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***233 VIRTUAL REALITY TESTING: THE USE OF VIDEO FOR EVALUATION IN LEGAL EDUCATION**

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The law students are ready to take their Evidence exam. The proctor lowers the lights. The **video** screen immediately displays a courtroom where the lawyers are arguing about admissibility of evidence.

The students, who are instructed to assume the role of judge, listen intently as the lawyers articulate the basis of their objections and responses. After ten minutes, the screen fades. The students have three minutes to make rulings and discuss, in writing, their justifications.

I. The Need for Innovation in Law School Testing

Over the years, the traditional law school curriculum has come under fire and, with it, the traditional teaching methods. [FN1] One result has been the comparatively recent emphasis on clinical methodology, [FN2] which is likely to increase, particularly in light of the MacCrate Report. [FN3] This article will not *234 continue the debate on teaching; I assume that practical, skills-based, clinical education is necessary and will continue to expand. [FN4]

But the literature advocating practical legal education emphasizes methods of teaching and study rather than methods of testing and evaluation. [FN5] The MacCrate Report lists the competencies needed for law practice, yet fails to address evaluation in any detail: only eight of its 414 pages discuss evaluation, and do so only in the context of bar examinations. [FN6] Post-MacCrate articles also fail to address any means of assessing students' competence after they experience skills education. [FN7] Yet until testing and evaluation reflect the same skills focus inherent in clinical education, measurement of the goals and objectives of learning will be deficient.

With the skills focus in legal education has come a realization of the need for new methods of evaluation. [FN8] If evaluation is to help students learn, it must go beyond testing their memorization of rules and assess their development and application of specific skills. [FN9] Essay questions, inherently subjective, may not be the best means of measuring specific abilities; [FN10] we should reconsider our entire system of evaluation.

What new tasks should a student who has completed a course be able to perform? [FN11] What "competence" should our evaluation measure? Surely there should be a strong correlation between the examination and the teaching. [FN12] Some teachers, particularly in the skills-based or clinical setting, are using nontraditional means of evaluation, such as out-of-class assignments, [FN13] observation and critique, [FN14] papers, [FN15] the learning contract, [FN16] and self-evaluation. [FN17] *235 For the most part, however, the end-of-semester, multi-hour, bluebook exam is still the norm, even though such an exam has only a tenuous connection with the classroom experience [FN18] or with law practice. [FN19] A better linkage of exam, classroom, and practice can be provided by **video**. [FN20]

This article explores the use of **video** for testing. My thesis is that as our teaching emphasizes performance, so

should our examination and evaluation procedures. In other words, the final exam must be as realistic as possible: I call it virtual reality. I describe two specific ways to use **video**: first, to develop a more reflective practitioner through self-observation; and, second, to provide a more realistic final exam problem. Although thus far the **video** exam has been (to my knowledge) confined to skills-based courses, [\[FN21\]](#) it could be used more widely.

The following section describes how I use **video** for student assessment in two distinct ways. First, a **video** of the student's own performance provides the student with direct feedback and an opportunity for discovery, growth, and improvement. This use emphasizes self-evaluation and reflection, complemented by the instructor's assessment. Second, on the premise that testing should simulate as real a situation as possible, I use **video** to test all students at the end of the semester, using a traditional framework [\[FN22\]](#) but presenting, on videotape, a more realistic problem.

II. The Use of **Video**

Video has a number of advantages over written material for both teaching and testing. **Video** allows students to see things they would otherwise be unable to see, conveying realistic situations with accuracy and immediacy. On a videotape students can observe behavior, such as nonverbal communication, that cannot be conveyed by the written word. The realistic presentation of **video** is excellent preparation for law practice. And law students should be acquainted with **video** because it is widely used in both depositions and trials. [\[FN23\]](#)

With the flexibility of **video**, the instructor can focus on a specific portion of a demonstration. [\[FN24\]](#) **Video** can add to variety in teaching, resulting in increased ***236** interest, attention, and learning. [\[FN25\]](#) A primary benefit of audiovisual media is the dramatic increase in retention of material when it is seen, not just heard. [\[FN26\]](#) **Video** also assists the learning process by providing diagnostic and remedial tools; [\[FN27\]](#) it allows the student to watch his own performance and determine his own strengths and weaknesses.

Just as **video** can be used in various ways in the instructional phases of education, **video** may be utilized differently in the evaluative components. Since my Mediation and Interviewing & Counseling courses are blends of theory, knowledge, and skill development, my thought was that the test, or evaluation, should reflect that mixture. My using **video** in the teaching process made its use for evaluative purposes seem natural. Accordingly, I divide the assessment into components reflective of the course design and content. The student's final grade is segmented, with at least one-third resulting from the practical application of the material, or skills development.

A. **Video** for Self-Reflection and Evaluation

1. Goals and Objectives

In videotaping a student's performance I have three goals: to provide the student an opportunity for self-evaluation; to give myself a means of assessing the student; and to provide a basis for constructive one-on-one feedback.

Traditional classes often provide negative feedback to the student, with fear the primary motivator. [\[FN28\]](#) But positive reinforcement is more effective than negative criticism, and more likely to improve performance. [\[FN29\]](#) If students anticipate criticism, their ability to hear comments may be limited, particularly if the teacher has not been trained in the best methods of providing feedback. And students may resist a supervisor's feedback because they want to be treated as adult learners responsible for their own education. [\[FN30\]](#) But students are willing to listen if they see an opportunity to improve, and if improvement brings positive reinforcement. [\[FN31\]](#) The assessment process can be beneficial to self-development rather than detrimental. [\[FN32\]](#)

For adult learners, particularly, both education and evaluation should be participatory. [FN33] Because reflection is integral to the development of skills, it is *237 important to teach techniques of self-evaluation. [FN34] Opportunities for reflection and self-evaluation include conferences with supervisors and regular entries in a journal. But much depends on memory, and memory is limited and not always accurate. It is easy to “filter”-to ignore matters perceived as negative. That is why **video** is so useful for self-critique. Videotape doesn't forget or filter. It confronts us with our own behavior, accurately recorded, and now seen from an observer's viewpoint.

