# ASSESSMENT OF LEARNING OUTCOMES IN TRANSACTIONAL SKILLS COURSES

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| **Judy Rosenbaum**[1] * | *Taming Grading Madness* |
| **Carol Morgan**[2] **&** **Carol Newman**[3] | *Making the Grade: A Guided Discussion Regarding Assessing Learning Outcomes in Transactional Skills-Based Courses* |

## *MAKING THE GRADE: A GUIDED DISCUSSION REGARDING ASSESSING LEARNING OUTCOMES IN TRANSACTIONAL SKILLS-BASED COURSES*

*A guided discussion facilitated by Carol Morgan and Carol Newman regarding assessment of learning outcomes, meaningful feedback, criteria for grades, and the role of the curve in transactional skills-based courses*

**Carol Morgan & Carol Newman**

***Note from Authors:*** *The following description of our guided discussion reflects our questions from our original presentation and our own insights and experiences, together with the insights and ideas suggested by our audience. Our audience represented a variety of law schools, varying in size, geographic location, and curricular emphasis on transactional law and skills, and varying in types of transactional courses, including clinics, simulations, and courses focusing on transactional skills. We are grateful to our audience, who served as a thoughtful, vibrant discussion group in generously sharing their experiences, ideas, and suggestions regarding assessing learning outcomes in transactional skills-based courses.*

### INTRODUCTION

Today, we are planning to discuss topics that are necessarily a part of planning and teaching a transactional skills-based course in a law school curriculum: How to assess learning outcomes; how to communicate these assessments as meaningful feedback; and, when appropriate, how to determine grades that reflect these assessments. We will begin by establishing vocabulary for learning outcomes and assessments relevant to transactional skills-based courses, we will give a brief example of how to incorporate the vocabulary into the discussion, and then we will spend most of our time discussing issues and

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* Editor's Note: Professor Rosenbaum's presentation, "*Taming Grading Madness,*" is omitted, and will be published in a subsequent edition of *Transactions: The Tennessee Journal of Business Law.*

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possible best practices in making formative assessments of transactional skills-based learning outcomes.

But first, let us begin with a brief review of vocabulary. Drawing from the guidance offered by the ABA Standards,[4] we will focus on three terms, as they apply to the law school curriculum: (1) learning outcomes; (2) formative assessments; and (3) summative assessments.

## I. VOCABULARY – LEARNING OUTCOMES AND ASSESSMENTS

***Learning Outcomes*:** Learning outcomes are generally described as descriptions of what students should know and be able to do upon the conclusion of a course or a unit within a course. ABA Standard 302 describes four types of learning outcomes in stating that "[a] law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

> (a) Knowledge and understanding of substantive and procedural law;
>
> (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
>
> (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
>
> (d) Other professional skills needed for competent and ethical participation as a member of the legal profession."[5]

Most transactional skills-based courses are likely to incorporate all four categories of learning outcomes:

- **Knowledge-Based Outcomes:** "Knowledge and understanding of substantive and procedural law"[6]

  *Possible Transactional Example:* [7] Students will be able to understand and distinguish provisions in corporate bylaws.

- **Skills-Based Outcomes:**

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[4] *ABA Standards and Rules of Procedure for Approval of Law Schools*, 2016 A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR 2016-17, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

[5] *Id.* at 15-16 (Standard 302).

[6] *Id.* (Standard 302(a)).

[7] *Please note* that each "Possible Transactional Example" described in this section was an example considered in our guided discussion at the Conference, but none of the "Possible Transactional Examples" is suggested specifically by or included in the ABA Standards.

- **Traditional Legal Skills:** **"**Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context"[8]

  *Possible Transactional Example:* Students will be able to explain provisions in corporate bylaws and make recommendations regarding choices of different provisions.

- **Other Professional Skills:** "Other professional skills needed for competent and ethical participation as a member of the legal profession." [9] According to Interpretation 302-1, examples of "other professional skills" may include "interviewing, counseling, negotiation, fact development and analysis, . . . document drafting, . . . organization and management of legal work, collaboration, cultural competency, and self-evaluation."[10]

  *Possible Transactional Example:* Students will be able to interview and counsel a simulated client regarding possible implications and choices of bylaw provisions.

