



Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum

Workshop
8E

Overcoming Our Timidity and Implementing the
Lessons of the Carnegie Report

David F. Chavkin

Washington College of Law, American University

David Chavkin is a Professor of Law at American University Washington College of Law. He is the Director of the General Practice Clinic there and teaches other courses, including a new experimental ethics class.

In addition to his teaching and scholarship in clinical education, he spends several months each year working overseas on issues of experiential learning.

Overcoming our timidity and implementing the lessons of the Carnegie Report

David F. Chavkin

As a clinical teacher, I find myself frustrated with the timidity of most legal educators in responding to the challenges of the Carnegie Foundation Report.¹ Why should we tinker around the edges when a fundamental change in legal education is really necessary?² Would it not make more sense to build an “apprenticeship” model for doctrinal, practice and formative goals that would look more like the clinical legal education model that I believe is the best model for inculcating skills and values.³ And, should we not heed the warning sounded by Andrew Watson about the limitations of freestanding ethics courses:

The present practice of giving a single course seems about as logical as keeping a medical student in laboratories during the four years of medical school and then turning him out upon an innocent population after a one-hour course in “medical practice.” He would assuredly be lost, and so would his patients.⁴

If I am right, what would this new model look like?

The first step was to decide on a model in which students would assist clients. Specifically would they function as lawyers for their clients or as something less? Because, in my experience, the ethics rules only come to life when students are themselves on the ethics hot seat, I decided to implement a model in which students would function as lawyers for some population of clients.

This choice necessarily had other consequences since it would be somewhat jarring to have students engage in the unauthorized practice of law in a course on professional responsibility.⁵ That recognition necessitated locating the student practice in a jurisdiction in which second-year spring semester students could practice under the applicable student practice rule.⁶ In Maryland, the student practice rule permits students who have completed one-third of their legal education to practice in the state.⁷ This rule made certification of my target students a simple process.

The next question to answer would be the focus of the clinical experience. In the clinic I direct, students represent clients in a general practice environment in which student teams might be assisting one client with a criminal matter, another client with a family law problem, another client with a consumer case, and a fourth client with a problem involving intellectual property.⁸ My primary reason for this model of clinic design is that it encourages student attorneys to see

clients as unique individuals rather than as “cases,” easily pigeon-holed as an “eviction case” or a “divorce case.”

In my clinic students earn seven credits for their work during the semester. In the fieldwork component they earn four credits and must commit 15-20 hours per week. Since there was no space for fieldwork activities within the two credits allocated to the existing legal ethics course, I knew that I would need to obtain approval for an additional credit from the faculty.⁹ However, even with that additional credit, the representation and related tasks would need to be able to be completed within the fifty-six hours associated with one additional credit.¹⁰ How should I spend those hours in the way most likely to yield formative (and, to a lesser extent, practical) benefits for students?

I decided to control the scope of the clinic by focusing on an area of substantive law that was relatively straightforward for this population.¹¹ Because I believe that the richest context for student exploration of their professional responsibilities is in the attorney-client relationship, I decided to choose an area of the law that presented rich opportunities for students to consider their role and responsibilities within that relationship. I ultimately chose wills and advance directives for these reasons.¹²

The next issue was to determine how large a student population could be served in this kind of setting. Two competing factors immediately came into play.

The first factor was the need to ensure that clients served by the student attorneys received competent representation. Ensuring quality of representation would require ongoing supervision meetings and constant monitoring of student work product. These supervision meetings needed to take place at least biweekly and they needed to last long enough to provide sufficient opportunities for feedback and to guide students through critical reflection of their experiences.¹³

The second factor was the need to serve as many students as possible. Although most clinical programs use an 8:1 student to faculty supervision ratio, the nature of this kind of hybrid model seemed to permit a far higher student to faculty ratio.

I ultimately opted to limit enrollment to a total of twenty students during the first semesters.¹⁴ Since I believe strongly in the benefits of teaming students in live client representation,¹⁵ this meant that I would be working with ten 2-person teams, a fairly manageable structure.¹⁶ This also meant that there would be a critical mass for classroom discussions of doctrine and for rounds¹⁷ while keeping the numbers small enough so that all students could participate.