The self-critique that I require of my students is based on interpersonal process recall (IPR), first developed by Norman Kagan and colleagues and since used in many disciplines. [FN35] After being videotaped in a simulation, students view the tape, reliving and verbalizing their behavior. [FN36] Kagan's method utilizes an inquirer, who is trained to ask questions that encourage the students to recall their underlying feelings and thoughts experienced during the **video**. [FN37] Although I have not used the trained inquirer, the goals of my students' self-critique are similar to those set forth by Kagan-namely, reflection and self-evaluation. My students must write a paper discussing their participation in the process (mediation or interviewing) and must evaluate their own performance. [FN38] The procedure demands that the students be self-reflective, confront their own performance, and take responsibility for improvement. It provides a model for lifelong learning. [FN39]

While self-evaluation is the dominant focus for the reflective practitioner, critiquing others is an important component of the learning process. [FN40] To enable students to observe and evaluate the performance of others, I have them assume the roles of the disputing parties in mediation or the client in the interview. Although I don't require it, I encourage those who role-played to watch the videotape and provide feedback to the mediator or the interviewer; particularly if they have taken their roles seriously, their comments can be very helpful. In addition, the role-players develop evaluation skills that they can use in assessing themselves. **Video** review also allows the students to see how they act and react when embroiled in a conflict, and to understand what their future clients (or the disputants in a mediation) may be experiencing.

*238 While the videotape is primarily for the student's self-evaluation, I also use it for my independent assessment of the student's skills. But my scoring accounts for only a small portion of the total evaluation and is combined with the grade of the self-critique.

2. Methodology

During the semester, each student has two opportunities to be videotaped. The first is a practice **video**, which the student is to use for self-critique and improvement before filming the final **video**. [FN41] The practice tape is primarily for the student's benefit. A best-case scenario for optimal development of skills would provide instructor feedback at this point but, regrettably, I have not had time for that. I do randomly review a few of the practice **videos** to determine the level of understanding and skill development of the class as a whole. If there is sufficient time, and if a student volunteers to be critiqued in front of the entire class, I may use a practice **video** for that critique, giving the entire class the same feedback. [FN42] Since one focus is developing evaluative skills, I tell the students not only to review their own **video**, but to have their classmates assist in the review process.

A few weeks after the practice **video**, we schedule the final **videos**. Each is about thirty minutes-a short period of time, admittedly, but I must keep each taping brief to accommodate all twenty-four students (the class limit). The audiovisual department is able to do four tapings at once; by a minimal extension of class time, all students can be videotaped within one or two class periods.

After the taping, each student has two or three weeks to watch his **video** and write a thorough analysis and self-critique. The sooner the student views the tape, the better his recall of the thoughts and feelings that motivated the

demonstrated behavior. [FN43] On the other hand, some time between taping and viewing allows for a more objective assessment. [FN44]

Since active involvement contributes to learning, [FN45] I make that the primary goal of the written critique, and I tell the students that their written critique will be the main determinant of the course grade. I do not expect them to conduct the mediation or interview flawlessly; rather, they should learn from the experience. [FN46] I schedule a private meeting with each student to go over the *239 videotape, and the student submits the written critique at the time of our meeting. I give direct feedback about the performance and the critique, providing the student the opportunity for improvement. [FN47]

While my videotapes are of simulations, it would be possible, in a clinical course, to tape an actual interview or mediation with live clients. [FN48] But there would be drawbacks. In a real situation, the instructor may need to interrupt or intervene during the taping. Scheduling difficulties may increase, and privacy and confidentiality issues pose additional concerns.

3. Grading

When I am considering the **video** and the self-critique, my primary goal is to determine the student's ability to extract knowledge and understanding from the course and apply it to her own performance. The **video** also provides a method of evaluating acquired skills, although I give less weight to performance. I emphasize the student's ability to be self-reflective and to recognize areas of achievement along with those for improvement. The paper demonstrates the depth of knowledge and understanding of the course material, not only from a theoretical perspective, but also from a practical standpoint. Specifically, the student should be able to identify those skills which derive from theory and then determine which she demonstrated effectively, which she did not, and why. [FN49] Consistent with understanding and self-evaluation, the written analysis is much more important in the grading than the actual performance. [FN50]

I generally expect the student to analyze her performance during each of the specific stages of the mediation [FN51] or the interview, [FN52] but because the **video** is short, it is rare that all stages will be covered; I also request a written analysis of the student's strategy at the conclusion of the videotape. In the mediation class, where some of the students will be taking the mediation clinic the following semester, I ask the student to specifically note areas for improvement. These become part of that student's learning agenda for the next semester. A detailed learning contract for the clinical course could follow *240 from the analysis. [FN53] Or a learning contract, drafted by the student, could be substituted for the written analysis.

The final grade for the self-evaluative component of the course is a combination of the score of the student's written critique and the instructor's independent assessment. For example, if 20 points of a student's grade are allocated to the entire exercise, a likely division is 13 or 14 points for the written evaluation and 6 or 7 points based on the student's performance.

B. The **Video** Problem for the Final Examination

1. Goals and Objectives

Whether a lawyer is in an interview, hearing, mediation, or trial, his reaction must usually be immediate. And the information that he reacts to is seldom in written paragraphs: it is presented through an interpersonal interaction.

To predict the student's spontaneous reaction in a real situation, a test problem must be as real as possible. The student should view the interview rather than read a transcript. Although it is possible to use a real-life situation in a

clinical setting, it is nearly impossible to be consistent and reliable; [\[FN54\]](#) students are assigned different cases with different clients. And even in simulation clinics, where the instructor uses the same fact pattern or problem, different persons playing the role of client create different situations. **Video** solves those problems: it presents the same realistic situation to all students and ensures consistent, objective evaluation. A bluebook exam based on a **video** is an efficient means of testing many students at once, using the same problem and the same criteria. [\[FN55\]](#)

Like any other exam, a **video** exam should be constructed with a view to validity, reliability, and fairness. [\[FN56\]](#)

Validity means that a test accurately measures what it is supposed to measure. [\[FN57\]](#) In legal education, the test should measure the student's competence with respect to the teacher's objectives, [\[FN58\]](#) which should be clearly set out at the beginning of the course. In skills-focused education, competence includes fundamental knowledge of theory and principles, and the identification, development, and refinement of associated skills. To be valid, the **video** exam must measure both understanding and performance. Although current performance testing attempts to assess competence, the test is often inconsistent with instructional objectives. In an interviewing context, for instance, the classroom goals and objectives include development of such communication *241 skills as active and interactive listening, nonverbal communication, and sensitive questioning techniques. Yet often the exam presents a written transcript. Such skills assessment is inconsistent with reality. A **video** problem is more realistic and therefore more valid.

