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CLINICAL LEGAL EDUCATION FROM A SYSTEMS PERSPECTIVE

EDGAR S. CAHN*

IN AN EXCELLENT PIECE INCLUDED IN THIS SYMPOSIUM, Professors Jack Sammons and Russell Cort characterize much of the controversy in legal education as a debate over whether to teach "law" or "lawyering."¹ They assert that once the threshold decision is made, everything else follows.² This article will discuss what follows.

A prestigious task force, established by the American Bar Association to consider the role of law schools in improving lawyer competence,³ addressed the various aspects of legal education—admissions, curriculum, faculty appointment—and framed recommendations concerning key relevant constituencies: the law schools, the bar, admissions authorities, lawyers generally and governmental agencies.⁴ One fact clearly emerges from that examination: all facets of an educational system are affected when one attempts to alter the objectives of that system. If one regards the graduate of a law school as a primary product of the educational process, then a decision to change the characteristics of that product necessarily involves three variables: the nature of the raw material, the design of the educational process and the quality control systems to which both are subject. If lawyering competency simply meant the addition of a course or two, the consequences for the system might be minimal. But even an attempt simply to improve a law student's writing skills has been known to cause major upheavals in curriculum and faculty workload.

This article seeks to address some of the consequences of choosing to make the imparting of lawyering competency a primary objective of legal education and utilizing a clinical methodology to accomplish that objective. My basic argument is that more is entailed than simply the addition of a clinic. In effect, one is talking about "system design." Regardless of the scale of that system, the emergence of competency criteria has direct applicability to the design and grading of final examinations in conventional classroom courses. The larger the scale of a clinic within a school's curriculum, the more significant the consequences for the dominant pattern of legal education, the prevailing

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¹ Cort and Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980).

² *Id.* at 400.

³ ABA TASK FORCE ON LAWYER COMPETENCY, *THE ROLE OF THE LAW SCHOOL* (1979).

⁴ *Id.* at 3-7.

deployment of resources by law schools and the nature of quality control standards that the public interest requires in licensing the individual and the institution.

A systems approach to any set of rules or norms begins from the premise that one does not know the true meaning of a rule until one has examined the institutional environment within which it lives: the resources assigned, the monitoring, feed-back and enforcement mechanisms available, the personnel policies, the organizational structure and budgetary process which bind the entire institution. This is simply realism, expanded to a systems basis and applied to legal education. Any rule, norm or policy can be frustrated by the mode of implementation, the importance or lack of importance assigned to it and the effectiveness of the mechanisms and procedures for securing implementation. In legal education, as in law, an attempt to legislate norms calls for a systems approach that focuses not only on the delineation of the norms but also on the creation of a coherent and correlated planning, management and administrative design, having the capacity to apply those norms so as to realize their intent.

One begins, of course, with a definition of the norms themselves—but that is only the beginning.

I. DEFINING COMPETENCY OBJECTIVES⁵

The process of defining competency objectives for lawyering is complex. There seem to be two basic approaches that can be taken: a task approach and a generic competency approach.

The task approach begins with an attempt to enumerate those tasks or activities which form the core of lawyering activity; once those are selected, then the objectives of that activity need to be defined and criteria developed for determining the extent to which a law student (or lawyer) has succeeded in realizing those objectives.⁶ The initial enumeration of lawyering tasks consisted of the following:

⁵ This part, indeed the entire article, draws upon ten years of wrestling with the problems of defining educational objectives in competency terms and trying to create an institutional environment within which those objectives could be achieved. It does not purport to be an objective description of that process. Though these ten years were spent at Antioch School of Law in Washington D.C., neither does this article purport to be a description of Antioch itself. Rather, it is a personal set of observations drawn from the learning process I underwent.

⁶ This is the point at which the quest for competency standards began at Antioch. The California bar, in launching the first massive test of lawyering competency as an experimental portion of the July 1980 bar examination, used the same approach. The California bar experiment drew directly upon material developed at Antioch and appears to have utilized, in revised forms, the rating sheets developed at Antioch in its early experimentation with a "task" approach conducting Professional Boards that involved a series of carefully pre-scripted simulation exercises. Letter from Kenneth McCloskey, Director of Examinations

Initial Interviewing (including preparation of an Intake Memorandum)
 Fact Investigation and Verification (including preparation for a discovery deposition)
 Legal Research and Library Skills
 Legal Analysis
 Client Counselling
 Negotiating
 Drafting a legal memorandum
 Law Advocacy—Direct and Cross Examination
 Strategy and Tactics
 Formal Writing Skills
 File Maintenance
 Client Management
 Professional Responsibility
 An anomalous rating category call "Initiative/Motivation"⁷

A task approach to defining lawyering competency objectives has the advantage of providing an instructor with a concrete starting point. In any particular case, it is possible to specifically enumerate the skills—factual, legal, analytic and interpersonal—that are part of a competent performance. The unstated premise is that, if each discrete task can be performed competently in the context of one case, it can probably be performed competently in other kinds of cases, regardless of the particular area of substantive law involved.⁸

A task centered definition of lawyering competency thus provides a starting point and, as a practical matter, may be the most useful approach when it comes to formalized simulation testing. Thus, for instance, the criteria by which a "competent" interview were judged derive from the following enumeration of objectives:

to Committee of Bar Examiners of the State of California (July 9, 1979) (California Committee of Bar Examiners' Study on the relationship between alternative measures of lawyering competencies).

⁷ For the recent task listing see Cort and Sammons, *supra* note 1, Appendix A, B and C. This enumeration was the end-product of a faculty retreat, consultation with private practitioners and the follow-up work of a special Task Force at Antioch.

The California bar examination focused on similar tasks. The "Attorney for the Plaintiff" was to conduct a client interview, develop a written discovery plan and interrogatories, prepare a client for direct examination, write a trial brief, and engage in a closing argument. The "Attorney for Defendant" was to write an initial memorandum for the file, interview and counsel a client, draft a counter proposal and letter to client, giving the opening statement, replying to opposing party's written points and authority memorandum and conduct a cross examination. See note 35 *infra*.

⁸ Lawyer observers can usually agree on whether a particular performance was competent, particularly if provided with a check list of tasks covering a fairly even mix of written and oral exercises.

1. Determine client objectives (legal and non-legal) and priorities among those objectives.
2. Elicit relevant facts—those which support and those which negate a possible cause of action—together with leads to additional facts and sources of verification.
3. Establish realistic expectations and an understanding of next steps, respective responsibilities of client and attorney and scope (and terms) of the representation to be undertaken.
4. Establish a relationship of confidence necessary for minimal client cooperation and trust.⁹

A task-centered definition of competency works well in totally controlled situations such as a simulation. It will not suffice for a clinic where time constraints, context, body of law and particular dynamics vary radically for different cases. Thus, for instance, assessing the "competence" of a five minute interview in a cell block involves a different application of the same criteria when applied to an extended two hour interview in a landlord tenant case. Moreover, clinical supervisors cannot be present to observe every client interview; adequate fact gathering may involve going back to the client repeatedly as new facets of a case merge; and students tend to "solve" clients' problems using their strongest skills and avoiding reliance on their weakest. Thus students with strong oral negotiating skills may do a superb job in handling client cases but provide the clinical supervisor with no opportunity to determine the student's competence in legal analysis, professional responsibility or written communication.¹⁰

Because each task can be performed in innumerable contexts, subject to a near infinite combination of variables and because it is vitally important for legal educators to have some common language in comparing clinical and classroom performance, Antioch moved away from the task focused approach and undertook to develop a list of generic competencies which would apply to all tasks.¹¹ This required extensive discussion because it involved abstracting from particular tasks to formulate generalized modes of lawyering activity, then testing the definition and completeness of each of those "generic competencies" against personal experience in performing specific lawyering tasks to determine

⁹ Endless variations can be and have been formulated respecting this particular list of objectives. But under each category it is possible to develop a specific check list and rating form for each objective.

¹⁰ One would expect that student competency as a lawyer in the clinic should bear some relation to performance in the law school generally. Classroom professors are convinced that they alone are in a position to assess a student's competence in legal analysis, particularly "issue spotting." They tend to downgrade clinical competence as consisting of only "soft" non-analytic interpersonal skills.

¹¹ See Cort and Sammons, *supra* note 1.

whether there were particular tasks or facets of tasks that were not fully incorporated in one or another of the generic competencies. Thus, for instance, there is clearly an element of legal analysis involved in client interviewing though most classroom teachers are not aware of this. To elicit "relevant facts" one must have a criterion for relevance; rules of law operate in an interview as a test of relevance and each question implicitly or explicitly will be rooted in a rule of law (substantive or evidentiary) that operates as a hypothesis against which the answer is tested. If the question does not generate information that bears upon any element of any conceivable cause of action or defense, then that answer becomes critical to any tentative conclusion the interviewer reaches concerning the validity of a claim or defense. In short, an intake interview that produces an intake memorandum can test for oral communication skills, written communication skills, legal analysis, problem solving and sometimes for professional responsibility.

The result of this discussion at Antioch was a list of competencies and subcompetencies, seemingly comprehensive enough to cover all lawyering activity.¹² The price paid for achieving this level of generalization was that the concepts and the definitions may have become so general and abstract that clinical supervisors might not agree as to which competencies or subcompetencies were involved in a particular task. Even when one reached agreement on that, rating the particular performance on the particular task meant in practice that one had to assess the task on its own terms first. Next, one had to move from there to judge what competencies were involved and whether the task had generated sufficient evidence to warrant a judgment regarding the broader generic competency. Thus, a combination of the approaches is needed—one which creates a matrix that adequately represents the ways in which lawyering tasks and generic lawyering competencies intersect.

Once the tasks and competencies are defined, there still remains a major task—a rating system for judging the level of proficiency. This can involve a variation on the unceasing debate between pass-fail, numerical systems and A-F grading scales. Functionally, however, we found these numerical systems involved making judgments about whether and under what circumstances we would let a student loose on an actual case to perform the given task or to utilize the specific competency. We ended up with a six tier system that stood for the following judgments:

1. Serious deficiency: could not be trusted with client or trusted to perform task,
2. Deficiency: required continuous supervision,
3. Marginal: did some work with minimal supervision but could cause problems if not carefully supervised,
4. Minimal competency: usually performed tasks satisfactorily with some supervision,

¹² See Appendix A.

5. Competency: performed task(s) satisfactorily with virtually no supervision except for final review,
6. Superior competency: performed tasks in outstanding manner with virtually no supervision except for final review and could supervise others.¹³

This development summarizes merely what is involved in full articulation of competency based standards when one attempts to define the objectives of legal education in output or behavioral terms. Like all other statements of standards or norms, these are not self-applying. To produce a "product" capable of meeting these standards requires looking at all elements of the production system—starting with the admissions process which determines the minimal specifications for the "raw material" which can be expected to meet or surpass these competency objectives after undergoing a prescribed course of study.

From a "systems design" perspective, the admissions process sets the minimal specifications for the "raw material" to be processed and tested, and certifies by some form of quality control. On an aggregate basis, this refers to questions about the mix of the incoming class: race, sex, economic class, age, handicap. On the individual level, it gives rise to highly controversial issues involving "character qualifications" for admissions to law schools. These take their starkest form when applied to persons with a misdemeanor or felony conviction (which may stem from a civil rights or peace demonstration, a marijuana arrest or a juvenile offense).¹⁴ The question of who should be given the opportunity to become a lawyer takes on a more subtle normative aspect when one considers the application of a brilliant but immature or unstable individual. Clinical education necessarily raises questions about emotional maturity, self-knowledge and personal discipline if a school proposes to "unleash" its students on an unsuspecting client who has no choice but to place trust in the judgment as well as the technical expertise of the student as a professional.

