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THE SEARCH FOR "GOOD LAWYERING": A CONCEPT AND MODEL OF LAWYERING COMPETENCIES

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I. INTRODUCTION

EVERY TASK PERFORMED BY A LAWYER CAN BE ANALYZED and evaluated as a manifestation of that lawyer's underlying abilities. A system for analyzing these tasks, when conducted in a valid and consistent manner, could eventually result in the creation of standards for all legal education, ranging from teaching methods and curriculum design to questions of student retention and lawyer certification. The Competency-Based Task Force of the Antioch School of Law has been working on such a system for six years and believes that a workable model has been developed. The purpose of this article is to describe and explain that model, and to give some examples of its uses.

The motivation for the Task Force's work stemmed from a desire to apply the principles of competency-based education to teaching in law school clinics. The issues initially raised in the clinical context were developed to the point that the implications of the work have meaning for the entire process of legal education. Before discussing these implications a brief review of the educational setting in which the Task Force was operating is necessary.

II. THE PROBLEM

How to define good lawyering and how to produce it? It is the contention of this article that those two problems underlie the long and often confusing debate over objectives which has dominated the history of legal education.[1] To the extent that the debate has been between opposing schools of thought, it has been characterized by the

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[1] An excellent historical perspective for the issues discussed in this section can be found in the work of professors Gordon Gee and Donald Jackson. *See* Gee and Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 719-69 [hereinafter cited as Gee & Jackson]. There, the authors were "struck by the repeated emergence of one issue" which they described as the "tension between 'practical' and 'theoretical' orientations in professional training." *Id.* at 927. For another historical perspective, see Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974) [hereinafter cited as Grossman].

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same lack of agreement about what is a problem and what is a solution that seems to be so inevitable in such exchanges.[2] With great confusion of terms, and arguments filled with unexpressed values, the forces of logic and experiment alone have not sufficed to produce any movement from one school of thought to another. In fact, occasional transfers of allegiance seem to be better understood as conversion experiences which cannot be forced.[3] In such circumstances, unresolved debate seems inevitable.

Despite these formidable obstacles, there are some recent indications that a consensus exists as to what the debate is all about. If the debate is conceived as being between those who would teach law and those who would teach lawyering,[4] it is possible to view this consensus as emerging from an exploration of what is meant by the term "lawyering." The term is expansive. It is presently used to justify numerous conclusions.[5] Nevertheless, this expansive use and justifica-

[2] To aid in understanding the conflicts in this area, an analogy may be drawn between the historical development of science and the development of legal education. For an excellent treatise on the historical development of science, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970). Although this type of analogy has been questioned by Kuhn, *id* at 208-09, it is still useful for illustration.

[3] *Id.* at 151.

[4] This formulation of the debate dates back to the beginning of university-based legal education. *See* Gee and Jackson, *supra* note 1, at 731-33. More recently, the formulation was used by the realists in their quest for clinical training. *See* Grossman, *supra* note 1, at 168-96. Other formulations include: theory vs. practice, academic education vs. training, abstract vs. applied, Langdell vs. Frank, intellectual skills vs. lawyering skills, and others. *See generally* Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 560-62 (1976) [hereinafter cited as Holmes].

[5] The term "lawyering" has been explored for many different educational purposes. These explorations have assumed many different shapes. Attempts to define the components of lawyering to justify various pedagogical decisions include: ABA/AALS, GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980); ABA, REPORT TO TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979) [hereinafter cited as CRAMPTON REPORT]; Llewellyn, *The Place of Skills in Clinical Education*, 45 COLUM. L. REV. 345 (1945) [hereinafter cited as Llewellyn]; Redlich, *Lawyer Skills Can Be Taught*, 3 LEARNING & THE LAW 10 (1976) [hereinafter cited as Redlich, *Skills*]; Rutter, *Designing & Teaching the First Degree Law Curriculum*, 37 U. CIN. L. REV. 9 (1968) [hereinafter cited as Rutter, *Design*]; Rutter, *A Jurisprudence of Lawyer's Operations*, 13 J. LEGAL EDUC. 301 (1961) [hereinafter cited as Rutter, *Lawyer's Operations*]; Strong, *The Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226 (1973) [hereinafter cited as Strong, *Law Faculty*]. Attempts to define the components of lawyering in an effort to evaluate lawyering competency include: Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 273 (1978); Rosenthal, *Evaluating the Competency of Lawyers*, 11 LAW & SOCIETY 257, 259 (1976) [hereinafter cited as Rosenthal]. Other explorations, in responding to the competency writings include: Carrington, *On the Pursuit of Competence*, 12 TRIAL 36 (Dec. 1976) [hereinafter cited as Carrington]; Cramp-

tion of conclusions are helpful because it is through this process that debaters are beginning to recognize continuities in the subject of the debate. Recent articles tend to use terms interchangeably even though these terms used to be considered the unique property of one opposing school of thought or another. For example, theoretical education is practical education;[6] practical education is theoretical education;[7] the study of law is the study of lawyering;[8] the study of lawyering is the study of law;[9] and doctrinal study is practical training.[10] Underlying

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ton, *Competency for What?*, 3 LEARNING & THE LAW 64 (1976) [hereinafter cited as Crampton, *Competency*]; Frankel, *Curing Lawyer's Incompetency*: Primum Non Nocere, 10 CREIGHTON L. REV. 613 (1977) [hereinafter cited as Frankel]. Explorations to justify particular objectives for legal education include the classic work of Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interests*, 52 YALE L.J. 203 (1943) [hereinafter cited as Lasswell & McDougal]. *See also* Peden, *Goals for Legal Education*, 24 J. LEGAL EDUC. 379 (1972) [hereinafter cited as Peden]. In narrower terms, Professor Kelso has attempted to set out a theory of lawyering as problem-solving behavior. Kelso, *In Quest of a Theory of Lawyering: Some Hypotheses and Tribute to Dean Soia Mentshikoff*, 29 U. MIAMI L. REV. 159, 161-76 (1975) [hereinafter cited as Kelso]. Empirical studies of lawyering in relationship to legal education included: Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978); Benthall-Nietzel, *An Empirical Investigation of the Relationship between Lawyering Skills and Legal Education*, 63 KY. L.J. 373 (1975) [hereinafter cited as Benthall-Nietzel]. Most of this research has been generally related to the area of legal education, usually, and perhaps inaccurately, referred to as "skills training." The terms "lawyering" and "skills training" are not synonymous and should not be confused. The proper view was expressed by Kelso, "to encourage research on lawyering does not imply a conviction that the primary objective of legal education is to impart skills." Kelso, *supra* this note, at 197.

[6] *See* CRAMPTON REPORT, *supra* note 5, at 10; Bellow and Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 663 (1971) [hereinafter cited as Bellow and Johnson]; Boyer and Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221 (1974) [hereinafter cited as Boyer and Cramton].

[7] For a description of the Realists' justification of practical training, see Grossman, *supra* note 1, at 168. This line is echoed in recent writings about clinical methodology. *See* Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979) [hereinafter cited as Barnhizer, *Instruction*]; Bellow & Johnson, *supra* note 6; Condlin, More Notes on a Theory of Fieldwork Instruction (May 14, 1976) (unpublished dissertation in Harvard Law School Library) [hereinafter cited as Condlin]; Rivkin, Legal Education in a Clinical Setting (June 10, 1979) (handout at A.A.L.S. Clinical Teachers Conference at Snowmass, Colo.). *See also* Rutter, *Lawyers' Operations*, *supra* note 5: "It is for this reason that, in so far as the dispute has turned on a distinction between 'theory' and 'practice,' it has been without relevance to the problem and unproductive." *Id.* at 302.

[8] *See* Rutter, *Lawyers' Operations*, *supra* note 5, at 306-08.

[9] *Id.*

[10] "The fact is that not only is the study of doctrine not theory, but it constitutes an intensely practical skill, perhaps the most important single skill of the practicing lawyer." *Id.* at 307.

these continuities is an implicit definition of the problem being debated.[11] Stated most broadly, the issue is not what the students learn, it is what they can do with what they have learned.[12] In narrower terms, the objective of legal education is the preparation of lawyers for lawyering.[13] The problem which underlies the debate, then, is defining good lawyering and testing means of producing it.[14]

If this statement of the problem is correct, then good lawyering is the pedagogical criterion of law schools. One simply has to describe the components of good lawyering adequately, and educational decision-making will eventually follow from that description. This approach has been suggested in numerous formulations over the past ninety years.[15]

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[11] For a discussion of the continuity of the problem, see Holmes, *supra* note 4.

[12] This statement of the problem seems to parallel some of the conclusions of Jerome Bruner in his works on theories of learning and education. *See* J. BRUNER, TOWARDS A THEORY OF INSTRUCTION (1966); Bruner, *Learning and Thinking*, 29 HARV. EDUC. REV. 184 (1959).

[13] As Peden has noted, formulations of objectives other than those which identify the end product in terms of the functions to be performed, seem to confuse means and ends (for example, subject matter objectives, educational processes objectives, objectives such as "thinking like a lawyer," or "imparting lawyering skills," or "learning to learn"). Peden, *supra* note 5, at 386-87. By stating the objective as preparation of lawyers for lawyering, it is intended to do nothing more than imply the need for a definition of "good lawyering" and the testing of means of producing it.

[14] In so stating the problem, there is no implication that law schools alone bear the responsibility for producing good lawyering or that law schools alone are capable of producing good lawyers. As many have pointed out, bad or incompetent lawyering is not necessarily a product of training, or even a product of lack of technical competence. *See* Boyer and Cramton, *supra* note 6; Crampton, *Competency*, *supra* note 5; Frankel, *supra* note 5. There are situational aspects of incompetent lawyering for which the system must bear responsibility. *See* Carrington, *supra* note 5. There are individual characteristics, such as laziness, which may or may not be affected by law schools, but which do produce incompetency, for which the individuals themselves must assume final responsibility. *See* Boyer and Cramton, *supra* note 6; Crampton, *Competency*, *supra* note 5; Frankel, *supra* note 5. Nevertheless, the producing of good lawyering remains the objective of legal education and can be used as the criterion for the evaluation of changes.

[15] This approach dates back to the Report of the Standing Committee on Legal Education, 13 ABA REP. 327, as cited in Gee and Jackson, *supra* note 1, at 739. Suggestions that educational decision-making should be based on an understanding of lawyering include: CRAMPTON REPORT, *supra* note 5 (design of teaching programs and curriculum decisions); Cahn, *Tomorrow's Law Schools*, 3 LEARNING & THE LAW 72 (1976) (graduation and admission to profession decisions); Carr, *Grading Clinic Students*, 26 J. LEGAL EDUC. 223 (1974) (evaluation decisions in clinical education) [hereinafter cited as Carr]; Kelso, *supra* note 5, at 194 (design of teaching programs and curriculum decisions); Lasswell & McDougal, *supra* note 5, (curriculum decisions); Kelso, *supra* note 5, at 159 *citing* L.S.A.C. Conference in September 1974 (admissions decisions); Llewellyn, *supra* note 5 (allocation of teaching responsibilities); Rutter, *Designing*, *supra*

Those commentators and educators who have reached this conclusion have also found that there has never been an accepted statement of the components of lawyering, much less good lawyering.[16] With the exception of a few proposed definitions, accompanied by many caveats, the dominant theme of commentators has been a call for extensive research.[17]

The call has been answered with empirical and theoretical approaches.[18] The empiricists have suggested that lawyering is best defined by what lawyers do. Good lawyering is, therefore, what good lawyers do. Most of this research has attempted to define the important components of lawyering by directing questions to various groups of attorneys.[19] The theoretical approach has been more involved, ranging from inventories of skills to conceptual models of lawyering tasks.[20]

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note 5 (curriculum decisions); Strong, *A New Curriculum for the College of Law of the Ohio State University*, 11 OHIO ST. L.J. 44 (1950) (curriculum decisions) [hereinafter cited as Strong, *Ohio St.*]; Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979) (evaluation decisions in clinical education).

[16] "The greatest difficulty in evaluating legal competency is gaining consensus on its component elements." *See* Rosenthal, *supra* note 5, at 259. "Everyone who has addressed the problem of defining lawyer skills has had no choice but to extrapolate from his own experience and knowledge, and as a result there has been little agreement beyond the tautological observation that the fundamental skill acquired by law students is learning to think like a lawyer." *See* Boyer and Cramton, *supra* note 6, at 270.

[17] Much of the research has been in response to an initial call by Llewellyn. *See* Llewellyn, *supra* note 5. For examples of additional calls for research, *see* CRAMPTON REPORT, *supra* note 5, at 5 (recommendation 12); Boyer and Cramton, *supra* note 6, at 270; Kelso, *supra* note 5, at 159, *citing* McDougal, *Beware the Squid Function*, 1 LEARNING & THE LAW 16, 17 (1974); Lasswell & McDougal, *supra* note 5, at 209; Rosenthal, *supra* note 5; Rutter, *Lawyers' Operations*, *supra* note 5, at 308-09.

[18] Kelso's call for research to "generate and test a comprehensive theory of lawyering" includes a recognition of the need to combine theory with empirical observation:

> Such a theory must be based upon empirical observations and be subject to empirical verification. However, it is not easy to decide what you will begin to observe when your challenge is to develop a theory of lawyering—a comprehensive insight into what lawyers do and how they do it.
>
> Further, there is the inevitable difficulty for research design that facts and theory have reciprocal interactions. It doesn't make sense to generate hypotheses not based upon empirical facts. But gathering facts without guiding hypotheses is apt to be wasteful.

Kelso, *supra* note 5, at 160. Despite Kelso's observation, there have been few attempts to combine theoretical and empirical approaches.

[19] Empirical research includes and is surveyed in: Benthall-Nietzel, *supra* note 5, at 377-91; Gee and Jackson, *supra* note 1, at 936-51.