For a test to meet the criterion of reliability, its scoring must be uniform. [\[FN59\]](#) The grades should not be affected by chance or by the inclusion of an item that the test was not meant to measure. [\[FN60\]](#) Often the case is made that objective test items are more likely to result in uniform scoring. [\[FN61\]](#) Although the **video** examination is not a traditional objective exam, the short answers allow for some objective measurement of the student's knowledge. And the **video** exam's simultaneous presentation of the same realistic problem to all students provides uniformity.

Although fairness is inherently correlated with validity and reliability, [\[FN62\]](#) fairness also includes assurance of equal access to all relevant information-including information specifically about the test. [\[FN63\]](#) Another element of fairness is limiting the grade to the skills or abilities taught in the course. [\[FN64\]](#) To increase the fairness of the **video** exam, particularly since this is a relatively new method of testing, **video** should be a means of instruction as well.

The **video** exam problem should replicate, as accurately as possible, situations a lawyer is likely to encounter in practice. Such an exam can demonstrate whether the student has fully integrated the knowledge and skills learned during the semester so that she is able to recognize a problem instantly and respond appropriately. The videotape provides a realistic example of what the student will confront in practice, and the exam answer predicts how the student will perform.

2. Creating the Problem

One method of creating a **video** problem is to take existing videotapes of trials or interviews and design questions about the content. For some subjects, such as trial advocacy, evidence, and even professional responsibility, sufficient **videos** are available. [\[FN65\]](#) For other subjects, you may have to create a tape.

Perhaps the ideal way to make a videotape would be to script the problem carefully and have professional actors in the roles, but such an approach is not likely to be feasible. I have relied on friends and colleagues to serve as **video** participants, and they have done the job adequately. I give them general information about the dispute or problem and some guidance about the primary issues and skills (or lack thereof) to be demonstrated. The outcome *242 has consistently been a portrayal of a real-life situation, which I think results from the absence of precise definition.

Once the tape is made, I examine the raw footage and, with assistance from our audiovisual department, produce an edited version; this involves some cutting, and the insertion of some questions. Each unedited film provides a myriad of problems about which specific questions can be asked. I review the raw footage a few times before designing the questions. If I need to focus on a specific, isolated problem, I edit the tape accordingly.

As the tape is played, the **video** stops at certain points and a question appears on the monitor, asking about something the students have just seen. The tape then allots two to three minutes (depending on the difficulty of the question) for the students to answer. [FN66] The question remains on the monitor while the students write their answers in their bluebooks. This is the only time the students have to answer that question; the **video**, like life, is not replayed. The **video** then picks up again, the interview or mediation continues, and we move along to the next issue. A twenty-minute tape generally has three or four short-answer questions. I use the **video** segment as the first part of the examination, [FN67] and it counts for only a portion of the entire grade.

One might pose a number of questions at the same time—for example, in a videotaped trial situation. Another option is to show the entire videotape and then ask several questions about it. [FN68] A more sophisticated extension of the **video** problem is the development of an interactive examination. [FN69]

3. Grading Considerations

I grade the answers to the videotape examination problem as I would grade other essay or short-answer questions. The student should identify specific issues, then discuss the application of the course material to those issues confronted by the lawyer or mediator in the **video**. In many situations there is no clearly right or wrong action, and hence no objective right-or-wrong answer. The student must demonstrate ability to recognize and discuss the primary issues, and not merely declare what the lawyer or mediator in the **video** should do, or should have done.

There are other options for grading. Such courses as Evidence and Criminal Procedure lend themselves to objective questions with right-or-wrong answers. Multiple-choice questions might have options displayed on the **video** screen or as part of the written exam. A true-false format could be used as well. A **video** problem could also test specific application of a rule or statute to a demonstrated situation and even call for interpretation of the rule as applied. [FN70]

III. Applications of **Video** for Evaluation

A. Clinical and Skills-Based Courses

Most clinical courses do not rely on traditional testing for evaluation but rather use close supervision of the student by professors or supervising attorneys, with feedback [FN71] and self-evaluation. [FN72] Often students are evaluated on a pass/fail basis, although specific grades are becoming more common. [FN73] But many skills-based courses, though theoretically within the clinical domain, [FN74] are offered as part of the traditional curriculum, along with the traditional final exam or paper. Those methods of evaluation are adequate for measuring whether the students have a clear understanding of principles or underlying theory, but neither can accurately measure a student's competence in performing the skills essential to (for example) negotiation and mediation, particularly the interpersonal skills. Skills-based courses, with the focus on performance, require a different means of testing. [FN75]

Both clinical and skills-based courses, with their emphasis on the demonstration of lawyering competencies, are prime candidates for the increased use of **video** in testing as well as teaching. (For one thing, these newer components of legal education are not so resistant to change as traditional programs; [FN76] they can provide a safe haven for continued experimentation and innovation in teaching and testing. [FN77]) For example, instructors who want to add

more objective and reliable testing methods to the inherently subjective observation of students will find the **video** problem helpful.

Subjects that might lend themselves to **video** evaluation include negotiation, alternative dispute resolution, pre-trial and trial advocacy, appellate advocacy, and office practice. In pre-trial and trial advocacy courses, for example, situations such as client and witness interviews, trial preparation conferences, motion and deposition practice, jury selection, and pre-trial conferences*²⁴⁴ with the court could be demonstrated by **video**, followed by a number of questions. While instructors in these subjects may have used **video** for teaching or even evaluating performance, they have rarely employed it as part of an examination process. They should consider its potential.