Just as admissions seeks to select those students who demonstrate the highest potential to achieve excellence in legal analysis, it should also seek those with the highest potential in the other but equally vital dimensions of lawyering competency—the ability to communicate orally as well as in writing, the ability to solve problems, weight competing options and devise and test alternative solutions in an uncertain world. Those students should also have the ability to cope with the competing demands of multiple clients (as well as the competing demands of clinic and classroom, court deadlines and exam periods).

Additionally, students should be selected who show the highest potential to make a contribution to those "minimal" normative aspirations of

¹³ See also Cort and Sammons, *supra* note 1, at 424, 447.

¹⁴ See generally ABA, APPROVAL OF LAW SCHOOLS, STANDARDS AND RULES OF PROCEDURE 17 (1979) (paragraph 504).

the profession, i.e., to make equal justice under law a reality and to improve the capacity of the legal system to respond to the legitimate grievances of persons without alternative sources of redress. And particularly because the client population is often comprised of those groups that have been the historic victims of discrimination, each school should be required to ask whether it does have a duty to redress, through its admissions process, the cumulative effect of historic patterns of exclusion of minorities and women from the legal profession.¹⁵

When one broadens the learning objectives, one necessarily alters the entry requirements. Aptitude to become a minimally competent "student lawyer" or "paralegal" differs from the aptitude required to become a minimally competent law student or "exam taker." Shifting the focus to lawyering competency means that aptitude embraces more than the traditional legal analysis.

Moreover, when aptitude is assessed, it is done in the terms of the available learning process. Capacity to learn entails two elements: (1) what; and (2) how. When alternative learning systems are created, as with the clinical method, predictive tests which measure aptitude for learning by one methodology (the appellate case methods) do not necessarily indicate potential to learn by other methodologies. Theoretically, clinical education ought to open admissions to people with different learning styles. There is no longer a reason for excluding persons who might have difficulty coping with legal analysis taught exclusively in the conventional fashion if they can demonstrate the potential to achieve identical proficiency at the same competence by practical application in a clinical setting.¹⁶

One study conducted at Antioch¹⁷ examined the relationship between

¹⁵ See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

¹⁶ This portion of the discussion draws directly on the Amicus Brief of the Antioch School of Law which was written by myself, Jean Camper Cahn and Robert S. Catz and submitted to the United States Supreme Court in 1976 in the case of *The Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The discussion also draws on experimentation with Professional Boards and with new approaches to academic standards developed at Antioch.

¹⁷ J. George, *The Domino Theory of Legal Education: An Empirical Analysis of Entry Barriers to the Legal Profession* (1976) (unpublished thesis in Antioch School of Law Library). The Antioch study is strikingly mirrored by one from the University of California at San Diego School of Medicine where two groups of students were compared, those admitted on the basis of MCAT scores and those from disadvantaged backgrounds admitted by a special "variance procedure." The difference in performance of the two groups appears to have decreased rapidly with the onset of internships or clinical rotations. Simon and Covell, *Performance of Medical Students Admitted Via Regular and Admission-Variance Routes*, 50 J. MED. EDUC. 237 (1975). A 1975 study at Temple University Medical School raises similar questions about the relationship of testing methods to determinations about competence. Baum and Ireland, *Minority Student Performance on Pathology Examination*, 67 J. NAT'L MED. ASSOC. 334 (1975). The Study evaluates the performances of two second year classes (1972-73 and 1973-74) on

actual performance in both classroom and clinic during the first and second years of law school with prelaw variables (e.g., Writing Ability section of the Law School Admission Test (LSAT), and Grade Point Average (GPA)) which are supposed to predict student performance. The results indicate no correlation between LSAT scores and grades at the end of the second year.¹⁸ The study did find that in the first year a correlation existed between two predictors of performance, GPA and the Writing Ability score, and trends in both classroom and clinic. This correlation disappeared by the end of the second year.¹⁹

It appears that exposure to clinical pedagogy in the first and second years eliminated the predictive value of the LSAT. The study also found that there was chance (random) correlation between the LSAT, GPA, second year grades and performance on an old multistate examination scored by the National Conference of Bar Examiners.²⁰ These results differ sharply from validation studies performed in traditional law schools where the LSAT did show significant correlation with performance in the second and third year and with subsequent performance on the multistate examination.²¹

The experience at Antioch, combined with these studies, suggests that test scores are of dubious predictive value if 1) they are only predictive of performance as a student, not as a professional following graduation; 2) they are only predictive of performance as a student

two different kinds of pathology examinations, an objective multiple choice test and a practical/clinical test covering the same content. Analyzing the differential performance of minority class members on these types of examinations, the researchers reported that minority students performed below the median on the objective tests, but performed well above the median on practical examinations designed and graded by the same faculty. The authors advanced these two interpretations of the data: "1. It would appear that the format of the standardized objective examinations favors white students. . . . 2. The better than average performance of black and other ethnic minority students on the practical examinations suggests that their proficiency for achievement in an applied situation is greater than that of their white contemporaries. . . ." *Id.* at 325.

These conclusions in the medical field about the import of different testing methodologies are corroborated by a survey of the literature on the relationship between undergraduate performance, performance in medical school and subsequent performance as a physician. "[A]vailable research findings have demonstrated that little or no correlation exists between academic and professional performance." Wingard and Williamson, *Grades as Predicates of Physicians' Career Performance: An Evaluative Literature Review*, 48 J. MED. EDUC. 311, 313 (1973). Based on this conclusion, the authors suggest there is a need to reevaluate the use of grades in making career decisions and urged the greater study of "performance" in the future. *Id.* at 313-14.

¹⁸ J. George, *supra* note 17.

¹⁹ *Id.* at 66.

²⁰ *Id.* at 22.

²¹ These studies were reviewed in the EDUCATIONAL TESTING SERVICE, INTERPRETIVE BOOKLET LSAT/LSDAS (1974).

operating in a traditional classroom setting, not student performance in a clinical, applied or practice setting requiring demonstration of identical competencies; and 3) they are at best only predictive of some, but not all of the crucial competencies required.

The LSAT and GPA have enjoyed an unjustified centrality in admissions for several reasons. First, they appeared to be the best predictors of superior student performance in the first year; they did not purport to predict merely satisfactory performance. Yet the research on the LSAT and GPA confirms that there is approximately a fifty percent (50%) chance that those who receive mediocre LSAT scores will do superior work in the first year in the most traditional curriculum.²² Unfortunately, neither the LSAT or GPA provide an indication of which fifty percent (50%) will do well and which will do only marginal work.

Second, it was assumed that the first year curriculum could not be varied to permit persons with different learning styles to acquire proficiency in legal analysis. Experiments with programmed learning materials, with simulation and with earlier initiation of clinical programs, suggest that the lockstep sequencing of the first year need not be inviolable.²³ Competence in legal analysis and written communications is indeed essential but it is not clear what level of proficiency must be gained prior to educationally profitable involvement in clinical programs.

Thirdly, the LSAT and GPA have enjoyed prominence as admissions criteria because it was assumed that nothing other than machine scorable objective tests, in combination with Grade Point Average, would enable admissions officers to cope with the unprecedented increase in law school applications that inundated law schools in the fifties and sixties.²⁴ The argument might well be made that priorities were wrong, that the initial selection of students was the area where law schools should have invested more resources. One might take the position that if the "right" student is admitted, that student will be able to learn in spite of deficiencies such as an uneven faculty, student ratios and poor facilities. Conversely, if admissions makes poor choices, the best faculties, ratios and facilities will have only a marginal impact. In short, although economics in law school admissions served administrative convenience, it may have deprived the profession and our society of individuals who could have made outstanding contributions. Law school economics of the future are likely to make it imperative that factors other than the LSAT and GPA be considered, for as the applicant pool levels off, and even decreases in coming years, the schools, driven by

²² *Id.*

²³ See Munger, *Clinical Legal Education: The Case Against Separatism*, 29 CLEV. ST. L. REV. 715 (1980).

²⁴ R. STRICKLAND, HOW TO GET INTO LAW SCHOOL 18-25 (1974).

the importance of tuition incomes, will have to scrutinize those who apply far less mechanically and with far greater individual attention.

There are numerous situations where persons who do "merely" satisfactory work in a traditional first year curriculum in fact prove to be highly superior lawyers over the long run. Given the availability of clinical programs, students may be able to demonstrate their potential excellence across the broad range of lawyering competencies while still in law school. If so, the basis for placing such undue weight on the LSAT and GPA is sharply undermined.

Once the school delineates the production of lawyers, rather than test takers, a law school responsibility, it may proceed on either of two assumptions. First, the first year curriculum will not change; minimal competency in legal analysis gained through the traditional method will remain a prerequisite to entry to the clinic and ultimately into the profession. Even if a school was to proceed on this assumption, it should not want to exclude students who may only do satisfactory work in the first year but promise to develop into highly competent lawyers with the potential to make significant contributions to the profession and society. Second, first year curriculum will change so that students with different learning styles can acquire the same competencies via different pedagogic methods. Under these circumstances, it becomes even more important to develop an admissions process which does not equate potential competence with present level of test taking facility. Under either assumption, it becomes important to pay attention to a new range of factors and new types of evidence in admissions.

My observations of the system developed at Antioch lead me to conclude that we made only two bottom line judgments. We asked what potential did the applicant manifest 1) to achieve competence as a lawyer within the time frame and learning opportunities available at Antioch; and 2) to make a significant contribution to equal justice under law and to improving the capacity of the legal system to respond to the grievances of the disenfranchised. In retrospect, trying to analyze how one might arrive at answers to those questions, I would propose the following sequence of analysis with respect both to competence and contribution.

First, examine the types of evidence deemed conventionally probative of legal analysis and written communication competencies. These include the LSAT (taking into account whether the applicant had taken a prep course or taken it several times), the GPA (taking into account whether the major was "hard" or "soft" and whether the school was known for high standards or inflated grades), any graduate degree, and any formal honors or awards. Taking these together gives rise to an initial predictive rating: excellent, possible excellence, solid but not distinguished, undistinguished, marginal, or high risk with major significant deficiencies. This initial rating is then subject to a two stage adjustment through (a) mitigating factors that would affect the initial assess-

ment based on conventional indications of potential competence, and (b) non-traditional evidence creating an independent affirmative basis for concluding that the candidate possessed higher potential than traditional evidence would indicate.

Under mitigating factors, it would be relevant to ask the following questions. Was the person a bona fide poor test taker who had demonstrated previously that despite poor performance at standardized tests, he or she was capable of high academic achievement? Was English a second language? Was the applicant the first generation descendant of an immigrant family? Were there educational deficiencies that might be relevant to the acquisition of test taking skills? Did the applicant undergo a personal crisis or illness that might have affected performance on the day of the examination. With respect to collegiate Grade Point Average, it is appropriate to inquire whether the applicant was a "late bloomer," or had to shoulder such personal family or financial problems that past academic performance would not be indicative of potential competence. These types of evidence, taken as a kind of rebuttal to the initial assessment, would then be assigned a weight: convincing, plausible, possibly relevant or largely irrelevant or unconvincing.