[20] Some have posited that lawyering is the exercise of certain skills. Those advocating this positior have offered numerous inventories of the skills involved. Llewellyn is credited by Strong as offering a starting catalogue for

Both empirical and theoretical researchers have sought to provide some framework for educational decision-making.

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identification of elements in the "lawyering process." *See* Strong, *Ohio St.*, *supra* note 15; Strong, *Law Faculty*, *supra* note 5, at 230-31; Strong, *Pedagogical Implication of Inventorying Legal Capacities*, 3 J. LEGAL EDUC. 555 (1951) [hereinafter cited as Strong, *Pedagogical Implications*]. Strong has continued that effort. His most recent attempt to "dissect into constituent parts the gestalt whole of law practice" provides:

1. Perceptional (essentially cognitive)
   a. Legal information (the rudiments of law)
   b. Legal analysis (case and statute)
   c. Fact discrimination (the effect on outcome of varying fact patterns)
   d. Legal synthesis (case and statute)
   e. Legal doctrine (the operative rules)
   f. Problem formulation (the analogy to medical diagnosis)
   g. Problem resolution (solving the legal problem formulated under "f" through use of elements "a" - "e," inclusive)
2. Instrumental (cognitive *and* affective)
   a. Legal symbolism (law has no distinct idiom as does accountancy or music; it employs the English language but it is a legal English with meanings often at variance with ordinary signification of a word or phrase as illustrated by "political question")
   b. Legal method (judicial method and legislative draftsmanship illustrated by the "art" of responsive law making and of canalized adjudication)
   c. Legal theory (reconciliation of conflicting legal doctrine by developing exceptions to legal rules to relax their woodenness and exceptions to the exceptions to prevent the exceptions made to the rules from destroying them)
   d. Legal process (dynamics of law making and of adjudication by divergent public and private agencies)
   e. Legal philosophy (function(s) of Law in society)
   f. Legal policy (expansion on "e" to embrace the interrelationships of law, science and policy [the Lasswell-McDougal construct])
   g. Legal design (fashion the means for achieving the ends postulated by "e" and "f" illustrated by the pioneering work of Underhill Moore in his celebrated New Haven traffic study and by David Cavers' call for empiric study *about* law rather than traditional inquiry *in* law)
3. Operational (integration of affective and cognitive learning in an experiential, applicational context)
   a. Fact ascertainment (sources of raw facts to be sifted for the legally relevant)
   b. Law ascertainment (sources of relevant law, found through legal research)
   c. Implementation (effective legal articulation through office memoranda, drafting, briefing, oral presentation, written exposition, and the like)
   d. Lay interviewing

For most legal educators, this research and the problem to which it responds are not of immediate concern. The question of a criterion for educational decision-making is seldom confronted outside of the faculty or committee meeting.[21] Despite a proliferation of definitions of good lawyering, research probing the basic philosophical questions of legal

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e. Client counseling
f. Representation
   1) Negotiatory process (both policy making and settlement)
   2) Arbitral process (both commercial and labor)
   3) Administrative process (both rule making and adjudication)
   4) Legislative process (by private ordering as well as public formulation)
   5) Judicial process (decisional law-making, statutory interpretation, formal adjudication)
g. Legal mechanics (routine of law office, court house, legislative chamber, etc.)

Strong, *Law Faculty*, *supra* note 5, at 230-31. Other inventories include: Burris, *Countdown on Competency*, 3 LEARNING & THE LAW 13 (1976); Holmes, *supra* note 4, at 578; Redlich, *Skills*, *supra* note 5, at 12. These inventories are offered as frameworks for educational decision-making. Strong gives the best example of this in his article, *Pedagogical Implications of Inventorying Legal Capacities*, *supra* this note.

Other educators have suggested that problem-solving skills are so generic and pervasive that alone they form a conceptual basis for a description of lawyering. *See* Kelso, *supra* note 5; Rosenthal, *supra* note 5, at 270-76.

Other theoreticians have described lawyering as the performance of certain tasks or operations. The most important contribution of this group has been their attempts to develop conceptual models of various lawyering tasks. Notably, the Bellow-Moulton Lawyering Process test is designed around this idea of the development of conceptual models of lawyering tasks. *See* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS (1978) [hereinafter cited as G. BELLOW & B. MOULTON]. *See also* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING (1977). Binder and Price describe the need for models of lawyering tasks in the Instructor's Manual to the text. *Id.* at 1. There have been a few attempts to set out models of legal analysis and legal problem solving. *See* Crombag, Wijkerslooth, and Serooskerken, *On Solving Legal Problems*, 27 J. LEGAL EDUC. 168 (1975).

Still other theroreticians have attempted to combine these skills and tasks approaches. Rutter seems to come closest to a combination of the two. *See, e.g.*, Rutter, *Lawyer's Operations*, *supra* note 5, at 312-16 (discussion of cross-examination).

All theoretical approaches are delimited by conceptions of the functions of lawyers in society. In other words, which skills and which tasks are determined by the societal functions being performed. This is clearest in the works of Lasswell and McDougal, *supra* note 5, and Peden, *supra* note 5. The question of "Competency for what?" is often raised by Cramton and others. *See* Cramton, *Competency*, *supra* note 5, at 64; Cramton, *Report to the President of the University for the Year 1978-79*, 6 CORNELL L.F. 2 (1979).

[21] Of course, the question is inherent in the process of evaluation of students. Nevertheless, it has received little attention even in that context. An exception is Levine, *Toward Descriptive Grading*, 44 S. CAL. L. REV. 696 (1971) [hereinafter cited as Levine].

education, and some strong sentiments for re-evaluation, there are no real indications that the unarticulated paradigm under which most legal educators operate is in crisis.

For one group of legal educators, however, this research and this problem are of immediate concern. In the clinical legal education experience,[22] the problem of the debate is a problem directly related to

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[22] By "clinical legal education experience" we refer to "clinical legal studies" as defined in the ABA/AALS, GUIDELINES FOR CLINICAL EDUCATION, *supra* note 5:

> A. "Clinical Legal Studies" includes law student performance on live cases or problems, or in simulation of the lawyer's role, for the mastery of basic lawyering skills and the better understanding of professional responsibility, substantive and procedural law, and the theory of legal practice. The performance or simulation of the lawyer's role may include one or more of the following:
>
> 1. representing or assisting in representing a client in judicial, administrative, executive, or legislative proceedings;
> 2. assisting a client as office or house counsel; or
> 3. undertaking factual investigations, empirical research policy analysis, and legal analysis on behalf of a client.
>
> . . .
>
> B. Introduction to the Clinical Legal Studies Curriculum
>
> An introduction to clinical legal studies may include the following:
>
> 1. interviewing;
> 2. fact gathering and field investigating;
> 3. identifying and applying law to case facts;
> 4. diagnosing a client's problem;
> 5. developing case strategy;
> 6. counseling;
> 7. drafting legal instruments and writing legal briefs;
> 8. analyzing the operation of legal institutions;
> 9. defining professional competence and the lawyer's professional responsibility in the attorney-client relationship;
> 10. negotiating and settling;
> 11. preparing for and conducting trials;
> 12. preparing appellate briefs and arguing appeals; and
> 13. developing a methodology to evaluate one's own professional performance throughout one's career.
>
> C. Concentrated Study
>
> To provide more thorough consideration of the elements in . . . [B], concentrated study may be undertaken which includes, but is not limited to, one or more of the following:
>
> 1. drafting instruments;
> 2. trying cases;
> 3. interviewing, counseling, and negotiating;
> 4. working on cases or problems which raise interdisciplinary issues;
> 5. analyzing problems in professional responsibility;

the diagnosis and evaluation of student performance.[23] Clinical educators confront the problem of defining and producing good lawyering on a daily basis.

The clinics of the Antioch School of Law, with their problems in diagnosing and evaluating student performance, have offered the Competency-Based Task Force an excellent point of entry into the debate.[24] Through four years of research, the Task Force developed a competency-based model for the diagnosis and evaluation of lawyering which has broad implications for the problem of defining and producing good lawyering. The remainder of this article is a discussion of that model.

III. A MODEL OF LAWYERING COMPETENCIES

The Competency-Based Task Force was formed at the Antioch School of Law in 1974.[25] The Task Force had as its immediate objective

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6. analyzing student views of the professional role of lawyers; and
7. researching problems related to substantive or procedural law, judicial, administrative, or legislative processes, public policy, or the effectiveness of specific laws.

Id. at 12, 14.

Three general models of clinical legal education are defined by Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U.L. REV. 1025, 1040-48. Clinical methodology has been described by several authors including: Barnhizer, *id.*; Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT, WORKING PAPERS (CLEPR 1973); Condlin, *supra* note 7. The characteristics and problems of clinical legal education are explored in Watson, *On Teaching Lawyers Professionalism: A Continuing Psychiatric Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT, WORKING PAPERS (CLEPR 1973). For the history of clinical education, see Grossman, *supra* note 1. *See generally* CLEPR NATIONAL CONFERENCE, CLINICAL EDUCATION FOR THE LAW STUDENT (1973); Bellow and Johnson, *supra* note 6; Redlich, *Perceptions of a Clinical Program*, 44 S. CAL. L. REV. 574 (1971) [hereinafter cited as Redlich, *Perceptions*].

[23] Clinicians usually must diagnose and evaluate the student's performance in actual legal processes. This is done in an individualized teaching context which serves to highlight the problems of evaluation of lawyering. *See generally* Barnhizer, *supra* note 7. Clinicians should realize that: "Evaluation criteria should represent an identification of specific qualities and attitudes which have been determined to comprise the frame-work of professionalism and competence." *Id.* at 132. *See also* Carr, *supra* note 15; Redlich, *Perceptions*, *supra* note 22, at 598-602.

[24] Some of the justifications for exploring the problem in the context of clinical legal education are set out in Leleiko, *Clinical Education, Empirical Study, and Legal Scholarship*, 30 J. LEGAL EDUC. 149 (1979).

[25] The Competency-Based Task Force (Task Force) consisted of the Co-Deans of the Law School, faculty members, clinical fellows, students and technical consultants. The actual composition of the Competency-Based Task Force over its history has involved continuities as well as discontinuities with respect to per-

the development of concepts, definitions, methods and instruments for evaluating lawyering competency for application to Antioch's clinical legal education program. The model described in this article is the result of experimentation with several different approaches. The approach initially taken was a task-oriented one. That approach was eventually discarded because it proved to be unworkable in Antioch's clinical program.

A. *The Model*

The model of lawyering competency that finally emerged was based on lawyering functions rather than tasks.[26] For example, a major function of lawyers is communicating, either orally or in writing. The tasks in which this function is carried out are almost endless (*e.g.*, letters, briefs, interviews, telephone conversations, pleadings, motions, and various trial advocacy tasks). In the model, the communication function is called a major competency. The model encompasses six such major competencies:

1. Oral Competency
2. Written Competency
3. Legal Analysis Competency
4. Problem-Solving Competency
5. Professional Responsibility Competency
6. Practice Management Competency

Each major competency is further divided into sub-functions called specific competencies. For each specific competency there are criteria to assist the analysis. The criteria define the kinds and range of observable performance or behavior included in the specific competency. The major and specific competencies in the model, but not the criteria, are contained in Appendix A.

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sonnel. We will not attempt to list the many persons who contributed to the work of the Task Force, although all deserve recognition. It is appropriate, however, to make appreciative acknowledgement of the fact that the prime movers, supporters, and guides have been the Co-Deans of the Antioch School of Law, Jean Camper Cahn and Edgar S. Cahn, Professor Terence J. Anderson of the University of Miami, and Professors Jane and Charles D. Kelso of the McGeorge School of Law, University of the Pacific. The value of their many contributions cannot be overestimated. The Task Force was funded by the Fund for the Improvement of Post-secondary Education (HEW). The development of particular instruments and procedures was also supported by funds from the National Science Foundation and the Council on Legal Education for Professional Responsibility (CLEPR).

[26] The complete model is contained in: COMPETENCY-BASED TASK FORCE, ANTIOCH SCHOOL OF LAW, CATALOG OF DEFINITIONS OF GENERIC LAWYERING COMPETENCIES (1978). All subsequent references to particular skills or competencies, and their criteria quoted in this article pertain to material in the Catalog. We will use quotation marks, otherwise unreferenced, to refer to material taken from the Catalog.

The basic theory of the model and its applications is that any lawyering task can be viewed as involving some combination of major and specific competencies. For example, an intake interview will involve at least the following major and specific competencies:

I. Oral Competency:
   A. Ability to use the mechanics of the language (*e.g.*, grammar, syntax, articulation);
   B. Ability to express *a thought* with preciseness, clarity and economy;
   C. Ability to express *thoughts* in an organized manner;
   D. Ability to speak appropriately to a given audience;
   E. Ability to identify and use appropriate non-verbal aspects of communications (*e.g.*, appearance, poise, gestures, facial expressions, postures, and use of spatial relationships);
   F. Ability to perceive other's communications and actions (verbal and non-verbal);
   G. Ability to communicate so as to advance immediate and long term objectives.

II. Legal Analysis Competency:
   Analyzing Facts and Identifying Relevant Law
   A. Ability to identify relevant facts;
   B. Ability to identify inconsistencies among facts;
   C. Ability to identify the reliability of asserted facts.

III. Problem-Solving Competency:
   Identifying and Diagnosing Problems
   A. Ability to identify client's objectives and priorities;
   B. Ability to identify obstacles and facilitating factors that bear on the realization of client's objectives and priorities.
   Implementing Strategies
   A. Ability to formulate a work plan that identifies who will do what, with whom, where, when, and with what expected results and costs.