B. Application to Traditional Courses

The **video** problem can be particularly useful for measuring the student's expertise in areas where a lawyer must make immediate decisions. Such courses as Evidence, Civil Procedure, Contracts, Criminal Law, and Criminal Procedure could make good use of **video** in testing. Just as clinical teaching methodology has been adapted to the traditional classroom, [\[FN78\]](#) the evaluation methods of clinical and skills-based courses, including **video**, can be effectively adapted to most subjects.

In an Evidence class, for example, a problem might require the student to object to an offer of evidence, draft a response to an objection, or perhaps make a ruling. Students of Civil Procedure could watch a motion argument or a trial and draft the points for appeal or, alternatively, the court's decision. In a Contracts class, the **video** could present a client interview from which the students must gather the facts and draft a contract, or advise the client about causes of action. For a Torts class, an accident could be staged and **video**-taped. [\[FN79\]](#) For Trusts & Estates, Teresa Stanton Collett has used a **video** exam problem showing a probate conflict.

With the integration of clinical, practical teaching into the general law school curriculum, [\[FN80\]](#) we no longer see "skills" and "substance" as entirely separate entities. Any course can benefit from the use of realistic, practical problems for both teaching and examination. The realism of **videos** is particularly effective in giving students a better understanding of the practical components of practice. The more realistic the presentation, the greater the opportunity for learning. [\[FN81\]](#)

IV. Impediments to Innovation and Some Suggestions

A. Inertia

For a number of reasons, law professors are never eager to implement change. [\[FN82\]](#) They are comfortable with the status quo, and they have an investment in it. [\[FN83\]](#) But as law schools and faculties become more diverse, identifying a specific status quo becomes more difficult. Innovation may be easier.

Contemporary thought urges law schools to change to meet demands and produce lawyers who can practice competently. [\[FN84\]](#) One example is continuing *²⁴⁵ modification in curricula to focus on skills and values. [\[FN85\]](#) Additional modification is expected, originating from within, and law schools will feel external pressures as well, notably from the practicing bar. While scarcely anyone sees law schools as "hotbeds of change," [\[FN86\]](#) incremental modifications are possible and even likely.

One barrier to innovation in teaching is that little recognition has been given to innovative teachers. [\[FN87\]](#) The more significant rewards are for scholarship; a focus on scholarship can mean less effort and creativity in teaching. [\[FN88\]](#) In fact, institutions that encourage academic innovation appear to be the exception; institutional inertia is the

rule. [\[FN89\]](#) But the increased recognition that nontraditional teaching has value should increase attention to new methodologies and should induce innovation.

Another barrier to innovation, and argument for the status quo, may be the ABA guidelines, drafted before new technologies became widespread and made novel testing approaches possible. Standard 304 mandates that students be given a written examination, although it makes a specific exception for clinical studies courses. [\[FN90\]](#) The interpretation of the rule elaborates further, providing that the examination should not be oral. [\[FN91\]](#) But neither the standard nor the interpretation makes clear whether the reference is to the question, the answer, or both. With **video** examinations, all answers are written. And questions posed on the monitor are in written form although there is no accompanying transcript. It is likely that as technology continues to play a role in learning and evaluation, modification of the standards will accommodate innovation.

B. Time Concerns

With teaching, scholarship, and a myriad of other responsibilities, many teachers may decide that **video** may be beneficial but just too time-consuming. It takes time to construct the exam, and more time, at least initially, to grade it. Then there is the time involved in administration.

In fact, the time needed for construction of a **video** problem is probably no greater than for the traditional essay problem, [\[FN92\]](#) particularly if one relies on colleagues to play the roles. And as one's experience with **video** increases, less time will be required.

The time consumed in giving the **video** exam is no greater than that associated with a more traditional question. In fact, an interview can be shown *246 on **video** in less time than it takes to read a transcript. It is important, however, to allow adequate time for students' response, particularly if a videotape is shown in its entirety. [\[FN93\]](#) Where the questions are integrated into the **video**, the time allotted for the answer must be considered when determining the length of the **video** problem as well as the entire examination. Grading the answers to the **video** problem takes no longer than grading answers to traditional questions. And, if the **video** problem is constructed in an objective format, grading time should be minimal.

The self-evaluative **videos** do pose time-related challenges. Scheduling the tapings and reviews can be time-consuming, although one might assign the responsibility to a research assistant or a secretary. Or one might delegate the entire responsibility for the videotaping to the students. The teacher would design and assign the problems, but the students would identify the role players and schedule and conduct the taping, perhaps at the audiovisual department or even at home. While such out-of-class options may save the teacher's time, they mean a loss of control over the process. But if the videotapes are used for evaluative feedback only, and do not form the basis of grades, that should not be a great problem.

As I have designed the self-reflection component, I must review each videotape. As I conduct the review with each student, I perform a role much like that of Kagan's inquirer. The interaction is important, particularly since many students are not familiar with methods of introspection and reflection. Even when the **video** is only thirty minutes, a minimum of one hour should be allotted for each student. I must also review the student's written critique, usually five to ten pages. But the **video** review process might be conducted differently. Another student who has previously taken the course and demonstrated competence, or a practicing mediator or attorney, could fill the inquirer role, particularly if no grade will be attributed to the student's **video**. For example, if the sole purpose is to develop evaluative skills, the teacher need not watch each **video**.

C. Complexity of Administration

Both the videotape exam problem and the self-evaluative **video** present administrative tasks consisting essentially of scheduling, supervision, and oversight.

With the examination, it is imperative that the proctor be aware of the **video** segment. Students must be advised that the **video** will not be replayed. It is essential that all students be able to hear and see equally well. If some students type their exams in a separate room, typists and nontypists must be together first to view the **video** and separated afterwards. Because the answers to the **video** questions are immediate, students cannot type this section of the exam. [\[FN94\]](#)

*247 I schedule videotaping during normal class times because students in the class act as clients for the student lawyers, or disputants for the mediator. This is pedagogically sound as well as convenient. Students learning to be mediators should have the experience of conflict, from a party's perspective, [\[FN95\]](#) and should understand the mediation process from the party's viewpoint. [\[FN96\]](#) But the use of students in the client/disputant roles presents some problems.