Next, admissions should examine other evidence that has a direct bearing either on particular skills or on the kind of motivational drive and emotional make-up that somehow allows an individual to prevail despite the odds. This includes a consideration of work experience, work products submitted, application form answers, unusual recommendations, family background, past contribution or achievement in work, extra-curricular or community affairs, specialized skills or knowledge of potential utility, the range of life experience, and particularly relevant paralegal or law related experience.

Finally, an assessment should be made in terms of motivational qualities which appear to bear on learning and performance potential in both clinical and classroom settings. These include physical staying power, energy level, persistence, frustration tolerance, tolerance of ambiguity, ability to cope with competing demands, degree of ambition or achievement orientation, and specific motivational factors related to becoming a lawyer.

The same categories of evidence would then be scrutinized separately in terms of potential to make a distinctive contribution to equal justice or to improvement of the legal system.²⁵ Here, the answers to questions

²⁵ While the reader is referred to the above-mentioned amicus brief in *Bakke* (see note 16 *supra*, for a discussion of the circumstances under which it is appropriate to consider race, class, sex or national origin as relevant to a determination of potential competence or potential contribution), certain points should not be omitted even if stated in rather conclusory terms. In *Bakke*, we argued that race was important in evaluating an applicant's potential for competence in at least three ways:

1. Where communication skills are being evaluated by tests, poor

on an application form or in an interview can prove particularly significant. I found one question on the Antioch application consistently yielded significant data: "Describe a particular injustice to which you were personally subjected or which you personally witnessed. What did you do and in retrospect, what would you do now?"

It is possible to categorize the types of evidence, to articulate the inferences which may be drawn, and to delineate the sequence of questions and inquiries that should be followed in order to consider all relevant evidence bearing on potential competence and potential contribution. Even without a systematic and "validated" procedure, it might well be asked whether anyone picks his or her lawyer by inquiring about their LSAT score—and reflect on the significance of the answer for law school admissions. Where admissions programs do not take account of intuitively relevant types of evidence, it would seem appropriate for clinical programs to insist upon establishing their own admissions criteria on grounds that concern for the well-being of the clients and the learning experience of other students in the clinic is important and should not be impaired by admitting students who may have a distinctly adverse effect on service to clients or learning by fellow students. Control over the "raw material" that is to be subjected to the clinical "educational system" is critical to the design of that system.

III. SYSTEMS DESIGN: THE BASIC ELEMENTS

Admissions criteria simply determine who is subjected to the education process. The design of the process is more complex in part because

test scores of minority applicants may understate the adequacy of present skills in communicating with clients. . . . [and] distort judgments about the applicant's potential to achieve proficiency in [communication skills]. . . .

2. Where the definition of professional competence incorporates values, assumptions and perspectives held by the majority culture, poor test performance may only reflect the extent of the divergence between the minority culture on assumptions about, for instance, the fairness of judges. . . .

3. Where tests and grades only measure an applicant's readiness to benefit from one pedagogic method and to perform on one range of test instruments, they cannot be predictive of potential to achieve and demonstrate competence via other pedagogic and testing methods.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Brief of the Antioch School of Law Amicus Curiae at 4. For a more detailed discussion, see *id.* at 14-30.

Regarding potential to contribute to equal justice and to improvement of the legal system, we argued that, given a sample in which both white and non-white candidates equally assert their commitment to contribute, a higher percentage of non-whites in fact devote a considerable portion of their professional lives to addressing denials of equal justice and seeking to improve the legal system even though that contribution may well be involuntary in an unknown number of instances. *Id.* at 6. For fuller discussion, see *id.* at 31-39.

the model of teaching and learning requires that a teacher consciously conceptualize his role.

My father used to define a lecture as "the method by which the notes of the professor are transferred to the notebook of the student without going through the minds of either." The Socratic method adds uncertainty, guesswork and personal anxiety to the note taking process; it does not necessary yield active thinking or comprehension. Many would contend that most of the real learning takes place in student study groups, in the frenetic intensity of legal writing and moot court assignments, and in the great cramming orgy that precedes final examinations. The teacher's role may simply be to inject an *in terrorem* effect that paces the reading a student does in anticipation of the time when the student sits down to figure out for himself or herself what the material is all about prior to an examination or a written assignment. The clinical methodology makes explicit what educators have always known: there is an unwritten curriculum that is at least as important as what is taking place in the classroom, which includes the information, priorities, norms, and role models being provided by the total institutional environment. The conventional law teacher is garbed with an aura of infallibility and omniscience; the clinical teacher is in a far less protected posture. The "official" paradigm of the learning process in traditional legal education is the teacher-student interaction. The paradigm of the learning process in a clinical context is the student as problem solver for the client, drawing upon any resources that are available—the clinical supervisor, fellow students, practitioners, legal secretaries, form books, case files, court personnel, etc. In effect, the clinical teacher is more than a teacher; his or her job is to create, manage and administer a total learning system.

To create such a learning system one must first define learning objectives. The lawyering competencies, defined generically as the result of several years of collaborative effort, trial and error, at Antioch, establish those objectives.²⁶ The specific tasks assigned constitute the context within which those competencies are manifested. Since students responsible for dealing with client problems will solve a problem any way they can, they are more likely to do so using their strongest skills than trying to overcome their deficiencies. Students strongest in written skills and legal analysis will use these in problem solving; students strongest in negotiating skills and oral communications will use those. Because the clinical teacher is caught between the responsibilities of client service and the obligations of student teaching, the natural temptation is to rely on students to do the things they do best; the writers write, the talkers talk; those proficient in legal analysis write the legal memos, while those proficient in oral communications do the fact find-

²⁶ See notes 5-9 *supra* and accompanying text.

ing, interviewing, and even negotiating. Everyone learns how to survive with the minimal possible learning, unless the teacher as "systems manager" can design a strategy for insuring that students have to cope with their deficiencies as well as utilize their strengths.

At Antioch, we developed the approach that each clinic had to specify two "criterion" tasks which the student had to perform which assured minimal proficiency in certain competencies: *e.g.*, write a pleading, prepare a legal memorandum, submit a satisfactory intake interview, prepare a client file, or write a close-out memorandum. The "tasks" were picked because they were predictably available no matter what kinds of cases were the specialty of that particular clinic. Students had to rotate to clinics with different types of tasks and demonstrate minimal proficiency over the full range of a core set of competencies. Without that kind of matching of student-to-task to clinic-to-competency, there was no method of assuring a uniform minimum experience, no method of utilizing clinical assignments as a remediation vehicle and no method of knowing what a passing grade in a given clinic meant in terms of lawyering competency.

As in any system, there had to be a designation of goals and objectives, a description of the organization and procedures for reaching those objectives, a deployment of personnel, equipment and logistics consistent with goals, organization and procedures, and "feedback loops" that provide for continual monitoring and assessment of the adequacy of the system. What all this "translates" into is that any clinic which specializes in a particular type or types of cases requires the development of the following set of materials. First, a Clinic Manual which sets forth the policies and procedures of the clinic, its educational and service objectives, the references (law, statutes, cases, etc.) the student must know to function in the clinic and the skills and procedures the student must learn. Second, a Syllabus which provides a detailed description of the educational objectives, methods, materials and schedules of the clinic and specifies the particular task which provide opportunities for the student to develop and demonstrate proficiency in basic lawyering competencies. Finally, a Student/Case Management Notebook, or its equivalent, which is essentially a device for keeping track of the status of cases and the needs, performance and progress of students. To help clinical supervisors construct those three basic tools without having to reinvent the wheel and to insure the minimal uniformity needed if students were not to have to learn a new system each time they rotated to a different clinic, a general manual of "Policies, Procedures and Guidelines For the Administration of Antioch School of Law Clinics" was developed.²⁷

²⁷ This portion of the discussion draws directly upon the exceptional and untiring work of Russ Cort, Carl Hartman and Eleanor Rider in preparation of both the basic manual and illustrative manuals in Family Law, including a special

The initial developmental focus at Antioch necessarily concentrated on assuring that certain minimums were relatively uniformly achieved.

handbook for the word processing center, and in Statutory Entitlement which concentrated on Unemployment Compensation and Employment Discrimination Law.

The topics enumerated in the basic manual, together with the basic forms included in the manual's Appendix, give a sense of the basic elements of the system:

Assessing Needs in the realms of Education, Service, Administration and Evaluation (defining service and educational objectives, role of participants, characteristics of clients, constraints, problems to be anticipated)

Caseload/Caseflow in the Clinic

- Intake: procedures and exceptions
- Division records and Assignment to Attorney
- Assignment of student for Intake
- Methods of Assignment of Students to do Intake Interviews
- Student Completion of Intake Assignment
- Acceptance Criteria for the Routine Case
- Acceptance Criteria and Procedures for Cases Requiring Unusual Resources
- Acceptance of Case Potentially Requiring the Involvement of more than one Clinic (Cases with Multiple Areas of Law)
- Closeout of Intake
- Acceptance and Scope of Acceptance
- File Organization and Maintenance: The File Jacket; The Main File, the Documents and Correspondence File; Miscellaneous and Additional Files
- Location and Use of Files
- Transfer of Cases by Outgoing Students
- Computer Tracking of Attorney Caseloads
- Transfer of Another Attorney
- Close out of a Case which has been Accepted
- Developing Methods to Deal with Caseload/Caseflow Management
- What Can Be Done About Maintaining the Case File in the Clinic
- Caseload Control
- Desirable Caseloads
- Monitoring Casework
- Unforeseen Contingencies
- What if not Enough Cases are Available
- Assignment of Cases and Tasks to Students
- The Problem of Preferential Assignments
- Assignment of Students to a Clinic
- Notification of Supervising Attorneys
- Orientation of New Clinical Students
- Transfer of Cases to Incoming Students
- Maintaining Student Case Assignment Record and a Caseload/Student Listing
- Clinical Rounds
- Grand Rounds
- Case Review Conference with Students
- Recording of Student Clinical Hours
- Functions of Lists of Cumulative Hours

That required an elaborate systems approach to clinical organization which built upon the cumulative shared experience of an entire instructional staff. Without that level of sustained institutional investment, it is doubtful that any one individual would have had the time, resources or breadth of experience to create such systems. But once such systems developed, they can be implemented elsewhere fairly readily.²⁸

Clinical education as a system clearly involves more than the definition of lawyering competencies, the specification of tasks and the development of managerial systems. There are other fundamental implications of a "systems approach" to clinical education that should be treated as illustrative case studies in system design where a void now exists.

First, designing an educational strategy seeking to internalize a code of professional responsibility (and addressing lapses in professional responsibility) raises problems that are at once unique and symptomatic

Approval of Student Hours
Grading of Clinical Students
Student Clinic Progress Files
Professional Responsibility
Counselling Students
General Considerations in Administration of Clinical Students
Integrating Client and Educational Needs

The forms developed included the following:

Eligibility and Intake Information
Student Case Assignment Record
Retainer
Acceptance Letter to Client
Case File Docket Sheet
Status Sheet
Documents File Index Sheet
Transfer Letter
Attorney Transfer Form
Case Disposition Form
"New Student" Letter
Caseload/Student Record
Basic Clinic Report

²⁸ Because of the initial preoccupation with minimum competency, we have yet to pay adequate attention to incentives for excellence and to design "advanced lawyering tasks" which involve the same generic competencies set in far more complex contexts. For example, the management of a complex anti-trust, utility rate or discrimination case involves the same fundamental competencies but appears to involve a different level of proficiency. Antioch did attempt to provide exposure to more advanced lawyering assignments through a required one-term internship in government and either an advanced concentration in trial advocacy, administrative advocacy, clinic management, or a senior thesis focusing on policy analysis in an empirical context. Recently the option of an "external clinic" in areas of practice not available within the clinic was added. But none of these have been subjected to the same rigorous competency-based scrutiny that characterized the "basic clinic."

of the complex considerations that go into other seemingly mechanical decisions (like the length of a clinical semester, the number of credits, how a credit is earned, or responsibility for a case once a clinical semester has ended). Second, designing a set of academic standards, including graduation requirements, and developing assessment strategies for assuring rigorous adherence to those standards pose still another set of issues, issues made more complex by the diversity of the student body. These clearly have implications not only for admissions criteria but also for bar examinations. Third, clinical education raises fundamental questions about faculty evaluation, retention and tenure that tend to be glossed over in traditional legal education. Fourth and finally, all of these in combination pose critical issues for the accreditation process where the implications of clinical education come into direct conflict with the current interpretation of substantive standards and the process by which those standards are applied.

