

At the Lectern

Pouring Skills Content into Doctrinal Bottles

William R. Slomanson

I. Objective

As the legal education literature continues to embrace skills training, many of us are sharing our trade secrets in a refreshingly collaborative way.¹ The illustration in this essay provides some practical insight into “skillsifying” doctrinal courses. It is especially relevant for those of us who teach the majority of all law students who will practice in small firms.²

One can pour varying amounts of skills content into existing doctrinal courses.³ I have added skills components to each of my courses over the last dozen years. I started with a totally doctrinal state civil procedure course.⁴ I found it easier to experiment with a smaller upper-division elective, as

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1. *See, e.g.*, the Institute for Law Teaching and Learning webpage, co-hosted by the Washburn and Gonzaga University Law Schools, *available at* <http://lawteaching.org>.
2. *See* Report of the New York State Bar Association’s Special Committee on Solo and Small Firm Practice, June 20, 2009, *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&CONTENTID=28427&TEMPLATE=/CM/ContentDisplay.cfm (estimating 64 percent of members of the New York bar to be working in solo practice or in firms of 20 or fewer lawyers).
3. As expressed in A.B.A. draft Standard 302, Interpretation 302-1: “Training with respect to individual skills can be delivered in a variety of ways and the Standard does not require individual classes with respect to individual professional skills.” A.B.A. Section of Legal Education and Admissions to the Bar, Standards Review Committee, Student Learning Outcomes Subcommittee, Chapter 3: Program of Legal Education, *available at* <http://www.abanet.org/legaled/committees/comstandards.html>. To view the draft, click Chapter 3—Redlined to Standards.
4. I continue to believe such a course should be taught at most law schools. *See* William R. Slomanson, *State Civil Procedure Plea*, 54 *J. Legal Educ.* 235 (2004).

opposed to a large 1L required class,⁵ where cold-calling still prevails.⁶ The skills-related objective in this course is to encourage my student learners to drive the case doctrine on a fresh journey, not powered by a Socratic engine. Previously, only a minority of my students benefitted from our clinical and moot court programs. But most of my graduates had to advocate on behalf of their clients early in their careers. In this student-driven alternative to the traditional doctrinal course, Socrates became a traffic cop.

II. Blueprint

I developed two discrete modules for augmenting my students' writing and oral argument skills. The first was a distance learning course, a one-unit online elective, which I tacked onto my then two-unit doctrinal elective.⁷ A description of that experiment was published earlier in this journal.⁸ The second leg of this skills journey was a moot court option with no electronic component. That evolving project has been far more productive, gratifying, and doable.

Pre-semester Preparation

Because my students tend to be liberal, except when it comes to change, I send a copy of the course description to all registered students before the first class.⁹ Doing so thins the ranks of those who are unwilling to undertake this practical experience before having to do "the real thing."¹⁰ I place a second lectern at the front of the class, from which students argue their cases and problems. I typically sit near the back of the room, assuming the role of trial

5. In addition to clinical and legal writing professors, doctrinal professors have successfully injected skills content into their first year classes. *See e.g.*, Christina L. Kunz, Incorporating Transactional Skills Training into First-Year Doctrinal Courses, 2009 Tenn. J. Bus. L. 331, 344-45 (2009) (offering group in-class exercises, different cultural approaches, and writing assignments coordinated with the library's related research course).
6. As described by a professor who has taught law classes for over 30 years: "Most professors still follow the essentials of the Socratic [M]ethod that create that same primal fear of naked unmasking: cold-calling on students and expecting intelligent answers to questions they've never thought about before." Andrew Jay McClurg, *Neurotic, Paranoid Wimps—Nothing has Changed*, 78 UMKC L. Rev. 1049, 1058 (2010).
7. I could not continue to offer the online portion of my course, because the A.B.A. Standards did not then authorize such classes. Now, Distance Education Standard 306 allows for twelve such units. Standard 306: Distance Education, ABA Standards for Approval of Law Schools 2011-2012, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter3.authcheckdam.pdf.
8. William R. Slomanson, *Electronic Lawyering and the Academy*, 48 J. Legal Educ. 216 (1998).
9. *See* William R. Slomanson, Course Description: California Civil Procedure, Thomas Jefferson School of Law, available at http://www.tjssl.edu/slomansonb/ElectiveCourse_Descriptions_Spring%202012.doc.
10. As draft Interpretation 302-3 provides: "A law school may determine tracks for students, such that graduates from different tracks have proficiency in differing bundles of professional skills." *See supra* note 3.

judge. The students who are not arguing are comparable to an eager jury. This atmosphere adds a healthy dose of reality, which I never attained in my previously doctrinal-only course.