I stress to the students that they must play the role realistically. The dispute should be internalized-as if the event actually happened. But this does not always happen; some students are not fully prepared or into role. I have tried to encourage preparation by deducting points when a student is obviously unprepared.

Even if students prepare conscientiously, it can be problematic for law students to act as if they are unaware of the law or legal consequences. That is why, for the final taping in my interviewing class, each student must recruit as her client someone who is not a law student and preferably not a close friend or relative. [\[FN97\]](#) Information for the client is transmitted in a sealed envelope-if time permits, by mail, otherwise via the student. Included are all necessary instructions such as warnings about disclosure and the necessity of a realistic presentation.

Another option for staging the **videos** is to use first-year law students in the roles. Even better, if prelaw students or drama students are available, they may be preferable as clients, disputants, jurors, or witnesses. But using students from outside the law school can compound administration and scheduling difficulties.

Scheduling concerns also affect the syllabus. Students need time between the practice **video** and the final **video** to review, digest, and, ideally, implement necessary changes. Since the student must have time to watch the final **video**, write the paper, and then meet individually with me, the final **videos** must be scheduled at least three weeks before the end of the semester.

Another administrative task is combining the scores that determine the final grades. Before integrating the **video** evaluation with traditional tests, I grade each component separately. While the examination, including the *248 **video** problem, is graded anonymously, the self-evaluative portion is not. [\[FN98\]](#) Once the nonanonymous scores are complete, I provide the names and scores to the registrar's office. When I get back the scores matched to an examination number, I combine the two scores for the final grade.

D. Potential Bias and Subjectivity

Concerns of subjectivity and bias may arise in both the self-evaluative **video** and the **video** exam problem. The **video** exam, particularly since it is unfamiliar, may be perceived as biased against those who need time for contemplation. Most law students grew up with television, however, and are able to gain information quickly from a **video** screen. Many are even more comfortable with audiovisual media than with the written word. [\[FN99\]](#)

While visual learners will benefit from seeing the **video**, they may also feel the need to see written documents, particularly in a testing situation. Some who use **video** provide a written transcript of the videotape. [FN100] But unless the exam is focused on an appellate issue, having a transcript is not realistic. Since my primary goal in using a **video** problem is to present what the student will confront in practice, I do not provide transcripts. But if the skills being tested require reference to other materials, such as a contract, those file documents may be provided. [FN101]

As with the traditional bluebook exam, some students are at a disadvantage because of the required immediate response. [FN102] Those students will perform better when given adequate time for analysis. Although the **video** problem demands an instant answer, the paper on the self-evaluative **video** demands thoughtful study and contemplation. The two distinct uses of **video** allow the teacher to assess students' performance when they have ample time for analysis, and when they must respond immediately. Together the two formats of testing not only replicate reality, but can draw on the different strengths of students.

When answers to the **video** problem are in essay format, they present the same concerns of subjectivity as any essay examination. [FN103] I prefer to use questions that call for short answers, and I use an answer key in my scoring. [FN104] One can make questions more objective by casting them, for example, in a *249 multiple-choice or true-false format. But some subjectivity is inherent in certain subjects and unavoidable in grading. One can minimize the subjective components in grading by preparing an objective point system in advance.

Grading the **video** must take into account the performance of the role players. For example, if the disputing parties were relatively cooperative and collaborative in mediation, preempting the mediator's display of specific skills, then assessment must emphasize other aspects of the process. (The same is true if the client in an interview is forthcoming with information.) Alternatively, if the dispute is difficult, the mediator's performance should be evaluated more leniently.

If one is greatly concerned about bias in grading, both the **video** problem and the evaluative segment could be graded on a pass/fail basis, although even then standards are necessary.

E. Cost

The primary indirect cost associated with the use of **video** is the increased faculty and staff time consumed in making and grading the self-evaluative **videos**. The videotaping may strain the resources of the audiovisual department, requiring the purchase of additional equipment and the hiring of more technical staff. If the audiovisual department is not equipped to do the videotaping, the students can do the taping at home. But that introduces variables and diminishes the instructor's oversight.

The cost of videotapes can add up. Even when the school keeps the tapes and reuses them, [FN105] they eventually wear out. One option is to require students to purchase their own tapes or pay a fee.

Indirect cost to the law school may also be felt in the number of students who can participate in the class. Self-evaluative projects require that one limit the number of students. Even though clinical education and other new methods are more expensive than the old Langdellian model, it is imperative that law schools strive to provide financial support for innovation. [FN106]

One way to reduce cost is to share resources. Law schools that already maintain audiovisual departments for trial projects may welcome other uses of their staff and equipment. University-based law schools may reduce costs by using the resources of other departments, such as communication and the-ater. Students in those departments may

need projects for credit.

Once **video** problems are produced, they are well worth the investment. They become part of the school's permanent collection. [FN107] Colleagues can exchange videotapes, or the school can develop a bank of **video** problems, *250 similar to banks of traditional exam questions, [FN108] obviating the need to produce a **video** problem each semester.

F. Student Reaction

Although I have not conducted a formal study to determine student reaction to **video** testing, since I began using these exams in 1991 I have received no complaints. [FN109] Others have made more of an effort to gauge student reaction; when students are given the opportunity to comment, most of them react quite favorably. [FN110]

Some students have voiced displeasure in watching the self-evaluative **videos**. Like professors, some students are resistant to change. [FN111] There may be some danger of embarrassment, particularly when watching oneself with an instructor present. Even so, when students talk about their reluctance to see themselves on videotape, the next-and more frequent-comment is that the experience was extremely beneficial. If the self-evaluative **video** is approached within the framework for learning and with a primary focus on skill improvement, students are more likely to embrace the opportunity. As legal education becomes more focused on skills, students will probably become more willing to be evaluated in a realistic manner, particularly when they can see a connection between the evaluation and their performance in law practice.