Students would attend class twice each week for one and one-half hours each class. Allocation of those hours would vary considerably from class-to-class between case-dialogue method (focusing on consideration of doctrine embodied in the Model Rules and cases), simulations and exercises (focusing on application of these principles to practice), and rounds (focusing on drawing both practical and formative lessons from the live-client representation).

In this structure, all three academic apprenticeships would be integrated¹⁸ so that students could internalize cognitive, practical and formative lessons. The next question was how to assess students in this model in a way that would measure student development and performance in each of these three apprenticeship areas.

The Carnegie Foundation Report severely criticized the sole reliance in most law school classes on a final examination as the means of assessment and also criticized the lack of meaningful feedback for students.¹⁹ Two important observations were made by the Report authors. First, they noted that, “What teachers value – what they deem important and essential for students to learn – can be ascertained most directly by what they assess – what they require students to know and be able to do.”²⁰ Second, they answered the question “What should be the purpose of assessment in the preparation of legal professionals?” in the following way:

From our observations, we believe that assessment should be understood 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.

How could I design methods of assessment and feedback that would meet these challenges?

I ultimately decided to establish three modes of assessment corresponding to the three apprenticeships identified in the Carnegie Foundation Report. In doing so, I recognized that evaluation would require a lot more effort on my part if it was to be effective.²¹ And, I would need to use techniques that would further the effort to get students to integrate the cognitive, practical and formative goals of my teaching.²²

To assess student cognitive development and performance I decided to use a two-step process. In order to measure the breadth of substantive issues discussed in the course, I decided to use 10 multiple choice examinations,²³ administered each week starting after the second week and ending after the eleventh week. Since I use a course management tool in most of my classes,

the process of administering and grading these examinations would be almost automatic once the questions and answers were developed.²⁴

Since I believe that assessment should play a *teaching* role and not merely a *sorting* role,²⁵ I decided to provide students with immediate feedback regarding the “right” answer, but also to allow students to take each quiz as many times as they wished in order to get a perfect score. Students would thereby be rewarded for wanting to “get it right” and, at the same time, they would hopefully internalize the “right” answer.

Another capability of the various course management systems provided two other potential learning benefits. First, these course management tools identify the frequency with which questions are “missed” and the extent to which the “wrong” answer is chosen. By monitoring these results, I could question my own choice of the “right” answer and help validate the examination on the fly. Second, the frequency with which questions were “missed” would provide *me* with valuable interim feedback on the extent to which students were grasping critical concepts in the course. I could use this information to return to these concepts in cleaning up confusion.²⁶

The second aspect of evaluation of cognitive development and performance would be based on a final examination, but a somewhat non-traditional final examination.²⁷ Instead of using a hypothetical written fact pattern, I decided to use film clips of lawyers in action.²⁸ Students would watch these clips at their leisure and as many times as they wished²⁹ and evaluate lawyer actions and inactions against a framework of the Model Rules of Professional Conduct and broader issues of professional responsibility.

While students would have to demonstrate knowledge of the Model Rules and demonstrate ability to apply these rules (cognitive ability), they would also have to demonstrate competencies in practice and formative areas as well. In a simulated sense, students would be assuming the role of attorney and would be grappling with questions of how they should behave in these situations. And, because the examination instructions required students to consider issues of professional responsibility that went beyond a strict application of the Model Rules, students were forced to consider questions of professional identity and related values.

The next aspect of assessment and feedback was based on student journals.³⁰ I decided to require students to maintain weekly journals of professional responsibility issues that they encountered in their lives. These could include issues that arose in their cases, but it could also include issues that arose in their paid employment and externships. And, it could include the nearly daily event on the Washington Metropolitan Area subway system (Metro) of seeing a

lawyer breach client confidentiality by reviewing a client's file in public or by discussing confidential information with a client in a public setting.

I decided to have students submit these journals electronically. I agreed to provide written feedback on their entries electronically.³¹ And, I scheduled bi-weekly one-on-one meetings with each student to discuss the issues raised in their journals in a more interactive and spontaneous manner.

