mitchell Task Force was to identify the educational outcomes consistent with William Mitchell’s particular educational mission. To do that, we started from

36. See Carnegie Report, *supra* note 1, at 22. See also Best Practices, *supra* note 1, at 50–55 (discussion of statement of outcomes for legal education); ABA Report, *supra* note 1, at 7.

37. MacCrate Report, *supra* note 20.

38. *Id.* at 138–41.

39. Best Practices, *supra* note 1, at 59.

Mitchell's tag line—"Practical Wisdom"<sup>40</sup>—and asked what that meant in terms of the three inquiries into knowledge, understanding and being able to do.<sup>41</sup>

Here is how the task force described a general overview of educational outcomes for a Mitchell curriculum:

"Practical wisdom to put the law to work" means that:

- Graduates have basic legal knowledge;
- Core subject matter;
- Legal systems, process, sources of law;
- Graduates are proficient in the skills of analysis, research, communication and representation;
- Analysis and reasoning;
- Legal and factual research;
- Communication (listening, oral, written);
- Representation (problem-solving, strategic planning, counseling, negotiation, advocacy);
- Organization and management of work;
- Graduates conduct themselves professionally and exercise judgment in use of knowledge and skills;
- Ethics;
- Service; and
- Justice.<sup>42</sup>

Moving more tightly in from the norms and values of the profession and through the norms and values of the particular institution, determination of outcomes depends finally on the norms and values of the individual teacher and course. This inquiry can range from institutional requirements to coverage questions to personal comfort with the material. And that is my entry point into the process.

### *B. My Practice*

For this stage of the inquiry, consistent with the process described above, I asked: What should students leave my course understanding, knowing and being able to do? What enduring ideas and concepts will they take from the course?<sup>43</sup> What attributes do I want them to have developed?

40. Celebrating 109 years of practical wisdom, William Mitchell College of Law, <http://www.wmitchell.edu/law-school/practical-wisdom.html> [hereinafter Practical Wisdom]; A law school for the real world, William Mitchell College of Law, <http://www.wmitchell.edu/law-school/for-the-real-world.html> [hereinafter Law School for the Real World] (providing information on what makes William Mitchell a school of "Practical Wisdom").

41. See TF Report, *supra* note 7, at 8-16.

42. *Id.* at 8.

43. Shalleck, Bryant, Ahmed and Huertas, AALS Clinical Conference Events, The Association

Wiggins offers a variety of exercises to help figure out course or curricular outcomes.<sup>44</sup> As I worked through some of these, I realized that my ten plus years in clinical teaching, a fundamentally goal-oriented pedagogy,<sup>45</sup> had situated me well to embark on this process in the new context of an estates and trusts course. My work on the Mitchell Task Force and Best Practices Implementation Committee, helping to generate lists of outcomes, convinced me not to reinvent the wheel but rather to use what had already been done by those groups as a jumping off point.<sup>46</sup> I contemplated my goals for my estates and trusts course, an inquiry that required consideration of multiple layers:

First, how does this course fit in to the curriculum of my institution? Put another way, how will this course further the institutional goal of instilling in students the practical wisdom to put the law to work? And second, what personal goals and outcomes do I have for my students: What is my personal understanding of what it means to be an Estates and Trusts lawyer? As I developed the outcomes for my course, I wove these two considerations throughout my analysis.

I determined that for me, this stage of inquiry involved identifying and describing outcomes that combined an exploration of professional identity and contextual knowledge. These identified outcomes clearly grew out of my own teaching and scholarly history and interests: the lawyer-client relationship and student-driven teaching/learning.<sup>47</sup> But, to make these outcomes more concrete and geared toward this particular course, I needed to consider the elements and characteristics of a good estates and trusts lawyer. What are the shared norms and values and practices of the kind of lawyer I wanted my students to be after they had taken my course? To use the outcomes-based framing, what does such a lawyer understand (about systems, her role, etc.)? What does she know (about the law, about her client base, about non-legal issues)? What can she do?

On a very concrete level, I wanted these students to finish my course and be able to represent clients in an estate planning clinic—interview them, gather information, do legal research relevant to the clients' concerns, counsel them, plan a course of action, implement that course of action, which probably would involve drafting documents such as wills, powers of attorney, health care directives, trusts, and so on.

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of American Law Schools, available at [http://www.aals.org/events\\_clinical.php](http://www.aals.org/events_clinical.php) (last visited Aug. 19, 2010).

44. See TF Report, *supra* note 7, at Appendix C.
45. See Carolyn Grose, Flies on the Wall or in the Ointment?: Some Thoughts on the Role of Clinical Supervisors at Initial Client Interviews, 14 Clinical L. Rev. 415 (Spring 2008), and sources cited therein [hereinafter Flies on the Wall].
46. See Best Practices, *supra* note 1, at 130–32; see also TF Report, *supra* note 7, at 8–10.
47. See, e.g., Flies on the Wall, *supra* note 45; Carolyn Grose, Storytelling Across the Curriculum: From Margin to Center; from Clinic to Classroom, 37 J. Assoc. Legal Writing Directors 7 (2010); Carolyn Grose, Once Upon A Time, In a Land Far, Far Away: Lawyers and Clients Telling Stories About Ethics (And Everything Else), 20 Hastings Women's L.J. 163 (2009).

On a more theoretical level, I wanted the students to be able to consider the client's whole picture—what other resources, documents, professionals might assist this client? What other roles might they as attorneys play in implementing the client's goals? And I wanted them to be sensitive and appropriately responsive to ethical issues as they might arise.

To home in more closely on the doctrinal outcomes—what law, in other words, I wanted my students to know, understand and be able to use—I gathered information from two sources: practicing estates and trusts lawyers, and casebooks on the subject, seeking answers to the question, “what do estates and trusts lawyers do, in general, and in this legal community?” Not incidentally, because my overarching goal for the course was this combination of practical wisdom and professional identity, the book I chose to use for the course dovetailed nicely with lists I had generated from my meetings with practitioners to determine what estates and trusts lawyers do.

This line of inquiry branched off into another consideration, relevant to the ultimate determination of my course outcomes: How well do I want my students to know, understand and be able to use this material when they have completed my course? What level of mastery do I hope for them to achieve? I sought the answer to this by considering the course within its institutional context—what curricular gap is this course filling? What do the deans and my colleagues expect of students who have completed this course? Because this survey course is an introduction to the topic, I decided I did not expect the students to master this material. On the contrary, I wanted them to gain a sense of the potential questions that might arise in the practice of estates and trusts law.