V. Conclusion: Evaluating the Lawyer of the Future

The incongruity between the standard bluebook examination and the practice of law makes it difficult to predict a law student's ability to practice law. [FN112] The standard exam measures only a small portion of the knowledge and skills on which a lawyer relies; [FN113] it does not provide an overall, realistic view of the student. Yet law school exams are used to establish rank, [FN114] which in turn is used as a criterion for other selections, including employment. [FN115] If the ultimate purpose of evaluation is certification, selection, and prediction, [FN116] the conventional examination is an inaccurate, inadequate measure. Other methods of evaluation, more relevant to actual law practice, should supplement, if not replace, the standard exam.

*251 To some extent the skills essential to law practice have changed over time, and will continue to change. Yet the most important part of lawyering remains interpersonal interaction. Many of the MacCrate Report's enumerated skills have interpersonal components. [FN117] Communication is key to the practice of law. Knowledge of theory and law and the ability to analyze will do little good in practice if the lawyer is unable to communicate. The lawyer must communicate with the client to obtain necessary facts and some indication of the desired goals and objectives; she must communicate with the court to argue a point of law; and she must communicate with the jury to effectively advocate for her client. Alternative methods of dispute resolution such as negotiation, mediation, and arbitration place primary emphasis on communicative components with the opposing party. While much communication is written, more is seen, heard, and spoken. In order to adequately predict practice abilities, we need to test these skills. The use of performance testing on a few state bar examinations indicates a recognition of that need, but such testing is now based on a transcript of an interview—a rather unrealistic approach.

Legal education may be in the midst of a paradigm shift—a shift to reality. [FN118] Changes have begun and will continue; use of **video** to provide a virtually real assessment, I suspect, is just the tip of iceberg. Legal educators have been challenged to improve the educational process. [FN119] Students need to learn skills and can only do so by using real-life projects. [FN120]

The next best thing to reality is virtual reality. With improved technology, problems will be presented in an interactive **video** format. Eventually the entire examination may consist of taking students to the courtroom, conference room, or other site, and into the virtual reality of law practice for the twenty-first century.

As the student enters the examination room, she is given a headset. With the press of a button, she is transported to a large conference room in which the decision-makers of five international corporations are discussing a contract dispute. The student, representing X Corp, must assist Mr. Segen in negotiating a resolution of the dispute.

After a cursory greeting, her client privately whispers, "They are negotiating in bad faith-what do we do now?" The student's verbal and nonverbal responses are electronically transmitted to the client. Depending upon the lawyer's response, the client continues with additional questions throughout the hourlong negotiation. The student's responses along with the ultimate outcome of X Corp's contract are evaluated and graded as part of the Ethics in Negotiation and Settlement examination.

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[FN1]. See [John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. Legal Educ. 157, 160-62 \(1993\)](#); Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?* 36 J. Legal Educ. 167 (1986).

[FN2]. See, e.g., David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. Legal Educ. 67 (1979); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *Vand. L. Rev.* 321 (1982); Robert L. Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed?* 18 *New Eng. L. Rev.* 577 (1983); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 *UCLA L. Rev.* 577 (1987); Joseph P. Tomain & Michael E. Solimine, *Skills Skepticism in the Postclinic World*, 40 J. Legal Educ. 307 (1990).

[FN3]. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development-An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 138 (Chicago, 1992) [hereinafter *MacCrate Report*].

[FN4]. Although differences can be articulated regarding methodology in practical, skills-based, and clinical education, see Jonathan Rose, *The MacCrate Report's Restatement of Legal Education: The Need for Reflection and Horse Sense*, 44 J. Legal Educ. 548, 554 (1994), the objective is similar: to learn to do. The terms will be used interchangeably in this article.

[FN5]. But see [Amy L. Ziegler, *Developing a System of Evaluation in Clinical Legal Teaching*, 42 J. Legal Educ. 575 \(1992\)](#); Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 *Pac. L.J.* 967 (1990); see also Robert Keeton, *Teaching and Testing for Competence in Law Schools*, 40 *Md. L. Rev.* 203 (1981) (addressing the evaluation process, albeit in a limited fashion).

[FN6]. *MacCrate Report* at 277-84.

[FN7]. E.g., [Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. Legal Educ. 469 \(1993\)](#); Rose, *supra* note 4; Costonis, *supra* note 1.

[FN8]. Tarr, *supra* note 5; Ziegler, *supra* note 5.

[FN9]. Janet Motley, A Foolish Consistency: The Law School Exam, 10 Nova L. Rev. 723, 731 (1986); see [Philip C. Kissam, Law School Examinations, 42 Vand. L. Rev. 433, 437 \(1989\)](#).

[FN10]. See 1 Michael S. Josephson, Learning and Evaluation in Law School 18 (Washington, 1984).

[FN11]. Neil Gold, Competence and Continuing Legal Education, in Essays on Legal Education, ed. Neil Gold, 31 (Toronto, 1982).

[FN12]. Motley, *supra* note 9, at 725; see also [Myron Moskowitz, Beyond the Case Method: It's Time to Teach with Problems, 42 J. Legal Educ. 241, 261 \(1992\)](#).

[FN13]. John M. Burman, [Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students, 42 J. Legal Educ. 447 \(1992\)](#).

[FN14]. James Carr, Grading Clinic Students, 26 J. Legal Educ. 223, 227 (1974).

[FN15]. *Id.* at 226.

[FN16]. Jane H. Aiken et al., The [Learning Contract in Legal Education, 44 Md. L. Rev. 1047 \(1985\)](#).

[FN17]. See Tarr, *supra* note 5.

[FN18]. Kissam, *supra* note 9, at 435, 466-74.

[FN19]. Burman, *supra* note 13, at 448.

[FN20]. This is not to say that **video** exams should necessarily replace more traditional evaluation methodology, but rather provide a viable and valuable supplement.

[FN21]. My work has concentrated on the use of **video** examinations in two courses: Mediation and Interviewing & Counseling. One of my colleagues, Teresa Stanton Collett, has used **video** as a method of evaluation in Counseling the Terminally Ill. See also Vincent R. Johnson, The **Video** Essay Question: An Experiment in Teaching Professional Responsibility, 50 Mo. L. Rev. 591 (1985).

[FN22]. The measurement tool most widely utilized in legal education is that of an examination or test. In this context, "law school test" means the end-of-semester examination, the bluebook. See Kissam, *supra* note 9, at 437.