An intake interview, therefore, utilizes an array of the major and specific competencies delineated in the model. A different task such as counselling may incorporate some of the same skills involved in carrying out an intake interview, as well as some others. A written product will obviously include none of the oral communication skills, just as interviewing includes none of the written skills.

The major and specific competencies in the model are considered to be generic in the sense that their definitions and criteria are independent of any specific task, substantive content, or situation. The assumption of the model is that the same specific competencies recur

in a variety of tasks and situations. What changes from task to task or from situation to situation is the *content* of the competency. Consider the following specific legal analysis competency and its criteria:[27]

1. Ability to identify relevant facts
   - —Did the student state the available facts correctly?
   - —Did the student identify all the available facts necessary or relevant for legal analysis?
   - —Did the student include facts that were unnecessary or irrelevant?
   - —If so, did this interfere with the student's analysis?

Answers to the criterion questions are based upon the nature of the task and the substantive content of the specific situation. For example, a determination of what constitutes necessary or relevant facts depends on the fact pattern, applicable procedural rules and the objectives.

The "ability to identify relevant facts" is needed in a limitless number of tasks and situations. Once the task is specified, the criteria can be given specific or concrete content. Until this determination is made, the major and specific competencies and criteria in the model remain generic.

The criteria of specific competencies generally delineate classes of errors, either of omission or of commission. Some criteria also designate other characteristics or implications of specific competencies as manifested in work products, performances, or behavior. The following are examples of criteria for various specific competencies in the model:[28]

I. Oral Competency. . .
   3. Ability to express thoughts in an organized manner.
      - —Was there a logical structure to the student's communication? (*e.g.*, chronological, spatial, hierarchical, topical, etc.)
      - —Was the structure used appropriate for the communication?
      - —If there was not an apparent structure, did the lack of structure impede communications?

. . . .

III. Legal Analysis. . .
   1. Ability to identify relevant facts.
      - —Did the student state the available facts correctly?

[27] *See generally* Appendix A.

[28] The criterion questions in this section correspond to various specific competencies outlines in Appendix A.

- —Did the student identify all the available facts necessary or relevant for legal analysis?
- —Did the student include facts that were unnecessary or irrelevant?
- —If so, did this interfere with the student's analysis?

. . . .

8. *Ability to identify discrete legal issues.*
   - —Did the student identify all of the significant issues raised by the facts?
   - —Did the student identify insignificant legal issues?
   - —Did the student distinguish between legal issues and issues which are not legal? (*e.g.*, factual, social, medical, political issues).
   - —Did the student identify issues not raised by the facts and law?
   - —Was each issue stated narrowly? (*e.g.*, with sufficient facts). And precisely? (*e.g.*, without unnecessary facts). . .

IV. Problem Solving. . .

1. Ability to determine client's objectives and priorities.
   - —Did the student identify the client's objectives?
   - —Did the student probe to assure that all objectives were articulated? Did the student identify the relative strengths of articulated objectives?
   - —Did the student identify the client's priorities?
   - —If there were conflicting objectives, did the student assist the client in assigning priorities?
   - —Was the student's depiction of the client's objectives and priorities correct?
   - —Did the student identify changes in the client's objectives and priorities at each essential stage?

. . . .

VI. Practice Management . . .

3. Ability to work according to applicable systems, rules, and procedures governing the handling of cases and files.
   - —Did the student identify the rules, procedures and purposes of the existing system?
   - —Did the student follow all specified procedures completely?
   - —Did the student follow all specified procedures accurately?

—Did the student follow all specified procedures according to time standards?
—Did the student follow all specified procedures consistently?

The Antioch Task Force model of lawyering competencies is a product model as distinguished from a process model; that is, it focuses on observable results rather than on how one arrives at the results. The foregoing examples of criteria for different specific competencies illustrate that focus. Most criteria are concerned with what was done. The form of data needed to satisfy criteria may be written (a work product, a blue book exam), oral (a verbal/non-verbal presentation or performance), or behavioral (actions occurring over time). Another source of data bearing on criteria can be a conference with the student. Whatever the source and form of data, the first emphasis in the model is on the observable, not on the student's underlying antecedent knowledge, skills, attitudes, or operations or on the observer's inferences or conjunctures.

The major and specific competencies can be analogized to the tips of icebergs. They are the results, or manifestations of underlying mental structures or processes. The tip of the iceberg tells us that the rest of the iceberg is there. If there is something problematic or wrong with the immediately observable tip, it is assumed in this analogy that the cause lies in the underlying and unobserved structure, or perhaps in the environment, or both.

The iceberg analogy is not entirely applicable. It serves, however, to call attention to two important points. First, the competency model begins with the designation of observables from which inferences and hypotheses may then be formed and tested with further data. Second, performance and competency are related, but not identical. Competency (the whole iceberg) includes performance (the tip of the iceberg). Performance may involve any number of underlying or antecedent mental structures, processes or operations. For example, a good performance with respect to a specific competency may mean many things: that the student has memorized something and successfully repeated it by rote; that the student understands the concepts, principles, and relationships and was able to use them effectively in the instant situation; that the student has become proficient in following a formula that worked in the observed case; that the student made a lucky guess; or that there was some other possible process or structual configuration. What may appear to be the result of extemporaneous logical reasoning (an underlying antecedent process) may, on further inquiry and analysis, turn out to be the result of past practice on the same type of problem. True competency should be regarded as an integrated structure of knowledge, mental processes, and attitudes that enables the student to respond effectively to the infinite variations of situations and problems that arise in life.

Be this as it may, observations of performance still lead to hypotheses and conclusions about competency.[29] As a practical matter, performance under a range of conditions is generally taken as the measure of competency, but as the exposition on diagnosis and evaluation in Section V[30] makes clear, performance and competency need to be distinguished.[31] It must be borne in mind that when the term "competencies" is used, it is used as a matter of convenience, not theoretical necessity (competencies is often used interchangeably with "skills" and "abilities").[32]

In addition to this brief synopsis of the Task Force model there are several particular characteristics which warrant additional comment.

B. *Some Critical Features of the Competency Model*

One conspicuous feature of the model is the range of specificity of the various "specific" competencies. Some are narrowly drawn[33] while

[29] The performance of tasks is necessary for a determination of competencies, but performance and competency are not the same thing. One may perform a task well in a single instance or in a limited number of instances, but that performance does not mean that the task will be performed well consistently or in different settings. One can learn to perform a particular task according to a specified model or procedure such that performance of the same task under relatively constant conditions will be effective. The issue is the ability to generalize from prior learning. The generic competency model does not guarantee the ability to generalize. It is based on the hypothesis that this ability will be facilitated if students, their supervisors and teachers concentrate on the development of skills that appear to be common to a wide variety of tasks. It can be hypothesized that a common language for identifying and evaluating competencies across situations and tasks will further support the ability to generalize learning.

Extending this analysis, perhaps one of the major problems with using the task as equivalent to competency is that there are different models for particular tasks. One person may prefer one model or procedure, another a different one. One can suppose that any particular way of doing a task can be taught to any student. A student who has learned to do a task one way may appear incompetent if a different format or structure is required by someone else in a different context. The problem is clearly demonstrated by the attempts of the ABA Client Counseling Committee to standardize the judging of the Client Counseling Competitions. While it is important to evaluate the success one has had in teaching a particular method for doing a task, the larger issue of "good lawyering" is flexibility—ability to perform tasks well given a range of teaching, models, styles and situations. On the assumption that generalized constituent abilities will be identifiable in any product no matter what the preferred model, evaluation can then focus on the commonalities as well as on unique features.

[30] *See* notes 65-88 *infra* and accompanying text.

[31] This point has been a source of confusion in education. *See* Spadey, *Competency-Based Education: A Band Wagon in Search of a Definition*, 6 EDUC. RESEARCHER No. 1, at 9 (1977).

[32] Often the term "manifestation of competencies" will be used, such manifestations being what is observed in work products or performances.

[33] *E.g.*, the ability to identify inconsistencies among facts. *See* Appendix A.

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others, by comparison, are very broad.[34] The reason for this range of specificity is that each major area was defined and analyzed separately. No effort was made to try to maintain a parallel level of specificity from area to area. The judgmental issues in each case were: 1) whether the specific competencies as identified covered the functions that teachers and supervisors felt were important in each area; and 2) whether they covered them parsimoniously.[35]

The parsimony criterion is important. The model contains fifty-three specific competencies. At first blush, there is an absurdity in claiming that all lawyering can be reduced to fifty-three skills or abilities. Why not 5,300, or why not five? One could easily expand the fifty-three competencies into more and more specific subcompetencies. The problem is that there is a loss in utility in being either too exhaustive or too general. Few teachers would find it diagnostically useful to group all diagnoses and evaluations into five or six categories,[36] or to try to bear in mind a list of competencies running into the hundreds or thousands.

No claim is made that the model, as it presently stands, is optimum. Over time, it may be desireable to add, delete, or modify some specific competencies or criteria. As it now stands, the model has been found to be a useful tool in a variety of applications.[37]

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[34] *E.g.*, the ability to supervise others. *See* Appendix A.

[35] The basic process by which the generic competencies model was developed was through systems analysis. After establishing the definition of a major function, the Task Force then undertook to analyze and identify subordinate functions (skills, competencies) that appeared to be components of the major function. Specific competencies or skills were stated in the form "ability to . . . ." Proposed lists of specific competencies were evaluated on a number of criteria. These included the extent to which each specific competency appeared to describe a necessary step or operation in light of the experience of attorneys, the clarity of the statement of the specific competency, the extent to which the specific competency described behavior or an operation that was potentially observable, the extent to which the list appeared to encompass the important aspects of the major function and the extent to which specific competencies seemed logically related to the particular major competency. In effect, the process was an attempt to translate into statements of denotable functions, the steps or operations performed in practice in a wide variety of situations. The process involved much debate and discussion over the characterization of different specific abilities in light of diverse experiences of Task Force members. There were many false starts, much revising of lists and statements and discarding of statements which at one point had seemed appropriate.

[36] There is an exception to this statement. As will be demonstrated, student performance can be evaluated with respect to the six major areas of competency of functioning. Such evaluations, however, can be based upon evaluation of the specific competencies that serve to define the major area.

[37] Conceptually, the model, its assumptions and its uses are very similar to the Model Peer Review System being proposed by the American Law Institute/American Bar Association Committee, ALI-ABA COMM. ON CONTINUING PROFESSIONAL EDUCATION (Discussion Draft, April 15, 1980). The Task Force generic competencies model also has much in common with a major functional model proposed by Douglas E. Rosenthal. *See* Rosenthal, *supra* note 5.

Another feature of the Task Force competency model is that the particular definitions and classifications of major and specific competencies involve underlying assumptions and decisions. For example, the distinctions between legal analysis skills and problem solving skills, and between either of these and communication skills, derive from practical as well as theoretical considerations.[38] Virtually every activity can be regarded as problem solving. Similarly, virtually every lawyering activity involves at least some aspects of legal analysis. Further, communications are the way problem solving and legal analysis operations are made known; thus, the major and specific competencies are not independent. In certain respects, the classifications are arbitrary, as is the case with virtually any taxonomic system.[39] The justifications for the current classifications are that they have a face validity in a wide range of applications and that they are useful.[40]

A third important feature of the model is its avoidance of specification of attitudes and values, *and* of the relative importance of different competencies. Attitudes are assumed to be manifested in behavior, products, or performances. Problems encountered with competencies identified in behavior, products, or performances can lead to hypotheses about underlying attitudinal, emotional, or motivational factors. Such hypotheses need further data for confirmation, such as discussions with the student or further observations. A teacher or

[38] An alternative approach could have been purely empirical. For example, a factor analysis of many items applied to many tasks could lead to the identification of a limited number of factors and to the selection of items that relate clearly to particular factors. At some point, factor analysis of instruments derived from the Task Force model will be a useful task to undertake. For the time, however, the heuristic value of the model has been more important than its empirical purification.

[39] Legal analysis is conceptualized as a series of abilities that are independent of a particular client or case. Problem-solving abilities are limited to clients and their particular cases. Communication skills or abilities are defined in such a way as to enable one to focus on them, to a great extent, separately from legal analysis and problem-solving. Similarly, professional responsibility can easily be intertwined with legal analysis and with problem-solving. It is defined separately in the model in order to emphasize it as an area of particular concern and attention.

[40] A perusal of the list of competencies in Appendix A indicates that the competencies are frequently identified with a view toward use in clinics. While some classifications may be arbitrary, the criteria of the competency usually clarify what skill problem one is observing, regardless of the ultimate validity of the location of the specific competency in the model. Thus, the use of the list of skills for teaching, diagnostic, and evaluation purposes is not restricted by the larger structure of the model. For example, we have interpreted "Practice Management: Ability to work according to applicable systems, rules and procedures governing the handling of cases and files" to apply to skills involving procedures in courts and other institutions, as well as in the clinic itself. In analyzing a product of performance, one can (indeed, typically must) cut across major areas of functions.

supervisor who finds that the students have a problem relating to "ability to maintain a level of productivity that conforms with applicable standards and normative expectations," or with "ability to judge the point at which further commitments cannot realistically be discharged competently," may hypothesize that an attitudinal problem exists and should be investigated.

Similarly, in professional responsibility, the "ability to identify situational conflicts with other ethical, ideological, or personal considerations bearing on a case or the lawyer/client relationship," and the "ability to determine and act upon courses of actions in light of such conflicts," do not commit the student or teacher to accept a particular ethical or ideological position. The specific competencies only require one to act rationally, with awareness, and in an accountable manner. In this respect, rationality and the ability to articulate considered reasons are values, but they do not prescribe *per se* a particular ethical or ideological position.[41]

In this context, substantive knowledge stands in the same relation to specific competencies as do attitudes and values. Problems which manifest themselves as inadequacies in performance of particular tasks may be traceable to a lack of knowledge. Indeed, lack of knowledge is a prime candidate as an explanatory hypothesis for problems observed in the manifestation of a number of competencies. Of the various explanatory hypotheses possible in diagnosis, it is probably among the easiest to test.