Unlike large 1L classes, where one relies on various forms of random targeting, I assign cases and problems the week before, via e-mail. The Clerk of Court (me) has a chart with each “lawyer’s” name on it. Assigned presenters must advise the “clerk,” by the end of the last class of the prior week, when they know in advance that they will not be present on a particular date. Given such notice, the “clerk” does not assign that “lawyer” to present a case or problem that will be argued in the following week. To provide further flexibility, there may be a substitution of counsel, at any time before the legal proceedings (classes) start. Regardless of class size or absences, each advocate usually presents the same number of times as the others in the class.¹¹

The Proceedings

As in practice, one must expect the unexpected. Each “lawyer” must have a buddy system in place so the assigned client is assured to of representation. Failure to appear results in a (grade) sanction against the client’s “lawyer.” I normally assign four hearings per 75-minute class. They consist of either casebook cases, or problems appearing in the case notes. The plaintiff (P) has about 30 seconds to present the essential facts. S/he is in the trial court, as if the assigned appellate decision hasn’t yet become ripe for appeal. This tweak facilitates a focus on the essential facts, rather than treading water with case histories. Then, to ensure the respective “lawyers” and the class are all on the same page, defense counsel (D) states the issue in the case as succinctly as possible. The court requires P to decide whether to accept D’s statement of the issue. The “judge” may (reluctantly) make corrections as needed.

Before I implemented this preliminary phase of the proceedings, many class members were confused about the gist of the argument, less because they were unprepared than because of the varied, and typically acceptable, alternatives for framing the issue. Now, when the D’s issue statement is unacceptably soggy, there is a predictable amount of back-and-forth word-mincing, especially during the first few rounds of argument. But more often than not, both advocates are saying the same thing—emphasizing the reality that a substantive issue may be stated in various forms. This issue-statement-agreement-articulation feature underscores the points that: (a) there is no one-size-fits-all way to articulate (or write) the “I” in IRAC; (b) there is often more than one primary issue in the case; (c) the first must often be resolved to get to the second; and (d) the advocates should be able to agree on a spin-free articulation of the issue presented.

By the time students have each argued several moots, their competency in reasoning, arguing, and appreciating the numerous practice intangibles is

11. One should minimize matchups between the same two students during the semester. I do not permit them to volunteer as a package deal—on the same case or problem, with a preferred partner. They will not usually have this option in early practice/pre-trial proceedings.

astounding. I have experienced a far greater level of preparation—not from just the two presenters, but the entire class—than was typical in my traditional doctrinal class. One reason is that peer pressure is the most influential motivator of all; students do not want to look foolish, twisting in the wind before their law school peers. Also, they clearly savor this unique opportunity to do what real lawyers do. Allowing for a truncated Q & A, for a post-presentation class question or two, keeps everybody in the game.

The value of this model is not limited to just the advocates. Everyone appreciates the opportunity to observe a number of presentations in the Inns of Court tradition.¹² Smart students learn from their mistakes. Wise students can now learn from the mistakes of others. The students observe each presentation, with a view toward assessing what worked or did not work for the respective presenters. They can thereby consider what they will do, when advocating in front of the class, and when arguing before a decision-maker in practice. This demeanor-laden feature of the course is perhaps the most responsible for minimizing web surfing during class time.¹³

Online Supplements

Creating online course content further impacts unrelated web surfing. I have created two very practical online supplements. They encourage additional at-home and in-class research so that my students can, instead, surf my course web page during class with good cause. One of these supplements includes the rules being interpreted-argued in the principal cases.¹⁴

The other website is my forms supplement. It contains the bread-and-butter judicial forms they will actually use in practice. Each time a relevant form is mentioned in the assigned case—or when I believe they should know of its existence because of the nature of the case or problem materials—I refer them to that form.¹⁵ While preparing for class, and while in class, they feel like they are doing what lawyers do in the “real world.”¹⁶