Guided once again by what estates and trusts lawyers do, with a greater understanding now of how well I wanted my students to be able to do it, I narrowed the doctrinal topics I would cover down to what I considered the basics: wills, nonprobate tools and trusts.<sup>48</sup> I wanted students to understand the basic doctrine of each so they would be able to counsel clients at various stages. Depending on who the client is and the context of her question, the attorney plays a slightly different role, e.g., a planner who counsels a property owner on the creation and execution of an instrument, a litigator who counsels a beneficiary on how a document can be challenged, an advisor who counsels a fiduciary on how a particular provision can be interpreted. I wanted my students to be able, at the end of my course, to recognize and begin to inhabit these different professional roles with the tools and expertise needed for each.

As I narrowed my outcomes to focus tightly on developing the students' skills as client representatives in the field of estate planning, I chose the doctrine I wanted to cover and how in depth to cover it by asking how

48. This determination of topics is, of course, subject to the same inquiry I have just described. There are many more and different topics that could be seen as making up the basic components of an introductory course on estates and trusts. My selection of these three was based on personal teaching goals and philosophy and my own comfort level with the material.

well analysis and application of this particular doctrine furthers the goal of teaching my students to be effective client representatives? Doctrine that did not particularly further such goals could be skipped or passed over lightly in favor of more in-depth coverage of doctrine that did further those goals. In this way, clear identification and explanation of outcomes helped drive my decisions about coverage in a way that I had not before experienced.

I had by now travelled higher up the spiral of outcome determination, beginning from the very broad question of what a law student should know, understand and be able to do. I then considered a slightly narrower inquiry into what a legal professional knows, understands, and is able to do. At that point, I took up the question of what an estates and trusts lawyer knows, understands and is able to do. From there, I considered what a student who has completed an introductory estates and trusts survey course should know, understand and be able to do. I arrived finally at the pinnacle inquiry into what a student in an introductory estates and trusts survey course taught by someone steeped in the professional literature and pedagogy of narrative and clinical theory should know, understand and be able to do.

After working through this process, here is what my syllabus describes:

#### Course Framework

The overarching story of estates and trusts law is about planning for and communicating about transferring assets and/or decision making and other powers from one person or entity to another person or entity, usually across generations, usually as a result of death or incapacity. This story can be told through the creation and administration of wills, trusts, nonprobate instruments, guardianships, health care directives and powers of attorney. The story can also be told through the various laws governing intestate succession, which apply when none of the instruments described above exist.

The stock characters in the story are the person who has the assets or power (the transferor), the assets or power themselves, the person or entity to whom the assets or power are being transferred (the transferee), the lawyer who plans for and facilitates the transfer, the administrative actors who facilitate the transfer. The specific characters depend on the context in which the story is being told (e.g., which instrument or instruments), and might include legally extraneous but nonetheless relevant characters like disinherited or forgotten spouses or children, same-sex partners, disabled children, charitable organizations, etc.

The basic story can be affected both by complicating characters and by complicating plot lines, like changed circumstances (of the transferor or the transferee or the assets or powers), tax liabilities, problems in administration or with administrative characters (like breaches in fiduciary duties), etc.

An estates and trusts lawyer, therefore, needs to be able to identify the various plot lines and characters that might present themselves to him in a client's situation; he must be able to figure out how the relevant law or laws

interact with those characters and plot lines, and to explain that interaction to his client and he must be able to work with his client to construct a story or stories that meet his client's needs. This might involve creating one or more of the instruments described above and/or planning for the implementation of those instruments when necessary. The latter might include defending against challenges to the instrument and/or to the creation or administration of the instrument.

These characters and stories provide the framework for this course.

### Course Outcomes

This is an introductory course. When you have completed this course, you should be able to go on to take the Legal Planning Clinic or an externship or other estate planning apprenticeship. I see this as a first step toward becoming a competent estates and trusts attorney, as a gateway to the practical experience that will lead to such competence.

More specifically, after completing the course, you will have core legal knowledge in estates and trusts law, including:

- The triggers in estate planning that affect drafting instruments.
- The difference between probate and nonprobate instruments.

You will understand that:

- Estates and trusts law is about assets, relationships, people and their issues, in crisis;
- Your role is to listen to your client, to counsel your client consistent with your client's goals and your knowledge of the law, and to work to implement your client's goals; and
- You must act ethically in light of relevant legal and non-legal concerns.

You will be able to:

- Gather information and goals from your client;
- Conduct research in case law, statutes and relevant secondary authority;
- Explain the law and legal options to a client;
- Begin to put together a comprehensive estate plan;
- Recognize issues in a will or trust that might raise challenges in the future and defend against such challenges; and
- Begin to draft a will and trust.

As with any spiral, this process was and continued to be recursive—I gathered information, drafted outcomes, gathered more information, redrafted outcomes, and so on. As I will explore throughout the article, the entire process is recursive, with each stage leading into the next and then ultimately back to the first. At this point, though, I had identified the outcomes and was close to a final decision on them.

### Stage Two: Assessment

The next stage in the process is designing an assessment program for the course. Tempting as it might be to start trying to design teaching and learning activities that will help students achieve the outcomes the educator has identified, Wiggins and McTighe urge teachers to emphasize first the importance of clarifying what desired outcomes look like in practice.<sup>49</sup> They warn that to do otherwise is to teach “more ‘by hope’ than ‘by design.’”<sup>50</sup>

This may be counterintuitive and hard to do. But outcomes-based teaching requires that the teacher be clear about what constitutes evidence that students have achieved the identified outcomes.<sup>51</sup> And the teacher must communicate clearly to the students what that evidence is. In this way, outcomes-based educators will teach transparently and authentically what they ultimately will assess, rather than looking backward and assessing what they may have taught.<sup>52</sup>

#### A. The Theory

Educational theorists distinguish between “thinking like an assessor” and “thinking like a designer.”<sup>53</sup> When thinking like a designer, an educator might consider what would be an effective way to teach a particular topic or activity. The educator is not necessarily considering whether students are going to learn sufficiently to achieve a particular goal.<sup>54</sup>

When thinking like an assessor, on the contrary, the educator recognizes the recursive relationship between assessment and outcomes, and realizes that the purpose of assessment is to determine whether students have achieved learning outcomes.<sup>55</sup> Assessments thus provide the student and the teacher with important information about the teaching and the learning of particular

49. See Wiggins & McTighe, *supra* note 8, at 14-17.

50. *Id.* at 15.