The discussion of these points which follows represents a personal perspective evolved from ten years or more of wrestling with these issues. In discussing each problem area, I advance specific proposals to suggest the implications of applying a systems perspective. The proposals should be viewed as illustrative of trying to view clinical education as a problem of system design in the context of certain normative commitments central to the way the profession has defined itself.

A. Professional Responsibility: Internalizing Normative Standards

Running a clinic can give rise to potential malpractice claims against an individual faculty member or against the sponsoring law school for lapses in professional responsibility by a student.²⁹ Sometimes the questionable behavior of a student rises to the level of a clear violation of the American Bar Association's Code of Professional Responsibility as adopted and modified in the particular jurisdiction. Sometimes the behavior does not rise to that level but involves negligence, tardiness or impropriety and places a clients legal rights in potential jeopardy even if timely intervention or good luck prevents any actual harm from occurring. Systems, deadlines, and checkpoints can be utilized to minimize the likelihood of actual injury to a client.

²⁹ In most clinical programs students function under student practice rules, are directly subject to the jurisdiction's Code of Professional Responsibility, and may be directly liable or subject to disciplinary sanctions by the bar because the student may be regarded as "retained counsel." In other clinical programs students function in part as paralegals and in part as student practitioners in administrative agency cases (e.g., prison discipline, social security, worker's compensation), where they are not precluded by court rules governing the unauthorized practice of law. In both situations, the supervising faculty member may find himself or herself being sued or potentially subject to bar disciplinary proceedings. The institution, as the "deep pocket," is likely to be sued for damages.

It is difficult for students to regard handing in a legal memorandum late as constituting a capital offense when they have been accustomed to handing in term papers, for example, after the given deadline. Work handed in so late that it leaves inadequate time for review and revision by the clinical supervisor gives rise to one kind of nightmare. Work handed in so that one must pay secretarial overtime or secure commercial copying because the school's facilities are closed poses a similar problem, even though the student will tend to regard it as a "budgetary problem" rather than a lapse in professional responsibility.

The lapse may be grave or trivial, but Disciplinary Rule 1-101 (B) provides that "[a] lawyer shall not further the application for admissions to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute."³⁰ Therefore, the safest procedure a law student can follow is to avoid any clinical program if a mistake in judgment or a minor lapse can directly jeopardize his or her entire legal career. Clinical programs can hardly flourish if "virtue untested" is the only safe course for potential lawyers. Some procedure must be available which treats clinical offenses as the equivalent of juvenile offenses and similarly "seals" the record to prevent unlapping stigmatism. But this in turn may entail a pregraduation inquiry as to whether there has been an adequate showing of "rehabilitation."

What happens in actual practice is that such lapses are virtually ignored. The clinical supervisor may give a verbal or written reprimand, but it is only in the gravest situation that a student will receive a failing grade for a breach of professional responsibility. Moreover, the "good" students are aware that they are somewhat immune from criticism or reprimand because they have become junior colleagues protected by the supervisor's needs. The clinical faculty member tends to rely on the ablest students to do the last minute, around-the-clock research or writing, or to revise a shoddy piece of work handed in by a less capable or industrious student. That dependency generally protects him or her from sanction for occasional lapses. The "poor" student who is censured cries "equal protection" and feels that he or she has been singled out for unfairly harsh treatment when others act similarly but are not similarly censured. When that perception of inequity is coupled with charges that the faculty supervisor is either racist or sexist, the kindest thing one can say is that the atmosphere ceases to be conducive to learning.³¹

³⁰ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 1-101 (B) (1978).

³¹ Students are quick to point out that they are not the only ones who miss deadlines and that failure of faculty to give adequate supervision, direction and feedback, or failure of secretarial staff to give appropriate priority to client-related papers should give rise to corresponding censure or sanctions. A "Clean hands" doctrine emerges which implies that the faculty member can not hold

If the only sanction available to a professor is to give a failing grade, then the sanction will not be used because it is usually felt to be disproportionate to the gravity of the offense. Many, if not most, clinics tend to grade on a Pass-Fail basis which sharply limits the sanctions and incentives available to a professor. Moreover, once a semester or a clinical rotation is over, a final grade is viewed as closing the door on any lapses of professional responsibility. Yet, in every situation at Antioch where a major lapse of professional responsibility occurred, it had always been preceded by seemingly minor lapses which were either ignored or were effectively expunged because the student had received a final grade from the previous clinical supervisor.

Clinical supervisors are reluctant to deal with seemingly minor lapses for several reasons. First, each such incident takes on a semi-confrontational aspect wherein a reprimand can give rise both to "due process" questions and to emotionally charged love-hate, approval-rejection dynamics because the student's sincerity, integrity, good intentions and character are seemingly drawn into question. The personal dynamics that ensue can be highly destructive to the kind of collegial working relationships that is so essential to the effective operation of a clinic. Second, a great many derelictions involve students who simply "slip between the cracks," and who are not available unless the supervisor can somehow catch up with them. Students can be most adept at shifting the burden to the clinical supervisor to hunt them down in timely fashion. Third, because students in a clinic normally are simultaneously enrolled in courses, the clinical supervisor is frequently engaged in a process of negotiating for a student's time in direct competition with an examination schedule or in implied competition with more senior tenured faculty members who regard their course assignments as sacrosanct.

All of these factors operate to insure that the only sanction which the clinical instructor has, namely, to fail a student, is one that will almost never be used. Accordingly, it becomes essential to develop a much more finely tuned sanctioning system, free of some of the emotional effect that otherwise attends expressions of disapproval. Conversely that system ought to reward or somehow recognize impressively diligent and conscientious performance.

The approach I would urge would be modelled after a traffic court where the list of offenses is clearly enumerated and a "ticket" handed out for each violation. The first "ticket" would simply constitute a warning; thereafter, points would accumulate. The record would be cumu-

students to standards if there is any lapse in his or her own supervision, clarity of instructions, speed in returning drafts, etc. In this and other respects, the problems of professional responsibility in clinical programs correspond to the absence of an adequate approach to upgrading acceptable norms of professional behavior for the profession as a whole.

lative, extending from one clinical semester to the next (patterns of conduct tend to be cumulative). One "point" would be charged for each violation; two "points" would be charged where actual injury, including severe inconvenience or increased work load, occurred to a client, fellow student or clinical supervisor. The accumulation of two points within any four month (one semester) period would require mandatory attendance at the equivalent of "traffic school"—a one evening session involving a review of the Code of Professional Responsibility and a description of the consequences that follow from seemingly minor infractions. The accumulation of three points would involve mandatory attendance at "traffic school" for three sessions coupled with a set of exercises or an examination. To this sanction others can be added: restitution, mandatory community service, additional clinical assignments. The accumulation of four points within any twelve month period would result in some form of suspension from the clinic tantamount to revocation of a "driver's license," as well as a loss of hours or assignments accumulated, and an "incomplete" or a "failure" on the transcript. The system should provide that the absence of any offenses for a period of time, for example six months, would operate to erase points accumulated for previous offenses.

Assuming that the clinical supervisor is the equivalent of the "traffic cop" who hands out tickets, any such system will also involve the development of a list of traffic offenses and some equivalent of the Traffic Court. A panel of hearing examiners drawn from students, clients, clinical supervisors, and classroom faculty would be created to conduct any hearing in the event that a student should desire to contest a "ticket." I would propose the following as a starting point for a list of offenses:

1. Failure to comply with a reasonable work deadline for case handling, intake, research, preparation of drafts, client appointment or other routine assignment (including failure to respond to a notice or note in the mailbox requesting the student to contact the supervisor);
2. Failure to notify the supervisor, in timely fashion, of substantial likelihood that completion of a clinical assignment cannot be done within a time frame requested by a supervisor;
3. Giving unauthorized legal advice to a client or potential client;
4. Failure to disclose any perceived conflict of interest to the supervising attorney;
5. Making statements to a client that impugn the professional competence of a supervising attorney;
6. Disclosing confidential information;
7. Failure to exercise due care in handling of case files and materials related to clinical work;

8. Failure to notify a client of developments in a case including transfer of responsibility for the case to another student or supervisor;
9. Postponing or seeking extensions of deadlines without just cause and without express advance written permission from the supervisor;
10. Failure to gain informed consent from a client for student participation in the handling of a case;
11. Misleading the public or a client into believing that the student is a lawyer;
12. Signing pleadings or other legal documents intended to be signed by a lawyer;
13. Encouraging a client to act in a manner injurious to himself or herself or encouraging a client to create false evidence;
14. Failure to obtain a written retainer except where the case is by court appointment;
15. Failure to treat clients, witnesses and court personnel with professional courtesy.

One may debate the merits or adequacy of the foregoing list. The point I am urging, however, is that clinical programs must find a way of heightening awareness to professional responsibility issues and must pay attention to the development of a system that articulates and enforces norms. The legal profession as a whole has been derelict in policing itself for reasons analagous to those encountered in clinical programs.³² What is needed is a system that can flag seemingly minor infractions immediately, that can operate evenhandedly towards the most and the least able students, that can generate graded sanctions that will have an educational effect, and that can recognize and reward exemplary conduct. Whatever the system chosen, whatever the offenses enumerated, one point is fundamental. If "learning by doing" has any value at all, professional responsibility is an area that must be assigned top priority. Otherwise, "learning by not doing" imparts another very clear message—infractions will be tolerated, and professional responsibility is less important than technical virtuosity. This is an area where conceptualizing the clinical method as involving the design and administration of a total learning environment may make a most important contribution and indeed provide a model that the profession itself can adopt.

B. *Assessment: Academic Standards, Competency Assessment, Graduation Requirements and Bar Examinations*

Law school examinations, academic standards, graduation requirements and bar examinations all have one thing in common—at best they

³² See Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377 (1980).

measure at various points in time the student's readiness to benefit from one pedagogical method and to perform on one range of test instruments. They do not measure the full range of professional competence, nor do they measure potential to achieve competence utilizing clinical or other non-traditional instructional methods.

Most academic standard systems are predicated on the same assumptions about readiness to learn, learning style, and sequence of learning. They essentially define a lock step pace requiring a student to accumulate a certain number of credits within the first semester, or first year, in order to remain in good standing. Failure to acquire the minimal number of credits, and in some schools to maintain a minimum average, results in academic probation or termination.