- **Values-Based Outcomes:** "Exercise of proper professional and ethical responsibilities to clients and the legal system"[11]

  *Possible Transactional Example:* Students will understand and employ principles of ethics and professionalism throughout various aspects of interviewing and counseling a simulated client.

*Assessments:* Assessments are generally described as methods of measuring whether learning outcomes have been achieved. ABA Standard 314 states that "[a] law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students."[12] Interpretation 314-1 further defines the two categories of assessments:

- *"Formative assessment methods"*: "[M]easurements at different points during a particular course or at different points over the span of a student's education that provide meaningful feedback to improve student learning."[13]

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[8] *Id.* (Standard 302(b)).

[9] *Id.* (Standard 302(d)).

[10] *Id.* at 16 (Interpretation 302-1).

[11] *Id.* at 15 (Standard 302(c)).

[12] *Id.* at 23 (Standard 314).

[13] *Id.* (Interpretation 314-1).

*Possible Transactional Example:* Written or oral comments to individual or group, with goal of providing meaningful feedback that will lead to improvement in student learning.

- *"Summative assessment methods"*: "[M]easurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning."[14]

  *Possible Transactional Example:* Final exam, paper, project or presentation, with primary goal of judging whether learning outcome has been met.

It is important to note that Interpretation 314-2 emphasizes that a law school is not required to "apply multiple assessment methods in any particular course . . . [or] to use any particular assessment method."[15]

In addition, for purposes of this discussion, we will use the terms "quantitative assessment" or "quantitative feedback" generally to refer to a method of assessment based on a point or letter grade system, and the terms "qualitative assessment" or "qualitative feedback" generally to refer to a method of assessment based on oral or written comments or delivery of informative feedback described within assessment criteria.

## II. APPLICATION OF VOCABULARY: EXAMPLE

The following example briefly demonstrates the application of the concepts of learning outcomes and assessments in the context of a transactional skills-based course – in this case, a corporate counsel seminar:

**Learning outcome:**

- Student will be able to communicate legal issues to a non-lawyer clearly and effectively

**Assessment methods to demonstrate achievement of learning outcome:**

- Interview and counsel simulated corporate client
- Presentation to simulated board of directors regarding area of current legal risk
- Memo to simulated client regarding issues in contract

**Criteria for assessment:**

- Rubric with qualitative and/or quantitative feedback

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[14] *Id.*

[15] *Id.* (Interpretation 314-2).

- General and individual feedback
- Peer feedback
- Self-assessment

**Communication of assessment:**

- Written and/or oral feedback to individual student
- General oral feedback to class
- Written and/or oral peer feedback shared with individual
- Written and/or oral self-assessment

**Assignment of grade:**

- Grade on individual assignment, based on rubric
- Cumulative performance, with credit for improvement

We will spend most of our discussion time today on Formative Assessments in Transactional Skills-Based Courses. In particular, we will focus on exploring and identifying issues in giving meaningful feedback to students, identifying questions to ask and methods to use in planning formative assessment tools and practices, and sharing successes and challenges regarding issues related to formative assessments in transactional skills-based courses (criteria, communication, assignment of grades, and role of curve).

## III. FORMATIVE ASSESSMENTS IN TRANSACTIONAL SKILLS-BASED COURSES

If we assume that we have identified learning outcomes and methods to demonstrate achievement of learning outcomes (such as simulations, drafting exercises, presentations, etc.), we face the challenging task of how to assess the achievement of such learning outcomes. Transactional skills-based courses generally use a variety of methods to demonstrate achievement of learning outcomes during a course, and these methods are rarely just an end-of-course quiz or project. These methods provide ample opportunities during the course for formative assessments, which, whether graded or not, will ultimately impact a final summative assessment for the course. In addition, transactional skills-based courses often give significant weight to class performance, which also should be assessed in a fair and objective manner.

## A. Criteria for Formative Assessments

### 1. *Creation of Rubrics*

A common (and recommended) method for a formative assessment is for the instructor to prepare, for each written or oral assignment, a rubric that identifies precisely what criteria the student needs to satisfy in order to demonstrate achievement of learning outcomes.