51. See TF Report, *supra* note 7, at 11.

52. See *id.* There is some discussion about whether outcomes that cannot be assessed can really be “outcomes” in the way this article describes. It is beyond the scope of this analysis to weigh in on this issue, *but see* Best Practices, *supra* note 1, at 253 (“There may be some desirable outcomes that are impossible or too difficult to assess. For example, it may not be feasible to assess a student’s commitment to justice. This does not mean law schools should stop trying to instill a commitment to seek justice in students, but we may not be able to measure how well we are succeeding. Therefore, we should be careful to distinguish between desired outcomes and measurable outcomes.”).

53. Wiggins & McTighe, *supra* note 8, at 18, 148-51.

54. See generally Barbara Glessner-Fines, Classroom Assessment Techniques for Law School Teaching, Assessment, Feedback, and Evaluation: Eighth Annual Conference of the Institute for Law School Teaching (2001) (suggesting the goals of formative assessment are informal observations leading to an improvement in faculty teaching).

55. See Wiggins & McTighe, *supra* note 8, at 18-19.

outcomes<sup>56</sup> and about the student's position or rank with regard to particular outcomes.<sup>57</sup> Thus, because what matters is whether students adequately achieve the learning outcomes of the course, before each assessment, the educator must consider what he expects students to learn in the course and thus what is important to assess. Different methods may be required to assess each of the educator's objectives.<sup>58</sup>

The practice and theory of assessment is much more complex and interesting than simply grading students. It is, in fact, the heart of teaching and learning. As described by Greg Munro, "assessment is not only a means of determining what and how a student is learning, but is itself a learning tool. . . . Hence, assessment is more than just tests and testing. Rather, it is an approach to legal education that fosters more active teaching and learning."<sup>59</sup>

Consistent with the idea that assessment must be tied to outcomes and outcomes to assessment, the authors of the Carnegie Report describe assessment as "a coordinated set of formative practices that, by providing important information about the students' progress in learning to both students and faculty, can strengthen law schools' capacity to develop competent and responsible lawyers."<sup>60</sup> Judith Wegner, one of the Carnegie authors, describes five key principles that should influence the design process of an assessment system:

1. Learning is the point.
2. Learning must be made visible to be assessed.
3. Learning is multifaceted and develops over time.
4. Assessment must reflect the particular purposes being served.
5. Assessment must occur in context and over time.<sup>61</sup>

What, concretely, does this mean for the kinds of assessments teachers should use? All the educational literature relied on herein and beyond stresses that assessment be criteria-referenced, formative and authentic.<sup>62</sup>

56. See Best Practices, *supra* note 1, at 255 (This kind of information results from formative assessments.). See also Schwartz, *supra* note 11, at 437-38; Wiggins & McTighe, *supra* note 8, at 247-50.

57. See Best Practices, *supra* note 1, at 255 (this kind of information results from summative assessments). See also Glessner-Fines, *supra* note 54, at n.8; Schwartz, *supra* note 11, at 437-38.

58. See generally Glessner-Fines, *supra* note 54 (providing the following techniques: watching student non-verbal cues, classroom dialogues and the pop quiz); Munro, *supra* note 10, at 117-25 (listing the following as assessment methods: interviews, surveys, statistical indicators, examinations and papers, performance appraisals, student portfolios, alumni follow-up reports, student self-assessment and external examiners).

59. Munro, *supra* note 10, at 11.

60. Carnegie Report, *supra* note 1, at 171.

61. See Best Practices, *supra* note 1, at 239-40. See also Munro, *supra* note 10, at 11.

62. See Best Practices, *supra* note 1, at 243; Carnegie Report, *supra* note 1, at 166, 168. This does not mean that assessments can't be summative and/or used to grade or otherwise rank

Criteria-referenced assessments describe explicitly and in detail the skills and abilities students should demonstrate for the particular assessment and the grounds on which the teacher will assess the students' demonstration of those abilities and skills.<sup>63</sup> According to *Best Practices*, such assessments fit the theory of outcomes-based teaching "by matching learning objectives with assessment items"<sup>64</sup> and therefore testing students' ability to achieve the outcomes described to them by the instructor. In other words, students are not being assessed on skills and abilities the teacher does not mean to be teaching them, that are not consistent with or part of the stated goals of the course.

A formative assessment provides feedback to faculty about whether the student is achieving a particular outcome but also provides such feedback to the student, thereby serving as a learning tool in and of itself.<sup>65</sup> Its purpose is primarily educational, and, while it may be scored, it is not used exclusively to assign grades or rank students.<sup>66</sup> Formative assessments also help teachers know whether their coverage of a topic is sufficient or whether they need to review the material again or present it in a different manner.<sup>67</sup> Unlike a single exam at the end of the semester, which provides "no navigational assistance,"<sup>68</sup> formative assessments involve feedback—often instantaneously—aimed at improvement.<sup>69</sup>

Finally, authentic assessment confronts students with "real-world challenges."<sup>70</sup> It fits in nicely with the idea that law schools are seeking to train competent professionals. If that is the desired or identified outcome, evidence of achievement should be assessed using "realistic performance-based testing—asking the student to use knowledge in real-world ways, with genuine purposes, audiences and situational variables."<sup>71</sup> Such assessments are formative as well, meant not only to test but to "teach students (and teachers)

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students. As will be discussed *infra*, what is important is that such summative assessments *also* be formative, criteria-referenced and authentic. For more on the question of grading in an outcomes-based system, see *Best Practices*, *supra* note 1, at 239–63; Carnegie Report, *supra* note 1, at 166–70; TF Report, *supra* note 7, at 14.

63. See *Best Practices*, *supra* note 1, at 244.

64. *Best Practices*, *supra* note 1, at 262 n.405.

65. See Glessner-Fines, *supra* note 54 (suggesting 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"); Munro, *supra* note 10, at 11.

66. *Id.*

67. See *Best Practices*, *supra* note 1, at 256.

68. *Best Practices*, *supra* note 1, at 245; Carnegie Report, *supra* note 1, at 164.