Some students will take longer to achieve proficiency in examination taking and in the specific language and logic system entailed in legal analysis. If there is only one method of instruction and one type of examination format, then there are basically three types of responses that can be made, other than simply mechanically applying the rule of meeting the credit-grade average minimums. These responses are: 1) early identification of students who are likely to have test taking or basic skills problems so that they can receive additional personal instruction as early as possible; 2) use of immediate retesting by using different hypotheticals following a failing examination after providing immediate feed back, a model answer, or critiques of the original examination (while maintaining the same qualitative standards);³³ 3) alter the points in time at which a certain minimal number of credits must be accumulated so that in effect, some students would be on a three and one-half or four year track with different initial pacing. Under such a system the critical go-no-go decision would take place for some, not at the end of the first year but either after one and one-half years or at the end of the second year.³⁴ The introduction of a competency-based approach to testing combined with the insertion of clinical opportunities to develop and demonstrate basic lawyering competencies opens up an entirely different range of opportunities in the design of the assessment process and the design of academic standards.

³³ Professor Charles Kelso, a visiting professor at Antioch in 1975, did this after noting that students, particularly minority students, approached law school examinations as a game in which the object was to guess who wins and then display as much knowledge of as many rules and cases as possible. By providing for an immediate critique, feedback and retesting, he found that all but two of the fifteen students involved passed the retest. The students reported that they had never taken an examination where the objective was to demonstrate that they could give reasoned analysis of the arguments for each side and where the outcome predicted was far less important than the rationales advanced for justifying the conclusion.

³⁴ One must recognize, however, the danger of economic exploitation of the student, leading to the accumulation of staggering amounts of debt by students who have no reasonable expectation of completing law school unless standards are unconscionably lowered.

Under most academic standard systems, grades are deemed to be self-validating evidence of competence, but one rarely inquires what those tests actually examine. If it is assumed that law schools are only interested in whether lawyering competency is achieved and demonstrated, a determination that there has been a failure to make progress in achieving that competence depends on looking at all relevant evidence. At Antioch, this meant that a task force read all of a student's examinations stretching over the first year and also examined the student's work products in the clinic. This "vertical" scrutiny of a student's work revealed whether there was a learning curve that showed signs of rising rapidly toward the end of the first year, but not rapidly enough to accumulate the requisite number of credits. It also enabled us to determine that some examinations which had been assumed to test for legal analytical ability did not do so. Finally, it enabled the task force to see if there was a different level of competence in legal analysis manifested in the clinic than that which was manifested in course examinations.

The introduction of alternative learning and testing methods significantly altered our assessment of some but not all students having difficulty. The comparison of examinations and work products produced by a single student from the beginning of law school onward provided an informed estimate of the rate at which the student would achieve the required level of proficiency. There still had to be a cut off point at which a student was informed that time had run out. But where improvements were delayed, yet clearly discernible improvements in performance, there was sound basis for permitting that student to remain in school.

This methodology leads to advocating two complementary approaches to academic standards not available in conventional settings. The first approach is to provide students with alternative ways to demonstrate proficiency in legal analysis; for example, adequate performance in either the clinic or the classroom will be deemed satisfactory to permit a student to continue into the second year. The second approach is to institute a comprehensive professional board examination prior to the beginning of the second year. It would be designed collaboratively by a faculty team to utilize multiple testing methods (simulation, clinical, multiple choice, essay examinations). Students could take those boards in May of their first year and could, if they had encountered academic difficulties, defer the boards to the end of the summer and participate in an intensive summer remediation program in anticipation of the boards.

Further, it makes sense to institute advanced competency requirements as an integral part of graduation requirements. These could include production of a portfolio of satisfactory work products, research papers, or examinations to demonstrate minimal proficiency in fundamental lawyering competencies together with evidence of advanced proficiency in some specialized lawyering skills.

A similar change needs to be made in bar examinations which do not

purport to test for the full range of lawyering competencies and which effectively reward test-taking ability rather than lawyering competence. A number of factors contributed to a decision by the Committee of Bar Examiners of California to institute an experimental portion of the bar examination designed to assess lawyering skills such as counselling and advocacy.³⁵ The experiment was designed in direct response to the consistently lower pass rate of minorities on bar examinations as well as in response to the fundamental question of whether bar examinations actually test lawyering competency.³⁶ It remains to be seen what the impact of that experiment will be, what divergence if any will be found between performance on the conventional portion of the examination and the experimental, and what the performance of minority candidates will be.

It will take continuing experimentation with alternative methods of assessment and different experimental subjects to ascertain whether significantly different results follow from the broadened concern with lawyering competency. But to the extent that bar examinations begin to incorporate such features as those in California, it can be anticipated that this will have a major impact on law school curriculum, testing methods and academic standards. Clinical programs themselves will predictably become more rigorous in their instructional objectives and more popular because they will be perceived as "bar preparation" courses.

C. *Faculty Evaluation, Retention and Tenure*

The faculty of a traditional law school is not and does not think of itself as a system or part of a system for the production of competent

³⁵ The assessment criteria were drawn directly from the various instruments, criteria, rating sheets and formats developed at Antioch and supplied by Jean Camper Cahn in response to an invitation by the Bar Examiners. Charles and Jane Kelso, who were intimately involved in competency-based projects at Antioch and Indiana University Law Schools, were involved in drafting instructions, refining the final evaluation criteria, designing scoring sheets and providing calibration aids for the judges. The test was conducted in assessment centers set up in four different cities. Performance of students was videotaped; trained actors and actresses were used for simulations. Applicants were variously assigned the role of attorney for plaintiff and attorney for defendant. Attorney for plaintiff was assigned the following tasks: client interview, designing a discovery plan and interrogatories, preparation of a client for direct examination, preparation of a trial brief and closing argument. Attorney for defendant was assigned a different but equally matched mix of oral and written tasks: memorandum for the file, client interviewing and counseling, draft of counter proposal and letter to client, opening statement, reply to points and authorities memorandum and cross examination. The instructions to the participants specified what was to be included and implicitly conveyed the criteria that would be used for evaluation purposes.

³⁶ Letter, *supra* note 6.

lawyers. It is a collection of individuals, preferably with impressive academic credentials, a resume that includes publication of an impressive list of scholarly articles, casebooks or treatises, and some substantive area of specialization. No particular teaching ability is required; that is assumed to be something that can be picked up "on the job." Nor is any depth of experience in practice necessary, though that has been regarded lately as more desirable than it used to be.³⁷ The conventional faculty functions not as a team but atomistically, coming together at faculty meetings as rarely as possible, and addressing problems of academic policy and administration through a few standing committees such as curriculum, personnel, admissions and academic standards.

Evaluation of conventional faculty focuses primarily upon their publications and claims to scholarly distinction. It is desirable, but not essential, to be a good "classroom performer," but popularity among students is not necessary, and in some cases is regarded as a real liability, as if the instructor has lowered the tone by catering to the masses. Law school faculties are expected to have a higher percentage of tenured members than the undergraduate or other graduate divisions of a university. Turnover is expected to be low. Salaries are expected to be in the \$30,000—\$45,000 range, comfortable but by no means comparable to that which could be earned in a lucrative private practice. Faculty members are theoretically expected to devote substantially all their time to teaching and scholarship, but in practice it is understood that they are free and even expected to augment their incomes by various consultantships, "of counsel" retainers, etc. In terms of teaching load, the ABA establishes a maximum of sixteen credit hours per year,³⁸ which could mean two large, required courses per semester. But that would be regarded as a truly onerous load, to be tolerated only by new members of the faculty trying to earn their spurs and gain tenure. Ideally, the load is one large course in a subject tested on the bar examination and one small seminar in an area of interest or expertise of the particular faculty member. The only intrusion on virtual autonomy comes in negotiating the assignment of large courses and, to a lesser degree, sorting out the mix of seminars and small classes so that the "core subjects," particularly first year courses, are taught by full-time faculty, so that, in the aggregate, there is a reasonable balance or diversity in the overall curriculum offerings. Legal writing, moot court and other skill related courses are taught by instructors or others usually lacking faculty status. Adjunct faculty are available as "cheap labor" to augment the full-time faculty and plug the holes in the curriculum left after the full-time faculty has had its pick.

³⁷ See Devitt, *Why Don't Law Schools Teach Law Students How to Try Law Suits?*, 29 CLEV. ST. L. REV. 631 (1980).

³⁸ ABA, *APPROVAL OF LAW SCHOOLS, STANDARDS AND RULES OF PROCEDURE* 14 (1979) (paragraph 404) [hereinafter cited as *APPROVAL OF LAW SCHOOLS*].

The rewards of academia are partly intrinsic and partly extrinsic. There is status, leisure, the opportunity to pursue scholarly interests, and the personal satisfaction of attracting a few of the brightest students as proteges. The ego satisfaction that comes from teaching a large class with consummate artistry is akin to what an actor in a star role with a captive audience or the conductor of an orchestra may feel. The pay, fringe benefits, and the job security all combine to make academic life relatively idyllic; or at least did so until the advent of the sixties when student activism, concerns over poverty, racism, sexism, Viet Nam, consumer fraud, student participation, admissions policies, and grading systems invaded even these hallowed halls. At present, those concerns appear to be diminishing in intensity and some measure of the old tranquility against prevails.

When one examines clinical legal education, it would be difficult to find a more sharply contrasting profile or a more divergent view of the role of faculty. Clinical faculty are generally regarded within academia as of inferior status. Those who seek jobs as clinical supervisors often do so because they lack the academic and scholarly qualifications required by normal recruitment standards. Clinical positions have become a "backdoor" into the faculty. The turnover rate is high, the composition of clinical faculty more diverse. The amount of conventional scholarly output expected has been low and the types of manuals, briefs, etc. that clinical programs produce are not deemed worthy of the designation of scholarship within the legal academic world. Clinical faculty give much more individual attention to students and the relationship is, of necessity, closer to that of the relationship between a senior and junior partner or associate. Where there are a number of them, clinical supervisors function as a loosely knit team, though still closer to solo practitioners. They help each other, engage in team teaching, provide assistance in drafting pleadings or interrogatories—if only because most clinical faculty have not themselves had much experience in the practice of law. To compound the problems they confront, many clinical faculty may have internalized a sense of inferiority that comes from academia on the one hand and from private practitioners on the other who regard the kinds of cases handled in law school clinical programs as low prestige cases involving lower class clientele. Their salary, fringe benefits and chances of tenure are considerably lower than that of traditional faculty teaching traditional courses.

Initially, clinical courses were regarded as mere skill courses, reducing lawyering to the equivalent of being a competent plumber or electrician. The advent of concern with lawyering competencies and the conceptual, definitional and methodological problems that these concerns have posed has, in turn, provided clinical law teaching with its first clear claim to intellectual respectability. Most of what clinical law teachers do, and in fact must do, is still regarded somewhat disdainfully and apprehensively by most faculties. When a systems analysis of

clinical legal education is applied to faculty recruitment, evaluation criteria, and tenure, it has significant but largely unrealized implications.

Law schools have tenure, law firms do not—clinical programs are somewhere in between. At the very least, integrating the concept of tenure into a systems approach to clinical education means that the concept itself must undergo significant change. For clinical faculty, tenure cannot be tantamount to perpetual immunity from scrutiny because the consequences of poor clinical teaching performance for clients, for students and for other teachers who have to take up the slack are grave. As in a law firm, the degree of interdependence is greater, and if one partner or associate puts in fewer billable hours or generates less business it has consequences for everyone including that partner or associate.

Analytically, tenure has never meant anything other than a shift in the burden of proof for reappointment. Until tenure is granted, the individual faculty member has the burden of proving that he or she should be reappointed. Once tenure is granted the burden of proof shifts to the institution to demonstrate “cause” why the individual should not be reappointed. In practice this means that tenured faculty are not subject to regular evaluations. It also means that the institution can never bear the burden of proof involved in demonstrating “cause” because the consequence in academia is tantamount to capital punishment.