The criteria should be tailored to the specific type of assignment, such as a contract drafting assignment, negotiation simulation, or oral presentation. If class performance is part of an assessment, a separate rubric might be prepared with criteria for assessment of class performance. A rubric might include both substantive and stylistic issues and might contemplate qualitative or quantitative assessment. A rubric can be broad ("student's slides were visually appealing") or specific ("student identified five key factors necessary for an independent contractor agreement").

*Sample Rubric: Contract Drafting Assignment:* A rubric for a contract drafting assignment might include measurements of both substantive and stylistic issues:

| Issue | Assessment | Notes |
|---|---|---|
| **I. SUBSTANTIVE ISSUES** | | |
| Addressed the following substantive issues: | | |
| o [First issue] | | |
| o [Second issue] | | |
| o [Third issue], etc. | | |
| **II. BUSINESS TERMS** | | |
| Addressed the following business terms: | | |
| o [First business term] | | |
| o [Second business term] | | |
| o [Third business term], etc. | | |
| **III. DRAFTING ISSUES** | | |
| Identified parties correctly | | |
| Included definitions section with all defined terms | | |
| Used defined terms appropriately and consistently | | |
| Corrected errors in precedent draft | | |
| Used numbers/dollars consistently | | |
| Used appropriate and consistent formatting and tabulation | | |
| Drafted with clarity and specificity | | |
| Avoided archaic language | | |

| Issue | Assessment | Notes |
|---|---|---|
| Avoided redundancies in provisions | | |
| Used correct cross-references to sections and articles | | |
| Avoided typographical errors | | |
| Used correct grammar | | |
| Set up preamble and signature blocks correctly | | |
| | | |
| TOTAL POINTS or OVERALL SCORE | | |

*Sample Rubric: Negotiation Assignment – Skills:* A rubric for expected skills and strategies to be demonstrated by a student negotiating team in any transactional negotiation simulation, regardless of subject, might include the following:

| Issue | Assessment | Notes |
|---|---|---|
| **I. NEGOTIATION PLANNING** | | |
| Team demonstrated a clear understanding of the facts and issues and its client's interests and objectives | | |
| Team appeared to have a strategy and clear goals and priorities | | |
| **II. FLEXIBILITY** | | |
| Team was flexible in adapting its strategy to new information and other developments during the negotiation | | |
| **III. COMMUNICATION** | | |
| Team was clear, concise, and articulate in communication | | |
| Team displayed confidence and persuasiveness by means of appropriate speech, tone, eye contact, or body language | | |
| **IV. INFORMATION-GATHERING** | | |
| Team was effective in asking questions and drawing out the interests and objectives of the other side | | |
| Team identified mutual interests of the parties | | |
| **V. APPROPRIATE LISTENING** | | |
| Team respectfully listened to the other side and did not interrupt the other side | | |
| Team demonstrated understanding of the other side's interests and objectives through active listening | | |

| Issue | Assessment | Notes |
|---|---|---|
| **VI. CREATIVE PROBLEM-SOLVING** | | |
| Team was creative in developing solutions to problems | | |
| Team demonstrated effort to find solutions with mutual gains | | |
| Team did not lose sight of client's interests and objectives in exploring creative solutions | | |
| **VII. CLIENT ADVOCACY** | | |
| Team clearly expressed client's interests, goals, and priorities throughout the negotiation | | |
| Team effectively advocated for its client and protected the client's interests | | |
| **VII. OUTCOME** | | |
| Team appeared to achieve (or was on the road to achieving) an outcome that met the objectives of its client | | |
| Team adequately and accurately summarized points of agreement and any unresolved issues | | |
| **IX. EFFICIENCY** | | |
| Team followed a clearly stated agenda | | |
| Team effectively used the allotted time | | |
| **X. TEAMWORK** | | |
| Team worked well together in sharing responsibility and providing mutual backup and support | | |
| Team did not talk over each other | | |
| **XI. WORKING RELATIONSHIP WITH OTHER TEAM** | | |
| Team was receptive to the other team's offers and ideas | | |
| Team established a positive working relationship with the other team for future negotiations | | |
| **XII. PROFESSIONALISM** | | |
| Team conducted the negotiation in a professional manner and appeared to observe ethical standards | | |
| | | |
| TOTAL POINTS or OVERALL SCORE | | |