69. Carnegie Report, *supra* note 1, at 162–67; TF Report, *supra* note 7, at 8.

70. Wiggins & McTighe, *supra* note 8, at 337–38.

71. *Id.*

what ‘doing’ a subject looks like and what kinds of performance challenges are considered most important in a field or profession.”<sup>72</sup>

Designing assessment tools that are criteria-based, formative and authentic is a first step. Next, teachers must determine whether the tools effectively measure the outcomes they are designed to measure. Are they, in other words, valid, reliable and fair?<sup>73</sup> “Validity means that an assessment tool must accomplish the purpose for which it was intended.<sup>74</sup> Reliability means that the test or measuring procedure yields the same results on repeated trials.”<sup>75</sup> Wiggins and McTighe urge assessors to ask themselves how likely it is that a student could do well on this performance task, but really not demonstrate the understanding the assessor is after, or a student could perform poorly on this task, but still have significant understanding of the ideas and show it in other ways.<sup>76</sup>

In other words, assessors must pay particular attention to what can (and cannot) be inferred from the evidence obtained through the assessment.<sup>77</sup> Put another way, by Roy Stuckey, “a measure is valid if it actually assesses what it purports to assess.”<sup>78</sup>

This kind of assessment—criteria-based, formative, authentic assessment that is reliable, valid and fair—is not simply one tool. These assessments need occur in the context of the evidence being sought and the outcome being taught. For example, basic knowledge may be suitably tested by a multiple-choice quiz, but measurement of deep insight may require contextual performance.<sup>79</sup> Given that effective assessment takes many forms, teachers should use a variety of assessment techniques throughout the semester.<sup>80</sup>

In conclusion, *Best Practices* suggests that an effective, outcomes-based assessment program must contain a clear and transparent description of the goals for each assessment. The assessments must inform students of

72. *Id.*

73. See *Best Practices*, *supra* note 1, at 239. See also TF Report *supra* note 7, at 14; Wiggins & McTighe, *supra* note 8, at 182-89.

74. *Best Practices*, *supra* note 1, at 239.

75. *Id.*

76. Wiggins & McTighe, *supra* note 8, at 184.

77. *Id.* at 185.

78. *Best Practices*, *supra* note 1, at n.407.

79. See Wiggins & McTighe, *supra* note 8, at 170; Grant Wiggins, *Educative Assessment: Designing Assessments to Inform and Improve Student Performance* 9 (1998) [hereinafter *Educative Assessment*] (comparing inferring ability to drive based on a paper and pencil test to inferring ability to drive based on a road test).

80. See TF Report, *supra* note 7. See also Wiggins & McTighe, *supra* note 8, at 152 (describing the continuum of assessment as more akin to a scrapbook than a snapshot); *Best Practices*, *supra* note 1, at 240-41, 253-55 (discussing cognitive, behavioral, performance and attitudinal assessments and use of multiple methods of assessment); Jay McTighe & Steven Ferrara, *Assessing Learning in the Classroom* 12 (National Education Association 2004).

their level of professional development. The assessor must use multiple methods to gauge student learning and must distinguish between formative and summative assessments. And the summative assessments must also be formative assessments. To design such a program, Wiggins and McTigue remind assessors to ask:

- What would be sufficient and revealing evidence of understanding?
- What are the different types of evidence required by Stage 1's desired results?
- Against what criteria will we appropriately consider work and assess levels of quality?
- Did the assessments reveal and distinguish those who really understood from those who only seemed to understand? Am I clear on the reasons behind learner mistakes?<sup>81</sup>

### *B. My Practice*

Thinking about assessment, then, is both thinking about assessment vehicles as things we will ask students to do to demonstrate their learning (e.g., quizzes and projects); and measuring tools—ways we will measure and communicate the students' success/failure at achieving the stated goals (e.g., rubrics and scores). In this section I describe both my process in determining the tools and measuring the students, and also what I learned both from planning and administering the tools I used.<sup>82</sup>

I began by identifying what needed to be taught in the course. Next, I brainstormed about the types and frequency of formative and summative assessment, and how I should structure those tools to maximize their potential for validity, reliability and fairness.

Focusing on the course goals (what was to be learned) and the assessment goals (how each assessment would evaluate whether students were learning what was being taught) helped me structure assessments that were criteria-

81. Wiggins & McTigue, *supra* note 8, at 151. At their session at the Clinical Teachers Workshop, Ann Shalleck and Sue Bryant described the assessment stage as asking the following questions:

- What does successful learning look like? (what will a student who has achieved this outcome be able to know/understand/do?)
- What is evidence of the student's ability to perform a certain task?
- What data will illustrate that the student has learned that task?
- What will help assess different levels of learning?
- What will be evidence of learner mistakes?
- What sites and activities will be used to assess learning and how will they help?

AALS Clinical Conference Events, *available at* [http://www.aals.org/events\\_clinical.php](http://www.aals.org/events_clinical.php).

82. I did not start from scratch with all this. Two excellent resources for designers thinking about assessment are the Best Practices Blog, *available at* <http://bestpracticeslegaled.albanylawblogs.org/> and the Center for Excellence in Law Teaching website, *available at* [http://albanylaw.edu/sub.php?navigation\\_id=1709](http://albanylaw.edu/sub.php?navigation_id=1709).

referenced (focused on the learning outcomes) and not exclusively norm-referenced (based on how students perform relative to each other). Having the goals in mind also helped me design tools that would inform students of their level of professional development and their proficiency in the subject matter, thus ideally maximizing their learning vis-à-vis the course outcomes.

In addition, I struggled to make sure that my assessment instruments were feasible, that there were multiple methods for assessing student learning throughout the semester and that the summative assessments I would use were also formative assessments. I worked to insure that the tools I was using were reliable and fair both in generating the evidence I needed to determine whether my students had achieved the outcomes I had established and in allowing me to compare them against each other.

In planning my assessment program, I noticed again how recursive the planning process seemed. I needed to have a good handle on educational theory to understand how to plan the assessment program. But I also needed to know what doctrine I wanted to teach before nailing down the formal assessment tools. The more I thought about assessment tools, in other words, the more I thought about outcomes, and vice-versa.

I found I could not simply move from Stage One (identification of outcomes) to Stage Two (assessment) in a purely linear fashion. Instead, I realized that my goal for students to take on roles as competent estates and trusts attorneys needed to be broken down into two distinct but related pieces: knowledge and understanding of basic estates and trusts doctrine and the ability to apply that doctrine in the context of the lawyer-client relationship, which might include interviewing, counseling, drafting and more.

Based on this insight, I determined that I needed two kinds of assessment tools: those that would quickly alert me and the students to how well they were grasping the basic black letter law laid out in the case book and those that would give the students the opportunity to apply that black letter law to real life practice situations, thus enhancing their understanding of the law in the context of practice.