12. See generally Judge J. Clifford Wallace, *Birth of the American Inns of Court*, 25 *Berkeley J. Int'l L.* 109 (2007).
13. I jokingly tell them that Solitaire and day trading are ok, but I draw the line at porn.
14. This supplement is linked to my prior performance test (PT) final examinations. It was drawn from the PT Libraries of my past exams. I encourage the students to review this document when preparing for each class, so that they will become generally more familiar with the performance test final exam format, and have a better sense of the particular statute being interpreted in the case at hand.
15. See William R. Slomanson, *Cal. Civ. Pro. Course Supplement*, Thomas Jefferson School of Law, available at http://www.tjssl.edu/slomansonb/CCP_Forms&Motions.htm.
16. The most poignant articulation of what I was unwittingly doing in the past appears in Daisy Hurst Floyd, *We Can Do More*, 60 *J. Legal Educ.* 129, 133-134 (2010):

What we are doing in law school is not wrong, but it is incomplete. We need to do more than teach students how to think and act. We need to help them to become and to be lawyers. A third-year student once told me: “You know, you teach us to do one thing very well, and then you just keep asking us to do it over and over and over

My Feedback

Immediate feedback is another critical element of this enterprise. The moot court format yields the opportunity to provide constructive criticism, during or after each round of arguments. Each advocate has two minutes to present his/her side of the case. Each is normally entitled to rebuttal. If one of the students is really struggling (which is rare), the judge can opt to scale back the time allocated to that student's argument.

To facilitate a more risk-free environment, I occasionally remind them: "What happens in Vegas stays in Vegas." This teacher expectation reduces their fear of making mistakes—or far worse, their peers in other classes hearing about some faux pas. Unlike competition-based moot court practice rounds, I do not overdo the Socratic Method unless there's been a glaring substantive error. I focus instead on unveiling the intangibles in their performances.

As "judge," one must make many decisions in terms of the quality, quantity, and tone of in-class questions and feedback. In the beginning of the semester, when egos are fragile, my questions are usually softballs, designed to help them develop confidence. As their confidence grows, I ask more difficult questions. I continue to be surprised by the variety of situations that trigger constructive criticism. I offer it immediately after asking the advocates to return to their seats, so that my evaluative remarks are less targeted, and supposedly addressed to the entire class. Waiting until the next class will usually be less helpful than on-the-spot suggestions.

For more sensitive matters—a presenter's nervous mannerism, for example—I speak to the student privately after class to avoid unnecessary embarrassment. When a student occasionally dresses in a way that noticeably distracts from the presentation, I often enlist the help of another student to offer private advice.¹⁷ While I give students the option of not having to dress for court, the more serious students appreciate the familiar coach's adage: Practice like it's real, so that when it's real, it'll be like you practiced.

Their Feedback

The occasional one-minute essays I assign, seeking student feedback on the class, often yield useful food for thought. For example, three of four students routinely respond to my anonymous mini-survey that the professor speaks—in the Goldilocks tradition—not too much, not too little, but just about right. Usually one of four students clings to the notion that the professor should be more actively involved. This minority, which I believe is shrinking, finds comfort in the more familiar Socratic approach linked to the doctrinal tradition. These students believe that the professor is in a better position

again." She was right. Our students are capable of so much more, and we need to rise to the challenge of doing more.

17. The several times that this has occurred, I brought in another student who was in my prior 1L procedure course, with whom I have a very good professional relationship. The three of us then discuss this point, which should not be done openly in class. Without fail, each presenter has thanked me and the assisting student for raising this issue.

to speak the law than the student advocates. That is not an unreasonable assumption. But it would defeat the purpose of this class if the professor were to reduce the skills element of the course, by limiting the number of moots in favor of more lectures. Further, my advocates' presentations are generally stellar, in comparison to cold calling on a class member.¹⁸

Substantive Review

A blended approach I've devised effectively bridges this divide. I monitor overall class preparedness by conducting weekly reviews. This is also my Socratic-related device for learning what they have learned. I take about 15 minutes, at the beginning of every other class, to quiz the class on the materials covered the previous week—randomly calling on students. They both welcome and benefit from this memory device. It is especially useful in a course that's chock-full of rules. These weekly reviews jog their long-term memory. They actually look forward to this part of the course as a regular opportunity to review for the final exam.