*Sample Rubric: Oral Presentation – Skills:* A rubric for factors expected in a student's oral presentation might include the following:

| Issue | Assessment | Notes |
|---|---|---|
| **I. PREPARATION AND KNOWLEDGE** | | |
| Appeared adequately prepared | | |
| Demonstrated understanding of legal issues | | |
| **II. COUNSELING** | | |
| Addressed issues completely | | |
| Explained issues with clarity | | |
| Offered reasoned options and advice | | |
| Used sound judgment | | |
| **III. ORGANIZATION AND EFFICIENCY** | | |
| Presented issues in organized way | | |
| Focused on issues without unnecessary detail | | |
| Used time wisely and covered important issues in allotted time | | |
| **IV. COMMUNICATION** | | |
| Spoke clearly and articulately | | |
| Spoke with appropriate volume, speed, and projection | | |
| Spoke in a manner appropriate for the audience | | |
| Maintained the interest of the audience | | |
| Invited and led discussion effectively | | |
| **V. USE OF SLIDES OR OTHER VISUAL MATERIALS** | | |
| Used appropriate amount of text | | |
| Used text size and color that are readable | | |
| Used visually appealing materials | | |
| Explained materials clearly, without excessive reading of materials | | |
| **VI. TEAMWORK (IF APPLICABLE)** | | |
| Worked well with partner in sharing responsibility and providing support | | |
| **VII. POISE AND PROFESSIONALISM** | | |
| Demonstrated confidence by appropriate speech, tone, eye contact, or body language | | |
| Avoided distracting habits and mannerisms | | |
| Commanded respect | | |

| Issue | Assessment | Notes |
|---|---|---|
| Demonstrated collegiality in working with others | | |
| Exhibited professional demeanor | | |
| | | |
| TOTAL POINTS or OVERALL SCORE | | |

*Sample Rubric: Class Performance:* A rubric for a student's class performance might include the following:

| Issue | Assessment | Notes |
|---|---|---|
| **I. PRESENCE** | | |
| Arrived at class on time | | |
| Attended class regularly | | |
| Missed class only in accordance with announced policies for excused absences | | |
| **II. PREPARATION** | | |
| Prepared for class adequately | | |
| Demonstrated preparation when responding to questions or making comments in class | | |
| Allowed sufficient time to prepare drafting assignments satisfactorily | | |
| **III. PARTICIPATION** | | |
| Stayed focused and engaged during class without other distractions | | |
| Initiated thoughtful contributions and questions in class (based on quality versus quantity) | | |
| Actively participated in break-out groups | | |
| Sought guidance from professor outside of class as needed | | |
| **IV. PROFESSIONALISM** | | |
| Gave prior notice of absences and other conflicts to instructor and, when appropriate, to teammates | | |
| Carried fair share of workload and met deadlines in group projects | | |
| Complied with professor's guidelines and law school's Honor Code in preparing drafting assignments | | |
| Demonstrated commitment to excellence in work product | | |
| | | |
| TOTAL POINTS or OVERALL SCORE | | |

### 2. *Use of Rubrics – When to Share?*

In designing a rubric, it is important to determine whether and how it will be used to provide meaningful feedback to the students.

Initial questions arise as to whether and when students will have access to a rubric.

- Does the instructor use the rubric for assessment only, and then provide separate feedback to the student?
- Does the instructor share the rubric with the student before the assignment and/or after the assessment?
- Does the instructor only provide a portion of the rubric to the student (*e.g.,* criteria on style versus substance)?
- Does the student use the rubric to perform either a self-assessment or peer assessment?

**<u>Summary of Discussion and Insights: Sharing the Rubric</u>**

### *Timing – Before the Assignment:*

*Decision Not to Share:* Some instructors do not share the rubric with students before an assignment. Their reasoning may be that they want to see how students will perform "on their own" and then use the rubric as a basis for assessment and instruction.

*Sharing Only General Evaluation Criteria:* Other instructors provide the rubric (at least with respect to stylistic issues) before the assignment. For example, before a drafting assignment, students might know that the evaluation criteria include the following: clarity and specificity, organization, absence of typographical errors, correct use of grammar, consistency in formatting, and appropriate use of defined terms. The reasoning behind this approach may be that an instructor wants students to know up-front what will constitute an excellent draft, so that students will focus on these issues in their attempt to produce quality work. Some instructors provide only general criteria in rubrics to avoid encouraging students solely to "write to the rubric."

