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When the ABA Comes Calling, Let's Speak the Same Language of Assessment

By David Thomson

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Introduction

There has been much discussion recently in legal education circles about the need for improvements in assessment. Recently, the American Bar Association has responded by adding an assessment requirement to the accreditation standards, making the subject even more urgent.¹ Because most of us in the legal academy are new to the language and methods of assessment, there have been misunderstandings. And further, because there are different levels of assessment and each level usually has different goals, sometimes the discussion can become confused. It is imperative that we understand the different levels and goals of assessment projects, so we may communicate more effectively with each other and meet the new ABA Standards in an efficient manner. This article will attempt to clarify and simplify the discussion of assessment as it applies to law schools. If we all understand what we are talking about and what we are doing in this area, we can share information more readily and accurately, and advancements will be quicker and more effective.

Over the last few years many law school faculty have reacted to the increased focus on assessment in an understandable but dismissive way:

“What? I know how to give my students a great final exam, and to grade them. I know all about assessment!” And some have felt threatened by the discussion, since they worry that this

increased focus will challenge how they grade their students, and many believe in the accuracy of their methods. Worse, many also worry that this discussion is really a veiled attempt to violate their academic freedom and tell them what to teach.²

This difficult and at times confused and confusing discussion has been spurred primarily by two related developments. First, university-level accreditation bodies are focusing more on assessment, and requiring that the universities that they accredit have in place a well-designed assessment plan. Universities, in turn, are starting to require law schools to prepare assessment plans and submit them to a central assessment office for review. Second, the law school accreditation body—the American Bar Association—has recently moved towards requiring more assessment efforts in legal education. So two forces are converging on law schools requiring that they engage with this topic more deeply.

At the first law school assessment conference—which the author hosted in Denver³—Steve Bahls, who at the time was chair of the ABA committee working on this project, brought the first draft of an ABA Accreditation requirement for an assessment plan in law schools to the conference and presented it to the attendees for comment and discussion. Since those heady days in the fall of 2009, the ABA has

¹ The ABA adopted Standards 301(b), 302, 314, and 315—all of which relate to assessment—in August 2014 ... They go into effect for students entering law school in the fall of 2016.

² Some faculty might also be concerned that if students are asked about outcomes in their end-of-semester evaluation of the course, such feedback might impact teaching assignments or contract renewals (for 405(c) faculty) ... Of course, it is hard to defend such a position; if a teacher says a learning outcome for a course is X, and a student doesn't feel they learned that X material or skill in the course, they probably should be allowed to give such feedback to the teacher and the school ...

³ This Conference, which took place on September 11-13, 2009, brought together leaders and early adopters in the subject of law school assessment methods and protocols in clinical settings, as well as legal writing and traditional doctrinal courses ... The program, materials, and video of each session for this conference may be found here: <http://www.law.du.edu/index.php/assessment-conference>.

“It is imperative that we understand the different levels and goals of assessment projects, so we may communicate more effectively with each other and meet the new ABA Standards in an efficient manner.”

received a great deal of feedback on several drafts of the assessment requirement, much of it along the lines described above. While the standards the ABA has just adopted are not as rigorous or clear of a requirement as many educators hoped for, it is clear that some sort of an assessment plan will soon be required in all law schools.

The New Standards: More Questions Than Answers

Standard 314—Assessment of Student Learning

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.⁴

This requirement, taken alone, is so vague as to beg a whole set of questions, such as: all law schools include both formative and summative assessment already—is this standard suggesting an adjustment, such as encouraging of more formative assessment? All summative exams measure student learning, and an argument can be made that they improve student learning as well (students generally get better at taking them during law school)—is this suggesting that nothing needs to be done? Or will a midterm exam added to many (if not most) courses suffice to “provide meaningful feedback”? Worse, the two interpretations provided for Standard 314 are unhelpful as well. The first one explains the difference between summative assessments (such as final exams) and formative assessment (such as mid-semester feedback that students can use to improve their work in the course). The second one makes clear that the ABA was not asking schools to “apply multiple assessment methods” in any particular course, and that schools are not required to “use any particular assessment method.”

Fortunately, the ABA did not stop there; Standard 315 and the interpretation that follows it provide more support for a substantial assessment process in law schools.