By treating competencies as indicators of underlying causal factors, the model provides a way of resolving the issue of whether incompetence is due to lack of technical skills or to character problems.[42] Sloth, for example, may manifest itself in a variety of specific competencies, as will venality. It is difficult to imagine problems of character that will not show up as problems with one or another of the specific competencies in particular situations (given their criteria). The competencies, therefore, are not concerned simply with technical proficiency.[43]

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[41] This method of evaluating professional responsibility should be compared to Kohlberg's theory of moral development. *See* L. KOHLBERG, COLLECTED PAPERS ON MORAL DEVELOPMENT AND MORAL EDUCATION (1973).

[42] For example, Frankel states: "The significant qualities distinguishing bad lawyers and, thus, the areas of truly major concern about 'competence' are matters of character, judgment, wisdom, morals, and attitude, not the business of technical proficiency." Frankel, *supra* note 5, at 618. The Task Force model gives operational, and observable meaning to such traits.

[43] The model does not specify different relative values of different general or specific competencies. In a given situation, any one of the array of competencies evaluated can be weighted equally or differentially. In an intake interview, for example, one instructor may feel that if the student does not clearly establish the next steps to be taken with the client, the overall interview should not be regarded as a good one. In individual applications, teachers and supervisors can weigh the relative importance of particular specific competencies according to their own standards. There is nothing in the model to preclude

IV. RELATIONSHIP OF THE MODEL TO THE TEACHING OF LEGAL ANALYSIS

Some implications of the work of the Competency-Based Task Force will be better understood in the more familiar context of teaching legal analysis.[44] If legal educators agree on anything, it is that legal analysis is taught in law schools.[45] It is usually taught indirectly, that is, as a by-product of the case method. There have been a few attempts to teach legal analysis directly, or at least certain components of legal analysis.[46] It is fair to say, however, that an overwhelming majority of legal educators believe that legal analysis is best learned through teaching the standard first year curriculum via the case method.[47] There are some strong justifications for this belief as the case method seems to be an extraordinarily successful pedagogical device.[48]

There is, however, a price for this extraordinary success. Since the process of legal analysis is typically taught indirectly through the case method, it is treated as a gestalt with components remaining unexpressed beyond the ultimately tautological observation that one applies the law to the facts.[49] As a result, there is no shared articulated

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this, although students should be advised in advance of their relative importance. In standardized, comparative evaluations, the weighting scheme for evaluations should be agreed upon in advance. With sufficient opportunity, relative weights for competencies evaluated in particular tasks could be developed empirically through regression analysis.

[44] An attempt has been made to distinguish legal analysis from problem solving and legal reasoning. The term "thinking like a lawyer" includes some elements of problem solving, and is not necessarily synonymous with legal analysis. Legal reasoning is understood to refer to the rationale of legal decision-making. There are obvious similarities in these processes. Nevertheless, they should be distinguished.

The traditional view of legal reasoning and an innovative new view are well presented in Hermann, *A Structuralist Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131 (1975).

[45] *See* Llewellyn, *supra* note 5, at 351.

[46] *See, e.g.*, W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES (1976); Crombag, Wijerslooth, & Serooskerken, *supra* note 20; *See also* Gross, *On Law School Training In Analytic Skills*, 25 J. LEGAL EDUC. 261 (1973) (an interesting discussion of the position that legal analysis should be taught as an operational skill).

[47] For a description of the standard curriculum, see G. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA (1975).

[48] Complaints, when they do surface, are usually addressed to the use of the method rather than the method itself. *See* Llewellyn, *supra* note 5, at 353, 356-64; CRAMPTON REPORT, *supra* note 5, at 18.

[49] There are exceptions. The components of legal analysis have been articulated in different fashions for different purposes. *See* Levine, *supra* note 21, at 699-702 (evaluation of examinations); Rutter, *Designing*, *supra* note 5, at 82-90 (teaching methods); Strong, *Ohio St.*, *supra* note 15, at 49 (curriculum decisions and allocation of teaching responsibilities).

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model of legal analysis. Each professor develops his own, consciously or unconsciously.[50] The models, therefore, as applied in the course of diagnosis and evaluation of student products and performances, are idiosyncratic.

Of course, they are not completely idiosyncratic. The high level of agreement among law professors in the evaluation of papers indicates that there are widely shared, if unarticulated, conceptions of what is legal analysis and what is good legal analysis. This is as one would expect, and, in this sense the law professor's equivalent of the obscenity test, *i.e.*, "I cannot define it, but I know it when I see it," works. The problem with using unarticulated and idiosyncratic models is that they work only in a very limited way.

The limitations are limitations of communication. Some are inherent in the lack of a common language for diagnosis and evaluation. These appear as problems of comparisons, record-keeping, and decision-making when the decisions require shared diagnosis and evalution. Some limitations, though not inherent, stem from the lack of articulation. These appear as problems of specificity, for example, specificity in corrective feedback to students,[51] and specificity in the evaluation of teaching methods. These limitations have slowed the development of an understanding of the law school learning process, in part, by making the development of theories of student learning problems extremely difficult. Moreover, the limitations relate directly to the problem of the objective of legal education raised in the introduction.[52] These limitations of communication certainly inhibit our ability to "define good lawyering and to test means of producing it."[53]

Despite these limitations, the traditional approach of using unarticulated, idiosyncratic models of legal analysis as the basis for diagnosis and evaluation of student products and performances is not being seriously questioned. In the clinic, however, the traditional approach is being questioned.[54] There, the problems of relating diagnosis and evaluation of student products and performances to "good lawyering" are a real and a daily concern. The traditional approach, which initially tends to equate good legal analysis with what good students do, works because it involves a direct comparison of very similar student work where most of the important variables are under the control of the professor.[55] The exception to this approach is

[50] Llewellyn called for conscious development and pointed out its benefits. *See* Llewellyn, *supra* note 5, at 358-62.

[51] The benefits of specificity in evaluation of examinations are described in Levine, *supra* note 21, at 702.

[52] *See* notes 1-24 *supra* and accompanying text.

[53] *See* Levine, *supra* note 21.

[54] For a discussion of grading problems in the clinical setting, see note 14 *supra* and accompanying text.

[55] *See* note 88 *infra* and accompanying text.

the evaluation of seminar writings on individually chosen topics. Most would agree that it is through this exception that the limitations of the traditional approach appear. Clinical diagnosis and evaluation is an extreme example of the seminar approach. Few of the variables in the clinic are under the professor's control and comparisons of student abilities are extremely difficult to make. Every clinical student, in effect, is given a different examination. The traditional approach can not operate here because the process of developing individual and internal standards through comparisons does not take place.[56]

The need, then, is for a method of diagnosing and evaluating the ability to do legal analysis which works in a clinical setting. In an attempt to develop such a method, the Task Force first adopted a task-oriented approach. The result of this approach was akin to trying to develop model answers for the process of legal analysis in a constantly multiplying number of lawyering tasks—a hopeless effort.[57] The amount of effort required by the present functional concept of lawyering competency is much less. Describing the process of legal analysis, either abstractly or in the setting of particular tasks, is not necessary. Only the component competencies of a lawyer who is functioning as a legal analyst, and criteria to relate those components to products, need to be identified. The lawyer's process of analysis cannot be directly observed, but one can diagnose and evaluate that process by its products.[58]

The resulting model has the obvious advantage to the clinic of being applicable to every lawyering task in every situation.[59] When this model, with a method for applying it, is returned to the traditional classroom, its implications and its concepts become clear.

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[56] There are additional reasons why the traditional method of diagnosis and evaluation is not suited to a clinical setting. Corrective feedback in the clinic differs substantially from that usually provided in the classroom or in individual reviews of examination papers. Clinical teaching is very individualized and, as a result, requires more specific and frequent corrective feedback. The need for a common language, not provided in the traditional method, is obvious to clinicians. Since much of the learning is through direct feedback, the need to separate the evaluations of different abilities is clearer in the clinic. It is interesting to note that case method learning and the traditional method of diagnosis and evaluation involved in case method learning more closely resembles the process of learning from experience than does clinical education which requires specific feedback for the testing of conceptual models of lawyering tasks.

[57] Others have encountered the problem. *See, e.g.*, Rutter, *Lawyers' Operations*, *supra* note 5, at 303.

[58] It seems that the products of legal analysis can be identified and that these products should remain the same regardless of how the process of legal analysis is described or taught. By identifying products, as opposed to trying to describe processes, one seeks to avoid the need for an agreed upon model for the process of legal analysis.

[59] *See* Appendix A, *infra* at 439.

The method of applying the model is basically a system for the classification of errors, similar to a doctor's recording of a patient's symptoms for use in diagnosing, evaluating, and treating an illness. As a system of classification, the method responds directly to those limitations of communication found in the traditional classroom method of diagnosing and evaluating legal analysis. A student's analytical errors are classified by using the criteria which correspond to the specific competencies manifested in the errors. For example, a student's failure to recognize factual contradictions in a hypothetical is classified under a specific competency,[60] as is a student's failure to connect important facts to essential elements of the rule.[61] These classifications do not identify the cause of the error, just as the recording of a symptom by a doctor does not explain its cause. In both situations, however, it does provide the information from which such theories can be developed.

The use of such a standardized system of classifications[62] could eventually generate the information needed for scores of educational decisions.[63] It would also begin the process of establishing articulated standards for legal analysis to be used in the pursuit of a definition of good lawyering and in testing the means of its production.[64]

V. METHODOLOGICAL CONCEPTS AND CONSIDERATIONS

This section will describe in general terms the concepts and potential uses of the generic competencies model,[65] ranging from those which are simple to those which are complex. This range in turn implies methodologies that vary from the straightforward to the elaborate. The essence of the exposition is to demonstrate that the model is a

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[60] *See* COMPETENCY-BASED TASK FORCE, ANTIOCH SCHOOL OF LAW, CATALOG OF DEFINITIONS OF GENERIC LAWYERING COMPETENCIES III-3 (1978):

III. Legal Analysis Competency. . .
A. Analyzing Facts and Identifying Relevant Law . . .
2. Ability to identify inconsistencies among facts, . . .
b. if so, did the student recognize them (factual contradictions)?

[61] *Id.* at III-5.

[62] For a comparison of standardized systems and individualized systems see Levine, *supra* note 21, at 702; Llewellyn, *supra* note 5, at 356-58.

[63] These decisions would include: allocations of teaching responsibilities for particular skills as suggested in Strong, *Pedagogical Implications*, *supra* note 20, at 560; advice to students on course selections; academic standards and the advising of remedial measures for probations; coordination of pervasive training; curriculum design; and evaluation of teaching abilities and methods.

[64] Those who have used this system have reported that there is an educational benefit for the teacher including an improved understanding of the law school learning process. The system should produce theories of student learning more efficiently by offering a method of recording the information on which these theories are based.

[65] *See* notes 100-10 *infra* and accompanying text for specific examples.

tool and as such, it can be used according to the needs and constraints of the situation.[66] Two applications of the model, diagnosis and evaluation, are discussed. This section concludes with a discussion of the teaching implications of these applications.

A. *Diagnosis*

The essence of diagnosis is classification. This requires a two stage process. The first stage is classifying the elements of a written product, oral performance or sequence of behavior according to the specific competencies involved. The basic process at this stage is analysis which involves error spotting. The second stage is formulating and testing hypotheses about the causes of observed problems within general and specific competencies. The basic process at this stage is a synthesis which involves developing and testing explanatory hypotheses or theories. The result of this two stage diagnosis is, or should be, a more focused program of instruction, guidance and counselling.[67]

The first stage of clinical diagnosis will be referred to as diagnosis of the product or performance; the second stage will be referred to as diagnosis of the student. One may move back and forth between the two stages; indeed, they may occur simultaneously. The stages are nevertheless distinguishable both with respect to the operation involved and to the conclusions drawn.

1. Diagnosis of the Product or Performance

How is the competency model used to diagnose a product? First, one decides, on the basis of the assignment and the expected product or performance, what array of specific competencies should be manifested and what form they will take. For example, suppose the student is asked to conduct a simulated intake interview. One specific competency that should be manifested is problem-solving: "Ability to identify the client's objectives and priorities." Since the simulation has been designed to make objectives and priorities known to the instructor from the start, a simple checklist based on the criteria for that specific competency can

[66] The authors are in the process of producing a training manual. The manual will elaborate extensively on points and concepts to be made here; thus, the aim of this discussion is simply exposition, not training or skill building.

[67] Note the analogy to legal analysis. One starts with a fact situation (here, a written product, oral performance or a sequence of behavior) and analyzes that fact situation with reference to rules of law (here, general competencies and their criteria). Where problems are found that can be related to specific competencies, one begins to build a theory of the case aimed at developing solutions and strategies for obtaining relief (here, improved competency). The analogy of competency diagnosis to legal analysis can be extended to include the process of evaluation.

easily be used to reveal errors of omission or commission. Two other specific competencies that should be manifested involve legal analysis: "Ability to identify relevant facts," and "ability to identify inconsistencies among facts." Again, the design of the simulated problem will provide the content for identifying errors of problems with respect to those two specific competencies. There will also be specific oral communication competencies whose manifestations can be analyzed, and observed problems (actual or potential) which can be classified according to the elements of the model.[68]

After this process is complete, the product or performance is analyzed according to the competencies expected to be revealed. Knowing what should be revealed, the instructor looks for errors which can then be classified to the extent that they indicate problems with a specific competency.[69] Errors of omission can be relatively simple to classify, although their recognition will obviously depend upon how much the instructor knows about the case, the area of law, the assignment made to the student and the instructions given to the student. Errors of commission are subject to the same variables insofar as their recognition and classification are concerned. Recognition of errors of commission is particularly influenced by the standards and expectations of the instructor.[70]

Errors of commission are likely to raise another error spotting possibility—problems with specific competencies the instructor had not expected to be manifested in the product or performance. Again, the generic competency model provides a basis for recognizing and classifying unanticipated errors. Assume, for example, that five students are assigned to write a letter to a hypothetical opposing attorney. One of the five includes in the product a statement which raises an ethical question while the other four simply comply with what was a straightforward task. The instructor had not expected an ethical breach to be manifested, but can readily classify it according to a specific competency under the area of professional responsibility. The unanticipated error of commission has provided the instructor with a fortuitous and important opportunity to glimpse into an area of competency develop-

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[68] This first step of identifying expected specific competencies is called preliminary analysis. It is applicable to live clinic situations as well as to simulations and, indeed, blue book exams.