The final basis of evaluation related to student work on behalf of clients. This aspect of evaluation is very similar to that employed every day in clinical programs across the country. Although the exact model may differ somewhat from program to program the model, I espouse rewards insight and reflective practice (learning) as opposed to overall quality of performance or outcome of efforts.³²

Putting these various evaluation vehicles together, I needed to decide what weight to give to each of these elements. While there is no magic to the weighting of each factor, I wanted to give substantial weight to student performance in the cognitive, practical and formative arenas. I ultimately decided to allocate 20 points to the 10 multiple-choice examinations, 30 points to the final examination, 30 points for the client-representation component of student work, and 20 points for the student journals. Students would need to engage each evaluation element in order to get a high grade in the course and each of the three apprenticeship elements would receive significant and relatively equal weight.

In the section on "Professional Identity and Purpose," the authors of the Carnegie Foundation Report posed the following question: "How can law schools best teach that sense of public responsibility, indeed, public service that the American Bar Association uses to frame its own discussion of model rules?"³³ They ultimately answered that question by proposing "an integrative model for law schools" in which "students [could] fit together the various elements of their educational experience, preparing them for the varied demands of professional legal work."³⁴

In this article, I have proposed a replicable model of ethics education that is affordable and manageable within the financial and other realities of American legal education. The authors of the Carnegie Foundation Report have thrown down the gauntlet, challenging legal educators to improve on our model of developing lawyers and I have tried to respond to that challenge. To paraphrase the CUNY administrators interviewed for that report,³⁵ we cannot afford to not respond to that challenge and seize this opportune moment for educational reform.

¹ The authors of the Report concluded that, “[W]e think that practice-oriented courses can provide important motivation for engaging with the moral dimensions of professional life – a motivation that is rarely accorded status or emphasis in the present curriculum.” WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 2007) (HEREINAFTER *EDUCATING LAWYERS*), at 88. They also concluded that, “[L]egal educators will have to do more than shuffle the existing pieces. The problem demands their careful rethinking of both the existing curriculum and the pedagogies that law schools employ to produce a more coherent and integrated initiation into a life in the law.” *Id.*, at 147. In adopting the model proposed in this text I am suggesting a very different model along the “continuum of teaching and learning” than the ones identified by the Report authors. *Id.*

Of course, the authors of the Carnegie Foundation Report were not the first to challenge legal educators to do better with regard to the teaching of ethics. In 1984, the American Bar Association Board of Governors established a Commission on Professionalism, whose final report was released in 1986. *TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE* (ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR AUGUST 1996) (HEREINAFTER *TEACHING AND LEARNING PROFESSIONALISM*). In that report, the Committee declared that, “Ethics should be taught through more creative professional responsibility courses” *Id.*, at 12.

² See Jerome Frank, *Why Not A Clinical-Lawyer School?*, 81 U. Pa. L. Rev. 907, 916 (1933) (“What would we think of a medical school in which students studied no more than what was to be found in such written or printed case-histories and were deprived of all clinical experience until after they received their M.D. degrees?”).

³ In using the term “clinical legal education,” I mean the following:

Clinical education is first and foremost a method of teaching. Among the principal aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problem in role; the students are required to interact with others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review.

Report of the Committee on the Future of the In-House Clinic, 42 J. Legal Educ. 508, 511 (1992).

The essence of this model is learning by doing with critical reflection of both the learning and doing steps. This resonates with the ancient Chinese proverb that is often attributed to Confucius: “I hear, and I forget. I see, and I remember. I do, and I understand.” In the western world, Aristotle’s observations about learning by doing came approximately 100 years after Confucius (see note 13, *infra*) and it was nearly another 400 years before Julius Caesar wrote in *De Bello Civili* (circa 52 B.C) that “Experience is the teacher of all things” and another 100 years after that before Pliny the Elder wrote in *Naturalis Historia* (circa 77 A.D.) that “Experience is the most efficient teacher of all things.”