A balance needs to be struck between the ability of a clinical faculty member to gain some greater degree of security after the investment of years of energy in building a clinical program and the institution's need on behalf of students, clients, and other clinical faculty to subject that faculty member to some form of periodic scrutiny. Accordingly, I would submit that tenure for clinical faculty has to entail at least a periodic evaluation every third year and that evaluation is meaningless unless the institution's burden of proof is changed to incorporate different categories of “cause” with different consequences flowing from a finding of each type of “cause.”

The traditional definition of cause has entailed a showing of clear incompetence or total unfitness. The line between one's private life and one's professional life was clear and virtually absolute. In the context of clinical teaching, the line is blurred, at least in so far as private conduct might result in disbarment or related sanction by the bar. If clinical teachers have to be “role models,” at the very least they have to remain members of the bar “in good standing.”³⁹ A finding of cause may be based on action which warrants loss of confidence in professional com-

³⁹ One exception to this which must be flagged is where the conduct that generates possible discipline by the bar involves principled challenges to disciplinary rules of questionable validity such as those prohibiting solicitation, barratry, maintenance and advertising.

petence, including breaches of professional responsibility, in dealing with students, in teaching, in client service activities or in clinical supervision. This would manifestly include an act leading to disbarment or a clearly justifiable suit for malpractice by a client or other party.

In the context of an ongoing clinical program, with all the responsibility that it entails, there is another kind of "cause" to be enumerated—conduct which over a prolonged period of time results in other clinical faculty members having to bear an inequitable burden in order to compensate for the defective, inadequate or substantially deficient performance of another. In theory the same standard applies or should apply in conventional teaching where other faculty members have to take up the slack left by another. In clinical programs, however, the consequences are so grave in terms of injury to clients, as well as inadequate supervision in teaching of students, that the "tortious" impact of substantial neglect or non-performance is felt much more swiftly and with far more severe consequences.

In the clinical setting, one must not only alter the standards involved in the showing of "cause" so that they address issues of competence, professional responsibility, and neglect of duties at a much lower threshold, but one must also alter the consequences of a finding of cause. If cause results solely in termination, then faculty members will be highly protective of each other if only out of the awareness: Ask not "for whom the bell tolls. . ."⁴⁰ As a result, different categories of cause must be established and different consequences must flow from each category if concerns over accountability are to be balanced against legitimate needs for security.

There must be one kind of cause that explicitly acknowledges life situations in which circumstances beyond one's control ranging from age, to physical illness, to debilitating psychological stress, result in substantially diminished capacity to carry one's fair share of the teaching, supervisory and practice responsibilities. In some cases the condition may be temporary, in other cases permanent. Because clinical programs are expensive, schools cannot afford to carry "dead weight" indefinitely, but it does not follow that they should be devoid of humanity in dealing with situations involving clinical faculty. The nature of the stress associated with clinical supervision in fact makes the actuarial probability of such situations considerably higher in clinical than in conventional teaching. Any number of responses short of severance may be appropriate, such as reduction in work load with a corresponding reduction in pay, temporary suspension from service, or requirement of restitution to individuals or the institution. In some law firms, when senior partners have reached a point where they are not generating the quantity of business needed or are virtually incapable of discharging

⁴⁰ J. Donne, *Meditation XVII*, reprinted in NORTON'S ANTHOLOGY OF ENGLISH LITERATURE 91.7 (Rev. ed. 1968).

certain responsibilities, they are still kept on the firm's letterhead and provided an office (sometimes at the individual's own expense) but their compensation drops radically. Presently, faculty pay scales tend to operate mechanically, being based on previous year's salary plus yearly increments reflecting cost of living, length of service and "merit" increases. Clearly, a finding of involuntary cause, whether temporary or permanent, should give rise to a much broader and more flexible range of sanctions than those normally associated with tenure.

The same flexibility should exist in another category of situations where personal problems, marital conflict or just plain exhaustion result in a "tenured" clinical faculty member turning in clearly deficient or barely marginal performances. Unless one creates a category of "cause" that is expressly denominated "remediable cause" resulting in a kind of "shape up or ship out" contract, this kind of lapse will be overlooked by common consent. While the same flexibility in sanctions mentioned above must be available here, there must be, in addition, a conscious and explicit attempt to define contractually the nature of the effort the individual must make within the next year in order to be continued in a "tenured" position. In effect, a finding of "remediable cause" should result in a one year reappointment that is designated a terminal reappointment unless the individual meets explicit performance standards specified at the outset.

The issue of "cause" and the standards governing potential loss of tenured status simply portray *in extremis* the persuasive problem involved in faculty evaluation. A systems approach requires a change not only in concepts of tenure but also in the prevailing approach to evaluation and contract renewal.

The evaluation of clinical faculty tends to be a popularity contest. Since it is assumed that nothing worthy of designation as scholarship will be produced, the only factor for non-clinical faculty to consider other than student popularity is "congeniality" which gets called "collegiality" but amounts to "faculty popularity." Since faculty members who become advocates for students may find themselves unpopular with other faculty, clinical faculty members find themselves contestants in two popularity contests with two very different groups of judges.

A systems approach to faculty evaluation in a clinical context defines the teaching role as the design and management of a system to produce lawyering competence (learning) and client service. Two consequences for faculty evaluation flow from this. First, evaluation of performance should flow from an "output inquiry," determining whether students learn and whether clients are served. Second, the process of faculty evaluation in a clinic must be set in a broad context because the design and management of this learning system is inherently a dynamic process requiring constant growth and change, as well as coping with the unknown.

In short, assessing teaching competence is like assessing lawyering competence. One can define minimums as reflected in specific categories of outputs, but one must create vehicles to encourage excellence which will invariably be of such an individualized nature as to resist conventional definition. Otherwise, in a field where expectations are so vague and undefined, anxiety over adequate performance and over contract renewal can deliberately lead the clinical faculty to develop a student constituency. Developing a student constituency at any cost may, in turn, mean relaxing standards if the rigorous application of standards will alienate students who will then see faculty evaluation as their opportunity for revenge. Experience leads me to believe that if one wishes to take evaluation of clinical teachers seriously then one has to evaluate in a context that promotes growth rather than one that merely generates insecurity.

This objective of individualized evaluation has three consequences. One, there must be considerable specificity in defining what a faculty member should produce in order to secure reappointment; two, the criteria used in defining "scholarship" for purposes of faculty reappointment must be broadened; and three, the reappointment determination should simply be a byproduct of a strategy to encourage both professional and institutional development on the part of the individual faculty member.

How can the first consequence, specificity in defining what a faculty member should produce in order to secure reappointment, best be met? One approach might be to specify in advance that an "output audit" would include an evaluation of case files of clients served, syllabus and clinic management strategies utilized, and an examination of work product files of students (including drafts, critiques of drafts, and revisions) hopefully showing that the student profited from the critique. Because this will doubtless be coupled with some kind of student evaluation regarding their perception of the adequacy of the supervision they received and the nature of the learning they underwent, it is critically important to provide the faculty member with an opportunity for presentation at his or her best. For example, the faculty member could be permitted to select a set of case files or student work products or a tape recorded clinical teaching session, or a videotape of a simulation exercise that exemplifies the teacher's best. In short, the teacher must be encouraged to think in terms of those products, outputs, or activities that evidence his or her capacity to create and manage a learning system which imparts lawyering competence and an internalized sense of professional responsibility. This should also be reflected in the presentation of student work products that evidence learning and growth as a result of participation in that learning system. Such standards decrease the subjective "popularity contest" aspect of faculty evaluation and hopefully provide the clinical teacher with an invitation

to substitute objective evidence so as to reduce the likelihood of unfair or arbitrary judgments.

Meeting the objective of individualized evaluation also must have the consequence of broadening the criteria used in defining "scholarship" for purposes of faculty reappointment. Clinical teachers necessarily engage in different forms of educational innovation or experimentation in order to shape a clinic. The development of manuals, grading criteria, scoring sheets, simulation exercises, intensive instructional materials in substantive and procedural law, case management systems, and unique patterns of delegation and quality control all constitute investments in educational innovation that should be regarded as forms of scholarship in the field of pedagogy. Likewise, particularly outstanding appellate briefs, pleadings, or creative settlement agreements constitute demonstrations of professional competence as role model, teacher and practitioner and should also be regarded as scholarship in the sense that they represent a contribution to the available body of knowledge and materials which can be utilized by students, clinical teachers and practitioners in the future. Finally, clinical education, viewed as systems management, is often the result of a team effort—the team importantly includes students as well as other clinical supervisors. Conventional definitions of scholarship stress "solo" works, and yet real progress in defining competency criteria, rating sheets, and management systems require enormous investments of time and usually require team efforts if they are to be of continuing utility and of use by other clinicians. Our notions of scholarship have to acknowledge that intellectual effort can take many forms and can take place in a group context as well, or better, than that done in isolation.

Thirdly, reappointment must be the byproduct of a strategy to encourage individual and institutional development. A clinical supervisor often feels as though he or she is on a treadmill from which there is no escape, except to the more manageable environment of the classroom. Student expectations and demands for access to clinical faculty are significantly greater than that levied on classroom faculty. This access is likely to have been encouraged, unwittingly or not, by the clinical faculty member because it is a genuine source of personal satisfaction to both parties and because it generates popularity and constituency which can aid a clinical faculty member seeking reappointment or eventual tenure. But such access, after a time, increases the sense of being overburdened. If each student expects an hour of supervisory time each week, and if the clinical supervisor in turn conducts clinically related seminars, case rounds, and regularly scheduled classes, there will be little time left for the clinical instructor to cope with caseload demands. The result is a partially self-induced "burn-out."

In this context, evaluation for purposes of securing reappointment has only negative connotations. It is one more burden for a person who

feels overburdened already; the best that can enure is "more of the same," the worst is non-renewal. Neither is very appealing once the initial novelty of teaching has worn off. As a general rule, negative sanctions at best prevent certain kinds of undesirable behavior and produce various avoidance (or game playing) reactions. They rarely induce affirmative responses, promote growth, increase enthusiasm or unleash creative energies. That requires positive, not negative, sanctions. And for clinical teachers, generally regarded as second class citizens in the academic world, there are precious few incentives. It takes an unusually self-sufficient person to sustain the same level of energy, year in and year out, given the paucity of intrinsic or extrinsic rewards for clinical faculty. Any reward available tends to suffer by comparison with the rewards available to non-clinical faculty.

It makes far more sense, therefore, to try to let the products which form the basis for evaluation be generated as part of an explicit plan for personal, professional and institutional development, and to reward the systematic implementation of that plan at discrete "milestones." Two complementary strategies might generate a different and more positive dynamic. Once again, they involve the creation of a "system" different from that associated with traditional legal education. These strategies are respectively a variant on "the learning contract"⁴¹ as it has developed in higher education, a "mini-grant" program to enable a clinical faculty member to cover the expenses of a project or even to hire an assistant to relieve him or her of some duties so as to free up time to bring a project to completion.