[69] The generic competency model contains general and specific rules to aid in classifying errors according to specific competencies.

[70] This can also be true for the definition and recognition of errors of omission. Experience indicates that instructors are particularly apt to be concerned with how a task is implemented in relation to models the instructor considers, implicitly or explicitly, to be appropriate. Their concerns are often expressed in terms of how the student has done something rather than what the student has left out. Errors of omission are, of course, also subject to definitions, standards and expectations of the evaluator. Perhaps the main difference is simply that they are easier to specify and articulate in advance.

ment of that student, as well as providing a focal point for further inquiry and instruction.[71]

In performing a competency diagnosis of a product or performance, the instructor should be alert to the ripple effect of errors. An early error in formulating a rule of law (one of the legal analysis specific competencies) can result in subsequent errors. Such subsequent errors do not necessarily indicate problems with the specific competencies under which they could be classified. The student may have proceeded effectively if one discounts the false premises for the sake of competency analysis and diagnosis.

The third step in the diagnosis of the product or performance is the identification of specific competencies which require a recognition of information beyond the immediate product and the testing of efforts to obtain that information.[72] A given product or performance is itself the result of decisions about solutions, strategies and tactics. For example, if the evaluator wants to make a diagnosis of the "ability to assess and order the range of alternative solutions, strategies with respect to the client's objectives and priorities, probability of success, consequences or partial success or failure, available resources and ethics" (a problem-solving specific competency), the evaluator will need information that goes beyond the product *per se*. Obvious sources of such information are a conference with the student or the submission by the student of a solutions and strategies memorandum. There are other sources of data that will bear on the diagnosis of implicit specific competencies, such as feedback from the client or the nature of subsequent events. The evaluator must suspend diagnosis of implicit specific competencies until the requisite information is available.

The result of a competency diagnosis of the product or performance is a profile of observed specific competencies. Note that at this point, no statement has been made about the weight, value, or seriousness of errors. Such statements are the function of evaluation, not diagnosis.[73]

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[71] Note that the instructor is not necessarily justified in concluding that the four students who did not make the ethical error have no developmental needs with respect to that application of professional responsibility. That is, the instructor is not justified in going back and crediting the four with satisfactory performance with respect to the specific professional responsibility competencies. Inferences about the competency implications of unanticipated errors made by one student, but not others, can in any given case pertain only to the particular student unless the instructor has not performed an adequate preliminary analysis of the task. Further information would be needed to draw inferences about the other students and why they did not make the error.

[72] The identification of at least some such specific competencies will have occurred in the preliminary analysis (the first step). The product itself, however, may also raise questions about implicit specific competencies, the manifestations of which are not directly determinable in the product.

[73] *See* notes 74-88 *infra* and accompanying text. Logically, errors are departures from some standard and the identification of departures or discrepancies constitutes evaluation. Nevertheless, there is a pedagogical and logical value in

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2. Diagnosis of the Student

Once the competency diagnosis of the product or performance is complete, the instructor seeks explanations for the results. What are the possible reasons for the observed errors? What are the possible underlying causes? In seeking explanations, the instructor enters the stage of hypothesis formulation and testing.[74]

All preliminary hypotheses can be related to specific competencies underlying those which are manifested in the product or performance. For example, the student may have misinterpreted the fact situation or may have failed to determine all the rules of law necessary for framing legal issues. The student may have misinterpreted the assignment ("Ability to perceive other's communications and actions—verbal and nonverbal," if the assignment was given orally). The student may have misjudged his command of the problem assigned and not sought clarification ("Ability to seek and use counsel and advice in timely fashion"). The student may have misjudged time limitations ("Ability to allocate time, effort and other resources necessary to carry out caseload task"), or may have overcommitted himself ("Ability to judge the point at which further commitments cannot realistically be discharged competently").[75]

The formulation of preliminary hypotheses about underlying specific competencies leads to questions devised to test them. These in turn can lead to derivative hypotheses. If in a legal memorandum, case authorities were missing ("Ability to determine rules of law relevant to framing legal issues—*e.g.*, statutes, regulations, case law, court rules, secondary authorities"), a derivative hypothesis might be that the student does not know how to interpret case holdings.[76] Similarly, a hypothesis which can be derived from the failure "to seek and use counsel and advice in timely fashion" is that the student may have cer-

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distinguishing between diagnosis and evaluation. As an analogy, observe that the temperature of a room (the product) is different from the thermostat setting (the standard). A difference of any magnitude could be considered an error. Further data that lead to an explanation of the difference can be obtained, but the conclusion about the effectiveness or merit of the environmental control system (how we evaluate the difference) depends on further objectives, standards and procedures.

[74] It should be clear that the general method described herein assumes a single observation (or set of observations), that is, diagnosis of a product or performance. Repeated observations follow the same principles but add more specific information pertaining especially to the variable of the student. It is likely that they will also add information pertaining to other setting variables including the variable of the instructor.

[75] There is also the possibility that the instructor was unrealistic in his assessment of the time available to the student to perform the task.

[76] If a test of that hypothesis were confirmed, the teaching implication would be straightforward.

tain attitudes, fears or expectations that are inhibiting effective performance.[77]

The Task Force model provides a framework for developing diagnostic hypotheses which may ultimately identify problems in areas of knowledge, attitude, motivation, emotion, values, cognitive operations and systemic factors.[78] By providing such a framework, the model assists in the formulation of explanatory hypotheses. These hypotheses need to be tested and the instructor has a variety of methods available for doing so. Which one is chosen will depend in part on the hypotheses and in part on the prevailing circumstances. The instructor may have a conference with the student in which questions raised by the diagnosis of the product or performance are discussed. The instructor may give another assignment aimed at testing a hypothesis or eliminating alternative hypotheses. The instructor may teach or provide some exercises and then retest. The instructor may also seek information from other teachers, supervisors, or the client.

As long as the aim of diagnosis is to support the continuing development of student lawyering abilities, the goal of hypothesis testing is to arrive at focused teaching and learning programs. The result may be remedial, where a remedy is justified on the basis of the diagnosis; continuation with the planned program; some form of advanced placement such as an increase in the difficulty or complexity of assignments and work; counseling; or some combination of these general possibilities.[79]

B. *Evaluation*

Evaluation concerns questions of merit and effect. While the basic process of competency diagnosis is classifying, the basic process of evaluation is ranking. Both classifying and ranking employ many of the same procedures. There cannot be evaluation without diagnosis,[80] but it

[77] Discovery of these attitudes has teaching and counseling implications.

[78] Lack of substantive knowledge is functionally the equivalent of lack of knowledge of how to perform a requirement necessary to complete some other task. Furthermore, all knowledge problems are functionally equivalent to attitudinal, motivational or emotional problems. It is the implications for corrective action that differ. Note again that all problems, regardless of kind, are assumed to be manifested in one or more specific competencies. Derivative hypotheses developed from preliminary specific competency hypotheses are likely to focus on the process characteristics of a task.

[79] Ultimate causes may be characterological. For example, the student is dishonest or lazy. One pedagogical value of this is that it keeps such conclusions anchored in observable consequences of carrying out a lawyering task. Thus the supervisor, instead of making moral judgments, can simply point out the effects of behavior. The decision that rests with the student is whether to change before the consequences reach the point of punitive or protective action.

[80] The reverse is not true. *See* note 73 *supra* and accompanying text.

is in the conclusions of the evaluator that diagnosis and evaluation differ significantly, since each is aimed at answering related, yet different, questions.

The Task Force's approach has been to apply a six point scale to each specific competency identified in the product or performance. While the scale can be given different meanings, a one (1) is used to indicate a serious problem and a six (6) to indicate superior competency or completely satisfactory performance.[81] Four (4) is taken as a reference point for minimum competence. Less than a four (4) indicates problems sufficiently serious to require attention. The decision about the seriousness of errors or problems with any specific competency is the evaluator's.[82]

The result of applying a rating to each diagnosed specific competency is that the diagnostic profile now has a set of scores. This score profile can be used as an instrument for review, as well as for providing feedback to the student and selecting priorities for further teaching. This profile, because its elements are specific competencies, provides a starting point for the evaluation of progress with respect to any subsequent product or performance of the student that contains any of the same specific competencies. The comparison from task to task is between the specific competencies those tasks have in common.

In virtually any product or performance, the array of specific competencies that have been manifested, classified, and evaluated is likely to have come from several major competency areas, such as oral communications, legal analysis and problem-solving.[83] One can now cumulate and average the ratings of specific competencies within each major area to obtain a profile of scores (each on the same six point scale) for the major areas of competency involved in the product or performance.[84] As a final step, the evaluator can cumulate and average the scores for the major areas of competency to obtain a total score for the product.[85]

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[81] Scales can be defined in terms of potential risk to a client (ranging from should not be trusted to be with a client to completely trustworthy with a client), or in terms of the relative amount of supervision needed to assure an adequate product or performance, or both.

[82] If standardized, comparative evaluations are to be made, the evaluation requires the calibration of evaluators and detailed scoring rules. The primary focus of this discussion is the internal consistency and rationality of the individual evaluator, not the extent of agreement among a group of evaluators.

[83] Note that only a few specific competencies may have come from any one major area.

[84] Simply averaging within a major area gives each specific competency equal weight. There are other schemes for applying different weights. *See, e.g.*, the discussion of the procedure used at Mercer University, notes 109-10 *infra* and accompanying text.

[85] Again, there are alternative weighting schemes. The evaluator may want to give the legal analysis score twice the weight of the other major areas

If the classification of specific competencies in the product has left questions about some specific competencies, then further information is required to make an evaluation. As with diagnosis, the further information may come from questions posed to the student, or from subsequent events such as statements made by the client. In either case, an identification of the specific competencies about which one is uncertain leads to specific questions or observations needed to resolve the uncertainties. Once such information has been obtained, the rating procedure is the same as that just described.[86]

In any evaluation of products or performances, there are a number of decisions that must be made by the evaluator before arriving at a score. For example, if in a legal memorandum one had decided to evaluate the specific competency "ability to use the mechanics of the language," what will constitute excellent, acceptable, or unsatisfactory performance? Will one misplaced comma result in a score of less than six? Will three or more grammatical errors be unacceptable? Will all errors have equal weight? One could elaborate the criteria of the specific competency into a highly detailed checklist and decide upon a point system that will convert into a six point scale. The complexity and systemization of the evaluation process depends upon the objectives of the evaluator. If one is interested in a formal, standardized evaluation in which groups of students are to be ranked in terms of competencies, attention needs to be given to the scoring system based

because it is deemed more critical. The ratings at any of the three levels (specific competency, major competency or total product) can be converted to percentages for grading purposes if one desires. In such a system, any rating or score is called "X." Then: % = [(X-1)/5]100. For example, a rating of 4 = 60%. A cumulative average of 5.2 = 84%. A rating (or score) of 1 = 0%. Especially with individual ratings, one needs to be aware of scale interval limitations. Thus, the only possible percentages for one 6-point scale are: 0, 20, 40, 60, 80, and 100%. If the evaluator chooses to give gradations in ratings (such as 4+ or 5-), he or she can use a variety of conventions, such as plus or minus = .33. Thus, 4+ = 4.33 = 67%; 5− = 4.67 = 73%; 5 = 4 = 80%. It is obvious that a scale of 0-5 would be identical to the one we have described, and that percentages could be computed even more directly, that is, without subtracting 1 from the rating. Any other scale could also be used. The intervals would be different from the six point scale, but conversions to percentages follow the same principles. There is an advantage in using a scale that has an equal number of steps. The midpoint between the upper and lower halves of the scale serves as a reference for judgments of minimally acceptable or unacceptable. Thus, one can divide any set of ratings into plus and minus (above the midpoint or below the midpoint) for decisions or comparisons. The same can be done with scales with odd numbers or steps, but the midpoint may have ambiguous meaning to a user.

[86] Note that one may, in light of subsequent information, alter already assigned values. Given the nature of live clinics, that is not an unlikely event. The changing of evaluations, however, is not limited to clinics, as many law school professors are well aware. The point is that the information needed for evaluating specific competencies is dictated by competencies and their criteria, not by arbitrary or unspoken values and standards.

on the criteria of specific competencies. If the objective is to call attention to specific competencies that, in the evaluator's judgement, may pose problems for the student in subsequent lawyering tasks, a less formalized rating system is acceptable. The key point is that evaluations are directed to behaviors that are denotable, providing the evaluator and student with the opportunity to focus on a mutually understood problem area. Ratings may still be subjective, but they are derived from data that can be perceived, examined and analyzed by both parties.[87] The essence of competency-based diagnosis and evaluation is explication or demystification, not metaphysical objectivity.[88]

C. *Implications for Clinical Teaching*

The generic competency model involves the application of the same basic skills to a variety of tasks and situations. If a primary goal of a clinic is professional responsibility, the model can be used to define what that means in various contexts. Other goals of the clinic can be achieved by utilizing specific competencies such as: "Ability to identify relevant facts;" "Ability to identify rules of law relevant to framing legal issues;" "Ability to determine trends in interpretation or application of law;" "Ability to identify discrete legal issues;" and "Ability to identify obstacles and facilitating factors that bear on the realization of

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[87] For example, there is a distinct difference (certainly to the student) between saying "this analysis is inadequate" and saying "there are inconsistencies among the facts that you did not take into account and that omission had the effect of. . . ."