Kenneth Kreiling has described the process of clinical education in the following way:

Traditional classroom legal education is concerned with the process of learning through information assimilation. Usually the information to be assimilated is applied within the narrowly circumscribed confines of the instructor-defined classroom. In contrast, clinical education is primarily concerned with the process of learning from actual experience, learning through taking action (or observing someone else taking action) and then analyzing the effects of the action. The data of learning are provided primarily by the students’ actual performances and experiences with clients who have legal problems. Such performances arise in a world where some facts cannot be ascertained, where personal qualities and interpersonal relationships are often critical, where the “problem-solver” must take action and choose solutions while faced with unpleasant contingencies. Clinical education provides a model of the multi-dimensional world of practice that traditional classroom education simply cannot provide.

Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 Md. L. Rev. 284, 285-86 (1981).

⁴ Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 20 (1963-64).

⁵ For example, rule 49(b)(2) of the Rules of the District of Columbia Court of Appeals defines “the practice of law” as “the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust

instruments or any other instruments intended to affect interests in real or personal property, will, codicils, instruments intended to affect the disposition of property of decedents' estates, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business; (B) Preparing or expressing legal opinions; (C) Appearing or acting as an attorney in any tribunal; (D) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal; (E) Providing advice or counsel as to how any of the activities described in subparagraph (A) through (D) might be done, or whether they were done, in accordance with applicable law; (F) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above." Anyone who engages in "the practice of law" without proper authorization is engaged in the "unauthorized practice of law." D.C. App. Rule 49(a).

⁶ Student practice rules vary significantly from jurisdiction to jurisdiction. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 S.M.U. L.Rev. 1507 (1998), at Appendix A (containing a national compendium of student practice rules).

⁷ MD Rules Governing Admission to the Bar, Rule 16.

⁸ This range of experiences is a great attraction to potential students who have not yet decided on their future fields of practice. However, it also has other significant pedagogical benefits.

⁹ The ABA Professionalism Committee had earlier urged that law faculties "authorize an optional additional hour of credit for courses in which the students write a paper or produce another type of legal work product on one or more significant ethical or professionalism issues in the subject area of the course." TEACHING AND LEARNING PROFESSIONALISM, *supra* note 1, at 20-21.

¹⁰ The ordinary calculation is that four hours per week are required for each credit. Since the fall and spring semesters each run fourteen weeks, that means that students would allocate fifty-six hours (14 weeks x 4 hours per week = 56 hours per semester).

¹¹ Before professors and practitioners working in this area I chose (wills and advance directives) attack me too ferociously for suggesting that this area of the law is "relatively straightforward," let me try to deflect those attacks in advance. Our client population consists of indigent clients whose estates are quite limited. They do not require complex trust arrangements, for example. And, since the number of clients represented would be quite small, I could be alert to complex estate planning requirements and shift those cases to the clinical program.

¹² This is also an area of legal assistance in which there is a large unmet need. Most low-income clients in the metropolitan area in which we would provide representation die intestate. Expanding services would therefore help meet a large unmet need and there were ready pools of clients seeking assistance from whom clients could be culled. These organizations include Legal Counsel for the Elderly, a project of the AARP.

¹³ Andrew Watson criticized those forms of experiential learning in which critical reflection did not take place.

My own assessment of their value [clinical programs] as part of professional education relates directly to the amount of interpreted experience which the student encounters. Mere contact with these professional situations may do little more than stir anxiety – anxiety traced to its source and analyzed creates growth potential.

Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. Cin. L. Rev. 91, 123, 157 (1968).

¹⁴ In my initial course proposal, I had suggested a course model in which approximately 70 students would be served. 50 students would participate in a traditional classroom experience supplemented by simulations and other exercises. 20 students would participate in the basic course and in the live-client representation component. My goal was to make the new course offering even more financially feasible while it proved its worth. The Curriculum Committee, responsible for approving all new course proposals, persuaded me that the financial concerns should give way to a more manageable course model.

¹⁵ See David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLINICAL L. REV. 199 (1994).

¹⁶ In addition to my services, the Dean generously provided me with the services of an additional dean's fellow (research assistant). Since the legal ethics course is customarily taught in the spring semester, it was relatively easy to find a clinic student from the fall semester to serve in this capacity.