These two sets of assessment tools ideally, would work in complement. The former would require students to focus on the statutes and cases and, to some extent, memorize those rules, while the latter—by demanding that students apply the rules they had memorized—would heighten students' understanding of them. Lack of success on either instrument would alert the student and me to the need to go back and reteach and relearn the foundational principles and how they apply in context.

Here is what I ended up with, as described in the syllabus:

#### Course Overview

The course is divided into roughly three units: wills, nonprobate instruments and trusts. Each unit will end with a 10- to 15-question collaborative quiz on the doctrine covered in that unit. The goals of these quizzes will be for

the professor and the students to determine how well they are learning the doctrine.

As will become apparent, however, the course is really designed around the lawyer-client relationship that might arise in the context of the doctrine we are learning. In each class, students will be asked to do exercises and answer questions designed to get them thinking about how the doctrine we are learning actually applies in the day-to-day practice of an estates and trusts attorney. Thus, in class students should expect to engage in:

- Group brainstorming on questions or problems;
- Group interviews;
- Group drafting exercises;
- Free writes, minute papers and other written reflections; and
- Socratic dialogue with the professor.

Before each class, you will be asked to write a creative reflection on the reading assigned for the class, organized around a fictional client (of your creation) and her estate planning issues. You will revisit your writing at the end of each class and offer that client concrete advice based on the class discussion. You will turn in the entire written project at the end of the semester, for pass/fail credit.

The final project of the course will involve some kind of review of a client file, with the assignment to develop an estate plan and/or draft some kind of estate planning instrument. There will be no final exam in addition to that project.

### Grading

All of the in-class activities will allow the students to self-assess how well they are coming to understand both the doctrine we are studying and how that doctrine applies to the practice of an estates and trusts lawyer. To the extent that students are asked to report on their brainstorming, these activities will also allow the professor to assess how well the class is absorbing the material and might result in adjustments to class assignments, projects and timing.

Each student should expect to be called upon at least twice during the semester, and asked to present a case or problem that has previously been assigned. Such interactions will be Socratic in nature, with the professor following up on the student's initial presentation with clarifying questions and/or requests for further information or analysis. The goals of these dialogues are (1) to further the student's understanding of the particular question, (2) to further the class' understanding of the particular question and (3) to help the professor assess how well the class is absorbing the material.

The collaborative quizzes will work as follows: I will hand out the quiz, containing 10–15 questions on material we have covered in preceding classes. You will have 20 minutes to take the quiz, and turn it in. I will then put students into groups of three or four and hand out one copy of the same quiz

again. You will have 25 minutes as a group to take the quiz and turn it in. Your grade for the quiz will be the average of your individual grade and the grade of your group. We will review the quiz and answers in the following class.<sup>83</sup>

Describing the assessment mechanisms and their goals so clearly in the syllabus required me to make good on my promises, that is to design tools—the quizzes and final project in particular, but also other in-class assessment activities—that did what I wanted them to do.

### The Quizzes

I found tying the goals to the substance and design of the quizzes to be particularly challenging. My goals for each quiz, in general, were:

- To give students an opportunity to test themselves on how well they had learned the doctrine;
- To give students an opportunity to teach each other the doctrine we covered;
- To pull together the pieces we covered;
- To give me information on how well I succeeded in teaching the doctrine; and
- To give me an opportunity to see how it all fits together.

With these goals in mind, I developed each quiz as we went along, noting after each class the pieces of doctrine I wanted to test, based on our class discussions of the reading for that week. I gathered questions from various sources, largely based on past bar exams, and modified them to fit the themes and emphasis of the course. This exercise helped me see even more clearly what we focused on and how I could connect the theory/doctrine/practice pieces even more. There was that spiral again—outcomes to assessment to delivery and back to outcomes.

But I realized that the assessment tool does not accomplish its goals simply by giving the quiz and then providing an answers and explanation sheet. If I wanted students to achieve all of the goals I had identified for these particular assessment tools, I needed to facilitate reflection by the students as well as reflect myself on the process of designing, administering and grading the quizzes. Thus my decision to give over the first half of the class after each quiz to quiz review.

By the time these review sessions took place, I had graded all the quizzes and returned them along with detailed explanations of the correct answers. There also had been time by then for students to e-mail me with substantive questions about particular answers. So I began the review class with a slide listing what I had identified—by the number of wrong answers—as the questions that had been most difficult and asked for questions or comments

83. Students were graded as follows: Class participation: 5 percent (either P or F); collaborative quizzes: 30 percent (10 percent each); creative writing project: 10 percent (either P or F); and final project: 55 percent.

about them. This discussion generally focused on substantive points that were not understood or my explanation of the answer.

Once the class seemed finished with this part, I asked for feedback about other quiz questions and/or general feedback about the quiz. This discussion resulted in more procedural complaints. For example, one of the criticisms of the first quiz was that there were too many long questions for the time allotted and that some of the questions were written in a tricky way so it was difficult to understand what was being asked. I attempted to be transparent and non-defensive about my goals and my perception of how well or poorly I felt I had succeeded in achieving those goals and reassured the students that I needed their feedback to make the assessment tools more useful for all of us.

And indeed, their feedback on the first quiz helped me refine my goals and better design the second quiz: I tried to make the questions shorter and there were two fewer. So I removed the time/rushing element. I also edited the questions so they were not tricky but simply asked for knowledge of the doctrine. The changes more tightly aligned this quiz with my stated goals. Adding those elements was not only unnecessary but it undermined my ability to determine how well students were understanding the relevant doctrine and how it might apply in particular situations.

### The Creative Writing Exercise

This project came about in a slightly different way—experientially. As I went through the materials the previous summer, trying to get a handle on the doctrine and scope of the course, I kept asking myself, “Why would a lawyer ever need to know this? What does a lawyer do with all of this?” I found that the more I imagined the answers to those questions—which for the most part were simply to counsel clients—the better I understood the particular doctrine. So the creative writing exercise began as a way to help students achieve the outcome of learning the doctrine of estates and trusts, with an eye toward counseling clients.

As the course progressed, however, I realized that the exercise provided students the opportunity both to use other important lawyering tools and to assess how well they used such tools. The most striking and interesting for me was the skill of fact-gathering, or, more explicitly, the essential relationship between facts and doctrine.

At the beginning of each class, I asked for a volunteer to read his or her story for that week as a framework for us to analyze the doctrine. I wrote the story on the board in cursory form and then asked the class what more they needed to know about the client or her situation to answer the questions she presented. In the first few classes, students participated slowly—reluctant perhaps to challenge their fellow student’s story-telling—and I found myself filling in gaps instead of asking students to dig deeper. But as the semester progressed, the “fact-gathering” part of the class got longer and longer, as students grasped the idea that they could not offer legal advice in a vacuum but

had to understand the context in which the question arose before providing a legal answer.