An instructor might choose not to inform the students about the particular substantive issues that the students will need to cover in their drafts, so that students will learn these issues on their own in the same way that attorneys do. For example, if a student is drafting a purchase agreement, the rubric provided to students in advance might not identify the specific representations and warranties that a student will need to include.

### *Timing – After the Assignment:*

***Sharing in Connection with Feedback:*** When providing feedback to students after an assignment, some instructors share the rubric (at least with respect to stylistic issues) along with their feedback (whether qualitative or quantitative). This approach helps students perceive an objective basis for assessment and identify areas for improvement.

***Sharing in Connection with Self-Assessments and Peer Assessments:*** An instructor might provide a rubric to students to use for self-assessment of their own work or to assess their peers' work (a "trade and grade" approach). These initial assessments have the dual benefit of providing learning opportunities for students and reducing the instructor's burden of grading. An instructor might then assess the quality of the self-assessment or peer assessment to provide additional instruction to students. Because some students do not conduct a realistic critique of their own work (they are either too harsh or not harsh enough), instructors often choose to have conversations with both types of students to ensure fair, objective, and meaningful self-assessments.

### 3. *Use of Rubrics – Additional Questions*

We can also consider additional questions about how the instructor will use a rubric:

- Does the instructor provide a quantitative assessment based on the criteria?
- Does the instructor use the rubric only for qualitative feedback?
- Or does the instructor use the rubric to provide both quantitative and qualitative assessments?
- Does the instructor use the rubric to make comparisons of the performances of students?
- Are some rubrics used solely for grading purposes (quantitative assessment) and not to provide qualitative feedback?

## **Summary of Discussion and Insights: Additional Questions about the Rubric**

Based on the criteria in the rubrics, some instructors provide quantitative assessment on an assignment, others provide only qualitative assessment, and some provide both quantitative and qualitative assessments.

*Quantitative Assessments:* For quantitative assessments, some instructors assign a letter grade or number to each criterion and/or to the assignment as a whole. For example, an instructor might assign a number 1-5 to each criterion based on the following system:

- 5= exceeded substantially all expectations
- 4= met substantially all expectations and exceeded expectations in some respects
- 3= met substantially all expectations
- 2= met some expectations; did not meet other expectations
- 1= did not meet expectations

The student would then receive a numerical assessment for each criterion and/or for the assignment as a whole. This number may or may not correlate to a letter grade. The instructor might inform the class of the mean or median and/or the range of numbers for the assignment.

Another type of quantitative assessment used by instructors involves assigning a specific number of points to a particular criterion, and the points allocated to specific criteria might be weighted to emphasize the importance of those criteria. For example, if students were asked to review a real property lease in the context of a proposed acquisition transaction, a rubric might give more weight to the identification of a substantive provision like an anti-assignment provision, which could affect the planning of the entire transaction. Lesser weight might be given to the identification of typically anticipated lease provisions, such as requirements to keep the property in good condition.

At the end of a course, for a final project, assessment might be on a quantitative basis only, because there might not be an opportunity for qualitative assessment. However, some instructors provide qualitative assessment in summary form to a class after the course is over.

## B. Communication of Feedback

Once a rubric is completed, the next step is to communicate the feedback to students (assuming the rubric is to be used for formative assessment):

Does the instructor provide written feedback (with or without the rubric)?

- Does the instructor provide oral feedback (with or without the rubric):
    - To the class as a whole?

  - To a small group of students?
  - To an individual student?
- How does the instructor communicate peer feedback?

**<u>Summary of Discussion and Insights: Communication of Feedback</u>**

*Qualitative Feedback – Methods of Delivery:*

*Written Comments, Summaries, Marked Rubrics, Demonstrations:* For qualitative feedback, instructors might write comments on a draft or a rubric, or provide a written summary of "most frequent errors" to the class. Instructors might provide feedback to the class as a whole. One method is to project a student's draft on the screen (preferably with the student's permission or without identification of the student) and make revisions, with help from all students in the class. Another method is for an instructor to review drafts before class and share "most frequent errors" to the class while students mark their own drafts individually. Instructors might also meet individually with individual students or small groups of students to provide oral feedback.