¹⁷ "Rounds" is a process in which student teams present their experiences in working with clients to the rest of the class. This process serves two educational goals. First, students learn from the experiences of others. Second, students can bring troublesome tactical, ethical, and counseling issues to the entire class so that the student teams can benefit from the collective wisdom of the group. For a comprehensive discussion of the role of "rounds" in clinical legal education, see Susan Bryant and Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLIN. L. REV. 195 (2007)

¹⁸ EDUCATING LAWYERS, *supra* note 1, at 145.

¹⁹ EDUCATING LAWYERS, *supra* note 1, at 162-171. The authors are especially critical of the fact that most law school assessment is “summative,” at the end of the course. As the authors note, “[A]lthough it measures achievement, its after-the-fact character forecloses the possibility of giving meaningful feedback to the student about progress in learning.” *Id.*, at 164.

²⁰ *Id.*, at 163.

²¹ This is, of course, no surprise for those who have taught classes based on models other than the case-dialogue approach. As noted in the Carnegie Foundation Report, “Compared to the efficiency of the large case-dialogue classroom, the formats that lend themselves to clinical and lawyering activities, including legal writing, are highly labor-intensive.” *Id.*, at 175.

²² “It is not enough to develop analytical knowledge plus merely skillful performance. The goal has to be integration into a whole greater than the sum of its parts.” *Id.*, at 178.

²³ The Carnegie Foundation Report refers to such examinations as “objective” examinations. That term would suggest that only one answer is objectively correct. However, like beauty, the “correct” answer is often in the eye of the beholder.

²⁴ I tend to use TWEN (The West Educational Network) in my classes. However, other course management tools (like Blackboard) have this capability as well. These course management tools grade examinations automatically based on the instructor’s key. They also automatically compile a gradebook for each student and for each question.

²⁵ The Carnegie Foundation Report reaches the same conclusion in somewhat different language. The authors use the term “formative assessment” to describe “feedback [that] is provided primarily to support students’ learning and self-understanding rather than to rank or sort.” EDUCATING LAWYERS, *supra* note 1, at 189.

²⁶ In the words of the Carnegie Foundation Report, this would put “two kinds of assessment together – linking feedback *to* students with feedback *from* students about how well they are achieving the learning goals of a course . . .” *Id.*, at 180.

²⁷ Because it is somewhat non-traditional, we devote a class to this model. The students watch a series of clips from the movie “Class Action” (Interscope Communications 1991). They are told to make notes to themselves of the ethical issues that they see in the film. Then they are placed in groups to share these issues, brainstorm additional issues, and flesh out their position on the issues identified. Then we reconvene as a class to discuss these topics. In this way, the students have a clear sense of what I expect from them in the final examination.

²⁸ For example, I have sometimes used a short interaction between the President of a corporation and the general counsel of the corporation that was developed some time ago as part of the ABA series Dilemmas in Legal Ethics. I have also used a far lengthier set of sequences from the pilot episode of L.A. Law involving choices confronted by criminal defense attorneys.

²⁹ In order to make this possible, film clips were digitized and made available to students as streaming video on the web.

³⁰ See J. P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLIN. L. REV. 55 (1996) (providing an excellent description of the many ways to use journals to further student self-reflection and learning).

³¹ I use the Microsoft Word “Review and Comment” function to facilitate this process. Electronic submission avoids the necessity of deciphering student handwriting and the Microsoft Word capability makes it far easier and time-efficient to submit even extensive comments.

³² I have described my basic criteria and method of evaluation in Stacy L. Brustin and David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 CLINICAL L. REV. 299 (1997).

³³ EDUCATING LAWYERS, *supra* note 1, at 129. The Report referenced the following language in the Preamble to the American Bar Association’s Model Rules of Professional Conduct: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” *Id.*

³⁴ *Id.*, at 194.

³⁵ When asked by the authors of the Carnegie Foundation Report how they could afford to provide a context-based small-class environment for first-year classes “when their more affluent competitor institutions obviously seek the economy of scale afforded by large first-year classes, CUNY administrators answered, ‘We cannot afford not to do it.’” *Educating Lawyers*, *supra* note 1, at 36.