Students were able to assess their this skill by how well they could answer their classmates' questions about their own client story and by how well they were able to think of questions to ask of others. A portion of the final project asked the students to reflect on their creative writing projects and their responses confirmed my sense that this had been an effective assessment tool.<sup>84</sup>

"Assessment really offers two insights, one into the students and one into the instruction. In other words, instructional designers assess learners for two reasons: 'to assess individual students' performances and to provide information about what kinds of revisions are needed in the instructional materials.'"<sup>85</sup> Given the goals I had identified for my course, these two assessment tools worked well because they helped students track their own development as learners and professionals and because they helped me track my development as a teacher. In addition, both tools gave students the opportunity to self-correct—either on their own, in the creative writing project or in collaboration with their peers during the group portion of the quizzes. And they gave me the opportunity to self-correct and adjust my design and implementation of the quizzes and my use of the client stories during the class. I thought that these two tools worked well within the outcomes-assessment-outcomes framework.

### **Stage Three: Delivery of Instruction**

Moving into Stage Three, I needed to figure out learning activities for the course. I did so by asking what would enable students to perform at the levels I had identified in Stages One and Two as sufficient "student proficiency." What learning activities would help the students become successful practitioners? How did such activities accomplish the goal of preparing students to do a particular task successfully?

#### *A. The Theory*

Michael Hunter Schwartz reminds teachers, whom he calls "designers," to "strive[] for congruence among the instructional goals, the test items and the selected instructional strategies."<sup>86</sup> That is, having identified outcomes and the evidence needed to demonstrate achievement of those outcomes, as well as the vehicles used to measure that evidence, teachers must design tools that will give their students the opportunity to gather the evidence and learn the tools needed to achieve the outcomes.<sup>87</sup>

84. This exercise is described and analyzed in more detail in a forthcoming article tentatively entitled, *Storytelling Across the Curriculum*, Chapter Two: Outcomes, Assessment Tools and Teaching Methods (draft on file with the author).

85. Schwartz, *supra* note 11, at 404.

86. *Id.* at 384.

87. *See id.* at 89.

To most effectively design a course that leads students to succeed in achieving the identified learning goals, the literature says teachers should approach this work from a macro perspective.<sup>88</sup> By considering the course as a whole, rather than as a collection of individual classes, teachers are more likely to teach toward the course outcomes. Also, by looking at the big picture, teachers are likely to use multiple teaching methods throughout the course and not feel pressured to do everything all at once in each class.<sup>89</sup>

Educational theory posits that use of multiple methods enhances adult learning by challenging students to engage in different activities and come out of their comfort zones from time to time.<sup>90</sup> Using multiple methods also recognizes and validates different and varied learning patterns and styles. The bottom line of planning and delivering instruction is that each teaching method has particular strengths and is suited to teach particular things. As such, each tool should be used intentionally to achieve particular goals.

It is beyond the scope of this project to describe all potential teaching and learning activities.<sup>91</sup> I will highlight two teaching methods that appear frequently in the law school classroom, Socratic dialogue and discussion. I do so mainly for the purpose of describing how to use these methods effectively within the context of outcomes-based learning, particularly given the foundational goal for law schools described earlier<sup>92</sup> of training competent professionals able to perform as lawyers once they graduate—Mitchell’s “practical wisdom” and “the ability to put the law to work.”<sup>93</sup>

Socratic dialogue has four steps<sup>94</sup>:

1. Begin by asking students to “state the case;”
2. Use closed hypotheticals to relate the case at issue to past rules or cases;
3. Use open hypotheticals to illustrate complexity and indeterminacy of legal analysis; and
4. Draw lessons about the process of lawyering and judging.

88. See generally Best Practices, *supra* note 1, at 105-63 (Chapter 4).

89. See *id.* at 132-41.

90. *Id.*

91. But see Best Practices, *supra* note 1 at 105-63 (Chapter 4); Munro, *supra* note 10, at 143-48; Schwartz, *supra* note 11, at 427-36; Sonsteng, *supra* note 20, at 111-71.

92. See Best Practices, *supra* note 1, at 207-25.

93. See Practical Wisdom, *supra* note 40. See generally Best Practices, *supra* note 1, at 39-91 (Chapter 2) (discussing practical wisdom as an essential attribute for a lawyer).

94. Best Practices, *supra* note 1, at 213-16 (citing Judith Wegner, Thinking Like a Lawyer: the Lessons of Experience 54 (unpublished manuscript on file with Roy Stuckey)).

The first step requires a student to engage in fact and rule-fit analysis and allows both to see how well the student has read and understood a case.<sup>95</sup> It is a form of formative assessment. Both student and teacher get a sense of the student's proficiency (in this case, reading and understanding the case).<sup>96</sup> The second step allows further analysis of the text by engaging the student in a discussion of rule choice, fact development, contextual and policy analysis and narrative development.<sup>97</sup> Steps three and four in particular are important as the teacher asks authentic rather than "hide the ball" questions, showing students that there are multiple ways to analyze issues, and that they can and must perform such analysis.<sup>98</sup>

To make the dialogue more accessible and useful, the teacher can ask other students to jot down their thoughts on the question under consideration and might even invite another student to take over the dialogue at some point. This practice requires all students to actively participate, rather than to recede into their laptops. It also lessens the pressure on the student engaging in the dialogue by implicitly reassuring her that the time will come when she is asked to pass the baton and be done with her part of the relay.

As with all teaching methods, Socratic dialogue is effective only if the teacher explains why she is using it, and only if she uses it to illuminate lessons well suited to this teaching method. Without such explanation, and method-goal fit, Socratic dialogue runs the risk of simply humiliating students by exposing their misunderstanding—generally thought to be the purpose of this technique.<sup>99</sup>

Because of Socratic dialogue's potential to isolate individual students, despite a teacher's best efforts to include others, it should be used in conjunction with more collaborative learning methods.