[FN23]. Gerald R. Miller & Norman E. Fontes, Videotape on Trial: A View from the Jury Box (Beverly Hills, 1979); Vincent R. Johnson, Audiovisual Enhancement of Classroom Teaching: A Primer for Law Professors, 37 J. Legal Educ. 97, 98 (1987).

[FN24]. Nancy A. Roeske, Videotapes as an Educational Experience, in *Videotape Techniques in Psychiatric Training and Treatment*, ed. Milton M. Berger, 57, 58 (New York, 1978) [hereinafter *Videotape Techniques*].

[FN25]. Johnson, *supra* note 23, at 102.

[FN26]. *Id.* at 100.

[FN27]. Ashly Pinnington, *Using Video in Training and Education* 14 (London, 1992).

[FN28]. Motley, *supra* note 9, at 731.

[FN29]. See Ernest R. Hilgard et al., *Introduction to Psychology*, 5th ed., 204, 264 (New York, 1971); B. F. Skinner, *The Science of Learning and the Art of Teaching*, 24 *Harv. Educ. Rev.* 886 (1954).

[FN30]. Tarr, *supra* note 5, at 979.

[FN31]. The lack of feedback and opportunity to improve is a primary criticism of the current law school examination process. See Motley, *supra* note 9, at 724.

[FN32]. Yet in traditional testing methods many who do not fare well subsequently fail to grow, and instead develop defensive behaviors including hostility and emotional detachment. See Kissam, *supra* note 9, at 481.

[FN33]. Bloch, *supra* note 2, at 345.

[FN34]. Ziegler, *supra* note 5, at 577; Tarr, *supra* note 5, at 968; Howard Lesnick, [Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum](#), 37 *UCLA L. Rev.* 1157, 1184-86 (1990).

[FN35]. See Norman Kagan, *Influencing Human Interaction: Interpersonal Process Recall (IPR) Stimulated by Videotape*, in *Video in Higher Education*, ed. Ortrun Zuber-Skerritt, 93 (London, 1984).

[FN36]. Norman I. Kagan & Bruce Burke, *Influencing Human Interaction Using Interpersonal Process Recall (IPR)-A Student Manual* 4 (Houston, 1976) (on file with author).

[FN37]. *Id.* at 26-28.

[FN38]. The student's written critique should first analyze the mediation or interview process, providing an indication of the degree of understanding of the subject matter. Thereafter, the performance on **video** should be critiqued in light of the process, which provides additional information about the student's ability to apply the knowledge to himself in a specific situation. This process, though not so thoroughly delineated, is in reality quite similar to the self-evaluation advocated and explicated by Tarr, *supra* note 5, at 984-88.

[FN39]. Doyel, *supra* note 2, at 602; see also Roeske, *supra* note 24, at 57.

[FN40]. Tarr, *supra* note 5, at 979; David A. Binder & Susan C. Price, *Instructor's Manual for Legal Interviewing and*

Counseling: A Client-Centered Approach 17 (St. Paul, 1979).

[FN41]. Since students unequivocally understand the importance of “final” exams, I have found the phrase “final **video**” similarly motivating.

[FN42]. In preparation for the final **video**, I also conduct two optional three-hour workshops for those students wishing to focus on and improve specific skills. Here we don't use **video**, but students receive direct feedback from the other students and me.

[FN43]. Norman Kagan, Interpersonal Process Recall: Media in Clinical and Human Interaction Supervision, in Videotape Techniques, supra note 24, at 70.

[FN44]. Robert E. Froelich, Learning via Videotape Simulation, in Videotape Techniques, supra note 24, at 60, 61.

[FN45]. Bloch, supra note 2, at 331.

[FN46]. This is often unfamiliar to students and one of the primary complaints of the end-of-semester examination procedure. See Kissam, supra note 9, at 471-74; Motley, supra note 9, at 731, 735.

[FN47]. Evaluation shared between teacher and student is an element of the andragogical approach. Bloch, supra note 2, at 350. But the actual grade is not disclosed.

Others may provide direct feedback to the student in writing. While this is more time-consuming, the students would have a written reference on which to focus for specific improvement. Moreover, if initially defensive about her performance, a student may not hear the instructor's critique, and having a written statement or scoresheet for later reference would be beneficial. I find that most students do take notes during the conference.

[FN48]. This was my experience at Capital Law School in 1978, where the initial interviews for clients of the clinical program were conducted by students in the Interviewing & Counseling class and videotaped. It is my understanding that other clinical programs also videotape live-client interviews.

[FN49]. Determining the why of behavior is the basis of IPR. Kagan, supra note 35, at 94-95.

[FN50]. See Tarr, supra note 5, at 983.

[FN51]. See Kimberlee K. Kovach, Mediation: Principles and Practice 24, 254-56 (St. Paul, 1994).

[FN52]. Extrapolated from David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (St. Paul, 1991).

[FN53]. See Aiken et al., supra note 16.

[FN54]. Carr, supra note 14, at 224.

[FN55]. This objective standard of adequacy or criterion-referenced test also includes a comparison among the students, resulting in a norm-referenced test. 1 Josephson, supra note 10, at 5.

[FN56]. Id. at 5-6.

[FN57]. Id. at 6.

[FN58]. Id. at 8.

[FN59]. Id. at 15.

[FN60]. Id. at 6.

[FN61]. Id. at 18.

[FN62]. Id. at 26.

[FN63]. Id. at 27-32.

[FN64]. Id. at 32.

[FN65]. Johnson, *supra* note 21, at 595.

[FN66]. In the context of interviewing, trial work, or mediation, issues arise which require instantaneous action. Similarly my exam demands an immediate response.

[FN67]. Another option is to use the **video** problem as the last portion of the exam. Johnson, *supra* note 21, at 594.

[FN68]. Dean H. Jay Folberg, at the University of San Francisco School of Law, has used this approach with mediation. Teresa Collett has also used the method of showing the entire **video** and thereafter providing the students a number of questions to answer.

[FN69]. The technology needed is more complex and beyond my personal knowledge and ability. Nonetheless, with advances in interactive **video** in both motion pictures and teaching, application for testing is clear. See, e.g., Client Interviewing Skills, The Interactive Courtroom, CLE Group (1990); Lesson 21: Mediation, Harvard Law School Interactive **Video** Library (1992). These could probably be modified for examination purposes. As expense and complexity decrease, the next step is an interactive test for lawyer competencies.