Clinical teachers generally are so busy responding to demands and crises that they have little or no time to plan. One consequence of stressing that clinical education involves the creation and management of a learning system is that it requires the investment of considerable energy and time to create or refine any component of such a system. Unfortunately, day-to-day demands tend to leave neither time, resources, energy or incentive for a developmental investment. If in anticipation of any academic year, a clinical faculty member were expected to draw up a learning contract with two central objectives—professional development of the faculty member and institutional development related to clinical education, scholarship, or client problems—then two major consequences would follow. First, the faculty member would have defined some goals, the attainment of which would provide a sense of

⁴¹ A learning contract is essentially a plan that designates the goals a student wishes to accomplish, the means by which the student proposes to accomplish them, the means by which the student will demonstrate accomplishment and the intervals at which the student will submit agreed-upon products or other forms of evidence. The use of a learning contract for faculty is extraordinary because it makes explicit an obligation of continuous learning, development and contribution as integral and essential to adequate performance as a faculty member.

closure and progress generally missing from clinical teaching. Second, the faculty member would have defined the standards and terms upon which he or she should be evaluated. The learning contract should address the clinical faculty member's concern that he or she acquire new skills, knowledge or proficiency so as to increase "marketability," and where a prior evaluation noted deficiencies, those should be explicitly addressed as part of the professional growth dimensions of the contract. Equally important, the learning contract should address institutional needs such as developing and refining appropriate systems, developing manual or mini-courses in substantive and procedural areas, experimenting with new delivery systems and new technologies, and expanding the body of knowledge on competency-assessment and the relation of professional competence to traditional testing systems like the LSAT or the bar examination. It is not enough to define those objectives and establish timetables. Each clinical faculty member should designate one or more persons as advisors or an advisory panel to provide feedback and critique. Those advisors might be drawn from within or outside the institution, but their importance lies in their ability to provide a relevant world of approval, feedback, and assistance that is now otherwise available. Further, the comments, critiques and evaluations of that advisory panel can be utilized to make the evaluation process a far more balanced and objective inquiry.

The development, negotiation and approval of such a learning contract require the designation of a prestigious and supportive administrator to assist, to comment and to approve; but once approved, the contract does two things. It makes the terms of evaluation more tangible and it creates a built in pressure toward personal development that operates as a counterveiling force to the myriad crises and demands of clinical teaching.

This strategy places evaluation in the context of personal, professional and institutional development. It should be coupled with the provision of positive incentives as an institutional expression of the value, prestige and importance the institution places on clinical faculty members' continuing growth and contribution. Establishment of a mini-grant program, with appropriate provision for publicizing awards and providing for publication or production of the products, could significantly improve the esteem with which clinical faculty are regarded by both themselves and others. An award of a relatively small amount of dollars to facilitate some project, purchase some student research, secretarial or supervisory assistance, secure computer time, or by-pass institutional red tape in setting up a conference or symposium would have a pronounced motivational effect. The principle point is that just as clinical faculty themselves are engaged in the design, creation and management of a learning system, so too they must understand that their own continuing growth, learning and development is essential to

the health and vitality of the clinical learning system they are charged with operating.

IV. SYSTEMS DESIGN AND QUALITY CONTROL THROUGH ACCREDITATION: THE PROBLEM OF INNOVATION

Clinical education represents one, but only one, of a number of possible experimental approaches one might take to educational innovation in law.⁴² Any serious attempt to innovate on a major scale, however, involves a concomitant commitment of resources. One may put "all one's eggs in one basket" as Antioch did with clinical education, or one may set up an optional experimental track as Southwestern University Law School did in attempting to redesign a competency-oriented law school curriculum. But unless infinite resources are available, the decision to innovate on a significant scale involves the decision to forego other types of expenditures. This promptly brings a law school into conflict with the accreditation process, as it currently operates.⁴³

The function of accreditation is to protect the public interest⁴⁴—to

⁴² It would be just as possible to innovate radically in other ways. For instance, use of emerging technology in minicomputers, microfiche, telecommunications and video might make possible a "law school" where the student's home was the classroom, where programmed instruction transmitted via phone or cable to home computers provided highly interactive instruction and testing, and where legal research was taught using Westlaw, Lexis or Juris terminals supplemented by the skimpiest introduction to traditional research materials.

⁴³ The ABA's accrediting authority stems from two sources: the judiciary of each state (or in some cases, the legislature, which determines who may seek admission to practice before its courts, and grant-making agencies of the federal government—primarily the new Department of Education which determines what institutions are eligible to seek public funds and which normally delegates that function to "private" accrediting bodies such as regional accrediting bodies or, in the case of law, the American Bar Association. *Foreward to APPROVAL OF LAW SCHOOLS*, *supra* note 38. Both sources of accrediting power—the state judiciary and the federal government—tend to defer automatically to the ABA's determination. A grant of provisional or full approval by the ABA thus enables graduates of that school to sit for the bar and enables that institution to be eligible to participate in major student aid and other grant or loan programs. Some states have chosen to impose additional requirements (*E.g.*, New York which requires more classroom hours than the ABA. *See BLACK'S LAW DICTIONARY, Requirements for Admission to Legal Practice in U.S.*, New York LXXIX (Revised 4th ed. 1968). Indiana requires particular subjects not required by the ABA. *See generally id.* at LXXVII. Other states have chosen to provide alternate routes by which students from non-ABA accredited law schools might secure admission to practice (*E.g.*, California with its "baby bar," *id.* at LX-XVI, Wisconsin, West Virginia and Mississippi with their diploma privilege, *id.* at LXXVIII to LXXX, and Virginia with its provision for reading for the bar. *See generally id.* at LXXX). Despite the exceptions, the ABA exercises the predominant influence in determining accreditation, and lacking accreditation, a school will be hard put to attract students.

⁴⁴ *See APPROVAL OF LAW SCHOOLS*, *supra* note 38, at 1. "The American Bar Association is virtually and actively interested in ways and means of bringing about the improvement of the legal profession." *Id.* at paragraph 101.

prevent students from being defrauded by institutions which take their money but fail to provide an adequate education, to prevent the public at large from placing reliance on degrees that are meaningless, and to insure that public funds will only go to those institutions which meet certain minimal standards. This licensing function thus requires that the educational process have a certain integrity and substance, but it also has another purpose: to encourage, or at least not to discourage, innovation and experimentation in education which will advance the state of the art and lead, hopefully, to improvement or new approaches and techniques.

Accreditation is not supposed to freeze the educational process or impose some monolithic mold. In law it tends to. The reason for this goes, in part, to the nature of the standards and in part to the advocacy function which the ABA plays for law schools vis-a-vis universities; and advocacy which views law schools as surplus producing centers that can support deficit generating departments or subsidize the escalating central administrative costs of the overall university.

The Council on Legal Education has over the years developed, refined and expanded the standards necessary to secure ABA approval—the sine qua non, for all practical purposes, of sitting for the bar.⁴⁵ Those standards, together with the compilation of interpretations which have evolved over the past ten years,⁴⁶ essentially set certain minimum requirements dealing with curriculum,⁴⁷ faculty,⁴⁸ physical plant,⁴⁹ library,⁵⁰ and tenure.⁵¹ Meeting those requirements costs money and the amount of money is constantly rising due in part to inflation, in part to the median faculty salary requirement, in part to skyrocketing library costs and in part to increased overhead charges by the school. Compliance has also become increasingly costly as the requirements have been made more stringent. And once a school has met the original standards, it is under an obligation to show continuous improvement on all fronts, and cannot simply rest on its laurels.⁵²

Facilities once deemed adequate are no longer adequate. The number of faculty required has increased so that now a 30:1 ratio of full time faculty to students is deemed essential to meet qualitative standards.⁵³

⁴⁵ See note 43 *supra*.

⁴⁶ See, e.g., ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, INTERPRETATIONS OF THE ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (1978) [hereinafter cited as INTERPRETATIONS].

⁴⁷ APPROVAL OF LAW SCHOOLS, *supra* note 38, at 8-12.

⁴⁸ *Id.* at 13-15.

⁴⁹ *Id.* at 22-23.

⁵⁰ *Id.* at 19-21.

⁵¹ *Id.* at 38-41.

⁵² *Id.* at 2. "An approved school shall seek to exceed the minimum requirements of the Standards." *Id.* at paragraph 105.

⁵³ INTERPRETATIONS, *supra* note 46, at 18.

Similarly, one must occupy a building utilized exclusively for law school purposes;⁵⁴ the library must contain all specified sets of statutes, reports, treatises, etc. and the minimal book budget for the library must not only maintain all current collections and subscriptions but must include an additional allowance for acquisition of new treatises, law books, and law-related books.⁵⁵ The library must also be staffed at all times with a professionally trained and credentialed librarian and must be open a sufficient number of hours to meet the needs of the students and faculty.⁵⁶

Faculty salaries must equal or exceed the median of faculty salaries in the geographical area in which the school is located.⁵⁷ A tenure policy is obligatory.⁵⁸ The ability of a school to "attract and retain"⁵⁹ quality faculty will be judged in part in terms of faculty turnover rate, opportunity for scholarly writing and publications,⁶⁰ sabbatical,⁶¹ adequate research assistants, and secretarial and support services.⁶² The calibre of the student body and of the educational program as a whole will be judged in part by the bar passage rate,⁶³ although a bar survey course may not be offered for credit or made a requirement for graduation,⁶⁴ and also in large part by the median LSAT score.⁶⁵ And academic attrition, as well as the willingness of a school to sever students who are having academic difficulties, will be viewed as a factor in determining whether standard students are being admitted purely for the exploitative purpose of extracting tuition.⁶⁶

Those rising "quality" standards are being steadily revised upward in part to prevent the proliferation of low quality law schools. The relation between those "input" standards and the effectiveness of the educational process has yet to be demonstrated, but the "needs" of deans, law

⁵⁴ APPROVAL OF LAW SCHOOLS, *supra* note 38, at 22. "The physical facilities shall be under the exclusive control and reserved for the exclusive use of the law school." *Id.* at paragraph 702(a). This section also provides that if "the facilities are not under the exclusive use, then the arrangements must permit proper scheduling of all law classes and other law school activities." *Id.*

⁵⁵ *Id.* at 19-20, 32-35.

⁵⁶ *Id.* at 21 (paragraph 605).

⁵⁷ *Id.* at 14 (paragraph 405(a)).

⁵⁸ *Id.* at 15 (paragraph 405(d)). An example of the tenure policy is set out. *Id.* at 28-31.

⁵⁹ *Id.* at 14 (paragraph 405(a)).

⁶⁰ *Id.* at 15 (paragraph 405(b)).

⁶¹ *Id.*

⁶² *Id.* (paragraph 405(c)).

⁶³ *Id.* at 8 (paragraph 301(a)).

⁶⁴ *Id.* (paragraph 302(b)).

⁶⁵ See, e.g., *id.* at 16-17 (paragraphs 501-03).

⁶⁶ *Id.* at 5 (paragraph 209). See also INTERPRETATIONS, *supra* note 46, at 7.

professors, and law librarians are somehow deemed to be self-validating if only to prevent law schools from being exploited as profit centers by universities.⁶⁷ In short, virtually unsurmountable entry barriers have been raised to any new law school designed to function in a traditional mold. The legitimacy of that "restraint of trade" by our learned profession is at least subject to question, but it ceases to be defensible when it has the direct result of impeding innovation and experimentation.

What if genuine efforts at innovation in legal education cause a school to violate the accreditation standards because of competition for limited resources? Accreditation procedures provide that a school may petition the Council for a variance if it proposes to offer a program of legal education contrary to the standards and if the proposal is consistent with the general purposes of the standards.⁶⁸ Since among the enumerated purposes are "ways and means of bringing about the improvement of the legal profession,"⁶⁹ it would appear that there should be at least an initial receptiveness. But to my knowledge, no variances have ever been granted.