Some instructors provide a model answer or a demonstration of the skill to the students. For example, after a counseling simulation, practicing attorneys might demonstrate how they would have answered a question or negotiated a particular issue.

*Group Evaluations:* For group work, instructors might require students to conduct a written evaluation of their own performance and the performance of their peers in the group. To provide structure for this review, an instructor might provide a rubric that includes an explanation of the different roles in a group (such as researcher, drafter, editor, etc.) and then require students to rotate roles in order to allocate responsibilities fairly and benefit from a variety of experiences. Instructors might share written peer feedback (often on an anonymous basis in a small group situation) to help students improve. This method of group evaluation helps eliminate "whining" or "freeloading."

*Peer Evaluations:* For written peer review of other assignments (such as a drafting assignment or a presentation), instructors sometimes share the peer review with a student, thus necessitating a decision as to whether the peer review will be provided on an anonymous basis. Because peer review in actual law practice is not on an anonymous basis, an argument can be made to provide peer feedback of such assignments with disclosure of the peer reviewer's identity, but an argument can also be made for the comfort of anonymity in a classroom learning environment. Another way for peers to provide feedback, particularly for simulations or presentations, is to allow time in class for oral comments regarding strengths and areas for improvement, either to individuals, in small groups, or to the class as a whole.

*Formative Assessments of Self-Evaluations and Peer Evaluations:* As noted earlier, students can benefit from the instructor's assessment of the quality of their self-assessments or peer assessments, and the instructor's assessment can be communicated orally or in writing, either to a student individually or with more general comments to small groups or the class as a whole.

## C. Assignment of Grade

Assuming a transactional skills-based course is not graded on a pass/fail basis, most instructors agree that assigning a grade is the most difficult part of teaching a transactional skills-based course. The challenge is to find a system that is equitable and defensible. As we often say, grading is what we get paid for; the rest of teaching is pure pleasure. Several questions arise with respect to both grading assignments during the course and assigning a final grade.

### 1. *Grades During the Course*

- Does the instructor assign grades to work product during the course?
    - If so, how does the instructor strike a balance between providing honest, meaningful feedback and encouraging students to continue to grow and improve?
    - If the instructor grades on a curve, what system does the instructor use for grading work assignments during the course that (a) is consistent with and subject to the requirements of the curve, and (b) avoids misleading students? (*See* the discussion below on the appropriateness of the curve in transactional skills-based courses.)
    - Does the instructor assign different grades for substance vs. style within one project or assignment?
    - Does the instructor assign interim grades on first drafts, with such interim grades being subject to change (in part or in total) based on revised drafts?
    - Are first drafts ungraded, with grades assigned to revised drafts only?
    - Does the instructor assess students on an anonymous basis?

**Summary of Discussion and Insights: Grades During the Course**

## *Methods of Grading Transactional Skills-Based Courses:*

*Formative Assessments without Grades:* Some instructors provide only qualitative feedback and do not assign points or grades to individual assignments during the course. The feedback is intended to help students improve on subsequent assignments and ultimately to achieve a more successful final assessment. One risk of not assigning points or grades during a course is that students might not recognize the need to strive for improvement during the course and might wait to put all of their efforts into a final assessment without taking the necessary incremental steps along the way to learn and improve. Another concern is that students, who are usually conscious of grades, might not have a sense of how well they are performing and whether they are meeting the expectations and requirements for the course. On the other hand, an advantage of giving formative assessments without grades is that the instructor may be able to take a "big picture view" and evaluate and give credit to a student for overall progress during the course. With such an approach, the student is not penalized for mistakes earlier in the course and can focus on improvement.

*Formative Assessments with Grades:* Other instructors assign points or grades on each assignment during the course. A variation on this approach is for an instructor to provide qualitative feedback on multiple drafts of an assignment, with points or grades only on the final draft of the assignment. Or an instructor might assign points or grades on an initial draft of an assignment and then give the students an opportunity to improve their points or grades (within parameters) on a subsequent draft of the assignment. Some instructors assign different points and grades on stylistic issues (such as formatting or grammar) versus substantive issues (such as inclusion of appropriate indemnification provisions). Qualitative feedback, when combined with points or grades, should be meaningful, with both encouraging comments and honest feedback about areas for improvement, so that students who earn low points or grades are still encouraged to work hard and improve.