[88] We noted at the outset of this section that diagnostic and evaluative process could range from the simple and straightforward to the complex and demanding. It should be clear at this point that the range of difficulty and the degree of precision and reliability desired depend in large part on the objectives of the evaluator, the conditions of observation and the extent to which the evaluator can or wants to take influencing variables into consideration (if not control them explicitly). These factors are called "variables of setting." Five classes of such variable have been identified:

1. the variable of the case
2. the variable of assignment made to the student
3. the variable of the student
4. the variable of the prior work
5. the variable of the evaluator

Each of these sets of variables can be further analyzed into groups of more specific variables and each can be shown to bear on the specificity of the diagnosis possible and the reliability of the evaluations made. It should be noted that under live case clinic conditions, there is a minimum control over some of the variables at any one time. Repeated observations will help establish their influence as a consequence of both stages of diagnosis (diagnosis of the product and diagnosis of the student). As observation conditions become more standardized, (as in simulations and in classroom testing conditions) the setting variables potentially (though not inevitably) come more and more under the control of the evaluator.

client's objectives and priorities." The first four are legal analysis specific competencies, the fifth is a problem solving competency according to the structure of the model. The content of the criteria comes from the area of law and the specifics of the case and immediate task.

Suppose a clinic objective is to teach students how to perform a specific task, for example, how to file a motion to suppress. The procedures for this and for many other lawyering tasks can be taught as explicitly as the rules of chess. The specific competencies involved in such learning appear to be principally: "Ability to perceive the communications of others (implicit and explicit messages)" or "Ability to perceive other's communications and actions (verbal and non-verbal)," and "Ability to work according to applicable systems, rules and procedures governing the handling of cases and files."[89]

As one generalizes the need to use such basic competencies in a broader range of conditions, or introduces tasks that assume basic competencies as prerequisites, other specific competencies will invariably come into play. Either the change in range of applications will reveal that specific competencies other than those just mentioned are in fact involved in the basic task, or the higher order task performance will reveal, through diagnosis or problems of competencies involved in it, that prerequisite basic knowledge is missing. Diagnosis of a research memorandum may reveal errors in "Ability to determine rules of law relevant to framing legal issues" or "Ability to determine trends in interpretation or applications of laws." Further diagnosis of the student's product may lead to the conclusion that the student simply does not know how to Shepardize adequately. The implications of such a diagnosis for clinical teaching are obvious.

The generic competencies model does not prescribe a particular teaching method for clinical education, but it does imply a focus on particular objectives and the setting of outcome criteria. These, and the content linking them, can be as complex and intellectually rigorous and challenging as one wants to make them. Perusal of the various specific competencies in Appendix A suggests that one can broaden clinical legal analysis, problem-solving and professional responsibility competencies to include consideration of theories of jurisprudence, the roles and functions of law in society, complex issues of ethics and idealogy and the subtle and various roles that lawyers play.[90] Indeed,

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[89] Clearly the teaching strategy, method and skill applied to instructing students how to accomplish basic lawyering tasks of any kind will be an important factor in the ability of students to master the tasks in a fixed period of time.

[90] The criteria for many of the specific competencies listed in the CATALOG OF DEFINITIONS OF GENERIC LAWYERING COMPETENCIES, *supra* note 26, make this point even clearer. *See also* G. BELLOW & B. MOULTON, *supra* note 20.

one can make the argument that the development of lawyering competencies, especially in clinics, can be as intellectually challenging, if not more so, than the acquisition of substantive knowledge and theory as traditionally taught in the classroom.[91]

D. *Other Pedogogical Implications*

In describing methodological concepts and considerations of the model, it has been necessary to stay within the very narrow context of diagnosing and evaluating individual students. It has been shown that the model is applicable to the individualized teaching context found in clinics and clinical courses.

Expanding in the clinical setting, the model provides the basis for developing a coordinated clinical curriculum. Each clinic or clinical course could establish learning objectives expressed in terms of the competencies and criteria described in the model. Individual students could be "tracked" through these clinics by using the model to evaluate performance in each clinic. In fact, the model implies coordinated clinical teaching covering the full range of lawyering functions with an ability to respond to individual deficiencies in particular functions or competencies.

Moving from the clinical setting to the traditional setting of the classroom, the model's implications remain the same. The same competencies that are involved in the clinic are involved in the classroom, the only difference being that the range and application of competencies is much narrower in the classroom.[92] The potential of a coordinated clinical curriculum thus becomes the potential of a coordinated classroom curriculum, while retaining the ability to track individual student development in all functions of lawyering.

The implication that law schools should offer a broad range of training is not new. Frank Strong long ago suggested an "inventory" approach to curriculum design based on the thesis that every law student must receive minimum basic training in all legal capacities.[93] The

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[91] Essentially, the same point was recently made by Dean Michael J. Kelly of the University of Maryland School of Law:

> The intellectual horizons of American law schools were drawn 100 years ago as a means of distinguishing the doctrinal discipline of law from the practice routines of that day. The assumption underlying this traditional law school model that performing as a lawyer either could not be analyzed or lacked intellectual interest and content was simply wrong. The growing complexity of our law and social relationships and developments in interpersonal "sciences" of the 20th Century have only underscored the original mistake.

REPORT OF THE DEAN, U. OF MD. SCHOOL OF LAW, THE SCANDAL OF AMERICAN LEGAL EDUCATION 7 (1979).

[92] This is recognized and discussed in Holmes, *supra* note 4, at 575.

[93] Strong, *Pedagogical Implications*, *supra* note 20, at 559.

competency-based model goes beyond offering another conceptual framework for curriculum design. It offers a standardized system for recording information about student abilities. It is a language for recording outcome[94] (that is, student products and performances) in terms of the functions of lawyering. As such, it provides data which can form the empirical basis for all pedagogical decision-making. This standard system or language permits comparisons of outcomes; and through such comparisons, decisions based on efficacy. These decisions can involve choice of feedback, teaching methods, course requirements and curriculum design. All such decisions would be expressed in terms of the functions of lawyering. If one wishes to describe good lawyering and to test the means of producing it, the competency-based model offers the language for doing so.

When external standards are added, the model also has implications concerning those decisions involved in the control of entry to the profession and the certification of lawyers. The problem of adding external standards which would necessarily be involved in such decisions is discussed in the following section.

VI. THE PROBLEM OF STANDARDS

The Competency-Based Task Force model provides a method for consistent evaluation, but it does not *per se* provide the external standards of lawyering competency needed to equate those evaluations with good lawyering. It does provide a tool by which such external standards could be developed and, therefore, a tool to be used in the ongoing search for a definition of good lawyering. The necessary elements of these external standards are the concepts of the task, products, processes, context of evaluation, delineation of variables, ability to identify and classify components of products or performances in terms of generic specific competencies, and the ability to adapt generic criteria to the characteristics of the task and setting. The model provides a means of separating statements of competency from statements about the performance of any particular task, or from statements about the behavior of the lawyer in any particular area of law.[95]

[94] Note that the criteria for each specific competency are expressed as measurable objectives such as: Did the student do . . .?; Did the student fail to . . .? Compare this with Strong's listing of objectives, for example, "to afford an awareness of . . ."; "to impart a working understanding of . . ." Strong, *Ohio St.*, *supra* note 15, at 46.

[95] As noted throughout this article, specific competencies are manifested in the performance of tasks. One can envision a competency-task matrix. At issue, however, is how tasks are defined. We have taken the approach of focussing on the common functions involved in the performance of various and sundry lawyering tasks. Although we have defined major functions more broadly than Rosenthal, *supra* note 5, or the Model Peer Review System being proposed by the ALI-ABA Committee on Continuing Legal Education, *supra* note 37, the approaches are conceptually very similar.

To establish external standards it is necessary to standardize observations and criteria for classification and ranking. Conceivably, standards could be established for a particular program within an area of the law; for a law school; for groups of law schools; or for groups of occupational outcomes of lawyers regardless of law school. In each case, statements of competencies would pertain to particular arrays of specific competencies observed and assessed under standardized conditions. The general procedure would be no different from any standardized testing procedure, although what constitute acceptable data, how they are gathered, and how they are established and interpreted would be distinguishable.[96]

The general implication of the Task Force model is that there is no such thing as competency *per se*. There are a number of dimensions of performance which are aided by structures of knowledge and values. The presumption is that given the opportunity to learn specific content and to learn the characteristics of different environments and types of situations, these structures will manifest themselves in consistent levels of performance in a variety of settings.

Decisions about levels of technical proficiency are no different from decisions about character traits. Both areas of decisions manifest themselves in classifiable and observable aspects of performance. The confidence placed in the reliability and validity of decision about both technical and characterological structures is primarily dependent on the adequacy of the observation processes that lead to decisions.

There are, undoubtedly, skills which all lawyers should be capable of performing insofar as certain products are concerned. There are also certain characteristics of performance that are expected of any professional person. It might seem that one could easily test and measure the former but not the latter, but the issue in both cases is the generality of conclusions about future performance. Although a student may write a good letter on one occasion, it does not mean that the student will necessarily do so on all occasions. Because a student misallocates time on one occasion does not necessarily mean the student will do so on all occasions. If one finds, however, that the necessary underlying or component skills in either case appear to be manifested adequately or inadequately over a variety of occasions, one has increasing confidence in the ability to generalize about conclusions and decisions of what is likely to be observed on future occasions.

The setting of standards, then, should pertain to standards for underlying component specific competencies, not for particular tasks or problems. That different areas of law or practice will provide different

[96] A recent discussion of the processes and problems of setting standards of quality lawyering performance in the Legal Aid Foundation of Long Beach, California (a legal services program) is found in Krakow, *Standards of Practice: A Systematic Approach to Quality Legal Services*, 13 CLEARINGHOUSE REV. 647 (1979).

kinds of application of various specific competencies is entirely likely. The specific competencies, however, will be the same from area to area and from practice to practice. It is also likely that the standards or norms applied to evaluating specific competencies could be different in different areas. This is an empirical issue. The point is that "Ability to identify client's objectives and priorities," "Ability to develop alternative solutions and strategies which include consideration of types of strategy, risk, benefits, legal and social consequence, client control, forums, economics, and ethics," or "Ability to express thoughts in an organized manner," are recognizable forms of behavior in any area. The content of the specific form in which they are manifested may differ, but the functions are the same.

What if one found good manifestations of a specific competency in one area of law or practice, but not in another? Would that invalidate the concept of generic competencies and thereby invalidate the use of the model for developing standards? The answer is no. No reason exists to suppose that someone who demonstrates ability to identify discrete legal issues in one area of law will necessarily be able to do so in another area in the absence of familiarity with that other area. Some of the generic competencies are clearly more dependent on specific underlying substantive knowledge than others.

Invalidation of the model would result from a convincing demonstration that the tasks lawyers do in different areas and the characteristics of how they perform cannot be classified within the model's framework. This issue cannot be resolved until the necessary general standards are developed through empirical research.

Standards depend first upon the ability of observers to agree on the classification of specific competencies in a product or performance and only secondly on their ability to agree on the merits of the elements or the seriousness of errors. Absent the first, the rating or ranking function becomes a response to characteristics of the stimulus that are, if not indeterminate, probably matters of individual perception and taste. The model requires that different observers respond similarly to the same things. The extent to which this is possible in a wide range of situations, given adequate training of observers, is also an empirical question. Therein lies the heart of the empirical research necessary to support general standards.

One can envision a wide range of assessment mechanisms designed to evaluate the demonstration of specific competencies over a range of tasks and conditions. Some assessments are amenable to written exams. Some assessment exercises could be computerized, while others could use simulated job performance exercises and still others could involve analysis of actual job performances.[97] One can envision an assessment

[97] For a recent review and analysis of methods that have been tried in the medical field, see Nu Viet Vu, *Medical Problem-Solving Assessment: A Review of Methods and Instruments*, 2 EVALUATION AND THE HEALTH PROFESSIONS, No.

center that uses a variety of diagnostic and assessment procedures aimed at evaluating specific competencies in different areas of application.[98] The aim of various assessment procedures would be first and foremost to obtain answers to the question: What competencies are demonstrated and how well are they manifested?

While the Task Force model does not provide external standards, it does provide a basis for developing them. In so doing, it also provides a basis for defining elements of good lawyering to be used as criteria for decision-making in legal education.[99]

3, 281 (1979). For a general review of a variety of performance tests, see Fitzpatrick & Morrison, *Performance and Product Evaluation* in EDUCATION MEASUREMENT 231 (B. Thorndike ed. 1971). *See also* Coffman, *Essay Examinations*, in EDUCATION MEASUREMENT 271 (B. Thorndike ed. 1971). The extensive literature in the field of education on characteristics of the "good teacher" and how to measure and predict them has recently been reviewed. *See* Schalock, *Research on Teacher Education*, in REVIEW OF RESEARCH IN EDUCATION 364 (D. Berliner ed. 1979).

[98] *See, e.g.*, the California Committee of Bar Examiners' study on the relationship between alternative measures of lawyering competencies. CALIFORNIA COMM. OF BAR EXAM., REPORT ON RELATIONSHIP BETWEEN ALTERNATIVE MEASURES OF LAWYERING COMPETENCIES (July 9, 1979). Studies are also in progress aimed at establishing an assessment center.