[FN70]. One example is the area of professional responsibility, where **video** has been used for testing. See Johnson, *supra* note 21.

[FN71]. Carr, *supra* note 14, at 226-27.

[FN72]. Tarr, *supra* note 5.

[FN73]. Nancy H. Kaufman, [A Survey of Law School Grading Practices](#), 44 J. Legal Educ. 415, 417 (1994).

[FN74]. This article does not distinguish among skills-based, clinical, and practical education. Cf. Rose, *supra* note 4, at 549 n.4, 554.

[FN75]. See Froelich, *supra* note 44, at 60; Bloch, *supra* note 2, at 341; Spiegel, *supra* note 2, at 592.

[FN76]. John O. Mudd, [Academic Change in Law Schools \(pt. 2\)](#), 29 *Gonz. L. Rev.* 225, 226 n.6 (1993-94).

[FN77]. Interpretation 2 of Standard 304(b), ABA Standards for Approval of Law School and Interpretations (Indianapolis, 1992).

[FN78]. Doyel, *supra* note 2, at 603.

[FN79]. Johnson, *supra* note 21, at 598.

[FN80]. Nancy L. Schultz, [How Do Lawyers Really Think?](#) 42 *J. Legal Educ.* 57 (1992).

[FN81]. See Bloch, *supra* note 2, at 332.

[FN82]. John O. Mudd, [Academic Change in Law Schools \(pt. 1\)](#), 29 *Gonz. L. Rev.* 29, 46 (1993-94).

[FN83]. *Id.* at 56.

[FN84]. Harry T. Edwards, The [Growing Disjunction Between Legal Education and the Legal Profession](#), 91 *Mich. L. Rev.* 34, 39 (1992).

[FN85]. Although MacCrate demands more. Rose, *supra* note 4, at 559.

[FN86]. Mudd, *supra* note 82, at 30.

[FN87]. Roger C. Cramton, The Current State of the Law Curriculum, 32 *J. Legal Educ.* 321, 326 (1982).

[FN88]. Mudd, *supra* note 82, at 61.

[FN89]. *Id.* at 48.

[FN90]. Standard 304(b).

[FN91]. Interpretation 1 of Standard 304(b).

[FN92]. This has been my personal experience, as well as that of Teresa Collett. See also Johnson, *supra* note 21, at 596.

[FN93]. In Teresa Collett's Counseling the Terminally Ill class, students viewed a videotape, after which they were able to select several questions to answer. A concern voiced by several students was that they needed more time.

[FN94]. Alternatively, the **video** component could be the final part of the exam. However, additional problems arise, such as what to do with students who finish the first segment early. See Johnson, *supra* note 21, at 594.

[FN95]. I think this is imperative and advocate that each student of mediation be committed to having her own real dispute mediated. See Kimberlee K. Kovach, *Mediation for Mediators? If You Talk the Talk, You'd Better Walk the Walk: An Examination of How Dispute Resolvers Resolve Disputes*, 11 Ohio St. J. on Disp. Resol. 2 (1996).

[FN96]. Advocacy in mediation has recently become another emphasis of those in dispute resolution education. I have organized a competition over the last few years, with the support of the ABA Section of Dispute Resolution, where the focus is on advocacy in mediation. While only law schools in Texas have participated thus far, the objective is to have a national competition within the next few years. For related discussion, see Eric Galton, *Representing Clients in Mediation* (Dallas, 1994).

[FN97]. Once when a student's spouse was the client, it was apparent from the **video** that they had just argued. The performance was dismal. Moreover, spouses and significant others know each other too well; the attendant nonverbal and other communication indicators would not be present in a realistic first interview.

[FN98]. I also require that students in the Mediation class observe a real mediation and write a detailed analysis, which is graded. This is strongly recommended in *Interviewing & Counseling*, but without the ability to provide access for all students, a requirement would be overly burdensome. In litigation-related courses, I would likewise require courtroom observation and a graded written critique.

[FN99]. Johnson, *supra* note 23, at 98.

[FN100]. Johnson, *supra* note 21, at 594; see also Letter from Larry Grosberg, *Law Tchr.*, Spring 1995, at 5 (describing use of videotape to evaluate lawyering skills).

[FN101]. Grosberg, *supra* note 100.

[FN102]. Kissam, *supra* note 9, at 453.

[FN103]. 2 Josephson, *supra* note 10, at 323-24.

[FN104]. Teresa Collett's exam provides for answers more aligned with the traditional essay response but allows the students to select questions.

[FN105]. Since the tape forms the basis of a grade, it must be kept one year at South Texas. Students can have a permanent copy of their **video** made by bringing in a blank tape.

[FN106]. E. Gordon Gee & Donald W. Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. Legal Educ. 471, 504 (1982).

[FN107]. *Id.*

[FN108]. There would be less concern of student access since videotapes are more difficult to reproduce than written exams.

[FN109]. I acknowledge that students may not complain immediately following the test because of fear of retaliation, even though the examinations are graded anonymously. But semesters later, when students in the clinic have an op-

portunity to comment, the consensus is favorable.

[FN110]. See Johnson, *supra* note 21, at 595.

[FN111]. Cramton, *supra* note 87, at 333.

[FN112]. An explicit goal of the examination process. See Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 Ark. L. Rev. 411, 416, 440 (1977); Kissam, *supra* note 9, at 475.

[FN113]. Kissam, *supra* note 9, at 476; Burman, *supra* note 13, at 449.

[FN114]. Kissam, *supra* note 9, at 480.

[FN115]. *Id.* at 463; Motley, *supra* note 9, at 739.

[FN116]. Nickles, *supra* note 112, at 416.

[FN117]. MacCrate Report at 139-40, 172-221.

[FN118]. Rose, *supra* note 4, at 551.

[FN119]. Mudd, *supra* note 76, at 238.

[FN120]. Christopher T. Matthews, [Sketches for a New Law School](#), 40 *Hastings L.J.* 1095 (1989).

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