*Considerations When Choosing a Grading System for Formative Assessments:* As noted earlier, some point systems for grading assignments during the course do not necessarily correlate to letter grades, although an instructor might provide information to the students about the mean or median or range for the class. This type of system helps to allow flexibility if a curve is required for the final grades in the course.

If letter grades are assigned during the course, and a curve for the course is required for the final grades, instructors need to be sensitive to the fact that letter grades during the course may be misleading to students. For example, a student might receive an A- on every assignment during the course and then be surprised to receive a B+ for the final grade based on the application of the curve. One way to avoid this result is to grade strictly, with a goal of lower grades during the course, but with a plan of adjusting final grades upward with the application of a curve. A disadvantage of this approach is that such lower grades might not provide realistic assessments and might instead unnecessarily discourage students from believing that they can improve during the course. In any event, clear communication to students about the point or grading system is essential.

Some instructors curve the points or grades for each assignment; others wait to curve at the end of the course. A numerical system tends to avoid the rounding problem that can occur with assigning letter grades during the course, given the big gap between certain letter grades (such as the numerical gap between an A- (3.7) and a B+ (3.3)).

While assessing transactional skills-based assignments on an anonymous basis may be challenging, particularly if an instructor meets with a student individually about multiple drafts or if a student participates in simulations or presentations, some law schools require at least some form of anonymous grading. When this method is feasible, it helps to demonstrate fair and objective assessment.

### 2. *Final Grades*

Regardless of whether formative assessments during the course are delivered with or without grades, a number of questions remain regarding determining final grades:

- How does the instructor assign a final grade for the course?
    - Is the final grade based on a summative assessment, an aggregation of formative assessments, or a combination of summative and formative assessments?
    - How do formative assessments factor into a final grade?
    - Does the instructor average all the grades on assignments during the course?
        - Does the instructor use weighted grading for different assignments (and class performance)?
        - Does the instructor give more weight to later assignments?
    - If the instructor does not assign a letter grade to work product during the course, how does the work product affect the final grade?
        - Does the instructor assign numbers that do not necessarily correlate to grades but will be taken into account for a final grade?

- Does the instructor use a check/plus system and then convert this system to a final grade based on pattern and/or improvement?
- What other methods are used?

- If class performance is part of the final grade, how is a grade assigned to class performance?
  - How does the instructor track student performance during the course?
  - Does the instructor give feedback to the students during the course?
  - Do the students do a self-assessment and/or peer assessment?

## **Summary of Discussion and Insights: Final Grades**

### *Aggregation of Formative Assessments:*

As noted earlier, some instructors provide only qualitative assessments during the course and have a quantitative assessment at the end of the course based on a final project or other method to determine a student's final grade. Some instructors aggregate formative assessments during the course (which might include qualitative and/or quantitative assessments) to determine final grades. Other instructors both aggregate formative assessments during the course and use a summative assessment based on a final project or other method at the end of the course to determine final grades.

If formative assessments on assignments during the course include quantitative assessments, instructors often use these quantitative assessments to factor into the final grade as part of a point or grading system. Instructors might give different weight to different assignments and/or give more weight to later assignments.

If formative assessments on assignments during the course only include qualitative assessments (such as comments or check/plus), some instructors review the overall progress or pattern of improvement of the student to determine the impact of these assignments on the final grade. A cautionary note about this method is that it might be less objective than a point or letter grading system.

### *Assessment of Class Performance:*

Class performance is often a factor in a final grade in a transactional skills-based class. Some instructors use a subjective approach to assess a student's class performance and might only assess class performance to bump a grade up or down. The risk of relying on memory to assess class performance is the tendency for an instructor to remember the most recent events and overlook significant events in the past. Other instructors use a rubric (*see* example of a rubric for class performance above). In order to promote fairness and objectivity, some instructors provide a rubric to students at the beginning of the course (so that expectations are clear), keep notes on student performance during the course (preferably after each class) on both positive and negative aspects (such as particularly profound comments, absence without notice, etc.), provide a mid-term assessment to students, and/or require students to conduct a self-assessment at the end of the course. Another method is to use peer assessment to identify other students in the class whose class performance has been particularly meaningful or helpful. Instructors can be surprised by the impact students have on each other, for that impact might not be apparent from the vantage point of the instructor.