[99] Note that the issue of ultimate validity of the criteria has been ignored. Basically, the ultimate validating of the criteria will come from application of the model to the assessment of specific competencies in different settings. Much of the data needed for these measures comes from broader sources than paper and pencil tests of knowledge, although it is an empirical question of the extent to which such instruments predict profiles of specific competencies under different conditions. Law school grades or bar exam scores may be good predictors of some specific competencies. It remains to be demonstrated that they are good predictors of many of the specific competencies embodied in the Task Force model, especially when that array may be manifested in a wide variety of settings and situations.

In an important sense, we are really proposing to turn the whole issue of validation around. The conventional approach would be to define the criterion variables to be predicted from measures of elements of the model. If the model in fact embodies the functions that lawyers can, do and should perform in various combinations under various conditions, then the model provides the criteria against which to validate anything else (such as admission procedures, educational programs and various methods of teaching and training). If one accepts that proposition, then the task is simply to operationalize the model for different settings and situations. The central technical problem at different stages would become one of establishing the boundaries and conditions of generalizability. The educational tasks would be the application of the technical problem to the articulated goals of the educational program. In any event, if the model were used to guide and evaluate teaching as well as to evaluate immediate and ultimate outcomes, then education would become a happy form of self-fulfilling prophecy—there would be a direct correspondence between process and product.

VII. ILLUSTRATIVE APPLICATIONS

In this section, the use of the Task Force model at the Antioch School of Law, and at the Walter F. George School of Law at Mercer University will be briefly described.

A. *Antioch School of Law*

1. Evaluation of Criterion Tasks in Basic Clinics

All Antioch law students must take basic clinics during the last half of their first year and the first half of their second year.[100] As part of evaluating the work in basic clinics, each student is evaluated on two criterion tasks during the course of the clinic. Criterion tasks are selected by the clinic supervisor during the planning of the clinic. These tasks, which can be oral, written or both, are those which all students will have an opportunity to practice during the clinic.[101] The supervisor will have the opportunity to observe the tasks directly and will be able to attribute them to a particular student. These tasks would also be recognized by practitioners within the clinical area as being important and necessary.

The evaluation of criterion task performance is made on the form contained in Appendix B. Each major applicable area of competency is evaluated using the six point scale previously described. The individual ratings are used to give a total rating or score for each of the two tasks.[102] Narrative comments may also accompany the ratings.[103] Copies of the evaluation go to the student's records, to the next supervisor and to the student. Thus, the instrument provides for a skills tracking system, feedback to the student and also supplies subsequent supervisors with information about strengths and needs.

The intent of the criterion task evaluation system is to focus on the development of general competencies without overwhelming the supervisor with a massive diagnostic, evaluative and recordkeeping responsibility. Supervisors are not restricted to the use of criterion tasks in determining final grades for the clinic, but in order to pass the clinic the student must have an overall rating of four (4) or more on each criterion task.

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[100] If, due to academic case loads, some students cannot get the chance to do criterion tasks on live cases, simulations can be substituted.

[101] If, due to academic case loads, some students cannot get the chance to do criterion tasks on live cases, simulations can be substituted.

[102] The weights assigned to major areas in arriving at a total score are determined by the individual supervisor. In effect the supervisor has the discretion to decide the relative importance of the different applicable major areas in determining the overall score for the task.

[103] Experience has shown that many supervisors feel much more comfortable with narratives than with numbers alone.

2. Assignments in Clinical Manuals

One supervisor developed a manual for his clinic that included a series of weekly assignments.[104] Each assignment was evaluated according to three specific competencies that were listed with the assignment. The system assures that during the course of the clinic, students will have the opportunity to develop and be evaluated on a definable range of specific competencies.

By focusing the evaluation of each assignment on a limited set of specific competencies, announced in advance, the method employs a form of programmed instruction that enables the supervisor and the student to keep close track of the student's progress in specific competencies, as well as monitoring the individual's needs.

3. Evaluation of Legal Memoranda in a Beginning Course

All students at the beginning of their first semester take a course called Professional Methods. This is an intensive course in which students are taught the basics of legal analysis. They are taught a method of briefing a case, and one of the final assignments is a legal memorandum on a hypothetical case.

A form for evaluating the memoranda has been developed from the Task Force model.[105] Specific competency criteria have been given substantive content related to what was taught and have also been given a series of scoring weights.[106] The evaluation form leads to a profile in terms of an array of specific competencies, as well as to a total score based on predetermined scoring weights for each competency. In some cases, different criteria for a particular specific competency have been used as separate grading items.

One of the advantages of this application has been that it provides twelve different teachers and their teaching assistants with a common basis for evaluating a given assignment. Students are given the opportunity to see to what the scoring points specifically refer, as well as the basis for the assignment of points.[107]

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[104] L. Weeden, Structured Legal Analysis Tasks and Basic Clinical Concepts, in Antioch School of Law Statutory Entitlement Clinic Manual (C. Hartmann, ed. 1978) (on file with Sammons). *See also* L. Weeden and C. Hartmann, Clinical Perspectives on Fair Employment Practices: Problems and Basic Competency Concepts (1979) (Antioch School of Law Equal Employment Clinical Manual).

[105] Appendix C sets forth some examples of scoring criteria.

[106] In this application scoring weights are not on a six point scale, but are related to the particular kind and extent of errors observed.

[107] For some elements a student may have included in the memorandum, beyond the minimum required, bonus points could be given. Bonus points should be kept separate from the basic scores for purposes of feedback to students. Most of the item scales are 3, 4, or 5 point scales. Some teachers may feel that they would like to make finer distinctions. A simple solution to that problem

4. Computer Exercises

A set of exercises for torts lessons has been programmed on the PLATO system.[108] The exercises are based on specific competencies related to analyzing torts problems. As an example, a fact situation is presented and a series of questions is posed that are intended to determine whether the student can identify relevant facts in this situation.

5. Analysis of Specific Competencies in Torts Exams

The analysis of specific competencies is also applicable to classroom instruction. At Antioch a study using competency analysis to evaluate tort exam questions and answers is in progress.

The study is looking at three years of torts exam questions and answers. Each year involved a different professor using a different class format. The first part to the study has been to determine what competencies the exam questions appeared to require. Next, samples of exam answers were selected on a stratified random basis. The samples for each year contain twenty exams consisting of five A's, five B's, five C's, and five F's. The researchers, without knowing what grades were given by the instructor, have been evaluating the answers, using the competency-based analysis, by recording which competencies were demonstrated and which were not.

When all of these evaluations are completed, the researchers hope to compare the competencies required by the questions to those exhibited in the answers. Possible correlations, if any, between the competencies demonstrated and the grade received, or between the type and frequency of deficiencies within and among the years surveyed, are areas that the researchers hope to study.[109]

B. *Mercer University*

At the Walter F. George School of Law, Mercer University, the model is being used to diagnose and evaluate student performance and products on certain lawyering tasks taught in the third year clinical lawyering process course. Prior to beginning their field work, the students receive one semester of training on selected lawyering tasks: interviewing, fact investigation, legal problem solving, counselling,

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would be to multiply all scoring points on the form by a constant (*e.g.*, 10). While such decisions have technical implications, the more immediate concerns are the distinctions teachers feel they need to and can make.

[108] R. PLATT & C. HARTMANN, INTRODUCTION TO TORTS: BASED ON THE REPORT OF THE COMPETENCY BASED TASK FORCE (1978).

[109] The analysis being conducted has explicitly excluded written communications competencies, which were very much included in a study by Linn, Klein, and Hart. *See* Linn, Klein & Hart, *The Nature and Correlates of Law School Essay Grades*, 32 EDUC. AND PSYCHOLOGICAL MEASUREMENT 267 (1972).

case construction and negotiation. At the end of the training on each task, the students perform a simulated criterion task for diagnosis and evaluation.

In preparing for an evaluation of student performance on these simulations, the clinician first identifies the specific competencies he expects to be able to observe. Also identified are those specific competencies which are considered critical or of more importance than others to the overall success of the task. The student then performs the task. An actor or actress is used for interviewing and counselling tasks. The clinician reviews the product or performer, making detailed notes of what was done and how. Then, going back to the competency list, and based upon the clinician's observations, the previously identified skills are rated on the one-to-six scale. The clinician also rates specific competencies that had not been predicted, but which had come into question because of unanticipated errors in the performance. Finally, he identifies specific competencies about which there may be problems but for which an evaluation cannot be made without further information from the student. For example, the skills involved in selecting particular strategies and tactics for negotiation cannot be finally evaluated until the student has described the basis of selection.

Next, in a conference with the student, the clinician seeks the information to complete the evaluations which are then reviewed with the student. The students have been previously introduced to the model and have reviewed tapes of their performances. There is a common language and frame of reference for the feedback provided by the clinician. Based on the observations and evaluations, it is possible to formulate explanations for the observed performance. The student may not have adequately understood the area of law; the student may have been engaged in premature identification of problems; or the student may have manifested errors produced by anxiety concerning the client's expectations. Tests of the resulting theory lead to identification of ways for the student to overcome problems with underlying processes that are interfering with competent performance.

In this diagnostic and evaluative process, the clinician arrives at two scores. One score is based on the specific competencies deemed critical to the performance, and the other on the remaining competencies evaluated. The process provides the clinic with a running record of skill performance in generic terms for each student so that individual progress and the effectiveness of teaching can be measured.

The record is used as a basis for pedagogical decision-making when the student moves from the classroom to the field training component of the course, such as in deciding what to focus on in a case review conference with the student. This type of evaluation is continued in the field training component and the results are discussed in weekly conferences with each student. Some statistical analyses of the scores ob-

tained by this method have been performed with the conclusion that the method can lead to reasonably reliable measures.[110]

VIII. CONCLUSION

The problems of defining "good lawyering" and testing the means of producing it are confronted daily in the diagnosis and evaluation of students participating in clinical legal education programs. In response to these issues, the Competency-Based Task Force has developed a generic lawyering competencies model for the diagnosis and evaluation of a wide range of lawyering tasks and situations. The model has been found to be a useful tool which can be adapted to a variety of situations and needs. Further, the model provides a starting point for resolving the problem of defining "good lawyering" by focusing on the manifestations of definable skills which are not restricted to the performance of specific tasks.

Additional training and research is necessary if the model is to be fully effective. Specifically, manuals are needed to develop uniformity in the classification of errors into specific competencies. In addition, training materials are required that will assist instructors and supervisors in adapting the model for the content and conditions of their unique endeavors. Analytical and empirical research is also necessary. Analytical research is needed to clarify the model's application.[111] The

[110] Reliability coefficients were computed for eleven students performing two tasks: an intake interview and client counseling. Based on scores (ratings) for the same specific competencies rated in both tasks, reliability coefficients for a single measure and for both tasks combined were:

	One Task	Both Tasks
Oral Communications	.43	.60
Problem-Solving	.58	.74

The zero-order product moment correlation coefficient between oral communication and problem-solving scores has been on the order of +.35, which is not statistically significant (although that is a function of sample size). Nevertheless, it suggests the evaluator was responding to different elements of performance and that the elements tended to be independent of each other. Correlations between legal analysis and problem-solving score have been statistically significant at the .05 level.

These data are encouraging, although they pertain only to one instructor and one class. Further analyses of this type are in progress. The computation of reliability coefficients has followed an analysis of a variance-components model. *See* B.J. WINER, STATISTICAL PRINCIPLES IN EXPERIMENTAL DESIGN (2d ed. 1971).

[111] These include: (1) further clarification and specification of competency criteria and decision rules for classifying elements of products and performances in a wide variety of applications, including trial advocacy; (2) further specification of steps involved in making a preliminary analysis of products and performance, and further guidelines for both stages of diagnosis under a wide

need for empirical research centers on issues of measurement and evaluation, standards, reliability, predictive validity, theoretical structure and instrument development.

To say that further research is needed does not vitiate the immediate interest in the use of the concepts and elements of the generic competencies model. It is reasonable to conclude that the model is a powerful and useful conceptual and methodological tool. The value of immediate and continuing analysis, expermentation and development of scope and form does not preclude a need for extensive research. Clearly, all the data are not yet in, but then, all the data never will be.

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range of settings; (3) further clarification of the role of variables of the setting and ways they can be taken into account; (4) further guidelines for the use of the model in developing teaching objectives, methods, and evaluation procedures in courses as well as clinics; and (5) further guidelines for the use of the model as a communication vehicle between teacher and student, evaluator and evaluatee, trainer and trainee, employer and employee, graduate and educational institutions.

APPENDIX A

I. ORAL COMPETENCY

General Definition: The ability to assess, control, and vary verbal and non-verbal communications with an audience(s) in a given situation to maximize the accomplishment of objectives.

Specific Competencies:

A. Ability to use the mechanics of language (*e.g.*, grammar, syntax, articulation).
B. Ability to express *a* thought with preciseness, clarity and economy.
C. Ability to express thoughts in an organized manner.
D. Ability to speak appropriately to a given audience.
E. Ability to identify and use appropriate non-verbal aspects of communications (*e.g.*, appearance, poise, gestures, facial expressions, posture, and use of spatial relationships).
F. Ability to perceive others' communications and actions (verbal and non-verbal).
G. Ability to communicate so as to advance immediate and long-term objectives.

II. WRITTEN COMPETENCY

General Definition: The ability to control and vary written communications with an audience(s) in a given situation to maximize the accomplishment of objectives.

Specific Competencies:

A. Ability to use the mechanics of the language (*e.g.*, grammar, spelling, punctuation).
B. Ability to express *a* thought with preciseness, clarity, and economy.
C. Ability to express *thoughts* in an organized manner.
D. Ability to write appropriately to a given audience (*e.g.*, format, citation form, vocabulary).
E. Ability to perceive the communications of others (implicit and explicit messages).
F. Ability to write so as to advance the immediate and long-term objectives.