Small group discussion (which I call simply "discussion" hereafter) is a prime example of such an activity, which works, like all methods, only when the teacher is clear about her goals and when her goals are well-designed for discussion. It is not enough for the teacher simply to throw out a question and say "discuss." Rather, to make discussion an effective teaching tool that helps students work toward achieving particular outcomes,<sup>100</sup> the teacher might follow these basic guidelines:

95. Best Practices, *supra* note 1, at 213-14 (citing Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, A Dialogue About Socratic Teaching, 23 N.Y.U. Rev. L. & Soc. Change 249, 265-66 (1997)). See also Carnegie Report, *supra* note 1, at 47-86.
96. Best Practices, *supra* note 1, at 214. See also Carnegie Report, *supra* note 1, at 47-86.
97. Best Practices, *supra* note 1, at 214. See also Carnegie Report, *supra* note 1, at 47-86.
98. Best Practices, *supra* note 1, at 214-16. See also Carnegie Report, *supra* note 1, at 47-86.
99. See Best Practices, *supra* note 1, at 216-21. See also *The Paper Chase* (Twentieth Century-Fox 1973) (The film tells the story of Hart, a first-year law student at Harvard Law School and his experiences with Professor Charles Kingsfield, the brilliant, demanding Contracts instructor whom he both idolizes and finds incredibly intimidating.).
100. See Best Practices, *supra* note 1, at 227-31.

- Ask clear, open-ended, varied questions, one at a time;
- Encourage students to ask questions;
- Validate student participation;
- Use caution in responding to student errors;
- Do not talk too much or allow discussion to go on too long;
- Announce when discussion is about to end; and
- Give students time to reflect on questions being discussed.<sup>101</sup>

When these guidelines are followed, discussion encourages students to listen to and learn from each other, rather than simply parrot what the teacher or casebook has said.<sup>102</sup> It requires students to use their imagination and make critical assessments. It helps students develop oral advocacy skills by encouraging them to express opinions and advocate for their positions with each other.<sup>103</sup> In short, discussion provides an active learning role for students, rather than relegating them to being passive recipients of their professor's knowledge.<sup>104</sup>

Both of these teaching methods are potential formative assessment tools since they give students and teachers an opportunity to observe how well the material is being understood and stated outcomes are being achieved. To choose between these methods or how to use them, the teacher must engage in the recursive outcomes-based education method on a micro level. For each potential teaching activity, or unit, she must consider her goals for that particular activity or unit, then what evidence she would recognize as reflective of achievement of those goals and then what particular activity will help students demonstrate such evidence.<sup>105</sup>

### *B. My Practice*

I had identified my outcomes broadly. I wanted my students to begin to develop a sense of their professional role as lawyers and to understand the contours of the lawyer/client relationship in the context of client representation. I also had identified the coverage topics as those that connected with the outcomes I wanted and assessment tools as those best suited to facilitate achieving each outcome. As I planned classes, I reflected that I did not ever want students to wonder, "Why is she having us learn this?" Or "Why is she having us do this?" So I planned to be intentional about the tools and

101. *Id.*

102. *Id.*

103. Best Practices, *supra* note 1, at 226 (citing Lynn Daggett, Using Discussion as a Teaching Method in Law School Classes, *in* The Science and Art of Law Teaching: Conference Materials (1995)).

104. Best Practices, *supra* note 1, at 227 (citing Friedland & Hess, *supra* note 20, at 55-56).

105. Best Practices, *supra* note 1, at 131 (citing Steven Hartwell & Sherry L. Hartwell, Teaching Law: Some Things Socrates Did Not Try, 40 J. Legal Educ. 509, 510 (1990)).

activities I chose and used and to be transparent and consistent about the connection between topics and activities and outcomes.

I built my lesson plan for each topic around the assessment tools I had identified as best reaching particular aspects of the client representation outcome. I wrote class notes first by (1) identifying the general topic, (2) identifying the outcome or outcomes I wanted, (3) picking the best assessment tools to achieve those outcomes, and (4) filling in the gaps—how will I actually spend the two hours? So for each class, I conducted a mini outcomes-based exercise which required that I state clearly and upfront at the beginning of the class the goals and activities and the connection between them.

To figure out how I would spend the class time, I began by identifying the universe of tools and chose among them initially based on my own background and comfort level. I figured if discussion and role-playing—two of the tools I am most comfortable using—work well to reach the outcomes I had identified, why not use them? I decided, consistent with this theory, that my main teaching mode would be small- and large-group discussion of problems and questions, interspersed with role-plays. In addition, I anticipated the potential need for some lecture and Socratic dialogue to focus the discussion and/or highlight particular points of law.

My challenge throughout the semester was how to connect my presentation of the doctrine to the goals/outcomes of the course. I came up with two substantive guidelines that framed the small-group and discussion work we did:

- Frame the rules/doctrine in terms of professional identity. E.g., what kind of lawyering is this? Does this implicate?
- Frame the rules/doctrine in terms of storytelling. E.g., what are the plot lines here? The characters? The context?

Thus in each class, with each point of law, I put a statute or case up on PowerPoint and then challenged the class in groups of three or four to perform the legal analysis and critical thinking to figure out how the rules applied to their client, whether the rules made sense, how they fit with each other, what the underlying themes were and how the rules fit in with that theme.

These guidelines also enhanced the role-playing I had the students do. They engaged in one consistent and thematic role-play throughout the semester, namely the “lawyering” they did in their creative writing project. Every week, before class, they were assigned to create a new chapter in their client’s estate planning life and assume the role of the lawyer counseling the client. At the end of each class, they were given the opportunity to revise or expand their advice, based on the work we had done during class. In addition, during the class, two or three students presented their client’s story and their colleagues collaborated with them in determining what to advise the clients. Thus, the client narrative exercise was a way of engaging the students in doing the analytic work necessary to be a competent estates and trusts attorney.

Another role-play I did early in the class, then referenced throughout the semester, was a mock interview. I was clear that the exercise was not intended to test the students on how well they asked open-ended questions and used the T-funnel approach,<sup>106</sup> but as a way to get them thinking about the lawyer-client relationship and how it begins. It also was a way to introduce the idea of law being important only in the context of the client's facts and goals.

I asked each student to come to class prepared to be interviewed about his or her invented client. I divided the class and had one-third of the students interview another third, observed by the last third, who then reported back to the class about the interview. During the debriefing, the students appeared hungry for role-specific advice—about client interviewing, about dealing with incompetent clients, about resolving moral/ethical dilemmas, about how not to judge your client's goals, about whether to give your opinion to your client. It was like a giant clinic class on interviewing.

At first I was put off by the result of this exercise. It did not seem to be what we were supposed to be talking about in this class. But then I realized that it was exactly what we should be talking about. If course outcomes were to encourage students to think about their professional identities as client representatives and to begin “putting the law to work” in the context of the lawyer-client relationship, the interview framework—gathering facts to apply the law to them—enhanced future discussion of the law by giving my students something concrete to work with.