Standard 315—Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods

The dean and the faculty of a law school shall conduct ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.⁵

The interpretation that follows this Standard supports a more robust assessment model in law school because it provides examples of methods that “may be used to measure the degree to which students have attained competency in the school’s student learning outcomes. ...” Some of those methods are the traditional ones (bar exam passage rates; placement rates) but some are new, such as “student learning portfolios, and student performance in [courses] that ... assess a variety of skills and knowledge.”⁶ This accreditation standard taken together with the interpretations sound more like what assessment is supposed to be about: not just final exams or even midterms in particular courses, but an evaluative process conducted across the curriculum and throughout the law school. Unfortunately, it remains unclear whether the ABA is encouraging assessment that takes place at the school level (bar exam passage), or course level (student performance), or the program level (learning portfolios), or all three.

Simplifying Assessment: It’s a Process

Because of the lack of clarity in the new standards, a review of what the development of an assessment plan is supposed to entail might be helpful. One of the first things to understand about assessment is that it is not an event but rather a continual cyclical process. At its best, an assessment plan has a goal of continuous improvement, which operates through a repeating cycle. There are many explanations easily found on the Web that illustrate assessment cycles, but the steps involved are essentially the

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⁴ ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015, Standard 314 (2014).

⁵ *Id.* Standard 315.

⁶ *Id.* Interpretation 315-1.

same: 1) Articulate measurable student learning outcomes (goals and objectives), 2) Teach your students, and 3) measure those outcomes, 4) Make adjustments to what is being taught or assessed (or both) based on those measurements, 5) Rinse and repeat. Here is a simplified diagram of the cycle:

This article is not intended to replace or replicate the many articles and books on the subject of assessment.⁷ But a small amount of detail about each of the steps listed above is in order.

First, a learning outcome is something you hope and plan for your students to be able to do with what you teach them over the course of a course segment (or semester). A *measurable* learning outcome is one that is, quite obviously, measurable—preferably in a way that is both accurate and reliable. So we want to set learning outcomes for our students that can be measured with a rubric or similar grading and review process based on work they have done during the course of the semester (or at the end of the semester). Second, it is important to tie your measurement of student work in the semester to the outcome you set. But what does that mean? It means that you give some thought to whether the instrument of measurement (exam, oral presentation, written document) is designed to accurately measure student progress towards the learning goal that you set.

Third, if we engage in the first and second steps fully, we will usually discover that students are not learning all that we wanted them to learn, or not fully able to do what we hoped they could do. Ideally, this inquiry leads to a focus on making adjustments to the course materials or subjects addressed or teaching methodologies used (or some of each). Sometimes it leads to revisions to the learning

outcomes—either because they were discovered to be less precise than we hoped, difficult to measure, or just do not reflect what we wanted our students to learn. So adjustments are made—either to the learning outcomes or to the measurement of those outcomes or to the teaching methods, or a combination of all of these. Note that it is important that a teacher be willing to make changes even midstream—during a course—to reflect weaknesses in their own teaching or their students’ learning, but not to merely adjust outcomes to downgrade student expectations. An effective assessment plan is aimed at improving both teachers’ teaching and learners’ learning. Overall, the purpose of engaging in this methodology is that, ideally, it *all* gets better: continuous improvement throughout the law school.

When we encounter colleagues of good faith who find engaging in this process to be threatening, perhaps the best thing would be to respond with this question: “What could possibly be wrong with writing out a list of things you would like your students to know and be able to do at the end of the course or program you teach?” Most law school faculty, given a relatively short time frame, could make that list with little difficulty. And then perhaps the follow-up could be: “Having made that list, what could possibly be wrong with considering the best ways to measure achievement of those things you want your students to know or be able to do?” Often, the answer to these two inquiries is: “Actually, making the list wasn’t difficult. And I think my final exam does a good job, or I can tell from the papers they write, that they did (or did not) achieve the goals that I have for them.” Having gotten that far, usually faculty become engaged in the process of making adjustments when they feel their goals for their students are not being met. When it becomes part of the culture to do this on a regular basis, continuous improvement will be a natural by-product.

Different Levels and Different Goals

Having simplified the assessment process here, the reality is that as the new ABA Standards begin to be applied it will become more complicated. Already discussions about assessment can quickly become

⁷ There are many, but a few of the key sources are: Gregory A. Munro, *Law School Assessment* (2004); Andrea A. Curcio, *Assessing Differently and Using Empirical Studies to See If It Makes a Difference: Can Law Schools Do It Better?*, 27 *Quinnipiac L. Rev.* 899 (2009); Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 *S. Ill. U. L.J.* 225 (2011); Rogelio Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 *Barry L. Rev.* 73 (2010); Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 *Cap. U. L. Rev.* 837 (2013).