Grading

One should consider what form of evaluation is appropriate for a practice-oriented skills course. Oral grading is an important feedback-related feature of this class. This evaluation component “keeps them honest” in terms of contributing to the enterprise. My course is a 70-point course. The midterm equals 10 points. Oral grading is 10 points. You would be wise to be sketchy about the final exam's point value. It tends to fluctuate, especially if you use performance testing. I formerly assigned no points for oral argument. I was married to my grading anonymity companion. But the practical skills nature of this course led me to seek a waiver of that policy, which the school readily approved. For a blueprint of how to grade oral presentations, consult “Assessment Criteria for Oral Argument of Motions.”¹⁹

The skills-laden midterm is typically either a state court demurrer, the equivalent of the federal motion to dismiss, or a special motion to strike, which has no equivalent in federal practice but is ubiquitous in state practice.²⁰ This take-home midterm is a practical exercise no doubt embraced by the ABA's Learning Outcomes draft standard on developing competency in “legal analysis and reasoning, critical thinking, legal research [within the

18. The more we speak, the less we know what they know. Questions asked during the moots, and my weekly reviews, provide some comfort to that minority.

19. Gregory S. Munro, *Outcomes Assessment for Law Schools*, Appendix C 199-202 (Inst. for L. Sch. Teaching 2000).

20. It illustrates the value of reducing the huge cost associated with pre-trial discovery. It further facilitates resolution on the merits, via an early determination of the plaintiff's likelihood of success. Cal. Civ. Proc. Code § 425.16 (2012). Students instinctively know that this experience will benefit them in practice (and perhaps on the bar exam).

performance test Library], problem solving, [and] written...communication in a legal context.”²¹

The performance test final further approximates what lawyers do in practice.²² Lawyers do not write one-hour bar essays in practice. Lawyers do not answer multi-state examinations in practice. Lawyers routinely assess a hoard of documents, with a view toward problem solving by using the given materials in the performance test file to reason to a logical conclusion.²³

III. Conclusion

The ground-breaking MacCrate Report,²⁴ and the ensuing Carnegie Report,²⁵ each stirred our collective desire for structures to close the gap between law school and practice. The *Best Practices for Legal Education* project cautioned that we should not limit ourselves to content-focused instruction.²⁶

When most of us attended law school, we thought of its doctrinal “thinking like a lawyer” approach as a rite of passage. It was the accepted condition precedent to our learning the necessary skills in practice. In today’s economy, however, savvy students are virtually demanding that we justify the high cost of their education in terms of practice preparation. As aptly articulated by a partner at one of the nation’s major hiring firms and an adjunct law professor for over 20 years: “Some signs appear to confirm that prospective law students may choose among schools, at least in part, based on their ability to deliver practical skills training. These kinds of demands from the principal constituents in the legal education process may force law schools to consider necessary changes in the direction of their programs.”²⁷

21. Draft A.B.A. Standard 302(b)(2)(i), see *supra* note 3.
22. See, e.g., Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools’ Competence to Prepare Lawyers*, 62 U. Pitt. L. Rev. 747, 751 (2001) (The Multistate Performance Test promises to be “the best measure of one’s ability to perform as an attorney, and, also, the most realistic regarding case situations when compared to the MBE and essay portion of the examination.”); see also Barbara M. Anscher, *Turning Novices Into Experts: Honing Skills For the Performance Test*, 24 Hamline L. Rev. 224, 228 (2001) (“Given the ABA’s concern with skills training, it is not surprising that an increasing number of state bars now feel compelled to test for practice skills.”). Doctrinal professors should strongly consider altering the MPT bar format to ensure course coverage of multiple issues.
23. Professors seeking copies of California or federal civil procedure (and International Law) performance test exams can contact me at bills@tjls.edu.
24. ABA, *Legal Education and Professional Development: An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (West 1992).
25. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007).
26. Roy Stuckey and Others, *Best Practices for Legal Education: A Vision and a Road* (Clinical Legal Educ. Ass’n 2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices-cover.pdf.
27. Steven C. Bennett, *When Will Law School Change?*, 89 Neb. L. Rev. 87, 118 (2010).

The pending draft Learning Outcomes Standard of the ABA's Subcommittee of the Section of Legal Education and Admissions to the Bar has engineered the blueprint for this paradigm shift.²⁸ In this essay, I have offered one of many potential techniques to implement the subcommittee's objectives. It will hopefully stimulate further dialogue, as our faculties pursue the evolution of skills-based instruction and assessment for our varied curricula.

28. For the online version of the draft Standard and its Interpretations, see *supra* note 3.