Indeed, throughout the semester, we referred to these two role plays. All the students' questions about particular doctrine could be analyzed and resolved by referring back to the client interview or the need to gather more facts from their clients. The more doctrine the students learned, the more complex their fact-gathering became. The more complex their fact-gathering, the more likely they were to elicit fleshed out client stories. The more nuanced and rich their client stories, the better they were able to provide meaningful legal advice to their clients. As a class, we developed a fact-law spiral that began with each student/lawyer's openness to imagining her client's story, which led to good client interviewing about facts, which resulted in a better understanding of a client's goals, which brought about more effective counseling and persuasive advocacy. The end result: better lawyering.

Supported by small group discussions during every class, occasional lecturing by me and the three collaborative quizzes, these two role-play exercises illustrated beautifully the universe of outcomes-based learning theory and the practice/theory spiral. My overall outcome was to get them thinking critically as practitioners and professionals. My means of achieving that outcome was to have them engage in the lawyer-client relationship as professionals. By participating fully in these two role-plays, each student assumed the role of lawyer to learn the doctrine that would be needed when she assumed the real-life role of lawyer. That to me felt like success.

106. See Stefano Moscato, Teaching Foundational Clinical Lawyering Skills to First-Year Students, 13 *Legal Writing: J. Legal Writing Inst.* 207 (2007).

### **Evaluation: The Final Phase**

Having discussed determination of outcomes, development of assessment tools and teaching methods/delivery, the course planning process would seem to be finished. However, the final phase, evaluation, is perhaps the most important. At the end of each stage, or even at various points within each stage, the designer loops back to the initial consideration of outcomes.<sup>107</sup> How does this assessment tool, classroom activity, or homework assignment fit in with the identified outcomes? How can the tool be better refined to lead successfully to an identified outcome? How can I describe the outcome with greater specificity to facilitate my teaching toward it?

With this inquiry, the designer constantly evaluates how he or she is succeeding in the planning and implementation process, with the ultimate goal, of course, to have his or her students achieve identified outcomes. As Michael Hunter Schwartz describes:

Designers revisit each phase of the process based on their evaluations. In other words, while the approach contemplates the [three phases], instructional designers recognize that design decisions are, at best, only intelligent predictions about what approaches seem most likely to produce learning. . . . The designer must revise the instruction, re-evaluate it and revise it again if necessary. The focus, therefore, is student centered. Instructional designers discard instruction that fails to produce learning and retain instruction that produces learning.<sup>108</sup>

In other words, as I have noted throughout the article, the design process is recursive.

I engaged in this recursive process in both the planning and the implementation of my course, finding myself both consciously and unconsciously falling back on my touchstone inquiry: how does this fit with my outcomes? I had identified the goals of professional identity and the lawyer-client relationship because I believed that they fit best within my professional and personal understanding of training a competent lawyer. I found the evaluative exercise of referring back to those goals limiting but in a comforting way. The universe of assessment tools and teaching activities was not infinite. By falling back always on my identified outcomes, its contours were well defined.

Thus in planning the course, I went through the materials multiple times in different groupings to identify the goals of each one and to make sure the activities I had designed facilitated achievement of those goals. I also added notes for myself to frame each class consistent with the outcomes I had identified, asking: “Why am I teaching this particular doctrine? What do I want the students to be able to do with it? What are they going to do with it? Am I giving them the opportunity to practice that?” Designing assessment tools and individual classes this way—getting deeper and more detailed with

107. See Wiggins & McTighe, *supra* note 8, at 30.

108. Schwartz, *supra* note 11, at 384.

each pass-through—reinforced for me the recursiveness of outcomes-based education. The goals got more concrete with each class but also fit within the larger goals of the course as I came to understand them better.

Then in teaching the course I found that I came to understand how to teach the doctrine more effectively by framing it always in the context of the course outcomes. The specific topics inevitably connected with my underlying theme of the lawyer-client relationship and, specifically, client-counseling. It was impossible for me, even as I lectured on the nuts and bolts of intestacy doctrine, not to revert to the language of the lawyer-client relationship and the framework of “what does a lawyer do with this stuff.”

Furthermore, I found that the recursiveness of the process, and my deep understanding of the relationship among the four stages, allowed me to be transparent and non-defensive with the students about why the course was designed the way it was and why particular activities or topics played out the way they did. Having a statement of outcomes in the syllabus allowed me to refer back to my course-design process and to explain my thinking without feeling like the students and I were playing a game of hide the ball. This transparency alone marks such a departure from the traditional law school teaching and learning experience that I found it refreshing and liberating.

As for whether this approach worked for my students, I think the answer is mixed. The highest marks I received in my student evaluations were in answers to questions about opportunities for self-evaluation and the practical application of legal concepts. The students found the small group work in the classroom effective as a tool that “helps us stay on track and make sure we are prepared for the day.”<sup>109</sup> They appreciated the quizzes as “really helpful in solidifying [their] understanding of the material.”<sup>110</sup> And they found the creative writing assignment “fun,” “novel” and helpful, not only in learning the material, but also in developing “critical thinking throughout the course.”<sup>111</sup> They also thought “the focus on practical application of what we were learning was very effective.”<sup>112</sup> However, some of them complained about the lack of “substance” in the course, and suggested that client counseling could be taught in a clinic or interviewing and counseling course instead of in a “doctrinal” estates and trusts course.

I take from these observations that I did not succeed in making clear enough the connection between my goals of helping them develop as professionals and my methods of doing so. They liked the goals and they liked the methods, but they did not see how the two worked together.

All of this leads me to the final insight, that outcomes-based education in the context of a particular course works better and better the more an educator

109. Student evaluation, on file with author.

110. *Id.*

111. *Id.*

112. *Id.*

does it. My understanding of the connection among goals, assessment and instruction deepened as the course proceeded. The same, I believe, will be true each time I teach this course. Now that I have a sense of the whole universe of this particular course—having completed every class, graded every exam, and reviewed the student evaluations—I ask myself, “How did I do? How will I do better next time? Oops, forgot to mention that goal at the beginning, but turns out it’s a biggie.”

Based on the answers to these reflective questions, I will refine the statement of outcomes in the syllabus. I will adjust the creative writing and interview exercises to more neatly fit within those outcomes. I will tighten up the quizzes and small group discussion questions. I will reorganize the syllabus. And through it all, I will consider and reconsider my outcomes. So here I am, right back where I started, ready to do it all over again.