“Note that it is important that a teacher be willing to make changes even midstream—during a course—to reflect weaknesses in their own teaching or their students’ learning, but not to merely adjust outcomes to downgrade student expectations.”

confused or confusing because it is not immediately clear what sort of assessment is involved, at what level the assessment is taking place, and/or what the goal of the assessment program is going to be. This is exacerbated by the indeterminate nature of the standards, which will add to the confusion. Because there are several different goals of assessment, and the level at which it can take place is different, it is important that we understand those differing goals and levels so that when we speak of assessment to each other, we are oriented to the sort of assessment effort we are talking about, and we can more immediately understand each other.

Assessment takes place (or should take place) at four different levels in law schools: 1) the student level, 2) the course level, 3) the program level, and 4) the school level. And there are two different goals to most assessment efforts: 1) Continuous improvement of student learning, and 2) Providing affirming evidence of the value and efficacy of the educational opportunity being offered. These levels and goals—and their relationship to each other—can be illustrated in the diagram below:

Level	"Where we are now"	Goal: Continuous Improvement of Student Learning	Goal: Providing Evidence of Effective Instruction
Student	Mostly Summative Assessment	Formative Assessment	Students are learning what the course is designed to teach them
Course	Not often happening	Formative and Summative Assessment	The course is meeting its learning goals across the students enrolled
Program	Rare	Cross-Course, Program-wide Assessment	The Program is meeting its learning goals across classes and faculty members in the program
School	Bar Exam	School-wide assessment for curricular adjustments	The School is achieving school-wide learning outcomes

At the student level, the most common goal is to measure how much of a subject the student learned over the course of the semester. Traditionally, this has been done through a final exam, or what is known as summative assessment, where it is the sum of the learning that is assessed. As law school curricula move toward more skills courses and experiential learning, the preferred method of assessment is formative in nature—that is, the assessment helps to form the student’s learning and to help them improve over the course of the semester.

At the course level, the most common goal is continuous improvement of student learning, both that year and in the future. Its simplest form is illustrated in the brief review of the assessment cycle above. When measurable goals are articulated and measured throughout the course, improvements can be made to the course year over year. A wise colleague once said to me: “One of the great things about teaching is that it is like Groundhog’s Day—each year we get a new crop of students to experiment on.” This refers to course-level assessment—improving student learning in the course each year.

Program-level assessment is something that is in its infancy in law schools, but will likely be a part of most assessment plans going forward. The idea of program-level assessment is to look at all similar courses, or the legal writing program as a whole, or the clinic as a whole, or courses in a certificate program as a whole. This sounds difficult and complicated, but does not have to be.⁸ Such an assessment program may have as a goal continuous improvement of student learning in the program. But it may have a different aim as well: to assess how the program as a whole is achieving its learning goals as a program.⁹

School-level assessment is the Holy Grail in law school assessment, and some would say just as unachievable. But this would involve an effort to set learning outcomes for the entire program of study, with either a goal of improvement of student learning, or evidence of effective instruction.

For school-level assessment with the second goal we have long had the bar exam. Indeed, I have heard a university assessment officer say, with approval: “Well, you have the bar exam!” And indeed, we

“School-level assessment is the Holy Grail in law school assessment, and some would say just as unachievable.”

⁸ [David I. C. Thomson, Using Student Evaluation Data to Examine and Improve Your Program, 21 Perspectives: Teaching Legal Res. and Writing 115 \(2013\).](#)

⁹ Such a plan for programmatic assessment can be fraught with issues ... Faculty are often understandably concerned that such a program-wide assessment effort might be a veiled attempt to ferret out particularly poor-performing teachers. But that is for the review process, and as long as anonymity by professor can be maintained in the data collection process and its review, it should be workable for all concerned.

“[I]t is worrisome that many faculty members on the one hand openly criticize the bar exam as being a tool that does not accurately indicate preparation for law practice, while on the other hand have little interest in how a program of proper school-wide assessment could make for a significantly better assessment program.”

do. More importantly, undergraduate education does not have anything similar, and neither does graduate business education. Accounting (for the CPA), Medicine (for Board certification), and Architecture (for the ARE designation) have similar requirements. So from an assessment officer's point of view, having the bar exam seems like a plus.