Serious innovation requires an approach to experimentation that actively encourages such innovation and provides the basis for a structured presentation to defend the innovation. I would propose two approaches. The first and more limited approach would be to specify that innovation or experimentation should be designated as an affirmative defense to a finding of non-compliance and the innovation. The second would be a more fundamental approach seeking to avoid the interim, stop-gap nature of requests to suspend the application of one standard or another.

There are three kinds of situations where innovation is most likely to be an acceptable affirmative defense to nonconformity with accreditation standards. One can be labelled design variance, that is, the violation is the direct result of the design of the experiment because the experiment seeks to test, question, challenge, modify, supplement or supplant one of the assumptions underlying traditional legal education. An example would be where an admissions policy experimentally attempts to challenge the prevailing reliance on the LSAT; another might seek, as a matter of design, to experiment radically with decentralized instruction in the home combined with a centralized assessment process using the emerging availability of home computers operating by cable or telephone to centralized research, substantially eliminating all but the smallest book collection necessary to teach the rudiments of traditional legal research.

The second situation where innovation should be designated as an affirmative defense to a finding of noncompliance with accreditation

⁶⁷ APPROVAL OF LAW SCHOOLS, *supra* note 34, at 4 (paragraph 202).

⁶⁸ *Id.* at 24 (paragraph 802).

⁶⁹ *Id.* at 1 (paragraph 101).

standards can be labelled the resource allocation (or resource priority variance). This variance would be available where compliance with a standard would so distort resource allocation and internal priorities that it would interfere with an alternative use of resources which would be of greater utility if devoted to costs associated with implementing an experiment. Variances involving capital expenditures on libraries and other facilities come to mind. For example, in clinical programs the dispersion of library books to clinical service sites and the emphasis on form books, pleading "banks," and duplicate sets of statutes and court opinions may render the library deficient under the standards in terms of treatises, law reviews, or law-related materials.⁷⁰

The third situation involves personnel variances in selection, classification, and utilization. A clinical program may operate best with a twelve-month year, may involve the use of "graduate students" or a non-faculty category of personnel, may involve no tenure or a radical or modification of conventional tenure, may involve higher turnover rate, may result in less time being allocated for traditional scholarly pursuits. In short, it may necessitate a governance system suited better to a law firm than the conventional faculty-centered mode of governance.

The above discussion represents a preliminary attempt to specify some of the categories of variances that should be codified if innovation is to be encouraged. If variances are to be utilized, then it is necessary to consider the applicable standard of proof and burden of proof. Variances could be rendered meaningless, and conceivably non-existent, if inspection teams are free to second-guess the institution and require the school to prove that the non-compliance was absolutely necessary to achieve the experimentation. There is always some reallocation of resources that can be suggested that might have accomplished a greater accommodation between conventional input standards and the resources needed for innovation. Additionally, the nature of the budgetary process involves so many complex interrelations that a test of "absolutely necessary" as judged by outsiders is one which few if any innovations can meet. The more appropriate approach would be a "reasonable nexus" test; did the school have a reasonable basis related to innovation for making choices that resulted in the alleged non-compliance? Some discretion and some latitude, even for error, must be allowed if experimentation is to be fostered.

The problem with an approach that specifies that innovation or experimentation should be designated as an affirmative defense to non-compliance with accreditation standards is that the school continues under the cloud of suspicion that marginal compliance is being tolerated as an act of largesse, and that otherwise intolerable conditions respecting quality are being permitted simply because the school means well

⁷⁰ See note 55 *supra* and accompanying text.

and is trying to accomplish good things. It never permits the school a forum in which to make its own affirmative case, but instead leaves it in a position where its central strengths can only be introduced as a kind of mitigating circumstance or worse, as akin to a plea of "not guilty by reason of insanity." Further, a designation that a school is continually out of compliance and is saved only by piecemeal exceptions still stigmatizes that school.

A more fundamental approach needs to be developed which includes both the standards and the use of a visiting team. Where innovation is involved, it takes a period of time and considerable continuity on the part of evaluators to determine whether the progress hoped for is being made, and to place in context the confusion and turmoil so often attendant upon experimentation. It requires that the "evaluator" begin with a sympathetic and supportive attitude. This means that the choice of inspector ought to be one that is concurred in by both the school and the ABA. Further, the inspector should be a multi-year role so that the school is not placed under the burden of constantly "educating" new inspectors as to what it is trying to accomplish.

This second and more fundamental approach to experimentation in legal education should seek to avoid the interim, stop-gap nature of requests to suspend the application of one standard or another. Accordingly, a different standard is needed. As this article has attempted to show, a standard by itself will not suffice; that standard must operate within an institutional structure that provided both a forum and a process appropriate to the peculiar challenge inherent in significant innovation. In this case, the appropriate standard is itself less a standard than a mode of inquiry suitable to considering whether the proposed innovation advances the fundamental purpose of the accreditation process. To discharge fully its commitment to fostering innovation in legal education, the ABA should undertake to create a special forum and a special procedure. The forum might well be a special committee on innovation or a special subcommittee of the Council on Legal Education with provisions for adding such other members as appears appropriate depending upon the nature of the innovation involved.

There should be a separate procedure for seeking and securing designation as an experimental institution whereby a school seeking to innovate can secure accreditation without first having to comply with all existing standards or secure waivers of the standards one-by-one. Application for such a designation would include a statement of the nature of and rationale for the experiment, the problem the experiment seeks to address, and the significance of that problem for the profession or for the legal system. A submission in the form of a self-study containing those elements should be considered sufficient to establish a *prima facie* basis for referral to the special committee or forum.

After application and referral, it would be appropriate for the special committee to engage in a process of dialogue which differs from the

quasi-judicative nature of accreditation inspections. The accreditation process can itself be sufficiently onerous, expensive and time-consuming as to effectively discourage innovation. For this reason, I would recommend that the initial inquiry should be limited to two and only two general questions. If these questions are answered to the satisfaction of the committee, then provisional accreditation with designation as an experimental institution should be awarded, coupled with provision for periodic monitoring conducted in a manner jointly agreeable to the committee and the applicant institution.

The two lines of inquiry appropriate to foster responsible innovation could be stated as follows: 1) Is the experimentation being undertaken in a responsible and rigorous fashion to achieve certain objectives, to test certain hypotheses, to utilize certain methodologies and to produce certain results? Have those been articulated and thought through with the rigor one might legitimately demand of any experiment? 2) Because experimentation in legal education necessarily entails experimentation on human subjects (faculty, students, staff, client, administrators), have the safeguards and inquiries associated with experiments on human beings been incorporated? This involves spelling out the meaning of informed consent and the allowable range of risk to which persons may voluntarily subject themselves. In determining the allowable range of risk, one must weigh several factors. The risk to the subject should be outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained so as to warrant a decision to allow the subject to accept those risks. The rights and welfare of such subjects must be adequately protected, and protected to the extent possible consistent with the design of the experiment. Finally, legally effective informed consent must be obtained by adequate and appropriate methods.

All of these questions become apropos in such matters as admissions, student attrition, faculty retention and workload. Even where a totally innovative curriculum is involved, the school may "hedge" its bet by incorporating minimal provisions that would enable a student to gain access to legal knowledge in the conventional fashion should the experiment fail.

At present, the accreditation process actively operates to discourage innovation. While tolerating "add-ons" once full compliance is achieved the process regards them as marginal and distinctly subordinate to maintaining the conventional model with its built-in escalating costs for "bare minimums." The problem was well-framed by Dean Rogers Crampton:

The cautious approach to the future is to spread resources over each of the alternative strategies (for change in legal education) rather than to commit an institution to a single one. For a prestige institution, this approach probably involves less

risk on the downside; but it also involves a reduced likelihood of really outstanding performance in the years ahead.

Only a few schools have dared either to stick with the traditional model in its undiluted form or to place an emphasis on one or another of the three modern trends: Antioch in clinical legal education and Chicago in legal research are two uncharacteristic examples that come to mind. Most law schools have followed the Harvard pattern of maintaining the traditional framework while pursuing all three modern trends simultaneously. It is doubtful whether any schools, except perhaps Harvard, have resources that are sufficient to support adequate programs on all fronts.⁷¹

V. CONCLUSION

However conceptually valid the proposed approach may be, it is reasonable to ask: "Why all the bother?" Does not the foregoing proposal entail an enormous amount of overkill simply to accommodate the inclusion of clinical education in the law school curriculum? Why, indeed, should the resource "tug of war" over a clinic be regarded as different from those involved in adding a single small seminar that has a comparable faculty-student ratio?

First, as most of this article has attempted to demonstrate, clinical education is different to the extent that it involves the creation, organization, and management of a total educational environment. Second, and more fundamentally, clinical education, viewed as a subset of innovation, stands for and embodies numerous different agendas, each of which traditional legal education has failed to address. Some of the agendas are historically rooted such as the under-representation of minorities, the poor, and women in the legal profession. Some of those agendas address the present state of the profession, including basic issues of competence, adequate systems for policing professional responsibility, and more cost efficient methods of delivering legal services to the indigent and the legally indigent (which includes the vast majority of Americans). Some of these agendas reflect the insertion of legal realism as a jurisprudential query regarding whether any of our laws work and in fact whether the legal system itself works. And some of the agendas are future oriented, addressing emerging delivery systems, increased use of paralegals, and the unknown but towering role that technology will play in the future.

Law schools now function both atomistically and eclectically, riding all horses with each professor free to do his or her own thing so long as each shoulders an equitable share of the large required courses which generate the critical tuition revenues. If any law school wished to define itself centrally as committing institutional resources to one distinctive

⁷¹ R. Crampton, *Annual Report on Cornell Law School* (1977) (on file with author).

mission, then compliance with equally escalating accreditation standards would pose a conflict. But the conflict is even greater if one assumes there is no need for any more law schools in the traditional mold but an acute need for new law schools that will address themselves to more distinctive, specialized missions such as one or more of the agendas enumerated above. At this point, the accreditation standards operate as a virtual bar, except where such vast monetary resources can be applied to facilities, faculty, library, etc., that not even the most inflated interpretation of the standards poses an obstacle.

Yet, the availability of resources on that scale may prove least likely where legal education seeks to wrestle with the persistent paradoxes of poverty, inequality, disenfranchisement and injustice. Nor are the problems of innovation limited to the economically disadvantaged. The study of the Common Law was forbidden at Cambridge and Oxford where the glories of Roman Law were celebrated—as Blackstone's writings in academic exile from the Inns of Court tell us.⁷² Langdell survived collegial hostility by sheer longevity,⁷³ and his disciples spread the gospel long before it was fully accepted by colleagues at Harvard. As we enter an age of rapid change, of future shock of the micro-millennium, there is a critical need to find a way to grant more than a grudging acceptance to new approaches lest we find that the model for competition among ideas is not Adam Smith's, but Schumpeter's.

⁷² See generally W. BLACKSTONE, *THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND* (G. Jones ed. 1973).

⁷³ See Tyler and Catz, *The Contradictions of Clinical Legal Education*, 29 CLEV. ST. L. REV. 693, 695 (1980).

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 special 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 Definitions: 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/sequence or 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 fact 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 cast 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) or the elements involved in the use of a discovery instrument. 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 types 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 by 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 assigned others 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. PROFESIONAL 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 weigh alternative courses of action in light of actual or potential situational conflicts in 1 and 2 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 these relate 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.