Note: The specific competencies parallel most of those for Oral Competency, and the notes for them generally apply to Written Competency as well.

III. LEGAL ANALYSIS COMPETENCY

General Definition: The ability to combine law and facts in a given situation to generate, justify, and assess the relative merits of alternative legal positions.

Legal Analysis:
Analyzing Facts and Identifying Relevant Law

A. *Analyzing Facts and Identifying Relevant Law*—Given a fact situation and knowledge of rules of law, ability to identify relationships between facts and law in a way that will facilitate the formulation of alternative legal theories.

Specific Competencies:

(Analysis of Facts)

1. Ability to identify relevant facts.
2. Ability to identify inconsistencies among facts.
3. Ability to identify the reliability of asserted facts.
4. Ability to distinguish facts from conclusions of law (Identification of Relevant Law).
5. Ability to determine rules of law relevant to framing legal issues (*e.g.*, statutes, regulations, case law, court rules, secondary authorities).
6. Ability to formulate legal rules appropriately or correctly.
7. Ability to determine trends in interpretation or application of laws.
8. Ability to identify discrete legal issues.

Note: For the specific competencies in this sub-part of legal analysis, and in subsequent sub-parts of legal analysis, a particular *sequence* or *process* of steps is not implied. A model was followed in deriving elements (specific competencies) listed here. Other models should, in one form or sequence of another, involve the same elements. Thus, these elements should be adaptable to various styles of legal analysis. Readers will also note that some specific competencies may overlap. This is probably inevitable, although we do not believe there are complete redundancies. It is believed that differences in seemingly similar specific competencies will aid in diagnosis of legal analysis problems.

Legal Analysis: Formulating Legal Theories

B. *Formulating Legal Theories*—Given facts analysis, the law, and the resulting identification of legal issues, the ability to identify and organize arguments and counter-arguments in terms of claims, defenses, or other legal results.

Specific Competencies:

1. Ability to group and categorize facts in terms of the concepts or language of the law.

2. Ability to select aspects of the facts which appear to call for the application or non-application of a legal rule or concept.
3. Ability to select aspects of a legal rule or concept which appear to call for its application or non-application to the facts.
4. Ability to show why some application of a legal rule or concept calls for an extension, limitation, or rejection of another rule or concept.
5. Ability to separate, combine and sequence arguments to formulate a legal theory.
6. Ability to sequence a complete range of legal theories in accordance with some systematic ordering principle.

Legal Analysis: Evaluating Legal Theories

C. *Evaluating Legal Theories*—Given a legal theory or alternative legal theories, the ability to predict the decision of an authoritative source.

Specific Competencies:

1. Ability to identify the predisposition of a particular decision-maker or class of decision makers (*e.g.*, characteristics of the decision-maker, workings of the decision-maker's institution, patterns of previous decisions, reasons given for previous decisions).
2. Ability to identify compelling equities recognized by the law or inherent in the fact situation.
3. Ability to determine relative effectiveness of a legal theory or of alternative legal theories by analysis and evaluation of 1 and 2 (above).

IV. PROBLEM-SOLVING COMPETENCY

General Definition: The ability to use legal analysis and other information to identify and diagnose problems in terms of client's objectives and to generate strategies and tactics to achieve those objectives.

Note: Problem-solving competencies are described here in the context of the client's objectives and priorities. Most definitions to follow imply a lawyer-client interaction. Problem-solving skills, however, are called upon throughout the lawyering process. Thus, there will be many occasions for evaluating problem-solving skills independently of client involvement (*e.g.*, the selection of tactics used in the design of an interrogatory). It is assumed, in such cases, that the use of such problem-solving skills is nevertheless derived from knowledge of client's objectives and priorities.

Problem-Solving: Identifying and Diagnosing Problems

A. *Identifying and Diagnosing Problems*—Given a situation, ability to isolate the problem and to identify, generate, and organize information in a way that will facilitate the formulation of alternative solutions.

Specific Competencies:

1. Ability to identify client's objectives and priorities.
2. Ability to identify obstacles and facilitating factors that bear on the realization of client objectives and priorities.
3. Ability to state alternative definitions of client's problem(s).
4. Ability to identify and develop information and steps needed to clarify alternative definitions of the problem(s).
5. Ability to make a tentative choice among alternative definitions of the problem(s).

Problem-Solving: Developing Solutions and Strategies

B. *Developing, Evaluating, and Selecting Alternative Solutions and Strategies*—Given diagnosis of a problem, the ability to develop and evaluate alternative courses of action designed to advance some or all of the client's objectives, and make a justifiable selection.

Specific Competencies:

1. Ability to develop alternative solutions and strategies which include consideration of type of strategy, risk, benefits, legal and social consequences, client control, forums, economics and ethics.
2. Ability to assess and order the range of alternative solutions and strategies with respect to client's objectives and priorities; probability of success; consequences of success, partial success or failure; available resources; and ethics.
3. Ability to reach informed consent with client on preferred solutions and strategies when appropriate.

Problem-Solving: Implementing Strategies

C. *Implementing Strategies*—Given selection of solutions and strategies, the ability to implement and modify those strategies, taking actions and evaluating results in light of objectives and other criteria.

Specific Competencies:

1. Ability to formulate a work plan that identifies who will do what, with whom, where, when, and with what expected results and costs.
2. Ability to take the actions (or assure that others assigned do) to carry out the formulated work plan.

3. Ability to check results at anticipated points and unanticipated times, and adjust as necessary.
4. Ability to seek and use counsel and advice in timely fashion.

V. PROFESSIONAL RESPONSIBILITY COMPETENCY

General Definition: The ability to recognize the ethical considerations in a situation, analyze and evaluate their implications for present and future actions, and behave in a manner that facilitates timely assertion of rights.

Specific Competencies:

A. Ability to identify situational conflicts with the Code of Professional Responsibility, or with commonly recognized institutional and professional norms and standards of conduct that flow from one's role in rendering services to clients.
B. Ability to identify situational conflicts with other ethical, ideological, or personal considerations bearing on a case or the lawyer/client relationship.
C. Ability to identify and weight alternative courses of action in light of actual or potential situational conflicts in A and B above.
D. Ability to act consistently with decisions and commitments resulting from the analysis of actual or potential conflicts.

Note: This area of competency is analogous to the previously described legal analysis competencies. It includes the identification of a particular set of rules, concepts, norms, and similar considerations as those related to actual situations with particular characteristics.

VI. PRACTICE MANAGEMENT COMPETENCY

General Definition:—The ability to manage time, effort, available resources, and competing priorities in a manner which generates the maximum output of quality legal services.

Specific Competencies:

A. Ability to allocate time, effort and other resources necessary to carry out case load tasks.
B. Ability to coordinate efforts with others.
C. Ability to work according to applicable systems, rules and procedures governing the handling of cases and files.
D. Ability to assess system operations and design improvements in the system, rules, and procedures governing the handling of cases and files.

E. Ability to maintain a level of productivity that conforms with applicable standards and normative expectations.
F. Ability to judge the point at which further commitments cannot realistically be discharged competently.
G. Ability to supervise others.

APPENDIX B

BASIC CLINIC REPORT

Student Name:_____Hours:_____Supervisor:_____
Date:_____ OVERALL CLINIC GRADE: P F I (circle one)
Division/Section:_____

I. CRITERION TASK EVALUATION

COMPETENCIES & DEFINITIONS	RATING		COMMENTS
Criterion Task	1	2	
ORAL The ability to assess, control, and vary verbal and non-verbal communications with an audience(s) in a given situation to maximize the accomplishment of objectives.			
WRITTEN The ability to control and vary written communications with an audience(s) in a given situation to maximize the accomplishment of objectives.			
LEGAL ANALYSIS The ability to combine law and facts in a given situation to generate, justify, and assess the relative merits of alternative legal positions.			
PROBLEM SOLVING The ability to use legal analysis and other information to identify and diagnose problems in terms of client objectives and to generate strategies to achieve those objectives.			

PROFESSIONAL RESPONSIBILITY The ability to recognize the ethical considerations in a situation, analyze and evaluate their implications for present and future actions, and behave in a manner that facilitates timely assertion of rights.				
PRACTICE MANAGEMENT The ability to manage time, effort, available resources, and competing priorities in a manner which generates the maximum output of quality legal services.				
CRITERION TASK OVERALL RATING				

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

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

II. CRITERION TASK SUMMARY	III. OVERALL CLINIC PERFORMANCE EVALUATION/RECOMMENDATION
Task # 1: Complexity: Simp. Ave. Comp. No. of times perf'd.	
Task # 2: Complexity: Simp. Ave. Comp. No. of times perf'd.:	
Distribution: Registrar - New Supervisor - Student - Grading Supervisor	

APPENDIX C

LEGAL MEMORANDUM EVALUATION*

Name_____ Assignment:_____

Score	Skills/Standards
	(Format)
	1A. Did the Student follow the prescribed format?
2	a. The student followed the prescribed format completely.
1	b. The student followed the prescribed format to some extent, but variation from it was effective (did not interfere substantially with ease of reading and comprehension of the necessary information).
0	c. The student followed the prescribed format to some extent, but variation from it substantially interfered with ease of reading and comprehension.
	or
	1B. If the student did not follow the prescribed format at all, was the format used effective for purposes of the legal memorandum?
2	a. The format used was very effective in presenting the necessary information (easy to follow and understand, orderly, logical).
1	b. The format used was somewhat effective, but made ease of reading and understanding somewhat difficult.
0	c. The format used was not effective (substantially interfered with ease of reading and comprehension).
	(Citations)
	2. With respect to case citations, did the student make them correctly and appropriately?
2	a. There were no errors in citation form or appropriateness.
1	b. There were some errors in form or appropriateness.
0	c. Citation form was sloppy, impressionistic or nonexistent, or citations were generally inappropriate.

**Only part of the form used is set out here.*

(Writing skills—Mechanics of the language)

3. Did the student demonstrate ability to use the mechanics of the language correctly?

3 ..... a. There were no significant or repeated problems in spelling, punctuation, or grammar (*e.g.*, subject-verb agreement, tense agreement, parallel structure, pronoun antecedent, and the like).

1-2 ..... b. There were some lapses in spelling, punctuation or grammar but not sufficiently serious to interfere with communication.

0 ..... c. There were problems of spelling, punctuation or grammar that were sufficiently serious to interfere actively with fundamental legal communication competence.

(Issue spotting)

4. Did the student identify the major discrete legal issues?

5 ..... a. All major legal issues raised by the facts were identified.

3-4 ..... b. All major issues were identified, but the student also included one or more insignificant issues, non-legal issues, or issues not raised by the facts.

1-2 ..... c. Some but not all major legal issues were identified; may or may not have also included insignificant, non-legal, or erroneous issues.

0 ..... d. Missed the significant legal issues

(Issue formulation—Completeness)

5. Did the student formulate the major issues completely?

5 ..... a. The statement of each major issue incorporated in a single statement a characterization of the relevant and necessary facts, the relevant rule of law, and the relationship of facts and rule to ultimate outcome.

3-4 ..... b. Statement of at least one but not all major issues incorporated in a single statement (the elements in (a)).

1-2 ..... c. None of the formulations of issues was complete with respect to incorporation of facts, rules of law, or relationship to ultimate outcome.

0 ..... d. There was little or no attempt to formulate major issues.

(Issue formulation—Preciseness)

6. Did the student formulate major issues precisely

(not too broadly, not too narrowly)?

5 . . . . . a . None of the issues was stated too *broadly* (so that the answer is self-evident or conclusory, and bears no necessary relation to the particular case), or too *narrowly* (so that the outcome is in doubt irrespective of the answer, because the relationship of answer to outcome involves many additional logical steps).

3-4 . . . . . b . Some but not all isues were stated too broadly or too narrowly.

1-2 . . . . . c . All issues were stated too broadly or narrowly.

0 . . . . . d . There was little or no attempt to formulate major issues.

(Discussion of issues and facts)

7. Did the student's discussion identify the relevant facts?

3 . . . . . a . All relevant facts were identified.

2 . . . . . b . All relevant facts were identified, but some irrelevant or superfluous facts were included.

1 . . . . . c . Some relevant facts were omitted

0 . . . . . d . Few of the relevant facts were included.

(Distinguishing facts from conclusions of law)

8. Did the student distinguish facts from conclusions of law?

3 . . . . . a . No facts were stated so broadly as to be tantamount to conclusions of law, *e.g.*, the defendant was negligent, without the inclusion of specifying facts.

1-2 . . . . . b . A few facts were stated so broadly as to be tantamount to conclusions of law, without specification.

0 . . . . . c . The student frequently stated facts that were tantamount to conclusions of law, without further specification.

(Categorization of facts regarding elements of rules)

9. Did the student's discussion group and categorize facts in relation to the concepts or language of the law?

3 . . . . . a. The rule(s) was broken down into elements or tests, and facts or groups of facts were connected to the elements.

1-2 . . . . . b. Some elements of the rule(s) were broken down and facts related to them.

0 . . . . . c. There was little or no attempt to break rules into elements and relate facts to them.

(Select aspects of facts that call for application or non-application of a legal rule or concept)

10. Did the student select aspects of the facts that appeared to call for the application or non-application of a legal rule(s) or concept?

3 . . . . . a. Facts or groups of facts were characterized in a manner that appeared objective and complete, and showed that essential elements of the rule(s) were or were not satisfied.

1-2 . . . . . b. There was some grouping and characterizing of facts to show that elements were or were not satisfied.

0 . . . . . c. There was little or no attempt to show that elements of the rule(s) were or were not satisfied.