Some instructors do not evaluate class performance at all, because they do not want to penalize students who tend to be quiet and introverted. However, others emphasize that promoting active participation is an essential component of a transactional skills-based course that is intended to teach students about the practice of law. One of the skills that students need to develop, especially those who are quiet and introverted, is to be comfortable in communicating with others about legal issues, in asking questions, and in offering opinions.

The authors emphasize that we do not want our students to be passive lawyers. We want them to be actively engaged with their clients and to have the confidence to ask appropriate questions and to provide clear and competent advice. Students need to practice these communication skills in a safe environment in law school, so that they can be prepared for the practice of law. We believe that we do not serve our students (or their future clients) well if we allow them to be passive and reticent and do not set expectations to help them develop the vital communication skills. Of course, it is up to each instructor to help create a safe environment for learning and practicing these communication skills in an atmosphere of trust and respect for everyone in the classroom.

## D. Appropriateness of Curve in Transactional Skills-Based Courses

Our conversations before and during the Conference have led us to the conclusion that law schools vary considerably in their approaches to the applicability of the curve to transactional skills-based courses. Some law schools require the curve for all courses, whereas others have an exemption from the curve (or at least a different and higher required mean for the curve) for courses that meet certain criteria, such as courses of small size, courses that do not have exams, courses with group grading, clinical courses, simulation courses, and seminars. As a result, transactional skills-based courses are subject to application of the curve in some situations, and they are exempt from applicability of the curve in other situations.

A number of arguments exist both for and against the application of the curve in transactional skills-based courses. These same arguments may apply to other skills-based courses as well, but this discussion focuses on transactional skills-based courses.

- Arguments for application of the curve:
    - Promotion of equitable treatment of students in all courses at the law school, regardless of type, nature, or size
    - Promotion of equitable treatment of students who perform the same assignment in a course
    - Promotion of consistency in grading in law school courses within certain defined parameters
    - Avoidance of grade-shopping for courses that have a higher grade point average than courses graded on a curve
- Arguments against application of the curve:
    - Use of criterion-referenced (versus group-referenced) grading in transactional skills-based courses
        - Grading on a curve measures student performance based on how other students perform (typically, on an exam in a course); in a transactional skills-based course, student performance is typically based on individual achievement of certain metrics or criteria, and comparison to other students' performance is less meaningful.
    - Wide disparity in skills among students
        - Students have different strengths and weaknesses and are working on improving different competencies; making an apple-to-apple comparison with other students might not be appropriate.
        - Students need to focus on their own individual skills development and not on whether they measure up to another student's performance

- Grading should reflect whether and how well a student individually meets or exceeds the learning outcomes for the course, not how the student compares with another student.

- Need to encourage risk-taking and learning from mistakes
    - In a skills-based course, taking risks and making mistakes are opportunities for learning and growth; grading on a curve, which penalizes students for mistakes, could discourage risk-taking and deprive students of valuable learning opportunities.
- Regular feedback by instructor, with opportunities for improvement
    - A unique aspect of transactional skills-based courses is that instructors generally provide significant feedback to students throughout the course, thus giving students ample opportunity to improve their skills; students should be rewarded if they take advantage of these opportunities.
    - Curve-based grading could have the unintended consequence of hurting motivation and reducing the student's incentive to do his or her best; if a student performs poorly on one assignment, the student may conclude that no amount of effort would overcome the disparity with other students.
- Potential inequity in grading among high-performing students
    - Comparing students who have equally met the criteria of a course and straining to draw distinctions could produce inequities among high-performing students.

## IV. CONCLUSION

Given the wide choices for grading practices and diverse application of these practices by law schools and faculty members within law schools, and given the ABA's emphasis on appropriate assessment of law students, law schools would benefit from continued expansion of open and honest discussions among faculty members (and among law schools) about assessment practices, including use of rubrics, communication of feedback, assignment of grades, and appropriateness of the curve to transactional skills-based courses.

Furthermore, we must consider each of these topics in the context of individual types of transactional skills-based courses, such as clinics, simulations, and other types of courses focusing on transactional skills. We have a lot to learn from each other as we all strive to prepare law students for the practice of law in the most meaningful and effective way possible.