It is beyond the scope of this article to discuss the myriad limitations of the bar exam. But it is worrisome that many faculty members on the one hand openly criticize the bar exam as being a tool that does not accurately indicate preparation for law practice, while on the other hand have little interest in how a program of proper school-wide assessment could make for a significantly better assessment program. The reality is that the bar exam is not a proper assessment tool for school-wide success in preparing its graduates for practice. It does, of course, test knowledge and skills that are used and needed in practice. But the mere fact that the bar exam was never developed in conjunction with a school-wide, legal education-wide, cyclical assessment effort indicates that it is not a proper assessment instrument. At the school level, however, it is all we have.

There is one exception, and it is a bright spot in legal education. It is the Daniel Webster Scholar Honors Program at the University of New Hampshire.¹⁰ This program was developed specifically to prepare its graduates for practice in New Hampshire, and indeed when they graduate from the program they are admitted to the New Hampshire Bar without taking a bar exam. This is because the program was designed with assessment in mind, and numerous formative and summative assessments have taken place over the course of the three-year program so that the need for a bar exam is obviated.

With that exception, what we have now for school-wide assessment is the Bar exam. Of course we also have employment outcomes, but the connection is less direct than the bar exam. If on the one hand, a law school cannot successfully prepare students to

pass the certification exam required to enter the field they have spent three years studying, then it has not achieved much. If on the other hand, a law school cannot successfully prepare its students to be attractive in the employment market, that may have less to do with their success in achieving learning goals, and more to do with the general reputation of the school or the vicissitudes of the legal employment market. But employment is a measurement of success as well—just not as direct as the credential required to practice.

Where we want to get to is the development of school-wide assessment programs that measure how well each school is doing in achieving the learning outcomes for the entire program, as defined by its faculty.¹¹ As a first step, that means that each law school's faculty will need to develop a list of measurable student learning outcomes for the entire program of study. This sounds difficult, but in my experience, it is not impossible. As with course-level learning outcomes, if the faculty is willing to put the time into several open discussions and drafts, it can generally and broadly agree on what their law school is supposed to be teaching.¹² After that critical first step is achieved, each faculty member can then map the learning outcomes in their courses (and programs they might administer or teach in) to the learning outcomes for the law school. Having done that, it is a matter of conducting assessments of learning at the course, program, and school level, and gathering that data for review.

¹⁰ Daniel Webster Scholar Honors Program: <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars>.

¹¹ Indeed, it may be that the ABA is ultimately thinking along these lines as well. Accreditation Standard 204 describing the Self Study process includes this language: "... the law school shall prepare a self-study comprised of ... (d) an assessment of the school's continuing efforts to improve educational quality, [and] (e) an evaluation of the school's effectiveness in achieving its stated educational objectives." ABA, *supra* note 5, Standard 204. Of course, it remains to be seen how this will be enforced and applied, and the relationship between this requirement and the new Standards 314 and 315.

¹² At the University of Denver, I have seen such an effort work. It was led by two tenured full professors on our faculty and over three meetings and drafts we were able to create such a document. I have heard from colleagues at other schools that such a process was similarly successful at their schools ... Two of those schools brought in a professional assessment facilitator to help.

Conclusion

As law schools address themselves to the new ABA requirement that they develop assessment plans, we would all do well to understand what part of an assessment effort we are working on. What level is the assessment project focused on? And what is the goal of the assessment effort? When we say “We are working on assessment in our law school”—what are we referring to? Is it designed to foster improvement in student-level assessment with a goal towards seeing how well first-year students are learning the substantive law they need to learn in first year? Is it designed to seek improvement in the legal writing program or clinic as a whole for the purpose of showing how effective the instruction is? Or is the school actually working on a top-to-bottom genuine, school-wide assessment effort to rival the bar exam? It is important that we are clear about what the goal of the assessment effort is, and what level of assessment we are focusing on, so that we can share information and learn from each other more efficiently about what we are doing and what is working as we move forward into the brave new world of law school assessment plans.

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Another Perspective

Engineering faculties' experiences suggest that an accreditation mandate can inspire constructive curriculum reform by forcing faculties to identify overall missions and specific learning goals, by encouraging faculty dialogue about the overall coherence of a curriculum, and by providing a means for continual improvement.

Deborah Maranville, *Lessons for Legal Education from the Engineering Profession's Experience with Outcomes-Based Accreditation*, 38 Wm. Mitchell L. Rev. 1017, at 1017 (2012).